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COUNTY COURT
DOUGLAS COUNTY
COLORADO
4000 JUSTICE WAY
CASTLE ROCK, CO 80109

THE PEOPLE OF THE STATE OF
COLORADO
Plaintiff,

And
DIANNE HALL
Defendant,

For Plaintiff:
STEPHEN BURSTEIN
For Defendant:
RHIDIAN ORR

FOR COURT USE ONLY

Case No. 13T4107
Division C

The matter came on for hearing on August 27, 2014 before the HONORABLE MONICA GOMEZ, Judge of the County Court, and the following FTR proceedings were had.

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WITNESSES

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1 MR. ORR: I might need that back. The only receipt on
2 there is the one from Airmont (phonetic). She paid cash for the
3 rest (inaudible).

4 MR. BURSTEIN: Yeah, the, everything looks good. Think
5 she's going, you know, then testify about it. But for admission
6 purposes.

7 MR. ORR: Okay. I don't care.

8 THE COURT: First, I'm going to do a little further
9 research on this. You know, I have a plethora of case law
10 regarding pre-advisement, post-advisement silence. Certainly
11 when a Defendant takes the witness stand, he or she opens herself
12 up to credibility challenges, but I think that Prosecutor's
13 inquiry may have gone a step too far. But I'm going to research
14 some case law. You are most certainly permitted to recall your
15 client, but with respect to instruction regarding the burden
16 shifting, I'm going to do a bit more research.

17 MR. ORR: I appreciate that. And when you do that, I'm
18 okay with that. And I think Mr. Burstein and I are agreeing that
19 we only going to talk about this, I'm not really going to go into
20 anything, we're not interested in opening another whole can of
21 worms.

22 THE COURT: Correct.

23 MR. BURSTEIN: No. As long as you ask questions about
24 the bill and the payment for the two rounds of drinks.

25

1 THE COURT: Okay. So, all right, then. So you may
2 recall - -

3 MR. ORR: - - We're going to, our expert's here and
4 ready to go whenever the Court is.

5 THE COURT: All right. Do you want to recall Ms. Hall
6 first?

7 MR. ORR: Please.

8 MR. BURSTEIN: Let me check on Mr. Groff (phonetic)
9 first and see if he would like to be present for the other, but
10 recalling her is (inaudible).

11 THE COURT: Okay.

12 MR. ORR: Your Honor, Mr. Burstein is fashioning a set
13 of jury instructions. I assume we will have a few moments at
14 lunch to do this or whenever?

15 THE COURT: We will. Yes. Whatever.

16 MR. ORR: Normally I read them the night before. And I
17 didn't have them. And since there was a raccoon at the house I
18 figured that - -

19 THE COURT: - - You had a raccoon?

20 MR. ORR: Anyway, I might as well have read them, but
21 they weren't there.

22 THE COURT: You had a raccoon in your house?

23 MR. ORR: The baby woke up. The dog woke up. A
24 raccoon made another (inaudible), the dog lost.

25

1 THE COURT: Sounds like my house, almost. All right.
2 We're ready for the jury. Please rise for the jury. You may be
3 seated. We're back on the record on People versus Dianne Hall.
4 All members are present this morning. Members of the jury, I
5 hope you had a restful evening. All right. Mr. Orr. Your next
6 witness.

7 MR. ORR: Thank you very much. If we may recall for
8 the limited purpose of addressing an issue that was raised
9 yesterday. Diane Hall.

10 THE COURT: You may.

11 MR. ORR: Thank you, Your Honor.

12 THE COURT: Please raise your right hand. Do you
13 solemnly swear under penalty of perjury, that the testimony you
14 are about to provide, will be the truth, the whole truth and
15 nothing but the truth?

16 MS. HALL: (Inaudible).

17 THE COURT: Thank you. You may be seated. Again, feel
18 free to have some water and adjust the microphone.

19 **DIRECT EXAMINATION OF RECALLED WITNESS DIANNE HALL**

20 **By Mr. Orr**

21 Q I'm hoping you won't be up there long enough to drink a
22 glass of water. Yesterday, on cross examination you were asked
23 by the government's attorney that did you have the receipts. And
24 we didn't have them with us, did we?

25 A No.

1 Q Okay. May I approach?

2 THE COURT: You may.

3 Q So last night you went home and you pulled off the
4 computer receipts from that day. Is that correct?

5 A Yes, I did.

6 Q And is that an accurate and fair depiction of that
7 receipt?

8 A Yes.

9 Q Okay. And those black squiggly lines are redactions
10 that the attorney would tell you to take out so you don't have
11 (inaudible)?

12 A Correct.

13 Q Okay. But it leaves clearly all transactions that were
14 done on 9/21. Right?

15 A Yes.

16 Q Now at this time I like to proffer this as exhibit C?

17 THE COURT: Any objection?

18 MR. BURSTEIN: No objection.

19 THE COURT: This will be submitted as Defendant's
20 Exhibit C.

21 Q And I will now ask for any (inaudible). One of our bad
22 habits.

23 THE COURT: I think we have plenty.

24 Q Thank you. Can I ask that it be admitted. There's
25 been no objection. May I ask that we publish it when ready?

1 THE COURT: Yes, you may.

2 Q So, on that day you had the time enough to purchase two
3 rounds of drink. Is that fair?

4 A Yes.

5 Q And on this credit card receipt it shows one of those
6 two purchases. What did you purchase the other one with?

7 A I used cash. I didn't realize that they were going to
8 be that expensive.

9 Q Fair enough. It is a concert. Is it a concert?

10 A Yes.

11 Q They're there to make money.

12 A Yes.

13 Q And I can't think of anything else to ask at this
14 moment.

15 THE COURT: Thank you. Cross examination.

16 MR. BURSTEIN: Thank you.

17 **CROSS EXAMINATION OF RECALLED WITNESS DIANNE HALL**

18 **By Mr. Burstein**

19 Q Ms. Hall, yesterday you had said that you had checked
20 through your receipts prior to trial and that you'd purchased two
21 rounds of drinks.

22 A Uh'huh.

23 Q Do you remember saying that to the jury?

24 A Yes, I did.

25

1 Q Today you're saying something different. Today you're
2 saying you only bought one round with the credit card, the other
3 in cash.

4 A Correct. I purchased two rounds of drinks.

5 Q Okay. No further questions.

6 THE COURT: Redirect?

7 **REDIRECT EXAMINATION OF RECALLED WITNESS DIANNE HALL**

8 **By Mr. Orr**

9 Q Ms. Hall, I don't recall you saying checked your
10 receipts, but you did say you purchased only two rounds. Is that
11 correct?

12 A Yes.

13 Q Okay. Thank you.

14 THE COURT: Do any of the jurors have questions for Ms.
15 Hall? Thank you, Ms. Hall. You may have a seat. Defendant's
16 next witness.

17 MR. ORR: Thank you. We may call Matt, Matthew D.
18 Malhiot. I'd have to go get him. He's in the questioning room.
19 May I have a moment?

20 THE COURT: You may. Are the People calling - -

21 MR. BURSTEIN: - - You Honor, with permission to have
22 our advisory witness here.

23 THE COURT: You may.

24 MR. ORR: You need to resubmit it. May I approach to
25 get this to get it out of the way, Your Honor.

1 THE COURT: Yes, you may. Thank you. Good morning.

2 MR. MALHIOT: Good morning, Your Honor.

3 THE COURT: Please raise your right hand. Do you
4 solemnly swear under penalty of perjury that the testimony you
5 are about to provide will be the truth, the whole truth and
6 nothing but the truth?

7 MR. MALHIOT: Yes, Ma'am, I do.

8 THE COURT: Thank you. You may be seated. Feel free
9 to have some water and adjust the microphone. We're just waiting
10 on the People's advisory witness and then we'll get started.

11 MR. MALHIOT: Thank you, Your Honor.

12 THE COURT: You're welcome.

13 MR. ORR: And Your Honor, at this time I would just for
14 clarification, upon completion of this testimony I would like Mr.
15 Malmiot be granted the same honor.

16 THE COURT: Yes, he may sit at Defense Counsel table.

17 MR. ORR: Thank you very much.

18 **DIRECT EXAMINATION OF EXPERT WITNESS MATTHEW MALHIOT**

19 **By Mr. Orr**

20 Q Mr. Malhiot, would you please introduce yourself to the
21 jury.

22 A Certainly. My name is Matthew E. Malhiot and it's
23 spelled M-A-L-H-I-O-T and it's pronounced My-it (sic), M-Y-I-T.

24

25

1 Q Okay. And let's talk about your extensive background
2 here. Areas of expertise provided. Talk to me a little bit
3 about alcohol in the human body.

4 A Well, alcohol is a central nervous system depressant.
5 And I worked in law enforcement as a police officer from 1979 to
6 2001. During that time, I was trained in forensic alcohol
7 toxicology and I started with the Montana Division of Forensic
8 Science. When I was a police officer, I became a breath test
9 operator, for DUI's on Intoxilyzer 5000 at the time. And as a
10 breath test operator, the initial training included forensic
11 alcohol toxicology, forensic alcohol pharmacology. How alcohol
12 gets in the body, what it does to the body and then I started
13 specializing in alcohol as an area of specialty. I continued my
14 training after being a breath test operator and became a breath
15 test senior operator. And in Montana under the Division of
16 Forensic Science a breath test senior operator is one who does
17 the calibration checks and quality assurance checks of the breath
18 test instrument and manages police department breath testing
19 programs. After that I completed additional training called a
20 breath test technician. And at the time, breath test technician
21 is one who did the repairs of the breath test machine and taught
22 others how to do breath testing. I also went to CMI Incorporated
23 the manufacturer of the Intoxilyzer and completed their factory
24 training on the Intoxilyzer 5000. During this time I also worked
25 as a DUI task force member in the Montana State Governor's Task

1 Force for impaired driving and underage driving and underage
2 consumption of alcohol. And worked extensively and targeted my
3 area of expertise in alcohol. I went to the Montana Highway
4 Patrol Standardized Field Sobriety training class and the Montana
5 Highway Patrol Standardized Field Sobriety Instructor class. And
6 those classes are established by the National Highway Traffic
7 Safety Administration. I also completed the US Department of
8 Transportation's Instructor Facilitator course. And that course
9 certifies you and teaches you how to teach US Department of
10 Transportation National Highway Traffic Safety Administration
11 course curricula. Because they have a whole bunch of different
12 curricula that they teach to law enforcement and other persons
13 interested in highway traffic safety. During that time I served
14 on the DUI task force and continued my education through CMI
15 Incorporated. I went to the factory and completed a 40 hour
16 course on the Intoxilyzer 5000 and Infrared Spectroscopy.
17 Infrared spectroscopy is a way of saying infrared light
18 absorption. And that's the scientific basis for breath testing
19 on the Intoxilyzer 5000, 8000, 9000 and many different
20 instruments used throughout the nation. After I worked in the
21 State of Montana, I took a job with the Florida Department of Law
22 Enforcement's alcohol testing program. And that's Florida's
23 equivalent of the Colorado Department of Health and Environment's
24 alcohol testing or breath testing program. Each state has a
25 state agency that has oversight and management of the breath

1 testing and blood testing programs. During that employment, my
2 first nine months employed was training. I was assigned to a
3 Forensic Toxicologist and assigned to a training officer. And
4 during that time they sent me to Indiana University Borckenstein
5 course. Dr. Borckenstein back in the '50's was the original
6 inventor of the breathalyzer. And thus the course was named
7 after him. And I completed that course. And that course was on
8 highway traffic safety, alcohol, drugs, research and litigation.
9 And at a very high emphasis on alcohol toxicology and alcohol
10 pharmacology, how alcohol works. And two other areas that really
11 delved into alcohol and that was what's known as pharmacokinetics
12 and pharmacodynamics. Fancy words of how alcohol gets in the
13 body, what alcohol does to the body and then what the body does
14 to alcohol to metabolize it and get it out of the body. So it's
15 very heavy emphasis on, on the science of alcohol and how it
16 works within the human body. After I completed that course, I
17 returned to Florida and then was sent back to Indiana again, to
18 complete a course on alcohol testing program management. How to
19 manage a state level program. And that has heavy emphasis on
20 quality assurance, statistical analysis of data, how to write
21 state rules, how to write curricula for breath testing and blood
22 testing. How to interact with state legislators so the forensic
23 science language and the statutory law language match and
24 complement each other. After I completed that course I was then
25 sent to Lafayette Louisiana for a course from the Southern

1 Association of Forensic Scientists on ethanol measurement and its
2 interpretation. Ethanol being the alcohol we find in human
3 consumables. And that course was very heavy emphasis on
4 different ways to measure alcohol in forensic spectroscopy, fuel
5 cell technology, gas chromatography (phonetic) technology for blood
6 alcohol. Also the old chemical oxidation which is an old method
7 used with the breathalyzer. The different sciences and basis on
8 how alcohol is measured in breath and blood samples. My duties
9 while I was assigned to Florida Department of Law Enforcement, I
10 had oversight over 100 law enforcement agencies; police
11 departments, sheriffs, highway patrols, in their breath testing
12 program. I would go out and inspect instruments, audit data. In
13 Florida at the time we audited every breath test done in the
14 state. We audited every inspection done on breath test
15 instruments and that's part of the quality assurance in breath
16 tests. You have state oversight and you monitor and watch. Look
17 for trends in analysis in breath testing. Look for problems.
18 And we did a lot of teaching and rule writing, curricula writing,
19 and then we also did research and development. Also during that
20 time, Florida Department of Law Enforcement had oversight over
21 blood analysts in the state. There were many blood analysts and
22 they had to have proficiency testing. So once a quarter, we
23 would set up blood proficiency testing. That was part of our
24 duties in Florida Department of Law Enforcement. Also during
25 that time I did research on alcohol and the Intoxilyzer 5000 as

1 far as specifically factory. The people who worked in factories
2 and were exposed to a lot of chemicals and how the 5000 reacted
3 in infrared light absorption and external chemicals, interfering
4 substances. Also did a research study specifically on the
5 Tindall (phonetic) effect. At the time there was a argument that
6 air bag outers, when an air bag explodes in a crash, those
7 powders get into the respiratory system and can affect the breath
8 test. So we did research on that. I also did research
9 specifically on quality assurance in breath testing. What needs
10 to be there. What steps should we take to insure the reliability
11 and the scientific reliability of breath testing results. And
12 that research was presented to the International Association of
13 Chemical Testing which is a peer group throughout the nation and
14 overseas, countries that gather at least once a year. Once a
15 year at a symposium and we have interaction and inter-training.
16 Also during that time, Florida was working with CMI the
17 manufacturer of breath test machines on the Intoxilyzer 8000.
18 And that was the big jump away from the 5000 and then a 9000 is
19 the next evolutionary step in new model instruments. Kind of
20 like Chevy develops new cars every few years and every once in a
21 while there's a big change. But they're all engines and they're
22 all internal combustion. So these CMI machines are all infrared
23 spectroscopy machines. And with the Intoxilyzer 8000, it did a
24 lot of changing as far as no more, some of the internal parts of
25 the machine are no longer there. They changed them out and tried

1 to improve the science. Same with the 9000. They changed some
2 things and they're improving the breath testing science as
3 science evolves. I worked with the CMI engineering division when
4 the development of the Intoxilyzer 8000 software and after we
5 implemented it in 2006, I continued to work with CMI and Florida
6 Department of Law Enforcement looking at improving the next
7 generation in histograms, graphing out breath tests and those
8 types of things. I had specific training in infrared
9 spectroscopy, low molecular molecules. I also have a Bachelor of
10 Science in Criminal Justice Administration with a course emphasis
11 on the science, courses in criminalistics, forensics, anatomy
12 physiology, biology, and the basic sciences.

13 Q In '79 to '99, what were you doing?

14 A At '79 to '99, I was active duty Air Force as a police
15 officer. I served 20 years.

16 Q And then you went to Cascade as a sheriff?

17 A There was some overlap. I started with the Sheriff's
18 Office in 2007. Yes. I'm sorry. 1997. Got my years mixed up
19 here.

20 Q And you can have a drink of water, okay. Have you ever
21 been found an expert on breath testing, forensic alcohol
22 toxicology and Intoxilyzer 9000 in the State of Colorado?

23 A I have.

24 Q Talk about the administrative things. How many on
25 average?

1 A I don't count them. It would be an estimate. I think
2 I've done a dozen of them.

3 Q And that's at the administrative level? Appearance?

4 A Yes.

5 Q Have you been in a County Court in the 18th Judicial
6 which is Arapahoe and Douglas County?

7 A I have.

8 Q And in front of which judge was that?

9 A I don't remember her name. It was in Arapahoe - -

10 Q - - Brown hair, female, Caucasian.

11 A Yes.

12 Q Okay. Judge Murray?

13 A If you say so. I have no reason to doubt.

14 THE COURT: What's your objection?

15 MR. BURSTEIN: Leading.

16 THE COURT: Sustained.

17 Q What did she look like?

18 A Female, Caucasian, dark hair. I don't remember her
19 name. I'm sorry.

20 Q Those who need to know, know then. You don't remember
21 her name, I'll try to find a way to get that. And that was
22 recently?

23 A This spring.

24 Q What testing have you done in Colorado to be proficient
25 on what is the Colorado machine?

1 A Certainly. When Colorado switched from the 5000 to the
2 8000, I contacted the - -

3 Q - - The 8000?

4 A I'm sorry.

5 Q The 8000?

6 A I'm sorry, the 9000. I contacted the Department of
7 Health and requested under public records information on the
8 machine. And they provided me a number of CD's. They provided
9 me with the breath test operators' course on CD. They provided
10 me with the breath test instructor course on CD. And I completed
11 those CD based courses. I also, Georgia also switched to the
12 9000 this year. Last year they started switching. And I live in
13 Georgia. So I went to the Georgia Department in charge of breath
14 testing and I sat with the Georgia Program Manager and reviewed
15 the complete CMI manual on the Intoxilyzer 9000. As a matter of
16 fact, I know the author personally. He and I worked in Montana
17 together. But part of that review process was what was new in
18 the 9000 compared to the 8000 and it was the next generation.
19 And they are very, very similar instruments. There's two more
20 filters, two more wave lengths, a little smaller, it looks
21 differently, but the science behind it and how it measures
22 alcohol, how it measures interfering substances, is very much the
23 same. It's just the next generational instrument. I also went
24 on line recently in Colorado, made available a on line course for
25 legal practitioners. How the Colorado program works. So I

1 completed that course also. I also reviewed the Georgia breath
2 test operator instructor manuals which are very detailed on the
3 operation and the Intoxilyzer 9000.

4 Q I'm going to stop you.

5 A Certainly.

6 Q Have you reviewed the Intoxilyzer 9000 operator's law
7 enforcement guide for Colorado?

8 A Yes, it's a very short 18 page handout for lack of a
9 better term.

10 Q May I approach, Your Honor?

11 THE COURT: You may.

12 Q This is Colorado's manual. Is that a fair and accurate
13 depiction of it?

14 A Yes. Their operator's guide for the instrument that
15 law enforcement is using.

16 Q Is this a fair and accurate representation?

17 A It is a fair and accurate representation.

18 Q Like to enter this into Exhibit D, for the Defense,
19 Your Honor.

20 THE COURT: Any objection?

21 MR. BURSTEIN: Relevance to (inaudible).

22 THE COURT: Response?

23 Q This is the document that he was allowed to look at
24 from Colorado showing not necessarily for the truth of the

25

1 matter, I'm certain, Your Honor, it is actually show the
2 voluminous amount of information that is provided.

3 THE COURT: The Court concludes that this is not being
4 offered for the truth of the matter asserted. Court will permit
5 Defense Counsel to introduce Exhibit D?

6 Q Thank you very much. And may we publish it at some
7 point to the jury, Your Honor?

8 THE COURT: You may.

9 Q You also said that you did the Intoxilyzer 9000 Georgia
10 Operator's Course. Is that correct?

11 A I've reviewed the manual. Unless you're an employee of
12 the law enforcement agency, they do not allow you to attend their
13 courses. But I've reviewed the manual, had interaction with the
14 Program Manager, three different manuals they publish. The
15 transition manual when they went from the 5 to the 9. And then
16 they published two versions of breath test operator's course
17 curricula.

18 Q Let's talk about the transition manual.

19 A Certainly.

20 Q May I approach, Your Honor?

21 THE COURT: You may.

22 Q This is what is printed off line. Is this a fair and
23 accurate depiction of what the transition manual was from
24 Georgia?

25

1 A This was the second version. The first one was
2 published in 2012. This is 2013 version, but yes. It's an
3 accurate representation and I'm familiar with it.

4 Q And you're familiar with that?

5 A I am familiar.

6 Q Like to enter that as Defendant's Exhibit E, not for
7 the truth of the matter asserted, but the voluminous amount of
8 information that is shared with the state.

9 THE COURT: And this is relating to the Georgia
10 transitional manual?

11 Q Correct.

12 THE COURT: Mr. Burstein.

13 Q Operator's manual.

14 THE COURT: People's position?

15 MR. BURSTEIN: Your Honor, the People object to
16 relevance (inaudible).

17 THE COURT: You may voir dire the witness. I do have
18 some relevance concerns. Go ahead.

19 MR. BURSTEIN: Mr. Malmiot. Have you reviewed all of
20 the documentation pertaining to the Colorado rules and
21 regulations and procedures for the new Intoxilyzer 9000.

22 A Yes. The state rules, there's many different documents
23 besides that little manual or pamphlet I call it. They just
24 published error exception message menus, there's many different

25

1 documents plus the state administrative code, the rules as you
2 say. Yes, I've reviewed those.

3 Q And does the manual from Georgia that Mr. Orr is
4 showing you, do they relate to all of the same things that are
5 covered in that one pamphlet that is provided on the exhibit.

6 A There's different areas. All encompassed. No.
7 Colorado has some different things than Georgia. Georgia has
8 different things than Colorado. The Georgia publications are more
9 extensive than the Colorado publications.

10 MR. BURSTEIN: Your Honor, I maintain my objection.

11 THE COURT: All right. The Court will not permit the
12 Defendant to introduce the Georgia Transitional Manual as an
13 exhibit based upon relevance grounds.

14 Q Will not instead of will?

15 THE COURT: Will not. Overruled.

16 Q Okay.

17 THE COURT: Or sustained. I'm sorry.

18 Q May I tag it so it can be put into the record?

19 THE COURT: You may.

20 Q Thank you. So through your review, you've gone through
21 all that Colorado has provided. All of what Colorado has
22 provided experts out there, has Colorado allowed you to look at
23 the 9000 machine itself?

24 A No, they have not.

25

1 Q Okay. Has Colorado let anybody but police officers or
2 law enforcement or CDPHE employees look at the 9000?

3 A I have no idea. I wouldn't be able to answer that
4 question.

5 Q Okay. So you have taken every course that Colorado, to
6 your knowledge, taken every course that Colorado provides on the
7 9000?

8 A To my knowledge, yes.

9 Q And you have taken courses from around the country that
10 allow teaching, that allow any teaching on the 9000. Correct?

11 A Every document published by any state, I have reviewed
12 or completed and reviewed the CMI manual that's published from
13 CMI that they teach for their course. Yes.

14 Q And you actually went and reviewed the 9000 documents
15 at CMI. Correct?

16 A Not at CMI. At the Georgia Bureau of Investigation,
17 but the CMI manual in their possession.

18 Q Thank you. I apologize. So that's the GVI not CVI.
19 CMI.

20 A CMI.

21 Q CMI. I keep using this acronym. What is CMI?

22 A That's the acronym I've always known since the mid-
23 '90's. Originally my understanding and it's speculative, but it
24 originally was a Colorado company and I don't know what the

25

1 acronym actually stood for at the time, but since they moved to
2 Kentucky, there's no name other than CMI.

3 Q But they're the ones that produce this 9000.

4 A They're the manufacturer of the instrument. Yes.

5 Q And they produced the 8000.

6 A Yes.

7 Q Okay. Have you taught anybody around the country on
8 the 9000?

9 A Yes. I teach in Colorado. Three courses specifically
10 I've taught. Members of the bar. I offer continuing legal
11 education through the Colorado Bar, award credit for persons who
12 complete my training. Also the State of Georgia, the Georgia Bar
13 offers continuing education credits. And next month I've been
14 invited and I'm teaching Georgia County Court or Municipal Court
15 judges on the Intoxilyzer 9000. Taught around the state in the
16 two states that are using me.

17 Q And Municipal Courts down there handle DUI's.

18 A They do.

19 Q Versus what happens in Colorado. This is County Court.

20 A Correct.

21 Q Okay. And you said you got TLE credits from the
22 Colorado Supreme Court. Is that how those are approved?

23 A They're the oversight and you submit your course
24 curricula to them. They evaluate it and specific hours of
25 training, attorney fees, continuing legal education and they

1 award 6 hours of continuing legal education credit for completion
2 of my course.

3 Q And currently, how are you employed?

4 A I am the Proprietor of Forensic Alcohol Consulting and
5 Training which is a limited liability corporation based in
6 Canton, Georgia.

7 Q Okay. And you're not here for free. Right?

8 A I am not.

9 Q Okay. So you're a consultant.

10 A I am.

11 Q And to your knowledge there are no experts in Colorado
12 that can testify to a 9000 other than people like yourself that
13 can come in.

14 A Not to my knowledge. Other than state employees,
15 police officers. Not to my knowledge there isn't aren't any
16 consultants.

17 Q Let's talk about the dirty business. Money. How much
18 are you getting paid?

19 A I'm getting a rate of 180 dollars an hour for court
20 time. Plus travel. I also get paid 600 dollars for an initial
21 review and consultation and report.

22 Q And that consultation review, that 600 bucks, you don't
23 take all cases.

24 A Well, I'll review the cases. I go to court probably on
25 about 25% of what I review.

1 Q So sometimes you tell the Defense Attorneys there's
2 nothing there.

3 A I do.

4 Q And let's see. Why did you start doing this? Why did
5 you leave the government?

6 A Well, personal reasons. Along with the State of
7 Florida at the time. I was vested in the retirement program.
8 I'd gone through a divorce. My daughter graduated college and
9 then the state, with the economy downturn, was going to cut our
10 pay. And it was a good time for me to leave. So I left to form
11 the (inaudible).

12 Q Did you leave on good terms?

13 A I did.

14 Q Would you train prosecutors?

15 A Would I and have I, yes.

16 Q Okay. On the 9000?

17 A Certainly. If they'd like to get training, I'd be more
18 than happy to provide it.

19 Q May I have a moment?

20 THE COURT: You may.

21 Q Can you tell me a little about the Montana Supreme
22 Court review?

23 A Stacy Crawford (phonetic)?

24 Q Yes, that's right.

25

1 A I was working as a deputy and it was a case in Montana
2 where field sobriety and horizontal gaze nystagmus were at issue.
3 And I testified to the medical basis for part of the field
4 sobriety testing and after that trial was over, the Defense
5 appealed the Court's ruling in finding me an expert and it went
6 to the Montana Supreme Court and their findings were that I had
7 ample qualifications to give expert testimony on the medical
8 basis for the horizontal gaze nystagmus test.

9 Q So you're not just training on breath testing machines
10 and in fact you train on the whole DUI stuff. Is that correct?

11 A I am.

12 Q But today, we're, I'm offering him at this point, Your
13 Honor, as an expert in forensic alcohol toxicology and on
14 Intoxilyzer 9000.

15 THE COURT: Any objection?

16 MR. BURSTEIN: Voir dire?

17 THE COURT: You may.

18 MR. BURSTEIN: Good morning, Mr. Malmiot.

19 A Good morning, Counsel.

20 MR. BURSTEIN: Okay. So I want to first start talking
21 about any time you testify pertaining to the Intoxilyzer 9000 in
22 Colorado.

23 A Yes, Sir.

24 MR. BURSTEIN: And I want to first start with what you
25 said first was administration jobs. Okay.

1 A Correct.

2 MR. BURSTEIN: That's not in the presence of a
3 prosecutor. Correct?

4 A Not to my knowledge.

5 MR. BURSTEIN: Oftentimes those are done over the
6 phone.

7 A All of them that I've done were on the phone. That's
8 correct.

9 MR. BURSTEIN: While you were still over in Georgia?

10 A Yes.

11 MR. BURSTEIN: Okay. Not subject to cross examination
12 except by the hearing officer.

13 A Correct. And they usually do.

14 MR. BURSTEIN: And those are pertaining to people with
15 driver's license. Right?

16 A That's the ultimate decision, revocation or reinstate
17 driving privilege. Yes.

18 MR. BURSTEIN: So they're not at that point dealing
19 with criminal conduct. They're just dealing with administrative
20 things, like a license.

21 A Based on the potential criminal conduct of impaired
22 driving. But I understand there is a legal difference between
23 administrative and criminal hearing.

24 MR. BURSTEIN: So there was approximately 12 of them
25 that you've done in Colorado. Didn't deal with any actual

1 criminal offenses at that time. There wasn't, you weren't in
2 court to deal with.

3 A There was no court. There was no opposing Counsel.

4 MR. BUSTEIN: Okay. And you said that you did testify
5 as an expert in one case in the 18th Judicial District last
6 spring?

7 A Correct.

8 MR. BUSTEIN: What were you offered as an expert for in
9 that particular case?

10 A The Intoxilyzer 9000, histograms, and I believe mouth
11 alcohol slope (phonetic) detection.

12 MR. BURSTEIN: Other than that one case, how many other
13 cases in Colorado in front of a jury have you testified in
14 person?

15 A I have not.

16 MR. BURSTEIN: And then I want to talk specifically
17 about the training that you received in the Intoxilyzer 9000.

18 A Okay.

19 MR. BURSTEIN: First, let's start with Colorado.

20 A Correct.

21 MR. BURSTEIN: You said that you reviewed some CD's
22 that were provided.

23 A Well, they were actually CD based courses. You go
24 through the course, testing points throughout the course, but
25 there's no final exam, it's not a certified course.

1 MR. BURSTEIN: Okay. And those are in order to operate
2 the Intoxilyzer.

3 A One is an operator and one is an instructor. Yes.

4 MR. BURSTEIN: Okay. And those are geared towards
5 police officers.

6 A They are.

7 MR. BURSTEIN: Okay. And essentially police officers
8 are not admitted as experts in your experience as an officer,
9 offered as experts in the Intoxilyzer 9000 simply because they
10 know how to operate. Correct?

11 A The operators normally are not. The instructors
12 normally are.

13 MR. BURSTEIN: And you also said that you took an on
14 line course for legal practitioners.

15 A Correct.

16 MR. BURSTEIN: Takes about an hour or so to complete
17 it.

18 A Hour, hour and a half. Yes.

19 MR. BURSTEIN: Basically goes through some power point
20 slides?

21 A And videos and test questions as you go through the
22 course.

23 MR. BURSTEIN: Videos of Mr. Groff (phonetic) here and
24 people that work for him?

25 A Yes.

1 MR. BURSTEIN: And the CD's and the operator instructor
2 courses, those are also provided by Mr. Groff's department.

3 A They were. Those weren't the only ones they provided,
4 but those were two of the ones they provided.

5 MR. BURSTEIN: You also said you had taught some
6 courses on the Intoxilyzer 9000. And is that the course that's
7 called the Intoxilyzer 9000 and CO software, CO being Colorado
8 software understanding the machine and interpreting the results
9 to benefit your client?

10 A Yes.

11 MR. BURSTEIN: And that's clearly if it's intended to
12 help benefit some clients, so those are geared towards the
13 offender market.

14 A Generally, yes.

15 MR. BURSTEIN: Because the state doesn't have one.
16 State represents the People.

17 A Fair enough, yes.

18 MR. BURSTEIN: Other than what we've just talked about,
19 what specifically have you either received training or taught
20 training on in Colorado on the Intoxilyzer 9000?

21 A Well, when you limit it specifically to that, received
22 training, I received the CD's and all the documents of the
23 initial evaluation and the methods generation. In addition to
24 reviewing the CMI manual which is the same manual for every
25 state.

1 MR. BURSTEIN: That you did in Georgia.

2 A Yes, the manual is physically reviewed in Georgia. I
3 asked for the manual from Colorado, but it's a CMI copyrighted
4 manual so they sent me a letter saying they could not reproduce
5 it because of copyright. So I reviewed the manual in Georgia.

6 MR. BURSTEIN: You talked about the copyrighted
7 material. Some of the material that you used in your training
8 with the defense bar in Colorado was actually material provided
9 by Colorado Department of Public Health and Environment, DPHE.

10 A General information, yes.

11 MR. BURSTEIN: Yes. That was also copyrighted by DPHE.

12 A Not necessarily. The, I didn't cut and paste their
13 manual. I may have rewritten a laundry list of error messages,
14 exception messages.

15 MR. BURSTEIN: Okay. Specifically turning to the
16 training that you received on the Intoxilyzer 9000 in Georgia,
17 can you go over other than reviewing the manual at their
18 facility, Georgia (inaudible) what else did you do in Georgia?

19 A Specifically the three transitions, two transition
20 manuals and the breath test manual along with the inspection
21 protocol manual, inspection protocol operation and numerous
22 meetings with the Program Director for Georgia.

23 MR. BURSTEIN: And you've got a lot of law enforcement
24 training in Montana. What specifically on the Intoxilyzer 9000
25 have you done in Montana?

1 A Nothing. Montana is not using the 9000 and I left
2 Montana before the 9000 was implemented.

3 MR. BURSTEIN: So then Florida is the other state that
4 you've experience with the Intoxilyzer 9000 then?

5 A Florida didn't implement the 9000 either. The 9000 was
6 a prototype, evolution after the 8000 and during my time in
7 Florida we worked with CMI because a lot of the 9000 features and
8 histograms were also being developed for the 8000. But
9 specifically the 9000 was never used in Florida.

10 MR. BURSTEIN: And at CMI, the manufacturer, the
11 Intoxilyzers, the 5000, 8000, and 9000, you went to CMI and you
12 attended a, basically it's a basic maintenance and repair and
13 instruction course. Right?

14 A I attended probably 4 different courses at CMI. One on
15 the 5000 and three different courses including advance electronic
16 repair on the 8000.

17 MR. BURSTEIN: What courses did you attend at CMI on
18 the 9000?

19 A They prohibit anybody that's not a law enforcement
20 employee from attending their courses, so I have not attended a
21 9000 course at CMI. I have emailed and requested and was denied
22 because I'm not an employee of a government agency.

23 MR. BURSTEIN: I want to talk about one of the DOR's,
24 which is the Department of Revenue here in Colorado hearings that
25 you testified over the phone in several cases. I want to talk

1 about some of the background that you're providing as a hearing
2 officer. Correct?

3 A Okay.

4 MR. BURSTEIN: You told a hearing officer that you
5 worked with CMI to help and assist with the debugging of some of
6 their software issues.

7 A Correct.

8 MR. BURSTEIN: And in the context of that when you're
9 talking about the debugging, you were also testified that you
10 talked about assisting CMI in the development of that software.

11 A Correct.

12 MR. BURSTEIN: And so, is it accurate then that your
13 testimony would be that you have assisted CMI with the
14 development of some of the software to the Intoxilyzer.

15 A I think as clarification and explanation of exactly
16 what we did would help answer your question, if I can do that.

17 MR. BURSTEIN: I'd just like you to answer my question
18 first and then if Mr. Orr wants to expand on that - -

19 A - - Then repeat the question.

20 MR. BURSTEIN: Okay. So your testimony is then, based
21 off of working with the debugging software and system with that,
22 you assisted basically what you were telling the hearing officer,
23 that you assisted with the development of the software for some
24 of the Intoxilyzer.

25 A That is a correct statement.

1 MR. ORR: May we approach, Your Honor?

2 THE COURT: You may.

3 MR. ORR: The Prosecution just handed me this. A piece
4 of very interesting evidence that they've been holding on to for
5 a while.

6 THE COURT: We're going to take a 15 minute recess.
7 Going to advise you not to discuss the case among yourselves or
8 with any third person. You don't have to stay in the jury room
9 so you may head out to the cafeteria if you'd like. I don't
10 think we have a cafeteria anymore, but I think there are some
11 vending machines. All right. Please rise for the jury. All
12 right, you may be seated. I'm going to ask that the, Mr. Groff,
13 rebuttal expert as well as Mr. Malmiot step outside of the court
14 room. We have some discovery issues to address. All right both
15 Mr. Malmiot as well as Mr. Groff are out from the court room.
16 The jury is also gone. So, Mr. Orr.

17 MR. ORR: District Attorney's Office has just shown me
18 the first time a affidavit of Allen Trigg (phonetic) Corporate
19 Counsel for CMI. They're trying to come against the veracity of
20 my client. They've had this since October 22nd or thereabouts.
21 December 15th is sworn by commission on that.

22 MR. BURSTEIN: That's when it was notarized in
23 Kentucky.

24 MR. ORR: Okay. So when did you get it?

25 MR. BURSTEIN: I got this maybe three months ago or so.

1 MR. ORR: Ample time to supply this to Defense Counsel
2 prior to the date of the event of the trial.

3 MR. BURSTEIN: May I approach, Your Honor?

4 THE COURT: You may.

5 MR. ORR: And I would ask for a copy that you'd put in
6 the file for the Court.

7 THE COURT: We'll make a copy for Defense as well.

8 MR. ORR: Thank you. Does the Court want a few moments
9 to read?

10 THE COURT: Yes. All right. Number 15 I think is the
11 bone of contention of the affidavit.

12 MR. ORR: As of yet, yes. And I'm assuming that it's
13 going to go further down the list of hasn't worked with, hasn't
14 debugged, hasn't done anything. Your Honor, knowing what the
15 Defense's defense was, having a report for several months in
16 their possession of what our defense was, knowing that Mr.
17 Malmiot was going to testify, holding on to this and let me be
18 clear. I respect my colleague over here. There are a lot of
19 prosecutors who I would go, that's a dirty handed, under handed.
20 He said to me a moment ago that I presumed you had it from CDAC,
21 Colorado District Attorney's Counsel, CDAC. I'm not in the
22 possession of it. This would change our defense, this would
23 change what I would address and I would look to see the veracity
24 of this. We would have had investigators and if this is actually
25 not true, which I don't think it is, I think there should be a

1 civil lawsuit against CMI by Mr. Malmiot. I'm going to ask for a
2 mistrial because the fact is a simple matter, they had
3 information that, and they withheld it. And whether it's the 18th
4 Judicial oversight that withheld it or it was an intentional by
5 somebody other than Mr. Burstein, or, God forbid, Mr. Burstein.
6 I believe this is grounds for a mistrial, Your Honor.

7 THE COURT: All right. Mr. Burstein. Your argument.

8 MR. BURSTEIN: So that I can adequately respond, I'd
9 like to know if the sense is there is a routine violation, if
10 there's Brady violation. If there's a Brady violation, what in
11 this document is exculpatory that was withheld. Just so I know
12 what to address.

13 MR. ORR: All of the above, Your Honor. And the fact
14 is that if you're going to attack somebody with a document that's
15 never been able to be verified credentially, whatever, this is a
16 Brady, it is complication clause. This is upsetting. But that's
17 aside. I don't want a mistrial yet, but I think we have to.

18 THE COURT: All right. Court knows the Prosecution
19 extensively questioned Mr. Malmiot on his qualifications during
20 voir dire. After Defense Counsel offered him as an expert in the
21 fields of forensic alcohol toxicology and the Intoxilyzer 9000.
22 One of the pointed questions asked during the voir dire was
23 whether or not Mr. Malmiot in the creation of debugging software
24 for the Intoxilyzer 9000 which the witness responded in the
25 affirmative. That he had in fact done so. The Prosecution then

1 attempted to or was attempting to introduce an affidavit of Allen
2 Trigg's who is purportedly a Corporate Counsel and Compliance
3 Officer for CMI who specifically in number 15 of his affidavit,
4 sworn affidavit, indicated that Mr. Malmiot did not assist in
5 creating debugging software for the Intoxilyzer 9000. This
6 document has been according to the Prosecution in its possession
7 since October. Is that correct?

8 MR. BURSTEIN: No. June, maybe.

9 THE COURT: Since June, this year. The Defendant's
10 expert witness was endorsed in May so the People were made aware
11 of this document at some point after the Defense expert was
12 endorsed. The Defense expert is a key witness to the Defendant's
13 case and this document while it certainly doesn't contain
14 exculpatory information, is a critical document which should have
15 been disclosed to the Defense because it is impeachment evidence
16 of their expert witness, the sole, well, the Defendant's expert
17 witness is the heart of the defense as I see where this case is
18 headed. Court concludes that this, to introduce this affidavit
19 as impeachment evidence and not disclose it to Defense Counsel
20 certainly has severe implications for the Defendant's theory of
21 defense. It's nothing short of ambushing the Defendant's expert
22 and Defense Counsel and the Defendant. Court cannot conclude
23 that she is receiving a fair trial in light of the non-disclosure
24 of this document which has been in the People's possession since
25 June. It's now nearly September, last week of August. I do find

1 that manifest necessity requires the only course of action this
2 Court can take which is to grant the mistrial. So Court is
3 granting the Defendant's request for a mistrial.

4 MR. ORR: I'd submit that as because of Prosecution's
5 action. Correct?

6 THE COURT: Because of the Prosecution's failure to
7 disclose the affidavit of Allen C. Triggs, Corporate Counsel for
8 CMI.

9 MR. BURSTEIN: Before the Court does grant a mistrial.
10 I think there are other remedies that the Court can entertain
11 here. I didn't ask any questions specifically about this
12 document yet. I did ask the witness regarding his testimony
13 about debugging and he answered in the affirmative. But nothing
14 has come to the jury. They don't know what this document is.
15 They don't know who wrote it. They don't know what it contains.
16 They don't know any of that information. So the Court does have
17 another option. And the other option is that the Court can
18 exclude any of the information in this document and I can simply
19 move on with my voir dire. None of this information has gone to
20 the jury. So there is absolutely no prejudice to the Defendant
21 by continuing the trial with the exclusion of this document. If
22 I can't address it, there's no harm. If there's no harm, there's
23 no manifest necessity for a new trial.

24

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1 MR. ORR: Your Honor, if this document is valid, any
2 testimony my client, my expert is giving would be possibly
3 misleading my jury and I'm not going to do that.

4 THE COURT: Yeah, I agree. I agree. Defense Counsel
5 should have the opportunity to inquire further regarding the
6 contents of this affidavit. He may choose to never use him
7 again. He may choose to, this may simply be untrue and he may
8 choose to rebut this evidence in a future trial. So I think it's
9 fair to give him that opportunity. I saw where this was going in
10 a heartbeat. Whether the jury did or not, I don't know. But
11 perhaps they did as well. It was clear that you had a smoking
12 gun in your possession, in your hands at the podium. Jury saw
13 it, I saw it and I can't ignore that nor can the jury. I don't
14 think at this point even though the content of this has not been
15 disclosed so Court will grant the mistrial.

16 MR. ORR: Thank you, Your Honor.

17 THE COURT: All right. We'll reset this off the
18 record. When the jury enters the jury room I'll address them and
19 let them know that we're not proceeding. And I'm just going to
20 add for the record at great expense Ms. Hall, this case is being
21 mistried. So.

22 MR. ORR: Thank you very much. Thank you for noticing
23 that.

24 MR. BURSTEIN: And Your Honor, is the Court finding any
25 intentional misconduct?

1 THE COURT: I'm actually going to set that for a
2 hearing. So we'll have a discovery violation hearing set before
3 the next trial date.

4 MR. BURSTEIN: Thank you, Your Honor.

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