

IN THE STATE COURT OF GWINNETT COUNTY

STATE OF GEORGIA

STATE OF GEORGIA :
 :
vs. :
 :
JOHN MICHAEL HUGGINS, :
 :
Defendant :
_____ :

FILE NO: 11-D-05411-6

COPY

PARTIAL TRANSCRIPT OF THE JURY TRIAL

7/30/2012 through 7/31/2012

TESTIMONY OF MATTHEW MALHIOT

Heard before the Honorable John Doran, Judge, State Court of Gwinnett County, at the Gwinnett County Courthouse, in Lawrenceville, Georgia on July 31, 2012.

A P P E A R A N C E S:

For the State: KYLENE ARMOND, Assistant Solicitor

For the Defendant: ASHLEY SCHIAVONE, Esquire

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Matthew E. Malhiot

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EXHIBITS

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STATE'S:

None.

DEFENDANT'S:

None.

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P R O C E E D I N G S

MS. SCHIAVONE: Please raise your right hand.

Whereupon,

MATTHEW E. MALHIOT

having first been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MS. SCHIAVONE:

Q Please state your name for the record.

A I'm sorry?

Q I'm sorry. I'll let you get situated.

A Matthew E. Malhiot, and the last name is spelled M-A-L-H-I-O-T and it's pronounced M-Y-I-T, Myit.

Q Mr. Malhiot, where do you work?

A Presently I am the proprietor of Forensic Alcohol Consulting and Training, which is a limited liability corporation in Canton, Georgia.

Q And what do you do for -- what do you do there?

A We provide expert consulting, expert witness, expert training in any issue involving alcohol to the legal community -- state's attorneys, defense attorneys, civil litigators -- on any issue that involves alcohol, obviously DUI, but civil litigation where accidents are involved or other criminal investigations where alcohol may be a factor in the offense or the issue before the courts.

Q And where were you employed before this?

1 A I was a department inspector with the Florida
2 Department of Law Enforcement Alcohol Testing Program, and
3 that is Florida's equivalent to the GBI's Implied Consent
4 Program. Each state has an agency that oversees forensic
5 blood and breath testing and that was the agency in Florida
6 that had oversight over breath and blood testing, and I was
7 working there from 2002 through 2010.

8 Q And before 2002, where did you work?

9 A I was a deputy in Cascade County, Montana, which
10 also did breath testing and DUI enforcements with the
11 Intoxilyzer 5000 in Montana and certified by the Montana
12 Division of Forensic Science.

13 Q And before that?

14 A I was a 20 year Air Force Veteran, law enforcement
15 and police services in the Air Force for 20 years.

16 Q Mr. Malhiot, can you tell us a little bit about your
17 educational background?

18 A Certainly. I hold a bachelor of science in
19 Criminal Justice Administration with coursework in anatomy,
20 physiology, biology, chemistry, the basic sciences.

21 I've also completed course work at Indiana University at
22 a school known as the Borkenstein School. Dr. Borkenstein, in
23 the 50's, was the inventor of the breathalyzer, the -- one of
24 the first breath test instruments invented. That course is
25 for highway traffic safety, litigation and research in blood

1 and breath testing, alcohol and drug testing.

2 I returned to Indiana University and completed a course
3 on management, how to manage a state program, quality control,
4 state rules, quality assurance, writing curricula for others
5 in blood and breath testing. Also attended a course at the
6 Southern Association of Forensic Scientists entitled "Ethanol
7 Measurement and its Interpretation," ethanol being the alcohol
8 we find in consumable drinks; beer, wine and liquors. That
9 was certified by the Forensic Toxicology Certification Board.

10 Also, I have completed course work with the National
11 Highway Traffic Safety Administration on standardized field
12 sobriety, standardized field sobriety instructor course, and
13 also United States Department of Transportation instructor
14 facilitator courses.

15 I continued my education through the University of North
16 Florida Institute of Police Technology and Management on
17 standardized field sobriety update courses. As things change
18 in the field of field sobriety, they update instructors so
19 when we teach new courses new information can be conveyed to
20 the new students.

21 I've also been in a training for the first year with the
22 Department of Law Enforcement; it was a training program.
23 We're assigned to a forensic toxicologist and a training
24 officer and we complete training on issues such as lower
25 molecular structure, molecules, ethanol, isopropanol,

1 different alcohols, different measurements of alcohol,
2 different measurement systems for alcohol, different
3 instrumentation, Intoxilyzer 5000, PBT's, different types of
4 blood and breath measurement systems.

5 I've also been to the manufacturer, CMI Incorporated,
6 which is in Owensboro, Kentucky for courses at their facility
7 on the Intoxilyzer 5000 and am currently certified by the
8 manufacturer to teach others how to use it, to repair it,
9 maintain it, calibrate, troubleshoot, and work on the
10 Intoxilyzer 5000's throughout the world that are sold from CMI
11 Incorporated. That's a pretty brief synopsis on my training,
12 educational knowledge, specifically on the Intoxilyzer 5000.

13 THE COURT: Ms. Schiavone, what I would suggest,
14 because it should be clear by now that the microphone at
15 the podium is entirely unreliable, just push it aside if
16 you will, but this will require you to use your best
17 courtroom voice.

18 MS. SCHIAVONE: I will do that. Thank you, Judge.

19 THE COURT: Thank you, ma'am.

20 BY MS. SCHIAVONE: [Resuming]

21 Q Mr. Malhiot, and you may have said this, but just to
22 clarify, are you qualified as a technician on the Intoxilyzer
23 5000?

24 A Yes. CMI Incorporated has qualified me and
25 certified me as a technician. I hold -- I held a breath test

1 operator permit for the 5000 in both Montana and Florida.
2 Those are not valid permits now because one of the
3 requirements to hold the valid permit is to be employed by a
4 law enforcement agency, of which I'm no longer employed. So
5 other than the employment criteria, I hold valid permits.

6 Q Have you ever taught any courses on the Intoxilyzer
7 5000?

8 A Yes. I've taught it to many law enforcement, breath
9 test instructors in Florida, FDLE, the alcohol testing, we
10 teach instructors at the community colleges and law
11 enforcement academies, and those instructors would teach law
12 enforcement. I've held seminars for defense attorneys on
13 breath testing, I've held seminars for prosecutors, and I have
14 been invited to speak at the county court judge's conference
15 three consecutive years in Florida on forensic breath testing
16 on both the Intoxilyzer 5000 and other models.

17 Q Have you ever trained anyone to use the Intoxilyzer
18 5000?

19 A Just as I said, many people I've trained and
20 certified as breath test operators.

21 Q Have you ever written any manuals concerning the
22 Intoxilyzer 5000?

23 A I helped co-author the Florida Breath Tests Operator
24 Guide and curricula for breath test operators in Florida; I
25 was not the single author. I've also written professional

1 presentations to the International Association of Chemical
2 Testing on quality assurance in forensic breath testing with
3 the Intoxilyzer 5000 use and some other research studies on
4 the 5000.

5 Q Who trained you to be an instructor and technician
6 on the Intoxilyzer 5000?

7 A Many people. CMI Incorporated, the manufacturer,
8 their engineering and training division; Mr. Phil Lively, who
9 was the director of the Montana Division of Forensic Science
10 Breath Testing Program; Laura Barfield, who's the program
11 manager of the Florida Department of Law Enforcement; and I've
12 been to numerous seminars, trainings, probably in the range
13 dozens, if not a hundred, different seminars on breath testing
14 and the 5000.

15 Q Have you ever testified in court as an expert on the
16 Intoxilyzer 5000?

17 A Yes, in many different states, federal courts,
18 military courts; yes.

19 Q Have you ever been asked to give speeches locally or
20 nationally on the Intoxilyzer 5000?

21 A Locally in Florida numerous times, yes.

22 Q Have you kept up with the new developments in -- if
23 any, in the Intoxilyzer 5000?

24 A Yes. I'm currently a member of the International
25 Association of Chemical Testing, which is a professional

1 organization that -- continuing education, I read the
2 scientific literature as it's published -- and the model used
3 in Georgia is the EN model, of which I have had training and
4 certification in use of -- use, maintenance, calibration and
5 repair of that instrument.

6 Q Does this include the SN Model 68001131 which was
7 used in this case?

8 A When you say "SN", that is short for serial number.
9 The first two digits of the serial number "68" indicates that
10 it's an EN model and, yes, I have been trained on that
11 specific version.

12 Q Have you ever taken the cover off an Intoxilyzer
13 5000 and worked with the interior of it?

14 A Hundreds, if not thousands of times; yes.

15 Q Are you familiar with its circuit boards?

16 A Yes.

17 Q Are you familiar with the layout of it?

18 A Yes.

19 Q Are you familiar with the pathways that the breath
20 follows?

21 A Yes.

22 Q Are you able to tell this jury how the intoxilyzer
23 operates and what controls its operations?

24 A Yes.

25 Q Are you familiar with the scientific principles of

1 breath alcohol testing?

2 A I am.

3 Q Including breath alcohol theory?

4 A Yes, both in infrared and chemical oxidation and
5 other scientific principles, but, yes.

6 Q Are you familiar with human physiology?

7 A Yes. As it relates to forensic breath testing, yes.

8 Q Are you familiar with the various limitations of
9 this device?

10 A I am.

11 MS. SCHIAVONE: Okay. Your Honor, at this time, I
12 would tender Mr. Malhiot as an expert in the Intoxilyzer
13 5000, as well as forensic alcohol testing.

14 THE COURT: Do you wish to voir dire?

15 MS. ARMOND: No, Your Honor. We'll stipulate that
16 he's an expert in the Intoxilyzer 5000 and the forensic
17 breath testing, but not towards the physiology based on
18 his course work.

19 THE COURT: All right. I think I agree with that
20 limitation.

21 MS. SCHIAVONE: Thank you, Judge.

22 THE COURT: The witness can express an opinion
23 subject to the limitation we just discussed. Thank you.

24 BY MS. SCHIAVONE: [Resuming]

25 Q Mr. Malhiot, have you been paid to testify in this

1 case?

2 A I am compensated for my time; yes, I am.

3 Q Is this the way in which you make your living?

4 A It is.

5 Q Have you ever testified for the State in a DUI
6 prosecution?

7 A Well, yes, obviously when I worked for the State.

8 But since I've been in private practice, I have been retained
9 by the State of Florida to come back and testify on -- in Dade
10 County on capital murder cases in the 12th circuit on what's
11 known as Frye hearings, which is a --

12 MS. ARMOND: Objection, Your Honor, relevance.

13 THE COURT: Sustained.

14 BY MS. SCHIAVONE: [Resuming]

15 Q Does the fact that you've been paid by the Defendant
16 in any way affect your testimony today?

17 A It does not.

18 Q I'd like to begin by having you explain to the jury
19 how this machine works. And what I mean is when somebody
20 blows into it, how does it end up giving a blood alcohol
21 result?

22 A Yes, ma'am. The instrument's based on what's known
23 as infrared spectroscopy, and infrared spectroscopy is a fancy
24 word for infrared light absorption, very much -- when we go to
25 Burger King and we see the burgers under the lights and the

1 burgers stay warm because of the heat lamps; the heat is
2 transferred.

3 What happens with this instrument is there's a cylinder.
4 And to picture it in your mind, it's probably about the same
5 size as a cardboard paper towel roll, the tube that's left
6 after all the paper towels are gone; it's about that size. At
7 one end is a light, a projector light just like when we watch
8 movies; shines light. At the other end is a light detector,
9 very much like when we have a portrait taken and a
10 photographer holds a light meter up; same principle. In front
11 of that detector is a wheel that's spinning, and in that wheel
12 is five filters, and it filters stuff out of the sample that
13 are not alcohol. It's trying to identify ethanol only, so it
14 has a zero reference. To get a good zero reference, it has an
15 ethanol filter, then it has three other filters that have
16 potential interference that it tries to filter out. When a
17 person blows into the instrument, the light shines down the
18 sample chamber and ethanol and all lower molecular structure
19 molecules will absorb light energy at specific wave lengths.
20 So as the person blows, the ethanol will absorb some of that
21 light that's shining down the tube so that the light meter at
22 the end will have a decreased amount of light hitting it
23 because what's absorbed. A very good analogy is if you're
24 driving down the road one day and your headlights are shining
25 for blocks, the next you take the exact same road but it's

1 foggy out so your lights only shine one block, so what's
2 happening is the moisture in the air is absorbing that light
3 energy. Very much the same principle is at play with the
4 intoxilyzer. That light energy that hits the detector is sent
5 to a computer. The computer processes that data and produces
6 the number you see on the screen and the print card. That's
7 very rudimentary how it works.

8 Q Does the machine make any assumptions while it
9 operates?

10 A Yes, it makes a lot of assumptions. Obviously, the
11 zero reference it makes an assumption that there's no alcohol
12 in the room. The other thing is it records the alcohol result
13 in grams of alcohol per 210 liters of breath. Well, if we
14 translate 210 liters of breath to gallons so we have some sort
15 of picture in our mind what measurement units we're talking
16 about, that's a 55 gallon drum approximately. Nobody blows 55
17 gallons into these instruments, they usually blow about two
18 liters. But that 2100 or 210 is based on a blood to breath
19 ratio and that ratio is assumed in the software that it's 2100
20 to 1. There's the same amount of alcohol in 2100 milliliters
21 of breath as there is in one milliliter of blood. So that's
22 the assumption and that's what the instrument's designed to
23 report the results at, and humans vary in their blood to
24 breath ratio so it's a population average that's used for that
25 reporting.

1 Q Before some -- before an officer can give a breath
2 test, does he have to go through some kind of training?

3 A Yes. All states including Georgia --

4 MS. ARMOND: Objection, Your Honor. He cannot
5 testify to Georgia procedure.

6 THE COURT: Why?

7 MS. ARMOND: He's not been tendered as an expert in
8 Georgia procedure. There's been no testimony that he's
9 ever actually taken any courses in Georgia procedure as
10 far as police academies or intoxilyzer. He doesn't even
11 hold a breath testing permit in the State of Georgia.

12 THE COURT: If you can make a foundation, I'll allow
13 the question.

14 BY MS. SCHIAVONE: [Resuming]

15 Q I'm gonna move on, Mr. Malhiot. Are you familiar
16 with the concept of residual mouth alcohol?

17 A Yes.

18 Q Okay. Can you explain what that is?

19 A Well, the breath test instrument's designed to read
20 alcohol that's coming from the blood, the partition ratio of
21 blood and breath. So a person exhales, that alcohol moves
22 through the barrier in the lung, exhales into the instrument,
23 and the instrument can measure the alcohol in breath. It does
24 not want alcohol that's in the digestive system, what has been
25 consumed and in the stomach or in the oral cavity; that's

1 residual mouth alcohol. There's two ways to have residual
2 mouth alcohol: obviously, consumption of alcohol just prior to
3 a breath test. The other way is regurgitation of alcohol
4 that's in the digestive system and have it brought back up to
5 the oral cavity. Either way is residual mouth alcohol and it
6 can affect a breath test.

7 Q Are there any safeguards to prevent this from
8 happening that you're aware of?

9 A Yes. There are software safeguards, there are
10 procedural safeguards. Specifically, there are three
11 safeguards that are used in breath testing to prevent mouth
12 alcohol from affecting or residual mouth alcohol from
13 affecting a breath test.

14 Q Can you explain a little bit more about those three
15 different safeguards?

16 A Certainly, the first is a pre-test deprivation or
17 waiting period. Prior to any breath test, a person is
18 isolated, not allowed to consume any alcohol obviously, but
19 monitored for belching, burping and regurgitation to ensure
20 they've brought no raw alcohol back into the oral cavity.
21 That's usually a 15 to 20 minute wait -- different states have
22 different requirements -- but it's a pre-test deprivation
23 waiting period to prevent them consuming or regurgitating.

24 The second is an instrument software, and it's called
25 slope detection. The instrument is looking at the slope of a

1 breath test to make sure it's continually rising and leveling
2 off. If it continually rises and levels off, the instrument
3 will accept it as a valid sample. If it continues to rise and
4 then drops off quickly, the assumption is that the oral cavity
5 had a higher alcohol concentration in the lungs and that drop
6 off is what we call slope violation or not being sloped.

7 The third is two samples with an .02 agreement. All
8 three of these safeguards work together. It's like a triad or
9 three legs on a bar stool; they all work together to help
10 ensure the reliability of the result.

11 Q Mr. Malhiot, to your knowledge, who is responsible
12 for conducting the 20 minute wait period?

13 A Well, the breath test operator is. Because -- In
14 law enforcement we teach people to keep an eye on somebody for
15 officer safety, make sure they don't escape, make sure they
16 don't slip out of their handcuffs, make sure they're not a
17 danger to themselves or danger to others. That's the normal
18 when we tell police officers to watch, that's what we're
19 watching for. Specifically in breath testing, the pre-test
20 deprivation is specifically to watch and guard for
21 regurgitation, vomitus, anything that could bring stomach
22 content back into the oral cavity. That's specifically what a
23 person is supposed to be watching for in the pre-test
24 deprivation or waiting period.

25 Q And, to your knowledge, when does this waiting

1 period -- when should this waiting period be conducted?

2 A Well, once a person is in a controlled environment
3 where observation can take place.

4 Q Are you familiar with any studies that have been
5 done on this?

6 A Yes, there are numerous publications. Kurt Dubowski
7 published in the Journal of Forensic Toxicology. The
8 International Association of Chemical Testing has published
9 many times. There's numerous different studies out there on
10 the subject.

11 Q Okay. And what do those studies say?

12 MS. ARMOND: Objection, Your Honor, hearsay.

13 THE COURT: Response?

14 BY MS. SCHIAVONE: [Resuming]

15 Q Have you formed an opinion about these studies --

16 THE COURT: No. No, what is your response to the
17 objection?

18 MS. SCHIAVONE: Oh, I'm -- I'll rephrase the
19 question, Judge.

20 THE COURT: All right. Now, let me just ask you
21 this, Ms. Armond. Isn't an expert entitled to testify
22 from established books and treatises on subject matter --

23 MS. ARMOND: No, Your Honor. The --

24 THE COURT: -- relating to his expertise?

25 MS. ARMOND: No, Your Honor. The expert may give

1 his opinion, he may not act as a conduit for hearsay and
2 tell the jury what those studies say. If they want those
3 studies admitted, they would need to lay the proper
4 foundation and present those studies.

5 THE COURT: All right. Anything?

6 MS. SCHIAVONE: Judge, I agree. That's why I'm
7 gonna rephrase the question.

8 THE COURT: All right. Let me hear the rephrased
9 question. Hold your response, please, Mr. Malhiot.

10 THE WITNESS: Yes, Your Honor.

11 BY MS. SCHIAVONE: [Resuming]

12 Q Mr. Malhiot, in terms -- let me back up. Did you
13 say Dr. Kurt Dubowski has written some research on this?

14 A He has.

15 Q Have you studied that?

16 A I have.

17 Q Okay. Have you formed an opinion from his studies
18 on that?

19 MS. ARMOND: Objection, Your Honor. That would be
20 hearsay as well. He can't form his opinion based on
21 those studies. He can only give his opinion.

22 THE COURT: Your response, any?

23 MS. SCHIAVONE: I'll rephrase the question, Judge.

24 THE COURT: All right. Let me hear the rephrased
25 question. Do not respond.

1 BY MS. SCHIAVONE: [Resuming]

2 Q Mr. Malhiot, in your expert opinion -- or excuse me,
3 have you formed an opinion about the adequacy of the 20 minute
4 deprivation period?

5 THE COURT: Okay. Any objection to that question?

6 MS. ARMOND: No, Your Honor.

7 THE COURT: Very well, I think that is permissible.

8 You may respond.

9 A Yes, I have formed an opinion as to the significance
10 of the 20 minute observation.

11 BY MS. SCHIAVONE: [Resuming]

12 Q Okay. Could you share that, please?

13 A It's part of the triad of safeguards, it's the first
14 one, to prevent mouth alcohol from affecting a breath test.
15 It's the breath test's foundation to ensure the sample is
16 good. Just like in a blood sample, we want to make sure the
17 arm is clean and the blood sample is taken properly. In a
18 breath sample it's imperative that a quality breath sample is
19 achieved. To ensure a quality breath sample, a pre-test
20 deprivation waiting period, observation period, is essential
21 to ensure that the sample collected is a valid sample.

22 Q Mr. Malhiot, I'm showing you what's been marked as
23 State's Exhibit Number 6 and already introduced into evidence.
24 On that slip there is a line for time first observed. Can you
25 explain what that means? Are you familiar with what that

1 means?

2 A Yes, I'm very familiar with the form. It's a CMI
3 Incorporated production form. It's actually the print card
4 that's used for intoxilyzers with internal printers throughout
5 the world. So I'm very familiar with the form.

6 Q Okay. And what is the purpose of that time first
7 observed?

8 A The time first observed is a spot where the officer
9 can write in the time the person was placed in a controlled
10 environment and the observation period was begun. That's time
11 first observed, that's what it's designed for on the form.

12 Q And what is written on that form?

13 A On this particular form it's blank.

14 Q Thank you. Mr. Malhiot, in your expert opinion, can
15 a proper pre-test deprivation period be done outside on the
16 side of the road?

17 A Well, if they're sitting face to face, yes. It's
18 partially subjective. The question is, can the person observe
19 for belching, burping and regurgitation? If those
20 environmental conditions allow that continuous observation for
21 belching, burping and regurgitation, the answer is yes. When
22 you say "on the side of the road," it could be.

23 Q In your expert opinion, can a proper 20 minute
24 deprivation period be conducted in a patrol car?

25 A I have had dozens, if not hundreds, of people in the

1 back seat of patrol cars and have watched thousands of
2 officers transport persons in the back of a patrol car and it
3 is my opinion it cannot because the person driving has to pay
4 attention to the road and all the functions of driving, and
5 there's a cage blocking between the front and the back seat,
6 and a person in the back seat is not being observed during
7 that 20 minutes. They're in custody, they can't consume any
8 more alcohol, but they're not -- it's not a proper observation
9 in my opinion.

10 Q In your expert opinion, when should a 20 minute
11 deprivation period be conducted?

12 A Once they arrive to the breath test location,
13 they're in the breath test room, it's a controlled
14 environment, it's a controlled atmosphere, it's well lit, then
15 the 20 minute observation can be -- can be properly conducted.

16 Q Thank you. Moving on, Mr. Malhiot, are you familiar
17 with the term "margin of error"?

18 A Yes, there's -- in breath testing there's many
19 different terms that are encompassed in margin of error. Yes,
20 I'm very familiar with it.

21 Q Could you explain that a little bit more to the
22 jury?

23 A Margin of error is a blanket term used for the
24 accuracy, reliability of a measurement device. It encompasses
25 accuracy standard, encompasses systematic error. A good

1 analogy is in the spring time we take all of the clocks in the
2 house and we set them ahead one hour. We put the same time on
3 every one -- the microwave, the oven, the DVD, all of them
4 have the same time. We come back a month later and they're
5 all different. Well, that's margin of error. Some time
6 pieces keep better time than others. Same with breath
7 testing, there's a margin of error. It goes back to the old
8 analogy we hear carpenters use; measure it twice, cut once.
9 So there's margin of error in any measurement system.

10 Q Is there an error rate, to your knowledge, in the
11 Intoxilyzer 5000?

12 A There's an accuracy rate and a measurement
13 uncertainty. They're both applied to the Intoxilyzer 5000,
14 yes.

15 Q Can you explain that some more to the jury, please?

16 A The accuracy standard on the Intoxilyzer 5000 is
17 published as five percent, plus or minus five percent. The
18 measurement uncertainty on the Intoxilyzer 5000 on human
19 samples is seven percent.

20 Q Are you familiar with the term "variability"?

21 A Yes.

22 Q Can you explain that to the jury?

23 MS. ARMOND: Objection, Your Honor. This is gonna
24 go again to procedure and statutes.

25 THE COURT: Well, what do you say about that, Ms.

1 Schiavone?

2 MS. SCHIAVONE: Judge, variability has everything to
3 do with the Intoxilyzer 5000, which he's been qualified
4 as an expert on.

5 THE COURT: Define your term, "variability."

6 MS. SCHIAVONE: The -- when I say "variability," I
7 mean the variance between breath tests.

8 THE COURT: And what is your objection?

9 MS. ARMOND: Your Honor, the variance that she is
10 referring to is the admissibility of the sample as
11 outlined by O.C.G.A. 40-6-392.

12 THE COURT: Overruled. You may proceed.

13 MS. SCHIAVONE: Thank you, Judge.

14 BY MS. SCHIAVONE: [Resuming]

15 Q Are you familiar with the term "variability"?

16 A Yes. The term "variability" replies to how much
17 variance between samplization is allowed.

18 Q Okay. And in terms of -- does that apply at all to
19 the Intoxilyzer 5000?

20 A It does.

21 Q Can you explain that, please?

22 A There are two separate variabilities allowed in
23 breath testing in different states. They have what's known as
24 the .02 agreement, .02 between or at .10 at 10 per -- or 20
25 percent variance between the samples. There's also another

1 variance that's evolving that talks ten percent of the mean;
2 take two samples, the average, and ten percent of that is the
3 variability. So at .10 the Intoxilyzer 5000 software used in
4 Georgia allows a 20 percent variance between samples. If one
5 sample is X, the second sample must be within 20 percent of X.
6 That's the way the software's designed and, as stated by the
7 prosecutor, written in statute.

8 Q Are there any checks in place to inspect the
9 Intoxilyzer 5000 that you're familiar with?

10 A Yes. The Georgia Bureau of Investigation and the
11 GBI conduct quarterly inspections on their evidential
12 instruments in the State of Georgia.

13 Q What are some of -- what are some of the things that
14 they look for during these inspections?

15 A They're checking for cleanliness, does the printer
16 work, does the display work, does it identify mouth alcohol,
17 does it identify radio frequency interference, does it
18 identify the .02 agreement -- the difference, the variance --
19 and they do a single point calibration check at the .08 level.

20 Q How often are these inspections done, to your
21 knowledge?

22 A They're done quarterly, meaning once per calendar
23 quarter, not necessarily every 90 days.

24 Q And I believe -- do they check for mouth alcohol, I
25 believe you said?

1 A They do, once. It --

2 Q Can you ex -- I'm sorry, finish. Go ahead.

3 A It's a single step check they do.

4 Q Can you explain how they check for it?

5 A Certainly. They swish a solution containing

6 alcohol, usually a mouthwash, spit it out, blow in the

7 instrument and see if the computer algorithm identifies that

8 there's alcohol in the oral cavity.

9 Q What if it doesn't identify it?

10 A They repeat it again. And if it doesn't do it a

11 second time, they can call the manufacturer for guidance.

12 Q What if on the second attempt it does work properly?

13 A Then they proceed on; it's considered effective.

14 The slope detection is not a perfect -- it's a computer

15 algorithm. Either the sample meets the slope or it doesn't,

16 so it's not a perfect system. That's why there are so many

17 safeguards for mouth alcohol and not just slope.

18 Q Are you familiar with the term "calibration"?

19 A Yes.

20 Q What does that mean?

21 A Calibration is a term used, it's the physical

22 adjusting of a measurement device to be within calibration.

23 Q Okay. And, to your knowledge, is calibration

24 checked during these quarterly inspections?

25 A They do what's known as a single point calibration;

1 they validate that it's measuring a .08 standard within plus
2 or minus five percent.

3 Q Okay. And how -- and how do they -- how many times
4 do they check for this?

5 A Well, they check it twice. They use an .08 known
6 standard. They allow the instrument to measure that standard
7 twice, and if -- as long as the both of them are within five
8 percent of that .080 target value, they consider the
9 instrument to be calibrated.

10 Q What happens if on the first attempt it fails at
11 calibration?

12 A They have to call the manufacturer for guidance.

13 Q Okay. To your knowledge, is this machine ever
14 calibrated on a regular basis?

15 A No. Georgia does not have a calibration schedule
16 for the intoxilyzer at all.

17 Q Okay. Let me ask you this, Mr. Malhiot, and let me
18 back up. How many times a year do they inspect this machine?

19 A Quarterly, so four times a year it would be
20 inspected.

21 Q Okay. Hypothetically, if we were to go ten years
22 and this machine passed their inspection for ten years, is
23 there a possibility it could not be calibrated for ten years?

24 A Highly probable. If it's not sent back to the
25 manufacturer, it's not calibrated.

1 Q Mr. Malhiot, have you had a chance to review the
2 breath test in this case?

3 A The print card, yes, and the quarterly inspections
4 of the instrument, yes.

5 Q Based upon your expert knowledge and experience,
6 what does all of this tell you about the breath test that we
7 have in this case?

8 A The scientific reliability of the breath test to be
9 above the statutory .08 per se statutory level is not within
10 scientific certainty. Based on the lack of a proper 20 minute
11 observation to prevent mouth alcohol from affecting it plus
12 the margin of error instrument accuracy, it is not within
13 scientific certainty above an .08.

14 Q That's all I have at this point. Thank you.

15 A Thank you, counselor.

16 THE COURT: Cross-examine.

17 MS. ARMOND: Yes, Your Honor. Your Honor, if I can
18 have just a second to get organized?

19 **CROSS-EXAMINATION**

20 **BY MS. ARMOND:**

21 Q All right. Mr. Malhiot, let's begin by just talking
22 about how much you were paid to be here today.

23 A Certainly.

24 Q You mentioned it on direct that you were, in fact,
25 paid to be here; correct?

1 A I am compensated for my time today, yes.

2 Q And what is -- how are you compensated for your
3 time?

4 A I charge a flat fee for the initial consultation,
5 case review, report, if requested, and that's a flat \$600, and
6 then I am compensated at a rate of \$180 an hour, five hour
7 minimum for court, so that's a flat \$900. Gwinnett County is
8 a \$50 travel fee. So that's the total compensation unless I'm
9 physically in court more than five hours.

10 Q And the flat fee that you charge to review the case,
11 that's not just today; that's at a different point in time,
12 correct?

13 A Correct, when I'm initially contacted by whomever
14 wants to retain the services.

15 Q Are you given a per diem allowance?

16 A No.

17 Q No per diem?

18 A No per diem. The flat \$50 travel fee covers local
19 travel.

20 Q So in total you've been paid approximately \$1550 for
21 your time; correct?

22 A I wouldn't say approximate. I'd say that's exactly
23 how much I've been compensated, but, yes.

24 Q But if you're here more than five hours today, it
25 may be more; correct?

1 A It may be, yes.

2 Q So it's approximate. Let's talk a little bit about
3 your education. You have a degree in Criminal Justice
4 Administration; correct?

5 A I do.

6 Q You would agree that that is not a natural science;
7 correct?

8 A It is not a natural science.

9 Q And you received that degree from Park University;
10 correct?

11 A I did.

12 Q Where is Park University located?

13 A They're in Parksville, Missouri.

14 Q Did you attend school in Missouri?

15 A I did not.

16 Q Did you attend class online then?

17 A I did not. I attended 100 percent in resident
18 courses at military bases. They have satellite locations.
19 When I was active-duty military, I attended college.

20 Q And you did that with professors in a classroom at a
21 military base?

22 A Yes, ma'am.

23 Q And that is from Park University?

24 A Yes, ma'am. I took no online courses at all.

25 Q Now criminal justice administration, that focuses

1 more on social science aspects; correct?

2 A There are two different. You can get a bachelor of
3 arts in criminal justice administration where you'd be
4 correct. The bachelor of science in criminal justice
5 administration has more of a natural science than a social
6 science.

7 Q But you've agreed with me that it's not a natural
8 science degree?

9 A The specific degree is not, no.

10 Q And let's talk for just a moment. You mentioned
11 that you are a member of the International Association for
12 Chemical Testing; correct?

13 A I am.

14 Q And you mentioned that in the State of Florida you
15 inspected intoxilyzer -- intoxilyzers; correct?

16 A I did.

17 Q And you would agree with me that the bylaws adopted
18 by the International Association for Chemical Testing require
19 that a tester or an inspector of the instruments have a
20 minimum educational requirement of a bachelor of science
21 degree with a natural -- in a natural science with an adequate
22 education in chemistry; correct?

23 A I do not agree with that statement at all, and if
24 you can show me the bylaws I'll show you exactly where I
25 disagree. That is not a bylaws minimum requirement, it's a

1 recommendation.

2 Q So you would say that the bylaws are just a
3 recommendation then?

4 A Specifically, the word "recommendation" is printed
5 in there, so, yes, I would.

6 Q Okay, so it's recommended?

7 A It is recommended that the state program managers
8 have a degree in a natural science, yes.

9 Q And you would agree that you do not have a degree in
10 chemistry; correct?

11 A I do not.

12 Q In fact, how many chemistry courses did you take in
13 your education?

14 A One specific undergraduate that I remember.

15 Q One chemistry class?

16 A Yes, ma'am.

17 Q Now let's talk a little bit more. You said you were
18 an officer in Montana; is that correct?

19 A The Air Force and in Montana, yes.

20 Q And approximately how long?

21 A Twenty-three years as a sworn law enforcement
22 officer.

23 Q And during those 23 years, were you a road officer
24 or did you enforce traffic laws and DUI's and that type of
25 thing?

1 A For part of the time, yes.

2 Q For how long?

3 A Probably the majority; 16 years, I would say.

4 Q Sixteen years. And how many DUI arrests did you
5 make in 16 years?

6 A I've estimated it in the past in the range of
7 approximately 500. I have not counted or kept track.

8 Q So approximately 500 DUI arrests. Were there state
9 tests administered in those arrests?

10 A State or federal depending if I was working with the
11 sheriff's office or the Air Force, yes.

12 Q And you mentioned that you do have a breath test
13 operator's permit for the State of Montana; correct?

14 A I held a valid permit at the time, yes.

15 Q So you would have administered those tests at that
16 time; correct?

17 A I did.

18 Q And at that time, were you called in to testify in
19 court on those cases?

20 A Sometimes, yes.

21 Q And in the times that you were called in to testify
22 in court, you testified about the accuracy of those tests;
23 correct?

24 A Within the margin of error, systematic error, yes,
25 absolutely.

1 Q But you asked juries to rely on the results of those
2 tests in making their decision; correct?

3 A I test -- I didn't ask juries. I testified and
4 answered the questions I was asked. And, yes, the -- within
5 the margins of error and the instrument's capabilities, I
6 testified to the accuracy of a specific test in a specific
7 case, yes.

8 Q And you never went to the prosecutor and said, I
9 don't trust this and it should be thrown out; correct?

10 A Yes, I have done that many times and I've made many
11 Brady notifications on forensic breath tests in both as a
12 sworn officer and as my duties with the Florida Department of
13 Law Enforcement.

14 Q But you would've been tipped off by the instrument
15 itself, correct, through some sort of sample, some of its
16 safeguards; correct?

17 A Not necessarily. It's possible an error message
18 would be created that would show an error problem with the
19 breath test or an inspection -- because in Montana I also
20 inspected instruments and I would have an inspection problem
21 or a systematic analytical problem. And when those problems
22 arose, I had duties, both as an inspector and an officer, to
23 notify the prosecutor of potential Brady issues. So I have
24 notified, many times, prosecutor offices that a breath test or
25 a series of breath tests may not be reliable.

1 Q And any time your inspections revealed a problem
2 with the instrument, you took it out of service; correct?

3 A Either that or repaired it on the spot, one of the
4 two. Corrective action was taken, yes.

5 Q As an inspector then, and a technician, you
6 inspected and repaired these instruments with the expectation
7 that they would be used in the courtroom and upheld as
8 accurate; correct?

9 A Within their capabilities, yes.

10 Q And you would agree that when you inspected an
11 instrument and you found no issues, it was reliable; correct?

12 A That is correct.

13 Q Did you do similar inspection certificates to the
14 ones that you mentioned earlier, State's Exhibits 4 and 5?

15 A I'm familiar with them. No, much more extensive
16 inspection protocols, but not certificates that look like
17 that; no.

18 Q You've never actually inspected an Intoxilyzer 5000
19 in the State of Georgia for the purpose of certifying it;
20 correct?

21 A I have not done the duties of the GBI, no.

22 Q And you mentioned that the instruments are
23 calibrated when they're inspected; correct?

24 A No, I've said the just the opposite. They may check
25 the calibration, but they are not physically calibrated. To

1 calibrate is a physical action to set the calibration.
2 They're only calibrated when they're sent back to Indi -- or
3 to Kentucky to the manufacturer.

4 Q And you have no way of knowing when this particular
5 intoxilyzer was calibrated; correct?

6 A The documents I reviewed in the timeframe I
7 reviewed, it was not. When it was specifically calibrated, I
8 do not know.

9 Q And you mentioned earlier that the calibration
10 checks ensure accuracy within five percent; correct?

11 A At that single .08 level. It does not ensure
12 accuracy along the entire range of detection. It ensures
13 accuracy within five percent at the time of calibration and at
14 the point in which they're calibrated.

15 Q Let's talk a little bit about a DUI investigation.
16 Were you ever a sworn police officer in the State of Florida?

17 A No.

18 Q How long did you work in Florida?

19 A Eight years.

20 Q So your last arrest -- let me ask this. How long
21 have you been testifying professionally?

22 A Probably thirty-something years both as a police
23 officer, an inspector, and in my private practice.

24 Q How long have you been testifying in your private
25 practice?

1 A Since September 2010 or sometime after then; the
2 first court appearance, I don't have memorized.

3 Q But approximately just under two years. And in
4 those two years, what percentage of your testimony is for the
5 defense?

6 A I don't have it broken out, and it would be
7 speculative; probably 90 percent is criminal defense, 5
8 percent -- or maybe 2 percent civil and 8 percent for the
9 State.

10 Q And by State, you mean the State of Florida?

11 A That is where I've been retained, yes.

12 Q Throughout your course -- your career as a police
13 officer for 23 years, you would agree that the most reliable
14 method of determining whether someone is under the influence
15 of alcohol is those firsthand observations made by the
16 officer; correct?

17 A It can be, yes.

18 Q And you would agree that an officer on-scene is in
19 the best position to smell things?

20 A Yes. Video has not been productive in capturing
21 smell so, yes, the odors associated with the investigation
22 would be limited to those at the investigation site, yes.

23 Q And you would agree that there are some limitations
24 to watching a video; correct?

25 A Well, correct; it's double-edged sword. There's

1 also great advantages to video over being there firsthand.
2 And when I say that, an officer can see things firsthand that
3 the video may not capture, but the opposite is true too;
4 somebody observing a video may be able to see things the
5 officer didn't see because the officer's also involved with
6 his own safety, the safety of the person, other traffic,
7 distractions where the view of a video may not have those. So
8 it's double-edged. Yes, the officer may see things and a
9 third party watching may see things, so it's possible to be
10 both ways.

11 Q And in determining whether someone is under the
12 influence of alcohol, it's best to consider all the physical
13 signs of intoxication; correct?

14 A I think the totality of the circumstances should be
15 considered, yes.

16 Q Things such as the odor of alcohol from the suspect;
17 correct?

18 A Well, odor may be something to take note of, but
19 it's not necessarily an indicator of impairment; it may be an
20 indicator of consumption. And the analogy I like to use is if
21 you walk in a house on Thanksgiving, you'll smell the turkey
22 but you'll not be able to tell us how many pound turkey is in
23 the oven. The odor by itself is something to note, but it's
24 not an indicator of impairment as a standalone.

25 Q And as a police officer, you would note that in your

1 report; correct?

2 A I would.

3 Q And you would note the other things such as
4 bloodshot eyes or a flushed face or how the person walked;
5 correct?

6 A I would.

7 Q And you would agree with me that alcohol affects
8 everyone differently; correct?

9 A It does. Tolerance is a function of manifestation,
10 so, yes.

11 Q And you would agree that someone who drinks a lot,
12 perhaps, or very frequently, would have a higher tolerance
13 than someone who does not drink a lot or does not drink often?

14 A There are two types of tolerance and I would agree
15 that learned tolerance comes with experience, so, yes.

16 Q You would agree with me that you've never actually
17 inspected the Intoxilyzer 5000 that was used in this
18 particular defendant's test; correct?

19 A No. I've reviewed two years worth of quarterly
20 inspections, breath test logs, and the print card in this
21 case. I have not physically had hands-on with this
22 instrument.

23 Q And, therefore, you would have no way of knowing
24 whether or not the safeguards were working properly; correct?

25 A No, not necessarily true. The safeguards are

1 computer algorithms, they're not individual specific to the
2 instrument. Every instrument CMI Intoxilyzer 5000 EN model on
3 slope, on the .02 agreement, it's the exact same software
4 algorithm so it's not individual instrument specific, it's
5 across the board, so the response on slope detection is gonna
6 be the same on every single instrument.

7 Q So if the instrument runs its diagnostic check and
8 it comes back okay then you would proceed with that breath
9 test; correct?

10 A The diagnostic check doesn't check those things I
11 just mentioned, it doesn't check any of those things. There
12 are other checks that can be done but the diagnostic does not
13 check slope detection, does not check .02 agree -- it doesn't
14 check any of those things. So the software routine in a
15 Georgia instrument, the diagnostic, and then the breath sample
16 would be automatic; it's not something that's controlled. So
17 I'm not sure how to answer your question.

18 Q Those things then are checked at the quarterly
19 inspections; correct?

20 A The -- those algorithms?

21 Q The slope --

22 A Yes, are checked -- singly checked at the quarterly
23 inspection.

24 Q You mentioned mouth alcohol earlier, and I want to
25 talk about that for just a moment.

1 A Sure.

2 Q The mouth alcohol you mentioned was in the digestive
3 tract; correct?

4 A It could be. There's two ways to either ingest it
5 or regurgitate it, those are the only two ways.

6 Q And you would agree with me that someone who has not
7 burped, belched or regurgitated would not have that residual
8 mouth alcohol from the digestive tract; correct?

9 A There are a very small percentage of persons who may
10 have a gastric condition that would cause without belching,
11 burping and regurgitation. Normally your statement, if you do
12 not belch, burp, regurgitate or bring any stomach contents up,
13 then you would not have mouth alcohol from the digestive tract
14 the majority of the time; that is a true statement.

15 Q And if you have not consumed alcohol recently you
16 would not have any in your oral cavity; correct?

17 A When you say recently, at least 20 minutes, yes.

18 Q And you would agree with me that if an officer is
19 watching someone for 20 minutes, that would be the observation
20 period; correct?

21 A Physically watching, yes.

22 Q You would agree with me that an officer could use
23 his other senses, as well, such as hearing; correct?

24 A Well, in a combination, yes. When you use -- when
25 you say that, can an officer sit in one room and leave the

1 door open and have somebody in the other room and monitor or
2 listen for belching, I don't agree with that. I don't agree
3 with sitting in the back seat of another -- in a caged vehicle
4 and listen for a burp, I don't agree with that. Using all of
5 their senses -- sight, smell, observate -- yes, but just to
6 say I can hear and complete the 20 minute, I would disagree.

7 Q And when you say "caged," you're talking about the
8 mesh caging; correct?

9 A Well, mesh or plastic. A lot of officers have
10 plastic cages to prevent any physical contact between the
11 officer and the accused.

12 Q You would agree with me that mouth alcohol
13 dissipates; correct?

14 A Over time it does, yes.

15 Q And that's a very short period of time; correct?

16 A Well, we'll get very specific. Approximately less
17 than 15 minutes, 12 to 15 minutes generally, mouth alcohol
18 will dissipate. So when you say a short period of time, it's
19 relevant.

20 Q And that's the theory behind the 20 minute wait
21 time, is so that any of that residual mouth alcohol will have
22 dissipated; correct?

23 A That is the basis for it, yes.

24 MS. ARMOND: Your Honor, if I can have just a second
25 to review my notes?

1 BY MS. ARMOND: [Resuming]

2 Q The breath samples that are taken on the -- by the
3 Intoxilyzer 5000 are meant to test the deep lung air; is that
4 correct?

5 A That's the intent, yes.

6 Q And the person gives that sample to attempt to get
7 as deep into the lung air as possible; correct?

8 A That's the design of the system, yes. The officer's
9 instructions and the exhalation is designed to get that. The
10 instrument, other than the slope and minimum sampling, doesn't
11 know where the air is from. It just knows 1) slope is met,
12 and 2) the minimum volume is met. Other than that, it -- the
13 instrument doesn't physically know the difference.

14 Q You mentioned that you've given several seminars;
15 correct?

16 A I have.

17 Q And in those seminars, isn't it true that you said
18 the 20 minute wait period does not necessarily need to be face
19 to face contact?

20 A There are -- a specific seminar that I taught in
21 Florida with a different instrument that has different
22 protocols and the instrument has a 20 minute timer in it so
23 that's specifically to a different protocol and procedural.
24 When I say face to face, we don't have to sit here and stare
25 at each other like we are, but in the physical proximity next

1 to each other, yes. When we say physically staring, no; same
2 room, same able to watch and observe, yes.

3 Q Thank you. I have no further questions at this
4 time.

5 A Thank you, counsel.

6 THE COURT: Redirect.

7 MS. SCHIAVONE: Thank you, Judge.

8 **REDIRECT EXAMINATION**

9 **BY MS. SCHIAVONE:**

10 Q Mr. Malhiot, Ms. Armond asked you some questions
11 about your experience as a DUI officer.

12 A Yes.

13 Q I'm gonna follow up a little bit about that.

14 A Sure.

15 Q And I believe you said that everybody has a
16 different tolerance for alcohol; is that your opinion?

17 A Yes. There's learned tolerance and that's learned
18 over time and consumption and exposure.

19 Q And how many DUI arrests have you made in your
20 career?

21 A I approximate somewhere in the range of 500.

22 Q When you were participating as a DUI officer, if you
23 suspected somebody was under the influence would you ask them
24 any questions?

25 A Yes, I would advise them of their rights and ask a

1 lot of questions.

2 Q What kind of questions would you ask?

3 A Well, the kind of questions I would ask are, one, I
4 want a little bit more of a medical history; are you diabetic,
5 do you have false teeth, is there any reason why this behavior
6 is manifesting other than alcohol? So there's a whole litany
7 of questions and interaction I would have persons that were
8 either under arrest or suspected of DUI.

9 Q Would you ask them any questions about an odor of
10 alcohol if you smelled it?

11 A Well, I would ask --

12 MS. ARMOND: I'm gonna object as irrelevant.
13 What he would've done as an officer, this is outside his
14 expertise.

15 THE COURT: Ms. Schiavone.

16 MS. SCHIAVONE: She brought it up on cross, Judge.
17 She asked about people's different level --

18 THE COURT: Overruled. Continue.

19 MS. SCHIAVONE: Thank you, Judge.

20 BY MS. SCHIAVONE: [Resuming]

21 Q In terms of if you smelled an odor of alcohol, would
22 you ask any questions regarding that as an officer?

23 A Yes. I would be very specific about the odor of
24 alcohol because that is usually the first indicator somebody's
25 consumed. I would tell them, listen, I smell the -- I smell

1 the beer or I smell the odor, what's going on, and then I'd
2 hear what they'd have to say -- well, yeah, I had a glass of
3 wine with dinner or I chugged a case of beer, whatever the
4 answer may be, but, yes.

5 Q Okay. Now moving on. You mentioned that you
6 studied the quarterly inspection documents referring to this
7 machine in this case; correct?

8 A I did.

9 Q Okay. And after having looked at those, to your
10 knowledge, was any calibration done on this machine?

11 MS. ARMOND: Objection, Your Honor, this would be
12 speculation at this point. He's already testified he
13 does not know when it was calibrated.

14 THE COURT: Sustained.

15 BY MS. SCHIAVONE: [Resuming]

16 Q Are you familiar with the American Society of Crime
17 Lab Directors?

18 A I am.

19 Q Okay. What is that?

20 A State crime labs can be members of the American
21 Director's Crime Lab Director's Association. They establish
22 professional standards for crime labs, DNA labs, biology labs,
23 different functions of crime -- of state crime labs and they
24 have different standards for accrediting those crime labs.

25 Q To your knowledge, have they offered accreditation

1 to Georgia's breath testing program?

2 A All breath testing, any state in the nation is
3 eligible to have accreditation. There's only three states
4 that have it so far; Georgia's not one of them.

5 Q Do you know why they've not offered it to Georgia?

6 MS. ARMOND: Objection, Your Honor. This is gonna
7 be hearsay.

8 THE COURT: Sustained. Sustained.

9 BY MS. SCHIAVONE: [Resuming]

10 Q Mr. Malhiot, in your expert opinion, do you have an
11 opinion about Georgia's breath testing program?

12 A I do.

13 MS. ARMOND: Objection, Your Honor. He can't
14 testify again to Georgia procedures.

15 THE COURT: Sustained.

16 BY MS. SCHIAVONE: [Resuming]

17 Q In your expert opinion, do you have an opinion about
18 the Intoxilyzer 5000?

19 A I do.

20 Q Okay. Can you share that with the jury?

21 A I certainly can. The Intoxilyzer 5000 is a
22 measurement device designed to measure forensic breath samples
23 and breath alcohol. As a measurement instrument, it's a good
24 instrument. It needs a strong quality control surrounding it.
25 It needs numerous things to keep upkeep to keep it working

1 properly because the importance of the measurement is vitally
2 important. So as a instrument is it capable, yes. Does it
3 need a quality control system to ensure that, yes. So that's
4 my opinion on the 5000. It's a good instrument; it needs more
5 than just buying the instrument and using it.

6 Q Thank you. That's all I have.

7 A Thank you, counselor.

8 THE COURT: Cross-examine?

9 MS. ARMOND: No, Your Honor.

10 THE COURT: All right, you may step down.

11 THE WITNESS: Thank you, Your Honor.

12 THE COURT: Can Mr. Malhiot be excused?

13 MS. SCHIAVONE: He may, Judge.

14 THE COURT: You're excused, sir. Thank you.

15 THE WITNESS: Thank you.

16 [Whereupon, the witness retired from the witness
17 stand, and was excused.]

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CERTIFICATE


STATE OF GEORGIA

COUNTY OF HALL

I, Pavon Bohanan, Certified Court Reporter, 2701 hereby certify that the foregoing pages constitute a true, correct and accurate transcript of the testimony heard before me, an officer duly authorized to administer oaths, and was transcribed under my supervision.

I further certify that I am a disinterested party to this action and that I am neither of kin nor counsel to any of the parties hereto.

In witness whereof, I hereby affix my hand on this, the 13th day of August, 2012.



Pavon S. Bohanan, CCR-2701, CVR-M