

IN THE STATE COURT OF FORSYTH COUNTY
STATE OF GEORGIA

STATE OF GEORGIA

CASE NO.: 10M-5124

vs.

VOLUME III

DEREK MICHAEL SINGLEY,

Defendant.

JURY TRIAL
HEARD BEFORE HONORABLE PHILIP C. SMITH, JUDGE,
ON AUGUST 24, 25, AND 26, 2011,
AT THE FORSYTH COUNTY COURTHOUSE, CUMMING, GEORGIA

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1 P R O C E E D I N G S

2 THE COURT: All right. Are we ready for the jury?

3 ASST. SOLICITOR GENERAL PARK: The State is ready.

4 THE COURT: Mr. Pilgrim?

5 MR. PILGRIM: Judge, we're ready.

6 THE COURT: Go ahead and bring in the jury.

7 (Whereupon, the jury entered the courtroom and the
8 proceedings continued as follows:)

9 THE COURT: You can be seated.

10 Proceed, Mr. Pilgrim.

11 MR. PILGRIM: Thank you, Judge.

12 If you would, please raise your right hand.

13
14 _____
15 MATTHEW E. MALHIOT,

16 a witness herein, being first duly sworn,

17 was examined and testified as follows on

18 DIRECT EXAMINATION

19 BY MR. PILGRIM:

20 Q You can have a seat.

21 A Thank you, Counsel.

22 Q Would you please state your name for the record and
23 spell your last name for the court reporter.

24 A Certainly. Matthew E. Malhiot, M-A-L-H-I-O-T.

25 Q And how are you employed currently?

A I am currently the proprietor of Forensic Alcohol

1 Consulting and Training, which is a limited liability
2 corporation out of Canton, Georgia.

3 Q Okay. What kind of -- do you have any formal
4 education by way of college, degrees, anything along those
5 lines?

6 A Yes. I have a Bachelor of Science in Criminal
7 Justice Administration with basic class work in forensics,
8 toxicology, anatomy, physiology, criminalistics, and
9 forensics --

10 Q Okay.

11 A -- among other course requirements.

12 Q All right. What other previous positions have -- how
13 did you start your career and then led you into the path where
14 you are now?

15 A Certainly. When I graduated high school, I was in
16 the Air Force for 20 years as a law enforcement officer and 20
17 years both in Montana and Germany and served in the Air Force
18 working in law enforcement and working in DUI enforcement,
19 traffic enforcement, patrol, normal law enforcement duties.

20 When I was stationed in Montana in the late '80s, early
21 '90s, I became involved with forensic breath testing both with
22 handheld breath test instruments and the Intoxilyzer 5000 in
23 the early '90s in Montana through the division of forensic
24 science. I was a certified breath test operator in Montana, a
25 breath test inspector, and I completed my breath test

1 technician course. And at the time a breath test technician
2 was a repair technician for the instrument and that was on the
3 Intoxilyzer 5000 in Montana.

4 When I retired from the Air Force, I stayed in Montana
5 with the Cascade County Sheriff's Office, responsible for
6 breath testing for the sheriff's office, the city police in the
7 City of Great Falls, the Montana Highway Patrol Division, and
8 all breath testing in Cascade County, Montana.

9 In 2002 I had the opportunity to take a full-time position
10 in Florida with the Florida Department of Law Enforcement
11 Alcohol Testing Program. And in Florida that is the equivalent
12 of Georgia's GBI. They had oversight and management of
13 forensic breath testing -- of breath testing and blood testing
14 to include the Intoxilyzer 5000 at the time in Montana (sic),
15 research, development, testifying in court, teaching police
16 officers, writing curricula, writing rules.

17 While I was with the Florida Department of Law
18 Enforcement, I completed Indiana University's Borkenstein
19 Course. And Dr. Borkenstein was the inventor of the
20 breathalyzer back in the '50s, so the course was named after
21 him. And that particular course was highway traffic safety;
22 alcohol research litigation, which had a strong emphasis on
23 forensic alcohol toxicology.

24 I also completed coursework with the Southern Association
25 of Forensic Scientists Certification and Forensic Toxicology

1 Certification board on ethanol measurement and its
2 interpretation. Ethanol being the alcohol that's found in
3 drinks consumable by humans. I also completed training -- the
4 one-year training program with the Florida Department of Law
5 Enforcement, which was an emphasis on forensic alcohol
6 toxicology, pharmacokinetics and pharmacodynamics. And those
7 are fancy words on how alcohol gets in and out of the body and
8 what the body does to alcohol when it is in the body. And what
9 alcohol does to the body.

10 I also completed coursework and study on blood alcohol,
11 breath alcohol, and other bodily fluids and alcohol analysis,
12 along with research, training on different instrumentations,
13 not only infrared instruments but electro-fuel instruments and
14 different states' instruments.

15 I also went to CMI in Kentucky. CMI is the manufacturer
16 of the Intoxilyzer. I went to their course on the Intoxilyzer
17 5000; the factory course on maintenance, repair, calibration.
18 I also am certified by the manufacturer to teach the
19 Intoxilyzer 5000.

20 Working with the manufacturer and their engineering
21 division, I helped develop the new instrument that's being used
22 in many states, the Intoxilyzer 8000. And I have completed
23 coursework at the manufacturer on the Intoxilyzer 8000.

24 Also, when I was with law enforcement, I completed the
25 standardized field sobriety class for law enforcement. I went

1 on and completed the standardized field sobriety instructor
2 course and completed the update courses to stay current with
3 changes in standardized field sobriety. I also completed the
4 course from the U.S. Department of Transportation on instructor
5 facilitator that helps teach the Department of Transportation
6 or National Highway Traffic Safety Administration course to law
7 enforcement.

8 While employed in Florida, I would teach at the Public
9 Safety Institute to law enforcement, attorneys, judges in
10 forensic alcohol toxicology, Intoxilyzer 5000, Intoxilyzer
11 8000, standardized field sobriety, HGN, and many other
12 different areas in forensic alcohol toxicology.

13 That's a brief summary of my training.

14 Q Okay. So specifically when it comes to law
15 enforcement and your duties for the first 20 years that you
16 were there, I guess based upon what you're telling us is you
17 had a specific emphasis at that time regarding field sobriety
18 evaluations and things of that nature?

19 A Yes. I would -- I not only completed coursework, but
20 I also taught other law enforcement and taught at the Montana
21 Law Enforcement Academy in Helena, Montana.

22 Q Okay. And to this day do you still speak and teach
23 aspects with regards to field sobriety evaluations?

24 A Yes, I do. I teach attorneys at seminars and am
25 invited to speak on forensic alcohol, to include breath

1 testing, field sobriety, HGN, and many different aspects.

2 Q Okay. How often or if ever do you lecture on these
3 -- on both of these subjects?

4 A I'd say in my private practice, about once a quarter
5 I go to -- and teach and lecture. When I worked for the State,
6 it was probably about the same, once a quarter I would -- I'd
7 be asked to teach.

8 Q Okay. And generally, who is your audience in these
9 lectures?

10 A Now that I am in private practice, it's mostly
11 members of the Bar. I -- I through the Florida Bar Association
12 I offer CLE or continuing education credits for members of the
13 Bar. My last couple of classes have been mainly public
14 defenders or private attorneys.

15 Q And generally it sounds like with -- particularly
16 with regards to field sobriety -- well, not field sobriety but
17 alcohol testing, forensic breath testing, things along those
18 lines, it sounds as though you are an authority on that.

19 How long have you been viewed as an authority in forensic
20 breath testing?

21 A I've been providing expert opinion in court and
22 testifying in court in -- since I was in Montana in the late
23 '90s on the 5000 and then in Florida, so many years in three
24 different states, Montana, Florida, Georgia, the Federal Court
25 System, and also military court martials, so many years.

1 Q And in what capacities have you used field sobriety
2 evaluations and forensic testing devices? Have you used them
3 both in law enforcement and in the private sector?

4 A I've used them in law enforcement, private sector.
5 When I worked for the State we did a lot of what's called,
6 dosing studies where we would dose persons with amounts of
7 alcohol, measure the manifestations of impairment, and then
8 forensically measure blood or breath or other bodily substances
9 for alcohol. Testing new devices, such as probation and parole
10 may use alcohol monitoring devices on ankles of persons. So
11 we'd do those types of testing in forensic alcohol.

12 Q Are you published in any shape, or form, or fashion?

13 A I have been published in abstracts, meaning I'd write
14 an article and present those articles to peer review groups.
15 I'm a member of the International Association of Chemical
16 Testing, which is a professional organization peer group that
17 works in forensic testing of blood, breath, and highway traffic
18 safety. I've presented to that peer review group and the
19 abstracts of my presentations have been published in their
20 periodical to include specific areas, airbags and breath
21 testing, temperature -- ambient temperature in the Intoxilyzer
22 5000, industrial chemicals in the 5000. I've also been
23 published on quality control and the Intoxilyzer 5000.

24 Q Have you ever been qualified as an expert in the
25 realm of field sobriety evaluations?

1 A Yes, I have. And it was also on appeal affirmed by
2 the Montana Supreme Court.

3 Q Okay. And how many times would you say in all your
4 time you've been testifying you've been qualified as an expert
5 in field sobriety?

6 A I don't count each time I go to court, so I would say
7 in the hundreds, less than 1,000, but in the hundreds. I don't
8 know the exact number.

9 Q Okay. And in how many different states?

10 A Three states and two federal jurisdictions and
11 military courts of appeal -- or military court martials. I'm
12 sorry.

13 Q How many times have you been qualified in the State
14 of Georgia?

15 A Dozens. I've been here less than a year but dozens
16 of times in eight different counties so far.

17 Q Okay. And how many -- have you ever been qualified
18 as an expert with regards to forensic breath testing?

19 A Yes.

20 Q Okay. About how many times?

21 A Hundreds, roughly the same as field sobriety and
22 breath testing.

23 Q The same amount of states?

24 A Yes.

25 Q Okay. And about the same number of times in Georgia?

1 A Probably, yes.

2 Q All right. And, you know, obviously, you're here
3 testifying as a witness for the defense. Are you being
4 compensated for your time here today?

5 A Yes. I am being compensated for my time.

6 Q Okay. Are you being compensated to provide direct
7 testimony regarding a certain circumstance or are you up here
8 after making a review, just telling what you know?

9 A Basically, telling what I know. Telling what I've
10 found in the record. What my opinion is, basically compensated
11 for my time, not paid for my testimony.

12 Q Okay. Have you -- have there ever been circumstances
13 or times where you've told a defense attorney what -- there's
14 just nothing I can do to help you?

15 A Normally about 50 percent of the time in the last
16 year I have reviewed a case and told the defense attorney that
17 there -- I found nothing to benefit his case. So about 50
18 percent of the time I review a case, there's nothing there that
19 I can counter or say bad things about.

20 Q Are you -- have you ever testified for the State?

21 A Yes. I continue to be retained by the State on
22 different issues.

23 Q Okay. In what state?

24 A State of Florida in the 12th Circuit, Manatee and
25 Sarasota County currently retain me. And I'm scheduled to go

1 there next week to testify for the State on breath testing
2 issues.

3 Q Okay. Still even now that you provide testimony for
4 defense experts -- as a defense expert, things along those
5 lines, you still do work for State agencies, such as the State
6 of Georgia or solicitor's office here, or whoever it may be?

7 A I have not been retained by the State of Georgia, but
8 the State Attorney's Office, which is the equivalent in
9 Florida, the 12th Judicial Circuit, yes.

10 MR. PILGRIM: Judge, at this time we would tender
11 mister --

12 How do you say your last name?

13 THE WITNESS: It's pronounced Malhiot, phonetically,
14 M-Y-I-T.

15 MR. PILGRIM: We would tender Mr. Malhiot as an
16 expert in the realm of field sobriety testing and
17 evaluation along with as an expert in the realm of
18 forensic breath testing.

19 THE COURT: Mr. Park.

20 ASST. SOLICITOR GENERAL PARK: Yes. If I could have,
21 your Honor, a brief voir dire and opportunity to question
22 him regarding, I guess, specifics to his -- specifics to
23 his qualifications?

24 THE COURT: Go ahead.

25 ASST. SOLICITOR GENERAL PARK: Thank you.

1 VOIR DIRE EXAMINATION

2 BY ASST. SOLICITOR GENERAL PARK:

3 Q Mr. Malhiot -- Malhiot, right?

4 A That's correct, Counselor.

5 Q You are -- you've been in Georgia for how long?

6 A About a year, I moved here August of last year.

7 Q Okay. And you said you've been retained. I want to
8 make sure we're clear. You had said that you'd been giving
9 lectures for members of the Bar, and I assume -- or at least
10 from what it sounds like, those are members of the defense Bar,
11 correct?

12 A That would be an assumption. I don't know if the
13 members of the audience if they were all members of the defense
14 Bar, but that would be a fair assumption, yes.

15 Q Okay. If you could, just tell the jury what specific
16 lectures you've given and what the seminar topics were.

17 A Certainly.

18 Q And on whose behalf they were presented.

19 A The first one was on my own company. I did a lecture
20 on the Intoxilyzer 8000 and Florida software. Exactly how the
21 8000 works and how the Florida software in Florida does the
22 things to meet the Florida requirements. I've given two
23 lectures on the Intoxilyzer 5000EN, how it works, error
24 messages, interpreting the results. And I'm scheduled again to
25 speak in October on the Intoxilyzer 5000.

1 Q Okay. And with regard to the Intoxilyzer 8000 and I
2 think you said the Intoxilyzer EN, do either of those machines
3 have any pertinence to the Intoxilyzer unit in this case?

4 A Yes. The question -- the unit in question in this
5 case, is an Intoxilyzer 5000EN.

6 Q Okay. With regard to the State of Georgia, have you
7 -- you said you've testified dozens of times in Georgia. Can
8 you name the counties in which you've testified?

9 A I believe I've testified once here, Cherokee County,
10 Fulton County -- I don't have the list in front of me. There's
11 about eight counties, though.

12 Q Okay. And as far -- I think you testified you were
13 compensated for your time. And I understand that everyone's
14 time is valuable. As far as your compensation for your time,
15 is there a fee that you charge to review a case?

16 A Yes. There's a flat fee involved with the case
17 review, case audit, gathering public records, and providing a
18 report or phone consultation or meeting, there's a flat fee for
19 that.

20 Q And what fee is that?

21 A \$550 if there's a video involved. And in this case
22 there was a video, so it was a \$550 flat fee.

23 Q So that's just 550 just to walk in the door, in terms
24 of reviewing the materials?

25 A Not just walking in but gathering materials, getting

1 the public records, reviewing all the materials, having a
2 meeting or consultation or preparing a report, but yes.

3 Q Sure. As far as the -- when's the last time you
4 testified on behalf of the State?

5 A About --

6 Q In -- in -- getting into your law enforcement
7 background, when was the last time you testified on behalf of
8 the State -- on behalf of the State in a DUI arrest situation?

9 A September of last year in Jacksonville.

10 Q Okay. And since that time you've been employed
11 solely, privately, for your own company which you just started
12 up, right?

13 A That's correct. By the State and by my -- and by
14 private attorneys, yes.

15 Q The times that you've come to testify in the State of
16 Georgia, it's solely -- it's solely on behalf of defense
17 lawyers in DUI situations, right?

18 A Not all DUIs. One was an aggravated assault. But
19 the majority, yes.

20 Q Okay. And in what context were you testifying in the
21 ag assault case?

22 A It was a -- what's called a retrograde extrapolation.
23 A blood draw was done six hours after the incident and the
24 question was what was the probability that the probability --
25 or alcohol concentration at the time of the event six hours

1 prior. And that's called a retrograde extrapolation.

2 Q Okay. And how much do you charge for -- again, your
3 time. But how much do you charge for court appearances?

4 A It's 180 an hour.

5 Q Okay. Do you also factor in mileage and those kinds
6 of things?

7 A There is a driving mileage of \$.44 a mile. But I do
8 not charge time while I'm driving.

9 Q Sure. Okay. So you're -- it's just a matter of the
10 amount of money that's paid to you to review the file, I guess,
11 your expenses in gathering the materials and completing your
12 report and then you get \$180 an hour for your testimony?

13 A That is correct.

14 Q Okay. As far as in the State of Georgia, what
15 defense lawyers have you been associated with or have hired you
16 in other counties throughout the State?

17 A Stein, Ward firm has hired me; Bubba Head's firm has
18 hired me; Kozinsky (phonetic) has hired me.

19 Q Ms. Kozycki?

20 A Yeah.

21 Q Okay.

22 A There's been dozens. I couldn't name them -- rattle
23 them all off for you.

24 Q Okay. And you said you testified in Montana?

25 A Yes.

1 Q Florida?

2 A Yes.

3 Q And those have been with regard to law enforcement
4 prosecutions; is that right?

5 A Not all of them. Even as a law enforcement officer
6 or working for the State of Florida, we were subpoenaed by the
7 defense.

8 Q Okay.

9 A But the majority was for the government, yes.

10 Q Okay. That was back in Montana and Florida, right?

11 A Yes.

12 Q And in doing that, do you know from your current
13 experience as a consultant that -- that your -- has your
14 opinion ever been excluded?

15 A Not to my knowledge. There has been a few times over
16 the years that a court has reserved and I may not have known
17 what the follow up is, but I've never been prevented from or
18 excluded from testifying.

19 Q Okay. And I don't have copy of your résumé. Do you
20 have a copy of your CV --

21 A I don't have one with me. I'm sorry, Counselor.

22 Q Okay. And Mr. Pilgrim went over your credentials as
23 far as your law enforcement background and, I guess, your
24 current experience and professional experience. But you had
25 said you had published abstracts. Do you have any names of

1 those abstracts?

2 A Yes. They're published under the International
3 Association of Chemical Testing, and I briefly named them. One
4 was Quality Control and Forensic Breath Testing. One was
5 Ambient Temperature and the Intoxilyzer 5000. One was Airbag
6 or the Tyndall Effect and the Intoxilyzer 5000. And one was
7 Fiberglass Manufacturing and the Intoxilyzer 5000.

8 ASST. SOLICITOR GENERAL PARK: Okay. Your Honor, I
9 don't think I have any objection regarding his ability to
10 testify in this case as an expert. I'll rule out
11 questions for him on cross, questions more specific to his
12 testimony in the case. But the State has no objection.

13 THE COURT: The Court will find he can be examined as
14 an expert on the topics of field sobriety examinations and
15 on the Intox 5000 and procedures related to its operation.

16 MR. PILGRIM: Thank you, Judge.

17 DIRECT EXAMINATION CONTINUES

18 BY MR. PILGRIM:

19 Q Obviously, as we've talked about and I know you were
20 just questioned about, you were retained for this specific case
21 in the State versus Derek Singley, correct?

22 A That is correct.

23 Q And are you familiar with the case?

24 A I've reviewed the police report, the video. I've
25 also reviewed the quarterly inspections on the Intoxilyzer done

1 by the GBI. I've reviewed the GBI's training manual on the
2 Intoxilyzer. I've also reviewed the GBI -- meaning the Georgia
3 Bureau of Investigation's quarterly inspection procedures. And
4 I've also reviewed the standardized field sobriety manuals in
5 preparation for this case. So I've reviewed quite a few
6 documents.

7 Q Okay. And those are things that -- some of the
8 things you probably had familiarity with before, but you
9 reviewed those prior to coming here, correct?

10 A Yes. I review them and do a comparison to what I
11 review in the reports against the standards published by those
12 agencies.

13 Q Okay. So if -- are you also familiar with the test
14 result we have in this case as well?

15 A Yes, I am.

16 Q Okay. And specifically let's start with the -- you
17 know, we're going to focus more of our time on the testing
18 aspect of it. But with regards to the field sobriety
19 evaluations, are you familiar with the results of the field
20 sobriety evaluations?

21 A Yes, I am.

22 Q Okay. And tell us specifically, just so the jury
23 knows that you have done a review of this case and you have a
24 comprehension of this case and you're aware of what clues were
25 exhibited on the three standardized field sobriety evaluations.

1 A The three standardized field sobriety evaluations
2 that were conducted were the HGN test, which is better known as
3 the eye test or horizontal gaze nystagmus. The officer
4 documented six clues observed. And those six clues that were
5 documented was lack of smooth pursuit in the left and right
6 eye; sustained nystagmus at maximum deviation, which means in
7 the left and right eye the nystagmus was observed when the eye
8 was pointed as far out as possible; and that nystagmus started
9 prior to 45 degrees in each eye. So three clues, left and
10 right eyes, a total of six clues. The --

11 Q All right. And --

12 A I'm sorry.

13 Q What about the walk and turn and the one-leg stand?

14 A The walk and turn and one-leg stand were also
15 conducted. And no clues of impairment -- validated clues of
16 impairment were observed in either of those divided-attention
17 tests as documented by the police officer that evening.

18 Q Okay. And with regards to one of the non-
19 standardized portions of the horizontal gaze nystagmus
20 evaluation in this case, are you familiar with the term,
21 vertical nystagmus?

22 A Yes, I am.

23 Q Okay. And if you would, would you explain
24 specifically what you know about what vertical nystagmus is?

25 A Yes. Vertical nystagmus is a nystagmus test that's

1 done above and beyond the six standardized clues when the eye
2 is asked -- well, not asked but is directed to gaze in an
3 upward fashion. The stimulus would be placed in front of the
4 eye and moved upward and the eye would track the item upward.
5 And if vertical nystagmus is present, one of the indicators is
6 that that dose of alcohol is a high dose for that individual
7 person. It is not a standardized clue. It is just an
8 observation that an officer can make as far as the nystagmus
9 present during vertical movement of the eye.

10 Q Okay. And based upon your review of this case, did
11 -- did Deputy Embrey did he note any vertical nystagmus?

12 A He did not.

13 Q Okay. With regards to other physical manifestations,
14 things along those lines, are there any things of note that
15 would appear to be a direct correlation of impairment with
16 regards to dexterity, you know, how a person's face looks,
17 anything on those lines?

18 A I found the opposite to be true in reviewing. I
19 found when asked for the driver's license, immediately produced
20 it. Those small motor skills or manual-dexterity skills
21 support sobriety. Asked to step out of the vehicle, walk to
22 the rear, documented no problems, normal walking. Those type
23 of observations are supportive of sobriety. So the opposite I
24 found was true throughout reading the report.

25 Q Okay. And those were the first things that were, you

1 know, obviously, candidly and honestly put into the report by
2 Deputy Embrey. But are those also things that you observed
3 when watching the video in this case?

4 A Yes.

5 Q Okay. And with regards to the issue for the stop.
6 Are you aware of the basis for the stop of the vehicle in this
7 case?

8 A Yes.

9 Q Okay. And to your knowledge, why was the vehicle
10 stopped in this case?

11 A The primary observation of the officer was the
12 headlights were turned off. And when he caught up to the
13 vehicle, the vehicle sped off or accelerated at a great rate.
14 So the basis for the stop was the no headlights and speeding,
15 were the two reasons for the stop.

16 Q Okay. Now, specifically with regards to the -- to
17 the driving mannerisms because this is a less-safe case, and
18 we're talking about less-safe driving, and it's also a per se
19 case, but the first primary and foremost is less safe.

20 Are you familiar with the National Highway Traffic Safety
21 Administration, the same -- the same organization that does the
22 standardized field sobriety testing and all that, are you
23 familiar with what their position is with regards to speeding
24 and less-safe driving?

25 A Yes.

1 Q If you would, would you explain that to the jury?

2 A The National Highway Traffic Safety Administration
3 conducted research, actually paid for a research institute to
4 conduct many different researches. And one of the researches
5 they conducted was driving behaviors after dark associated with
6 potential impairment. And they came up with a laundry list of
7 items: crossing the center line, turning with a wide radius,
8 driving on other than the roadway.

9 One of the things they came up with in the research was
10 driving ten miles or more below the speed limit as a possible
11 indicator of impairment. They did not say that exceeding the
12 speed limit was an indicator of impairment.

13 Q Okay. Is there -- has there ever been a position by
14 the National Highway Traffic Safety Administration or others
15 that indicated the speeding was a less-safe act?

16 A I don't think that that terminology is used by the
17 National Highway Traffic Safety Administration as a less-safe
18 act.

19 Q All right. Now, with regards to -- with regards to
20 the breath testing aspects of this case, are you familiar with
21 -- you are familiar with the breath test in this case. Are you
22 familiar with the device that was used?

23 A Yes, I am. The Intoxilyzer 5000EN model.

24 Q All right. And with regards to that, are you
25 familiar with the specific device that was used?

1 A I have not seen that specific serial number
2 instrument. But I am specifically familiar with the
3 Intoxilyzer 5000EN. I reviewed the quarterly inspection
4 documents on this particular instrument and the breath test
5 slip, for lack of a better term, produced by the instrument for
6 this particular individual.

7 MR. PILGRIM: Your Honor, may I approach the witness?

8 THE COURT: Yes.

9 BY MR. PILGRIM:

10 Q I'm showing you what's been marked as State's Exhibit
11 Numbers 12, 11, and 10. If you would, would you take a look at
12 all three of those and let me know if you recognize those?

13 A You've given me 9, 10, 11, and 12, so ...

14 Q Sorry.

15 A Yes. I'm familiar with the documents and the
16 associated attachments.

17 Q Okay. And are -- those documents, are those some of
18 the things that were encompassed in your review of the specific
19 model or this specific serial number of the Intoxilyzer 5000EN?

20 A Yes, they are.

21 Q Okay. And did you have an opportunity, prior to
22 coming to court, to review all of those as well?

23 A Yes, I did.

24 Q Okay. So you are, I guess to a certain degree, as
25 intimately familiar with this device as you can be with regards

1 to the documents they provide from the GBI?

2 A That's correct, yes.

3 Q Now, generally, can you explain to the jury how --
4 how does this device work?

5 A In layman's terms it's what's known as an infrared,
6 light absorption instrument. And what it does is as a person
7 blows into the instrument there's a sample chamber. And the
8 sample chamber the best way to describe it is about the size of
9 a cardboard roll -- end roll from a paper towel roll, that
10 cardboard that's left. It's about that size and about that
11 volume.

12 As a person blows in the breath will enter one end and
13 exit one end, but shining through it is a light. And at the
14 other end is a filter wheel that has filters. And what that
15 filter does is it eliminates all the other wavelengths except
16 for those wavelengths that react with alcohol and some other
17 assorted chemicals that are chemically close to alcohol.

18 A good way to explain it is, if you drive to work in the
19 morning and you turn your headlights on, and they shine for
20 three blocks. The next morning you drive to work, take the
21 exact same route, leave the house at the exact same time, turn
22 your headlights on and they only shine for one block but it's
23 really foggy out. So what's happening is the light is being
24 absorbed by the moisture in the air, that's why the headlights
25 don't shine as far.

1 The microwave oven is another example. You put your
2 dinner in the microwave oven and you push two minutes and the
3 dinner will get warm but the plate will stay relatively cool.
4 And what's happening is the energy is being absorbed at certain
5 wavelengths and the plate is not absorbing energy. So the same
6 theory can happen with breath and alcohol. And that's why
7 there's filters to eliminate the other things that can absorb
8 wavelengths of light. So, in a very general term that's how it
9 works.

10 Q All right. Now, are you familiar with -- have you
11 ever operated this machine?

12 A Hundreds of thousands of times and inspected them,
13 taken them apart, put them together, calibrated them. I've
14 worked extensively with the 5000 and 8000.

15 Q Okay. So to a certain degree you're pretty
16 intimately familiar with the Intoxilyzer 5000?

17 A I am.

18 Q Okay. And are you familiar with, generally, the
19 types of mechanical safeguards that are in place on that 5000?

20 A Yes.

21 Q Okay. If you would, would you run through a list of
22 some of the mechanical safeguards that are in place to make
23 sure that the machine is supposed to operate properly?

24 A Physical, mechanical safeguards, I mentioned the
25 filter wheel, there's five filters on an Intoxilyzer 5000EN.

1 The filters are there for -- one is a zero reference, so you
2 can start off with zero. The other is for ethanol, to measure
3 ethanol, which is the alcohol in drinks. One is to measure
4 acetone, which is to help prevent diabetics from being falsely
5 accused. One is toluene and the other, the fifth is a
6 derivative of ethanol and alcohol when it's metabolized,
7 ethylisohol (phonetic). And that -- that and toluene are not
8 calibrated. So, three of the five filters are calibrated. Two
9 are just there as an electronic safeguard. That's one of the
10 safeguards.

11 The sample chamber and breath tube are also heated.
12 They're heated to prevent condensation. And alcohol being a
13 molecule that's attracted to water, if you have condensation in
14 there, alcohol could be trapped in the sample chamber and give
15 you a false reading. So they're heated to prevent
16 condensation.

17 There's software algorithms or software routines that do
18 safeguard things. There's waiting periods. There's a lot of
19 different things. But mechanically, physically that you can
20 touch in the instrument you have the five filters. You have
21 the heating of the sample chamber. You have an air pump to
22 pump out the breath after a sample to get back to a zero
23 reference. But most of the safeguards are software driven and
24 procedural driven versus physical, hard where you can touch.

25 Q Okay. And generally in the State of Georgia, are you

1 familiar with the process by which these machines are kept and
2 maintained?

3 A Yes.

4 Q Okay. And how often is this procedure conducted?

5 A Once a quarter -- once per calendar quarter the area
6 supervisor will go do a check of the Intoxilyzer. They have
7 about a ten-page procedure checklist that they'll follow to do
8 their quarterly check of the instrument.

9 Q All right. And this checklist and procedure that
10 they follow, where do they get the direction to do this?

11 A The GBI, Georgia Bureau of Investigation Division of
12 Forensic Science, specifically the implied consent supervisor
13 has published that document to do the check with.

14 Q All right. Now, are these people that are so
15 intimately familiar with the machine, such as you, that can, if
16 there's a problem, they just fix it?

17 A No, they do not fix them. In fact, their checklist
18 says if there's a problem or it doesn't meet standards, they're
19 to call the manufacturer and get guidance.

20 Q Okay. Now, with regards to the procedure for which
21 they -- they test these things, specifically what are these --
22 these people from the state patrol, what are they expected to
23 do when they walk up for these inspections?

24 A Well, there are specific steps. The first step
25 they'll do is they'll do an F10 reprint, which will actually

1 just print the last breath test done on the instrument and
2 they'll check that as a quality control check of the last
3 breath test operated.

4 They'll check the instrument for the acetone filter.
5 They'll check the instrument for the difference, they have an
6 .02 difference standard, they'll check it for that. They'll
7 check it for radio frequency interference. Is that radio
8 frequency working properly? They'll do a calibration check at
9 a .08. They'll do a mouth alcohol check.

10 So, they'll check some of the functions of the instrument,
11 probably eight of the specific instrument functions.

12 Q Okay. Now, with regards to the standards that are
13 applied here in the State of Georgia, how does this compare to
14 the checks and standards that are applied in other states?

15 A Most states have much more extensive testing. The
16 National Safety Council in 2008 has published minimum breath
17 testing standards that should be followed, quality control
18 checks, those types of things. One of the things that they
19 have published is that a calibration check of the instrument
20 should be done with every breath test. Georgia's not doing
21 that.

22 They also published that the quality control check or the
23 quarterly inspections should check the entire range of
24 measurement. Georgia is doing what's called a single-point
25 calibration check instead of checking it along its entire

1 range. But the quarterly inspection is well below the national
2 standards and the standards of most states.

3 Q Okay. And generally when it comes to these industry
4 standards for quality control, who are the primary offices or
5 committees or whatever you want to call it, who are the ones
6 who set these standards?

7 A The National Safety Council reports to Congress and
8 the Department of Transportation. And there are a group of
9 scientists among states and the federal level that research
10 these things and work within the industry standards and publish
11 these guidelines. They're not mandated to the states because
12 of legal issues and states' rights. But there are minimum
13 standard recommendations to the states.

14 Q Okay. And based upon what you just told us, is
15 Georgia following most of these standards?

16 A No. In fact, they're not following most of the
17 standards. Very few of the standards do they follow.

18 Q All right. Are there states out there that do?

19 A Yes. Many states do.

20 Q Now, generally what is the procedure for obtaining a
21 breath sample from a subject as they walk in? I know we -- I
22 guess to a certain degree, Deputy Embrey testified to how he
23 sets somebody up to the machine or whatever. If you could kind
24 of gloss over that but then explain some of the high points of
25 some of the things that need to be done when doing -- to get a

1 breath sample from a subject.

2 A The breath test starts well before the breath test.
3 It sounds -- sounds weird, but prior to a breath test in all
4 states, except South Dakota because South Dakota is a blood
5 state only, they don't do breath testing. But 49 of the 50
6 states require a pre-test deprivation period. Georgia has
7 mandated in their Georgia training that at least 20 minutes
8 prior to the breath test -- breath test, the subject must be in
9 a controlled environment and observed for many things. One,
10 the obvious, not to consume any more alcohol.

11 But the observation is to be sure there's no
12 regurgitation, no belching and burping of alcohol from the
13 digestive tract back into the oral cavity which could
14 artificially raise the results. So 20 minutes prior to the
15 test, in a controlled environment they need to be observed for
16 regurgitation, belching, and burping and, obviously, no more
17 consumption of alcohol.

18 Q Now, let me -- let me stop you right there. Isn't
19 there -- there's something built into the machine called --
20 that you already referred to as a slope detector that's
21 supposed to stop that, right?

22 A Slope detector is a software algorithm that's one of
23 the safeguards. It's not foolproof. Many, many times slope
24 detection will not catch mouth alcohol and report mouth alcohol
25 as a valid alcohol result. So, there's three specific

1 safeguards for mouth alcohol and they're redundant and backup,
2 the 20-minute observations, the slope detection, and the two
3 samples. They all have to be working properly to ensure that
4 mouth alcohol or residual mouth alcohol or regurgitated alcohol
5 has not affected the result.

6 Q Now, the slope detector, is this actually a device
7 that's inside the machine or is it --

8 A No. It's actually a software algorithm or software
9 routine. If you take an Intoxilyzer apart, you cannot
10 physically touch the slope detector. It's part of the
11 software.

12 Q Okay. Sorry to stop you there. Continue with the
13 procedure.

14 A After they're observed for the 20 minutes, the breath
15 test sequence is started. The officer or breath test operator
16 will enter data and that data is printed on the print card,
17 State's 12, the individual's name -- different states have a
18 lot of different things, the arresting officer, the breath test
19 operator, the case number, time, date, those type of things are
20 all put on -- data input into the instrument.

21 The instrument will go through a routine and print
22 specific things about the individual routine. In Georgia, they
23 do a diagnostic first and the diagnostic will check the
24 voltage, check the printer, check the temperature of the sample
25 chamber, it will check a few of the functions of the instrument

1 and say the diagnostic is okay.

2 Then it will do an air blank. It'll physically pump room
3 air wherever the breath test instrument is, through the
4 instrument to help establish the zero reference. And it's not
5 an absolute zero reference. A lot of times in smaller breath
6 test rooms, if you have a person in there who's been drinking
7 and it's pumping room air, the ambient air is going to have
8 alcohol in it, so the zero reference can be artificially raised
9 slightly. But it helps establish the zero reference.

10 Then the next portion is the individual will be asked to
11 provide a sample. And they're asked to blow into the
12 instrument until told to stop. The instrument will take that
13 sample, measure the alcohol, display the alcohol result and
14 then do another air blank. After that air blank, in Georgia,
15 it does another diagnostic; the same diagnostic as before, it
16 just repeats it.

17 After the diagnostic, it will do another air blank, to
18 ensure the zero reference is established again and then it will
19 ask for a second sample. After the second sample, it will do a
20 final air blank to zero out again. And that is basically the
21 breath test sequence in the State of Georgia.

22 Q Okay. And with regards to the -- actually, we'll get
23 to that in a second.

24 What, if anything, with regards to these diagnostics -- I
25 mean, these self-checks this machine is performing on itself, I

1 mean, are these, so called foolproof?

2 A No. There's many functions it does not even
3 diagnose. For instance, to get a minimum sample, they have to
4 blow a specific pressure for a specific time and that's checked
5 by what's called a flow sensor or pressure gauge. That's part
6 of the diagnostic. It's not part of the quarterly inspection.
7 So that portion of the instrument is never checked.

8 It does what's known as an internal standards calibration
9 check. So it's not checking it against an external standard,
10 it's checking against its own electronics for calibration. So
11 the calibration check is -- is not an accepted standard.

12 It checks the sample chamber temperature but it doesn't
13 check the breath tube temperature. So there's a lot of things
14 that the diagnostic does not even look at.

15 Q Okay. And with regards to the quarterly inspections
16 that I've already handed over to you, is there any -- I know
17 there's not many, but are there any issues of concern with
18 regards to the quarterly inspections that were done in this
19 case?

20 A Yes. You've given me the September and October from
21 2010 quarterly inspections. In the quarterly inspection in
22 September the instrument calibration the target value is a .080
23 and the results they were getting were in the .083 range, so
24 it's running high. And I looked at more than just these two.
25 But the instrument was showing a high result on the quarterly

1 inspections.

2 Q Okay. What about some of the other issues when
3 there's a point where it says that all of the working parts and
4 all that stuff are in place and it's working properly, are
5 there any issues with that?

6 A Well, the statement is that all proper equipment is
7 attached and in good working order. But there are many
8 features of the instrument that are never tested during the
9 quarterly inspection. So that statement is incomplete.

10 Q Okay. And you mean they're not tested simply because
11 there are just certain aspects that Georgia doesn't deem
12 appropriate to test?

13 A I don't know why they don't test it, but the pressure
14 gauge specifically, when you look at the quarterly inspection,
15 they're not testing the pressure gauge at all and that's part
16 of the minimum sampling requirement. The pressure gauge is a
17 physical device inside the instrument that's not tested. So to
18 say everything is attached and working properly, I don't see
19 how you can come to that conclusion without testing everything.

20 Q Okay. Would that be contrary to the standards that
21 are set in place by the organizations that mandate the
22 standards?

23 A Yes.

24 Q Now, with regards to the -- you kind of touched on
25 the point of what's called a single-point calibration.

1 Specifically you said that, you know, they're only calibrating
2 at a .08, why is that an issue?

3 A Well, if I said that I -- it was a mistake. They
4 don't calibrate at .08 they check the calibration of .08. The
5 factory is the only one who calibrates. The State of Georgia
6 does not do calibrations on these instruments. They check the
7 calibration and they check it .08. And it would be
8 speculative, but it's because that's the per se limit, that's
9 what most states -- why there's a .08.

10 But the problem is they're only doing a single-point
11 calibration check. If you take the bathroom scale and it
12 starts at zero and goes up to 300 pounds, most of them that
13 I've seen. And you want to check that bathroom scale, you're
14 going to put a ten-pound weight on it, then you're going to put
15 a 50 pound and then 200 pound and then a 300 pound so that, you
16 know, that it's accurate along its entire range of measurement.

17 The same with this instrument. When it's calibrated, it's
18 calibrated at zero, one, two, and three, all along its range.
19 And then to come in on a quarterly basis and just check one
20 point along that range and assume the range is -- is good, it's
21 just an assumption. You cannot validate it. Dr. Dubowski from
22 Indiana University who's published hundreds of papers on
23 quality control and breath testing, and I concur with him that
24 a calibration check should check the instrument along its
25 entire range of measurement, not just a single point.

1 So, the instrument on the date of inspection is measuring
2 a .08 high, but we don't know what it's doing at .10, .20, .30
3 because of the single-point calibration check.

4 Q Now, what -- specifically you also made reference to
5 what was called a control test at the time of a sample that's
6 being given. Do we do control tests, and what are they?

7 A Georgia does not do external control testing at the
8 time of breath testing. A control test -- external control
9 test is you take an external device, something that's outside
10 of the Intoxilyzer, normally they are simulators with a known
11 reference solution. We know that this simulator has a .08.
12 That's what they do on their quarterly inspection. And you
13 test the instrument against that known standard with every
14 breath test.

15 Florida does it twice with every breath test. Virginia
16 does it once. Alabama does it. Most states do the external
17 control testing. Georgia does not. The 5000 is capable of
18 doing it but for whatever reason they have chosen not to do it
19 yet. So the external control testing is not done in Georgia.

20 Q All right. So there are machines throughout the
21 nation that actually do this control testing?

22 A The 5000 is capable of doing it, but they've chosen
23 not to do it. But Dräger's instrument does it. The
24 Intoxilyzer 8000 does it. DataMaster, all the instruments --
25 modern breath test instruments are capable of doing it.

1 Q How old is the Intoxilyzer 5000?

2 A The EN version, which is used in Georgia was brought
3 into the state in '95. The 5000's original design and
4 instrumentation goes back into the late '70s.

5 Q All right. And are there newer, updated machines
6 that are out there? I mean, just curious.

7 A Yes.

8 Q Okay. Is there -- just as an anecdotal, is there
9 anything with regards to the machine, particularly in this
10 case, that kind of just shows its age?

11 A Well, yes. The instruments, they're getting older
12 and older. CMI is evolving to the 8000. Most states that are
13 using CMI products have gone to the 8000. The reason the
14 manufacturer is pushing customers that way is parts and
15 replacement parts for the 5000 are becoming harder (sic) and
16 manufacturers of the parts are not making them.

17 A perfect example is the Intoxilyzer 5000 has an internal
18 printer, but they can't find anybody who will manufacture or
19 repair the printers anymore. And this particular instrument
20 has an external printer attached because they can't even repair
21 the internal printers anymore. So they did a software change
22 and found a vendor to sell external printers to go with this
23 instrument.

24 Q How do you know that one comes from an external
25 printer?

1 A Just by the font and the way the print card is
2 printed you can tell it's an external printer.

3 Q Okay. And is -- moving specifically to this case,
4 are there any specific problems that you saw with the sample
5 noted in this case?

6 A Well, as I look at the print card, there's incomplete
7 information. On the bottom of the print card it says, "Time
8 first observed." And that portion of the form is designed for
9 the officer to write in when he started the 20-minute
10 observation prior to the breath test; when they were in a
11 controlled environment and when that 20-minute observation
12 began, that's blank.

13 We see a significant drop between the first and second
14 sample. It's not significant outside the .02 agreement, but it
15 is a drop. Those two combinations plus the margin of error,
16 systematic error and accuracy of the instrument, bring the
17 results into question, as far as I'm concerned.

18 Q Okay. Now, with regards to this observation period,
19 is an observation period -- first off, is it -- is it something
20 that is mandated?

21 A It's mandated in the Georgia Bureau of Investigation
22 Training Guide for Breath Test Operators to be issued their
23 breath test permit, yes.

24 Q Okay. And is the 20-minute observation period, is
25 this something that should be -- you said should be done in a

1 controlled environment, is this something that you can do on
2 the way back to the station or anything along those lines?

3 A The training guide says, "A controlled environment
4 where you can observe them for belching, burping,
5 regurgitation, or consumption of alcohol." I find it very
6 difficult to observe somebody for belching, burping, or
7 regurgitation in the back of a patrol car while you're driving
8 down the road. Most patrol cars nowadays have some sort of
9 barrier between the back and front. So I don't think that
10 meets the intent of controlled environment.

11 Q Okay. Now, outside of some of the specifics that we
12 talked about, is there -- is it even possible or is it possible
13 for the machine to have an error or generate a problem without
14 registering an error on any diagnostic or anything that pops
15 up?

16 A Yes. The instrument -- if it's -- if the problem
17 with the instrument is not part of the diagnostic routine,
18 it'll never show up. A perfect example is the breath tube is
19 heated to prevent condensation. The breath tube also has
20 inside built-in the RFI antenna, which is the radio frequency
21 interferrent (sic) antenna. But there's an electrical plug on
22 the breath tube. If you were to take an Intoxilyzer 5000,
23 unplug that electrical plug, the instrument will run fine. It
24 will never have a problem with a diagnostic, but the breath
25 tube will be cold and the RFI antenna won't even be hooked up.

1 But the instrument's diagnostics would never even know it. So
2 there's many things that can go wrong with the instrument that
3 the diagnostic would never even look at.

4 Q Okay. Now, generally with regards to the numbers
5 that we get, how is this data assimilated and calculated and,
6 more or less, put into place and given out?

7 A What happens is there's a reduction in voltage in the
8 light, as the light -- the alcohol absorbs infrared light, the
9 amount of light registering in the detector is reduced, so the
10 voltage is reduced. That voltage reduction is sent to the
11 internal computer where the software calculates that voltage
12 reduction into a breath alcohol concentration. That exact
13 formula, I think, only CMI engineers and software engineers
14 know. It's not released and it's not published.

15 Q Okay. Is that what is referred to as like the source
16 code?

17 A Well, the source code is specifically the notes that
18 programmers write in English and the software is computer
19 language, so it equates to each other, yes.

20 Q Okay. And we don't know anything about how the data
21 is calculated or assimilated or anything along those lines?

22 A That's correct. It's not released by the
23 manufacturer.

24 Q Okay. And do you know the reason for that?

25 A They say it's proprietary information and will not

1 release it.

2 Q All right. So, I guess, is there anyway to really
3 know how this result is calculated?

4 A The calculations that the instrument makes?

5 Q Right.

6 A No. It's physically impossible to know without the
7 release of the software or control testing and testing along
8 its entire range. There's two ways to do it. One is called
9 black-box testing and one's called software evaluation.
10 Georgia doesn't do black-box testing and the manufacturer won't
11 release the software. So, actually --

12 Q Okay. So --

13 A -- no. There is no way.

14 Q Okay. So along with that with regards to like the
15 slope detector being a software part of the instrument, is that
16 -- do we even know how that works?

17 A The algorithm of slope?

18 Q Yes.

19 A I do not, no. The specific electronic algorithm that
20 they use to determine slope is not released. It's all part of
21 the software.

22 Q Now, with regards to the -- taken in conjunction with
23 the breath test result we have in this case, and some of the
24 other information that's been provided to you by our office and
25 the State itself, is there -- what would you consider to be one

1 of the best evidences of the fact that there must be a problem
2 with the Intoxilyzer 5000 reading in this case?

3 A Well, the totality of the circumstances do not
4 support each other. No clues on walk and turn, no clues on the
5 one-leg stand, no problem walking, not speech impediment, no
6 fine motor skill problems, I would not expect that to be in a
7 person with an alcohol above a .10. They just don't match.
8 The only indicator at roadside was HGN and HGN could be natural
9 nystagmus, could be a medical cause, there could be other
10 causes of nystagmus. Everything does not support the result.
11 And vice versa the result doesn't support everything else. So
12 because of that -- that and looking at the quarterly
13 inspections, I consider the breath test result to be
14 unreliable.

15 Q I mean, is it possible to have six out of six, zero
16 out of eight, and zero out of four?

17 A It's possible the sun won't come up tomorrow.
18 Anything is possible, yes, it could happen. Possibility, yes.

19 Q Okay. Is it likely?

20 A Not very likely, no.

21 Q Okay. And is there enough issues that we have with
22 the machine that you're aware of having dealt with the machines
23 on numerous, numerous occasions in the State of Florida and
24 dealing with the machine here in the State of Georgia and other
25 states as well, having been trained to operate the machine, fix

1 the machine, inspect the machine, doing essentially the same
2 job that the people at the GBI do here for the Intoxilyzer 5000
3 in the State of Georgia, you did down in Florida, you know, is
4 there enough to say that, I mean, this machine is not perfect?

5 A It's not a perfect instrument, no. I don't think any
6 Intoxilyzer or breath test instrument is perfect. I think
7 there's enough here to seriously question the results on this
8 particular breath test.

9 Q Okay. Hypothetically, if you were to see something
10 like six out of six, four out of eight, two out of four --

11 ASST. SOLICITOR GENERAL PARK: Objection, depicts
12 hypotheticals, how is it even relevant?

13 MR. PILGRIM: He's an expert, Judge, he can answer
14 hypotheticals.

15 THE COURT: He can answer hypotheticals based on
16 evidence in the record but not just random hypotheticals.

17 BY MR. PILGRIM:

18 Q Okay. Finally, I guess, based upon your experience
19 in law enforcement, based upon your 20 years of experience
20 doing field sobriety and field sobriety instructor, generally,
21 does six out of six, zero out of eight, and zero out of four,
22 not only do they not -- do they correlate with the breath test
23 that we received in this case, but do they correlate with each
24 other?

25 A No, they don't. They don't. Generally, when there's

1 six out of six on HGN there's going to be some other
2 manifestations during walk and turn and one-leg stand, not 100
3 percent of the time, but generally, you'd expect to see other
4 manifestations of impairment displayed during the rest of the
5 standardized field, sobriety.

6 Q Okay. And along with that and along with the breath
7 test result that we have here, would you also expect to see
8 other non-validated clues or manifestations of impairment as
9 well?

10 A Yes. Trouble finding the driver's license, trouble
11 walking from the vehicle to the rear of the vehicle, I would
12 expect a lot more documented observations along with validated
13 clues. I saw no divided-attention validated clues anywhere in
14 the documents.

15 MR. PILGRIM: That's all the questions I have at this
16 point.

17 THE WITNESS: Thank you, Counselor.

18 CROSS-EXAMINATION

19 BY ASST. SOLICITOR GENERAL PARK:

20 Q Mr. Malhiot, I don't want to -- I don't want to bore
21 anyone, I know your time is valuable. But I want to ask you --
22 one thing I want to make sure is I don't want to prolong
23 anything, but as far as your opinions in this case I want to
24 try to limit them so I'm not asking unnecessary questions.

25 You're not coming in here and questioning the manner in

1 which Deputy Embrey conducted the evaluation?

2 A I am not.

3 Q You have no experience -- or you have no criticisms
4 of the manner in which he conducted the evaluations, the field
5 sobriety evaluations, correct?

6 A The only -- the only criticism is the lack of
7 documented -- when you say of what he did, is the lack of a 20-
8 minute observation. I have nothing to say that he did field
9 sobriety incorrectly or if that's what you're specifically
10 questioning.

11 Q That's a very fair point. I wanted to find out
12 specifically about your assessment of his entire performance of
13 the roadside stop and of his investigation into Mr. Singley and
14 his condition before making the arrest. You have no criticism
15 of that, whatsoever, right?

16 A Prior to him making the arrest?

17 Q I know what your opinion is regarding he shouldn't
18 have been arrested. But you have no criticism of the manner in
19 which he conducted the investigation, fair?

20 A Not fair. I do have criticism that may not have been
21 asked on direct, but --

22 Q Okay.

23 A -- but, yeah.

24 Q What's the criticism?

25 A Well, I think, based on looking at the documents,

1 looking at their own police report, there are continued field
2 sobriety exercises that could have been done that weren't done.
3 There's other -- when you see no clues on walk and turn, no
4 clues one-leg stand and you're still on the roadside, there's
5 other things that can be done.

6 Q Okay.

7 A So I think the only criticism I would have had is
8 there other things that could have been done at roadside that
9 would have assisted him in making the proper decision.

10 Q Okay. You've got experience as far as being involved
11 as an officer at some point. When was the last time you did a
12 roadside investigation into someone?

13 A 2001.

14 Q Okay. So about ten years ago?

15 A Yes.

16 Q Okay. And you were -- before we got in the
17 discussion, I think you were discussing the 20-minute rule, I
18 want to find out specifically what you were provided by Mr.
19 Pilgrim and what documents you obtained on your own? Do you
20 have a file you, I guess, create through your company when
21 someone seeks your services out?

22 A Yes. I have -- the documents I obtained is what he
23 has gotten under discovery.

24 Q Okay. Which are?

25 A May I refer?

1 Q Absolutely.

2 A I was provided the Forsyth County Solicitor General
3 letter; a certificate of service for the charges; copies of the
4 tickets; the charging document; the incident report, page one,
5 page two, page three, page four; the DUI investigation field
6 notes, the narrative portion; the standardized field sobriety
7 results; the DUI investigation field notes; another narrative;
8 copies of the tickets; copies of the printout from the
9 Intoxilyzer for this particular incident.

10 Q Did you get a video?

11 A I did.

12 Q Did you watch the entirety of the video?

13 A I did.

14 Q Okay. The front facing as well as rear facing?

15 A Yes. In the back of the patrol car?

16 Q Okay.

17 A Yes.

18 Q Let's discuss the 20-minute rule. I think what came
19 out of, I believe, your direct examination was that you saw
20 questions regarding in which the 20-minute rule wasn't utilized
21 or maybe not observed in this situation. If you could look at
22 the report, your evaluation in arriving at your opinions and
23 tell the jury when -- what time the report says the stop of the
24 defendant occurred?

25 A Certainly.

1 Q About 1:45?

2 A It's not written in the note, unfortunately. I'm
3 sure -- I have no reason to doubt what you're saying. I'm not
4 saying he wasn't in --

5 Q I don't want to put words in your mouth, take your
6 time.

7 A Approximately 1:45. I'm observing 1:46 a.m.

8 Q Okay. And what does the reading on the Intoxilyzer
9 slip show in terms of the time the test was administered?

10 A 0243.

11 Q So, roughly, 58 minutes subsequent to the time the
12 traffic stop occurred?

13 A Correct.

14 Q And your assumption with regard to the 20-minute rule
15 not being observed -- and I think you were mentioning something
16 about a controlled setting; is that right?

17 A That is correct.

18 Q Where the concern is that the subject doesn't consume
19 any alcohol?

20 A That's one of the concerns.

21 Q And that the subject doesn't vomit or regurgitate on
22 themselves, correct?

23 A Regurgitate into the oral cavity, yes.

24 Q Okay. And so you, like you said, you observed the
25 entirety of the video?

1 A Correct.

2 Q And you were able to watch Mr. Singley the entire
3 time that the video was on, correct?

4 A That is correct.

5 Q Did you see any regurgitation or anything like that?

6 A I did not see it specifically, no.

7 Q Okay. And from the rear-facing video -- it's about
8 30 minutes or 35 minutes, correct?

9 A Approximately, yes.

10 Q Okay. So that's 30 minutes where he's not ingesting
11 any alcohol?

12 A Correct.

13 Q And he's not regurgitating?

14 A It doesn't appear, it doesn't mean he didn't, but --

15 Q And you were watching him --

16 A -- generally not.

17 Q You were watching him with your own eyes, sir?

18 A Yes.

19 Q Okay. Also, as far as him not consuming alcohol --
20 he didn't vomit at any time?

21 A I did not observe any vomiting.

22 Q Okay. And it would be noteworthy to the point -- in
23 your law enforcement background and experience it would be
24 noteworthy to put in the report if someone -- a subject had
25 vomited on themselves which could be an issue with regard to

1 the 20-minute rule, right?

2 A Absolutely.

3 Q Okay. So again, we're not dealing with a situation
4 where -- your criticism of the 20-minute rule in terms of --
5 you're critical of the fact that it's not a controlled setting
6 doesn't really hold a lot of weight in terms of the fact that
7 you were able to visually observe him 35 minutes in the rear of
8 the patrol vehicle or Deputy Embrey was able to observe him 35
9 minutes, correct?

10 A Not necessarily.

11 Q Okay. Let's hear it.

12 A When you arrive at the station or the jail, wherever
13 that breath testing instrument is, I'm sure the deputy had to
14 get out of his patrol car, secure his weapon, then escort the
15 individual into the breath test room. It's my position that
16 the controlled environment and the 20-minute observation should
17 be done in the breath test room when they're sitting and they
18 can observe prior to -- 20 minutes prior to the breath test.
19 I'm sure there's time between the time of arrival at the
20 station and getting to the breath test -- or the jail and
21 getting to the breath test when they're not observed, that's
22 what it's based on.

23 Q Okay. And you don't know from your review of the
24 report as well as the videotape, and you have experience as far
25 as being a law enforcement officer, you have no reason to

1 question Deputy Embrey not losing custody or leaving Mr.
2 Singley's side the entire time subsequent to arrest?

3 A I do not have specific information on that, no.

4 Q You have no criticism of the manner in which Deputy
5 Embrey accompanied him to the field sobriety -- or accompanied
6 him to the sheriff's office and presented him to the
7 Intoxilyzer?

8 A I have no information as to how that was done, no.

9 Q And you have no specific information relating to this
10 individual Intoxilyzer, correct?

11 A As far as what?

12 Q As far as the unit itself, the manner in which it was
13 placed into service when it was first put in service, other
14 than the fact that you have an opinion that Georgia standards
15 for Intoxilyzer maintenance and calibration are substandard by
16 your view?

17 A By the view of the National Safety Council and the
18 specific documents on the quarterly inspections that it's
19 running high. But other than that, I don't have specific
20 firsthand knowledge of that serial numbered instrument.

21 Q Okay. You've never taken -- taken a field trip to
22 the Forsyth County Sheriff's Office to view the Intoxilyzer
23 Serial Number 68-013766?

24 A I have not.

25 Q Okay. And the hypothetical situation where we're

1 discussing a presence of alcohol in the air by someone burping
2 or bleach -- someone bleaching the floors, anything along those
3 lines, you have no knowledge as to how that would impact this
4 individual machine?

5 A No. It's just a general statement that alcohol in
6 the ambient air can affect the zero referencing of the
7 instrument.

8 Q Sure. And so you don't know one way or the other if
9 there's a situation where alcohol could accumulate in the air,
10 if the door is open that's certainly going to minimize that
11 type of risk and possibly skewing your results on this
12 particular test?

13 A Yes. Fresh air introduced to the room will help
14 reduce that probability, yes.

15 Q And so if the door is open, there's not going to be
16 an issue?

17 A Well, not necessarily not any issue, it would
18 minimize that issue potentially.

19 Q You don't have any criticisms of Deputy Embrey and
20 how he administered HGN, correct?

21 A I do not.

22 Q Okay. You have no question or ability to question
23 the validated clues he was able to obtain from Mr. Singley,
24 correct?

25 A Right. I can't see Mr. Singley's eyes on the video.

1 We have to rely on his documentation of his observations.

2 Q And in your law enforcement experience you would
3 trust and assume that someone who has administered field
4 sobriety evaluations and someone who is trained to not only
5 conduct field sobriety evaluations with regard to specifically
6 the HGN and someone who was able to teach other officers on how
7 to conduct the HGN evaluation, you'd have no reason to question
8 the manner in which he did it and no reason to question the
9 fact that he showed six of six clues on that exam?

10 A My only question would be that the divided-attention
11 tests don't support the results. I would question are you
12 sure, but specifically I'm not saying this officer did not.
13 I'm saying the manifestations and the observed clues don't
14 support each other. I'm not saying he did anything wrong or
15 bad.

16 Q And that's what I wanted to get. I want to make sure
17 that -- I don't -- like I said, I don't want us to bore the
18 jury, I want to find out specifically, narrowly what your
19 opinions are and if you can tell -- if you say that I don't
20 like Deputy Embrey, I don't like the job he did in this
21 situation. I understand you don't agree with the arrest. But
22 in terms of his investigation of what took place on October
23 25th, if you don't have any questions with that, I can move on.

24 A We've discussed what he's done and what observations
25 I had, and I don't have any criticisms as far as what he did.

1 Q Perfect. Let me ask you a little bit about your law
2 enforcement background.

3 A Certainly.

4 Q You said you got some background in Montana?

5 A That is correct.

6 Q When -- what dates were you in Montana as far as --
7 as far as being involved in DUI investigation and arrest?

8 A '79 through 2001, minus '84 to '88 when I was in
9 Germany.

10 Q Okay. When you were in Montana what were your --
11 what were your primary responsibilities as a DUI officer?

12 A I was a patrol officer and shift supervisor. I was
13 also a member of the DUI -- County DUI Task Force.

14 Q Okay.

15 A Cascade County DUI Task Force, I'm sorry.

16 Q Sure. And during the time that you were in Montana
17 with regard to those responsibilities, do you recall what the
18 BAC was --

19 A The per se limit?

20 Q The per se limit, yes.

21 A .10 at the time.

22 Q Okay. And you also had experience in Florida?

23 A Yes.

24 Q And when were you in Florida?

25 A 2002 through 2010.

1 Q Okay. And you just recently left last year?

2 A Yes.

3 Q And do you still currently have some role or
4 responsibility as it pertains to the Florida Department of Law
5 Enforcement?

6 A I do not.

7 Q Okay. You said, I think -- I thought there was
8 something I wanted to ask you regarding you're on retainer
9 regarding something in the 12th Circuit. If you could, I
10 guess, elaborate on that again, so I could maybe get back to my
11 frame of thought --

12 A Certainly. The 12th Judicial Circuit in Florida does
13 not allow breath testing because of a court opinion under
14 statutory per se or implied consent. They have to use a legal
15 standard known as the Frye Standard, meaning introductory of
16 scientific evidence. And I go down there and testify about the
17 Frye Standard as far as infrared light and infrared breath
18 testing that it is accepted in the scientific community.

19 Q Okay. For purposes of utilizing an Intoxilyzer
20 result?

21 A On an 8000 in Florida with control testing on every
22 breath test and different quality control standards, yes.

23 Q Isn't the Intoxilyzer 8000 just a newer model of the
24 Intoxilyzer 5000?

25 A No. It's using a different wavelength of light.

1 It's using different things. But they're both infrared-light
2 instruments. So in that sense they're the same, but it's using
3 a different micron wavelength, a lot of differences. But
4 they're infrared machines.

5 Q Okay. And you're, I guess, on retainer down there
6 for purposes of the State being able to admit Intoxilyzer
7 results?

8 A That's correct.

9 Q On the 8000?

10 A That's correct.

11 Q Okay. And so what if we could break down -- and you
12 said you don't have a copy of your résumé. What could we break
13 down as far as your current responsibilities, how you put food
14 on the table for your family from day -- on a day-to-day basis?
15 What are you doing? You're consulting. What's the bulk of
16 what you're doing as far as consulting work?

17 A I'd say 80 percent of it is defense in DUI cases, ten
18 percent is work for the State, and ten percent is from
19 teaching.

20 Q Okay. Ten percent with the State, specifically down
21 in the State of Florida?

22 A Yes.

23 Q And ten percent teaching. Is that teaching
24 nationwide?

25 A Yes.

1 Q And you would say that the teaching at seminars put
2 on by the Bar, but if you had more specific information -- and
3 I wish I had a copy of your C.V. because I'm sure you would
4 have it listed and it would be easier to have an idea about who
5 was putting on the seminars where you're teaching.

6 A Actually, the teachings are not on my C.V.

7 Q Okay.

8 A But -- but specifically, I have put on one; the Super
9 Symposium here in Georgia, which is put on by another
10 consultant; the DUI Boot Camp, I think is the Georgia Bar. I
11 don't know if it's the Criminal Defense Bar, but it's put on by
12 the Georgia Bar. But I'd say most of it, if not all of it is
13 members of the defense -- the Criminal Defense Bar.

14 Q Okay. And I guess what I was going to get into was
15 if you're putting on a lecture regarding the supposed
16 shortcomings of the Intoxilyzer 5000, are you there -- if
17 you're coming in to speak, are you also observing other people
18 speaking? I'm sure as you're getting a fledgling business off
19 the ground you're trying to network and make as many -- make as
20 many contacts as you can. Is that correct or true?

21 A Yes. I'm trying to make contacts. I don't
22 necessarily arrive hours earlier to listen to other speakers,
23 but I've heard others.

24 Q Okay.

25 A And I don't necessarily teach on the shortcomings of

1 the instrument.

2 Q Except in this case.

3 A I'm not teaching.

4 Q All right. That's true.

5 A What I'll teach is what the results mean, both when I
6 did the teaching for prosecutors and did my first seminar for
7 defense, I used the exact same curricula. So not necessarily
8 shortcomings but interpreting results and understanding the
9 instrumentation.

10 Q Okay. As far as the -- you have -- other than your
11 opinion as a whole that Georgia is substandard in doing the
12 calibrations on the Intoxilyzer 5000, you have no specific
13 criticisms with regards to this machine, other than when it
14 calibrates or it tests at a .08 it shows it at a .083?

15 A In that specific and the general lack of quality
16 control measures to ensure reliability.

17 Q Okay. You do know that it passed inspection per the
18 Georgia Bureau of Investigation protocol three days before that
19 test was conducted, right?

20 A Yes, I do. Yes, it was issued a certificate of
21 inspection.

22 Q Okay.

23 ASST. SOLICITOR GENERAL PARK: If I could approach?

24 THE COURT: Yes.

25 BY ASST. SOLICITOR GENERAL PARK:

1 Q Which one do you have in front of you, sir?

2 A The September and October.

3 Q Okay. And with your familiarity of that -- of that
4 -- of the testing and measures and those kinds of things, these
5 printouts, are these the typical printouts that would be
6 associated with a machine as it's running the standard
7 calibration checks?

8 A Yes. They're quarterly inspection protocol.

9 Q Okay. And with regard to the one subsequent in
10 October, State's Exhibit 11?

11 A Basic same associated print cards --

12 Q Okay.

13 A -- to support the documentation of the certificate of
14 inspection.

15 Q Okay. To show that it was -- it successfully passed
16 inspection?

17 A Yes.

18 Q You would agree with me, sir, alcohol impacts and
19 affects people differently, true?

20 A Yes.

21 Q And in your observation as a law enforcement officer
22 have you made arrest decisions where you would make -- place
23 them under arrest either for .10 violation or subsequently a
24 .08 violation, bearing in mind that you haven't made an arrest
25 on a DUI in ten years, where you had limited dexterity clues in

1 the terms of the field sobriety, walk and turn and one-leg
2 stand, the manner in which someone hands you their license,
3 driving behavior, where you got a six of six on the HGN?

4 A There have been times I've made arrest decisions
5 where there've been limited clues on the other portions and a
6 six out of six on the HGN, yes.

7 Q Okay. And six out of six on the HGN ultimately
8 verifies -- or when you make an arrest decision, were those
9 subjects in those instances, did they take the Intoxilyzer test
10 or provide a breath or blood sample?

11 A Sometimes. Some of the people would refuse, but,
12 yes, sometimes.

13 Q Sure. And in those instances where people agree to
14 take the test, did you have people who have been over the per
15 se limit?

16 A Yes.

17 Q Okay. Tell me if this is fair, you're coming in here
18 today reviewing documents, and basically using hindsight to
19 come in and question the validity of an Intoxilyzer slip?

20 A I don't believe that's -- that's an accurate
21 statement.

22 Q Okay. Then what is it?

23 A I think I'm using the totality of the information
24 provided to make sure the puzzle pieces match, and in my
25 opinion they do not match.

1 Q Okay.

2 A I don't believe I'm using hindsight to say the
3 Intoxilyzer is bad. I believe I'm using the totality of the
4 circumstances to say that the breath test may not be a valid
5 result.

6 Q Okay. And you've also -- you've also just testified
7 that in your experience as a law enforcement officer that
8 you've had someone with very minimal or nominal field sobriety
9 clues on the divided-attention test and had a six of six that
10 ultimately were over a .10. How do you --

11 A Yes.

12 Q How do you reconcile those two things?

13 A I said few. I didn't say total absence of any clues.
14 I can't personally recall of a time where I saw no divided-
15 attention clues, six on the HGN, and I'm trying to recall a
16 specific time when I made an arrest based on solely that. I
17 may have. I can't say I haven't. But I don't believe I've --
18 100 percent of the time zero clues on any divided-attention
19 test, I don't recall specific times. I've had minimal clues,
20 one, two, but I don't remember specifically a zero.

21 Q When do you send your final invoice on your -- on
22 your consultation?

23 A Probably tomorrow morning I'll send a final invoice,
24 unless the case is held over and I'm required to appear again
25 tomorrow.

1 Q Certainly. And I don't anticipate keeping you any
2 longer than probably the next ten or 15 minutes. You'll get --
3 you're going to get out of here.

4 Let me make sure I have this correct. You charge Mr.
5 Pilgrim's firm \$550 for review of the documents and materials?

6 A That is correct, along with the gathering of public
7 records.

8 Q Okay. So that's a catch-all charge for everything,
9 all of your effort, 550?

10 A 550 plus the exact fee from GBI, which is about 20
11 bucks for the documents they provide.

12 Q Okay. And you -- you've been here two hours, or did
13 you get here around lunchtime?

14 A I think it will be about five hours.

15 Q Do you clock in when you take the witness stand or do
16 you clock in when you walk in the courthouse?

17 A From the time the attorney asks me to be here, and
18 today it was at 11:00, so 11:00 this morning -- for lack of a
19 better term, clocked in.

20 Q Okay. I didn't mean anything derogatory.

21 A No. No. I understand.

22 ASST. SOLICITOR GENERAL PARK: That's all I have.

23 THE WITNESS: Thank you, Counselor.

24 THE COURT: Redirect?

25 REDIRECT EXAMINATION

1 BY MR. PILGRIM:

2 Q Just to be clear, you actually want to be compensated
3 for working?

4 A Yes, I do.

5 Q Okay. So we make money here. All right. So we all
6 work because we have to, correct?

7 A Correct.

8 Q Okay. And, you know, you just -- I'll go ahead and
9 lay it all out there in the open. You actually have a
10 mandatory minimum, a certain amount of money you have to pay,
11 it doesn't matter if you come in for one hour I don't just give
12 you 180 bucks?

13 A Correct.

14 Q Okay. So, let's just throw it all out there. You're
15 making money in order to testify in this case, but you're not
16 making money for your opinion?

17 A No. I'm making money to be compensated for my time.
18 That's the way I make a living. Just like you get paid, he
19 gets paid, everybody gets paid at work.

20 MR. PILGRIM: Okay. That's all the questions I have.

21 THE COURT: Recross?

22 RECCROSS-EXAMINATION

23 BY ASST. SOLICITOR GENERAL PARK:

24 Q You've never met Mr. Singley?

25 A Not prior today, no.

1 ASST. SOLICITOR GENERAL PARK: That's all I have.

2 Thank you.

3 THE WITNESS: Thank you, Counselor.

4 THE COURT: All right. You can come down.

5 May the witness be excused?

6 MR. PILGRIM: Yes, your Honor.

7 ASST. SOLICITOR GENERAL PARK: I have nothing further
8 for him.

9 THE COURT: All right. You can be excused.

10 Anything further from the defense?

11 MR. PILGRIM: Not from the defense, Judge.

12 THE COURT: All right. In light of the hour, I'm
13 going to do this, I'm going to adjourn court for the day.
14 And while you're at home tonight, my admonition to you is:
15 no homework. Please do not discuss this case with your
16 family members or anyone else. Please do not conduct any
17 form of investigation, either in books of reference
18 materials or online. Please do not attempt to visit any
19 of the scenes that have been described in the testimony or
20 shown in the evidence.

21 And with that admonition, have a nice evening. We
22 will recommence and begin at 9:30 -- excuse me -- at 9:00
23 in the morning. At that time we will meet for argument
24 and charge.

25 Is there any rebuttal from the State? I should have

1 asked you that.

2 ASST. SOLICITOR GENERAL PARK: Nothing from the
3 State, your Honor.

4 THE COURT: All right. After you have the argument
5 and charge in the morning, at that time the case will be
6 yours to deliberate but not until. So please do not
7 discuss this case among yourselves or with anyone else.

8 With that, you can be excused and we'll see you at
9 9:00 in the morning.

10 (Whereupon, the jury left the courtroom.)

11 THE COURT: I'll ask parties and counsel to appear at
12 8:30 for the charge conference.

13 (Whereupon, following the evening recess, the
14 proceedings continued on Friday, August 26, 2011, as
15 follows:)

16 CHARGE CONFERENCE

17 THE COURT: Let's see, I've got the State's requests
18 and the defendant's requests.

19 State's one is pattern, I'll give that. Two is
20 pattern, I'll give that. Three is pattern, I'll give
21 that. Four is pattern, I'll give that. Five, I'm not
22 sure we've got impeachment here. I don't think --

23 MR. PILGRIM: We'll withdraw ours as well.

24 ASST. SOLICITOR GENERAL PARK: Well, your Honor, with
25 regard to the expert, I mean, maybe it was just kind of

1 inconsistencies.

2 THE COURT: Got anything in particular?

3 ASST. SOLICITOR GENERAL PARK: What?

4 THE COURT: Got anything in particular?

5 ASST. SOLICITOR GENERAL PARK: In particular
6 regarding the -- the issues regarding the 20-minute rule
7 and how he initially stated that it wasn't adhered to and
8 then with regard to the fact that it was adhered to.

9 THE COURT: That's not actually impeachment.

10 MR. PILGRIM: I think it's all actually argument.
11 The facts are what they are. The jury can see whether or
12 not, you know --

13 ASST. SOLICITOR GENERAL PARK: That's fine.

14 THE COURT: All right. Six is pattern, I'll give
15 that. Seven is pattern, I'll give that. Eight is
16 pattern, I'll give that. Nine is pattern, I'll give that.
17 Ten, I'll give that. Eleven --

18 ASST. SOLICITOR GENERAL PARK: Your Honor, I didn't
19 have 11 --

20 THE COURT: I've got --

21 ASST. SOLICITOR GENERAL PARK: -- as far as the
22 headlight charge, whatever the State is -- whatever the
23 Court is inclined to charge.

24 THE COURT: What I have on that is -- I've pretty
25 much tracked what you have, except for on the speeding I

1 just -- rather than saying 85 miles an hour, I just said
2 the speed specified in the accusation.

3 ASST. SOLICITOR GENERAL PARK: Sure.

4 THE COURT: And on the driving without headlights,
5 "Every vehicle upon a highway within this State at any
6 time from a half-hour after sunset to a half-hour before
7 sunrise shall display lights, including headlights."

8 Less safe, generally, I'll give that. Well, 13, I'm
9 not going to give. I really hesitate to do anything
10 that's not pattern on these basic burden of proof issues.
11 Fourteen, I'll give that; 15, I'll give that; 16 is
12 pattern, I'll give that.

13 ASST. SOLICITOR GENERAL PARK: Your Honor, is the
14 Court going to charge HGN?

15 THE COURT: What do I have? I don't have it in here.

16 ASST. SOLICITOR GENERAL PARK: The State would like
17 to have a charge, if I could request it at this time. I
18 apologize for not having one submitted.

19 THE COURT: Well, if I give it, I'm going to give
20 that sort of hybrid charge --

21 ASST. SOLICITOR GENERAL PARK: That would be fine.
22 The one you normally give is perfectly fine with the
23 State.

24 THE COURT: All right. That's in. Turning to the
25 defense requests to charge.

1 MR. PILGRIM: Your Honor, I believe most of ours are
2 the standard, with the exception of we included a bare
3 suspicion charge. And I can't believe I forgot this,
4 similar to Mr. Park forgetting HGN, a charge with regards
5 to similar transaction.

6 THE COURT: I've got that in there. Bare suspicion
7 is in. The rest of these all appear to be pattern. I'm
8 not going to recite them one by one. I'm going to give
9 the expert witness charge. I'm going to give the -- I'm
10 going to give the charge on the defendant not testifying.
11 I'm not going to give your 12 on statement by the
12 defendant, since we don't really have him Mirandized or
13 arrest statements.

14 MR. PILGRIM: Okay.

15 THE COURT: You do or don't want venue?

16 MR. PILGRIM: It's not an issue, Judge.

17 THE COURT: All right. I won't give it then. A
18 general charge on DUI, I'll give that. All right. You
19 have 18 inferences from chemical analysis, I don't think
20 that's quite --

21 MR. PILGRIM: I don't think it's relevant in this.
22 Mr. Park brought that to my attention --

23 ASST. SOLICITOR GENERAL PARK: Yes.

24 MR. PILGRIM: -- I'll withdraw it.

25 THE COURT: Okay. Twenty is the Kachwalla thing, I'm

1 going to give that.

2 ASST. SOLICITOR GENERAL PARK: Your Honor, if we
3 could go back to the general DUI charge, I don't think we
4 have an issue of refusal in the case.

5 MR. PILGRIM: That's true.

6 ASST. SOLICITOR GENERAL PARK: I figured you had it,
7 but I just wanted to make sure we were -- make sure that
8 wasn't in.

9 THE COURT: There's no refusal charge in there. All
10 right --

11 ASST. SOLICITOR GENERAL PARK: Your Honor, the State
12 will waive opening and reserve closing.

13 THE COURT: All right. That's that. We have a -- I
14 want to take a look at the verdict form and -- let me go
15 through what I am going to give. I'm going to give issue
16 of plea of not guilty; presumption of innocence; burden of
17 proof; bare suspicion; jury is judge of law and fact;
18 evidence generally; direct and circumstantial evidence;
19 credibility of witnesses; conflicts in testimony;
20 statements by the defendant.

21 I don't think there were statements by the defendant
22 to tell you the truth since the audio was off.

23 ASST. SOLICITOR GENERAL PARK: He made statements in
24 the rear of the patrol vehicle.

25 THE COURT: I guess those were more or less

1 statements. They weren't direct, actual assertions, but I
2 guess they could be taken along with the circumstances as
3 being statements.

4 Expert testimony; failure to testify; similar or
5 connected -- similar or connected offenses or
6 transactions; definition of a crime; intent; intent, as to
7 DUI; offenses charged, first, driving under the influence
8 per se .08 grams; driving under the influence less safe;
9 the less-safe general charge; the charge on the layman's
10 observations of a person as to intoxication; field
11 sobriety -- I have a charge I give about field sobriety
12 evaluations that they are voluntary and no person may be
13 compelled to submit to such tests. The officer is not
14 required to tell the subject the tests are voluntary.

15 Speeding; speeding in excess; driving without
16 headlights; verdict; the Court has no interest in the
17 case; responsibility for sentencing; deliberations; retire
18 to the jury room; also, the HGN, which is in the final
19 draft but not in this, I've added it.

20 Anything else?

21 ASST. SOLICITOR GENERAL PARK: Noting from the State.

22 MR. PILGRIM: We just need to make sure all the
23 evidence is up there, too.

24 THE COURT: All right. All right. We'll go to the
25 jury at 9:00 then.

1 (Whereupon, following a short recess the proceedings
2 continued as follows:)

3 THE COURT: Is the State waiving opening?

4 ASST. SOLICITOR GENERAL PARK: That's correct, your
5 Honor, reserve closing.

6 THE COURT: Are we ready for the jury?

7 ASST. SOLICITOR GENERAL PARK: The State's ready.

8 THE COURT: Ready for the defense?

9 MR. PILGRIM: Yes, Judge.

10 THE COURT: All right. Bring in the jury.

11 (Whereupon, the jury entered the courtroom and the
12 proceedings continued as follows:)

13 THE COURT: All right. You can be seated. Ladies
14 and gentlemen, we have come to that portion of the trial
15 where the attorneys come to you with their closing
16 statements.

17 Mr. Pilgrim, are you ready for close?

18 MR. PILGRIM: I am, Judge.

19 THE COURT: Go ahead.

20 MR. PILGRIM: If I could have a brief moment to set
21 up.

22 THE COURT: All right.

23 (Whereupon, there was a pause in the proceedings.)

24 MR. PILGRIM: I haven't used a notepad in a long time
25 in a closing argument, primarily because my writing is not

1 the best in the world, but we're going to give it a shot
2 here. There's a couple of things I'd like to point out to
3 you.

4 Well, good morning. First, let me start off just by
5 thanking you for your time and attention. You know, I've
6 tried to take a look at the jury as I go through this
7 entire process, see how they're responding to certain
8 things. Whether it be certain questions that are being
9 asked, things along those lines. I have taken note of the
10 fact that y'all have been extremely attentive.

11 And I understand y'all have kind of been going all
12 week long, in and out, taken away from your lives. And we
13 understand how much of a difficult process that is for all
14 of you to have to go through that, and we really do
15 appreciate it. This is something that is extremely
16 important. It's extremely important to my client. This
17 is his day in court. This is something that he's asked
18 for, something that he requested you to dedicate your time
19 and attention to. And it's a -- it's what makes our
20 system great.

21 So, I really do appreciate y'all paying attention,
22 listening to everything that has been testified to,
23 everything that we said. And with that being said, I'm
24 going to try to make my statements here pretty short.

25 At the beginning of this trial, I focused primarily

1 on two things. The first thing was that the State was
2 going to ask you to trust them and they're going to ask
3 you to put faith in a lot of the aspects of their case.

4 And I said that all I was really going to ask you to
5 do was trust yourself. Trust your life experience. Trust
6 the things that you have brought into this courtroom,
7 things that the Court can't take away from you. Things
8 that we can't tell you to just, you know, toss out of your
9 mind and just listen to what we tell you. You're not a
10 blank slate when you walk into this courtroom. You are
11 individual people with individual ideals and individual
12 experiences. And I'm going to ask you to rely on those
13 things when you're sitting back in that deliberation room
14 thinking about how you want to deal with this case.

15 Now, I'd like to try to wrap things up to try to give
16 you a little of an idea of how I'd like to propose you
17 think about this case. And the best thing that I can
18 think of about the circumstances is, I think most of us
19 can remember the 1980s, some of us better than others.

20 But Ronald Reagan was our president during the
21 majority of that time period. We had ourselves quite a
22 little bit of a situation with Communist Russia. And by
23 no means am I saying the Forsyth County Sheriff's
24 Department is Communist Russia.

25 But one of the things that it did point out that I

1 would like to point out through his administration, one of
2 the things that he consistently hammered on is when we're
3 dealing with other people -- when we're dealing with our
4 governments and other governments, we want to trust what
5 they're telling us, but we're going to verify; Trust but
6 verify. Ronald Reagan used that the entire time during
7 his administration to talk about weapons disarmament,
8 things along those lines. And it's something that I'm
9 going to ask you to do today.

10 It's something that we've talked about since the
11 beginning of our country, the formation of our country.
12 Benjamin Franklin said, "A healthy distrust for government
13 is imperative." I'm not saying that we have to be
14 skeptics. I'm not saying that we have to walk around as
15 anarchists, hating our government and completely
16 distrusting everything they say. But Ronald Reagan had it
17 correct, whether you believe in his politics or not, trust
18 but verify.

19 We want to believe that we're doing the right thing.
20 We do the exact same thing with our kids. We do the exact
21 same thing with friends, colleagues, coworkers. We want
22 to trust them. To a certain degree we're going to give
23 them the benefit of the doubt. But at some point with
24 those relationships, we always have to verify that the
25 information is the way we see it; trust but verify.

1 And throughout this entire case, the State -- and I
2 have very, very -- I feel pretty confident in the fact
3 that when they begin their process of closing argument,
4 everything that they're going to tell you about, they're
5 going to ask you to trust what we're telling you. They're
6 not going to say, draw upon what you saw in the video,
7 draw upon what you know about this machine, draw upon what
8 we told you about this machine. They're going to say,
9 trust us. This is how this stuff works.

10 Now, also at the beginning of this case we hammered
11 on the fact that, you know, these types of cases that
12 reach the juries, there's always issues to be solved. If
13 it was a great case for the State, we would have pled it
14 out a long time ago. If it was a horrible case for us,
15 same thing. If it was a horrible case for the State, we
16 would have worked out some kind of deal or the case would
17 have been dismissed. There are issues, which is why it
18 sits before you. Issues that we couldn't agree on, so we
19 decided to impanel six people that have life experience to
20 take a look at the video, listen to the evidence in this
21 case and decide the issue for us.

22 When we're dealing with situations such as this, a
23 lot of times we're trying to explain away certain
24 conducts. Me, as a defense attorney, if I've seen bad
25 clues on the walk and turn and the one-leg stand, whatever

1 it may be, I try to offer up some different types of
2 scenarios or circumstances or environmental factors,
3 whatever it may be in order to say, you know, this
4 explains this conduct. This explains what you normally
5 would see out of an impaired person, it's not because of
6 the alcohol, it's because of X, Y, or Z.

7 And I'm in a unique position at this point where I'm
8 able to say, just like you, ladies and gentlemen, I don't
9 see anything on this video that would indicate to me that
10 Mr. Singley's impaired. So when we bring it back to what
11 we were talking about before, trust but verify, I'm
12 looking for the verification of the things that the State
13 is trying to tell us. The things they want you to
14 believe.

15 Now, in no shape, form, or fashion am I going to sit
16 here and tell you that Deputy Embrey isn't a very well
17 qualified officer. The State's going to send this stuff
18 back with you. It's going to be all his certificates of
19 everything that he's done, all of his different trainings,
20 all of these qualifications, by far one of the best
21 officers that we have in Forsyth County. I'll say it to
22 his face. I'll say it to you. I'll say it in open court.
23 I'll say it when I walk out on the street. I'll say it in
24 private conversations and I'll say it in public
25 conversations. I have a tremendous amount of respect for

1 the job that he does, and he does a very good job.

2 But there are times that we find ourselves in a
3 situation where we have to play Monday morning
4 quarterback. We have to come back and take a look at it
5 and say is everything there that we need in order to make
6 sure that we can convict this person for the charge for
7 which he's been charged with?

8 We started out this entire case talking about driving
9 manifestations, things along those lines. Okay. You
10 heard the fact that he was speeding. The first thing I
11 would like to point out with regards to that is Deputy
12 Embrey's direct statement that he was going approximately
13 85 miles per hour. Okay. I'm not going to sit here and
14 contest the fact that he was driving above the posted
15 speed limit. Okay. I know how to pick my battles. I'm
16 not going to sit here and say that Deputy Embrey didn't
17 see him speeding, didn't see him turn his lights off.

18 My client all but admitted the fact that, yes, my
19 lights were off. He acknowledged the fact that he'd done
20 that. He indicated, yes, it was a stupid move. He gave
21 an explanation as to why he did it. The explanation was
22 at least partially justified given the circumstances in
23 Forsyth County at that time. Was it reasonable? I don't
24 know.

25 The reality of the situation is you have to have your

1 lights on after a certain hour of the day and before a
2 certain hour of the day. That's what you're going to be
3 charged on. And you can't drive above the posted speed
4 limit. But there's also going to be a very specific
5 charge that if he was driving specifically 85 miles per
6 hour in a 65-mile-per-hour zone, you have to convict.

7 Then there's speeding in excess, well, the State is
8 sitting here and they're telling you, trust them. He
9 doesn't have a laser or radar unit, which gives you a
10 verified specific speed. He specifically says, I had him
11 at approximately 85 miles per hour. I paced him with my
12 patrol vehicle. I haven't given you any information
13 whatsoever to prove to you that my patrol vehicle is --
14 the speedometer is calibrated or anything along those
15 lines. The only thing they're saying is, well, it's a new
16 car, so it must be fine.

17 Well, if it's a machine, then it must be working.
18 That's what we're supposed to assume. And in this
19 criminal justice system, we don't assume anything. You
20 have to have proof in front of you. We don't have any
21 proof of the fact that that was necessarily the case. All
22 we have is the statement from Deputy Embrey approximately
23 85 miles per hour. And, again, I'll pick my battles. If
24 you want to go back there and convict him of speeding,
25 fine. If you want to convict him of no headlights, I'm

1 for you to do it. I can pick my battles.

2 But then when we get to the meat of the charges of
3 what we're dealing with, which is driving -- which is
4 driving under the influence of alcohol per se, meaning
5 that he was over a .08 and driving under the influence of
6 alcohol less safe, which means he was operating a motor
7 vehicle on the highways of this State, under the influence
8 of alcohol to the degree that he was less safe to operate
9 his vehicle. I submit to you that there is not enough
10 evidence for the State to meet their burden.

11 What are some of the things that we look for in the
12 State's case? Less safe has nothing to do with the BAC,
13 nothing. Two separate and distinct standards. The first
14 thing we look at is field sobriety -- or driving
15 manifestations. The expert testified that even the
16 National Highway Traffic Safety Administration stated that
17 speeding is not one of those things that is considered to
18 be less safe, so to speak. It wasn't on their list.

19 Okay. This is a guy with 20 years of law enforcement
20 experience and he's got even that much more experience
21 after that working for the State in a civil capacity where
22 he's monitoring the breath testing machine. You heard his
23 credentials. He went on and on and on about how he got
24 his experience.

25 Okay. He reads, he studies, he deals with this stuff

1 on a day in, day out basis and he tells you the National
2 Traffic Highway Safety Administration, the same people
3 that put together these standards for these standardized
4 field sobriety evaluations that Deputy Embrey uses and
5 utilizes on a day in, day out basis in his job capacity,
6 specifically stated that speeding is not one of those
7 things that has any impact on whether or not somebody can
8 safely operate their motor vehicle.

9 And you use your common sense on this. People slow
10 down, which is one of the things that they said was a
11 less-safe act. They slow down because their judgment is
12 impaired. They can't pay attention as easily. The
13 reaction time is slower. If you're speeding, obviously
14 your reactions must be quicker. You must be able to
15 operate a vehicle more safely. Deputy Embrey specifically
16 testified that there was no other less-safe act, no
17 failure to maintain lane, no inability to use a turn
18 signal. He pulled over just fine.

19 With regards to his driving, with the exception of
20 these couple of little things that he saw that drew his
21 attention to him, there was nothing about his driving that
22 caused him any concern. That was his own words.

23 He approaches the vehicle. He smells a moderate odor
24 of an alcoholic beverage, not strong, not very strong,
25 moderate. Pulls him out of the vehicle. No problems

1 getting out. You saw all this yourself. No problems
2 getting out, steady on his feet the entire time he was
3 there, solid as a rock. The question to ask is: Is this
4 what we normally see out of somebody that was impaired,
5 that was less safe? Use your common sense. Use your life
6 experience.

7 Then we get into the meat of the field sobriety
8 evaluations. The HGN evaluation, Deputy Embrey testified
9 he got six out of six clues on the HGN evaluation. We
10 don't have any appropriate measures by which to look at
11 the timing of the passes, which you heard is subject to
12 human error, whatever it may be. This is a scientific
13 evaluation, but all these extraneous things can have an
14 impact on it.

15 He indicates that he gets six out of six. We can't
16 see the nystagmus. They're asking you, look -- this is
17 what he's telling you to trust him. Generally, again, I
18 don't have a problem with that. But we want to verify
19 that information through other things that we can see,
20 other things that are in front of us.

21 So we move into the walk and turn, one-leg stand.
22 What do we have? Zero clues. Zero clues. No problems.
23 We went through every single one of those clues separate
24 and independent of each other, not one was met. Not one.
25 Deputy Embrey testified that there are a certain number of

1 clues you have to get or whatever it may be in order to
2 determine under their standards whether or not somebody
3 may be impaired. Nothing. Zero.

4 So where are we at now? We've got six clues. Is
5 there any independent verification of what we see there?
6 Can we verify that information? No. We have to rely on
7 the trust of the State in order to do that. And the
8 question you have to ask yourself: Are you comfortable
9 with that?

10 Zero clues on the one-leg stand, zero clues on the
11 walk and turn, can we verify that information? Based upon
12 the instructions that Deputy Embrey gave my client, which
13 we couldn't hear because we had a malfunction in a piece
14 of equipment. Deputy Embrey testified the instructions
15 that he gave were the same instructions that he normally
16 gives. He didn't meet any of those criteria. He didn't
17 get any validated clues. Zero, zero, your verification is
18 there.

19 Preliminary breath test, the only other field
20 sobriety evaluation that was done. Deputy Embrey
21 testified that, look, all that really does is verify what
22 I already knew, which was that alcohol was in the system.
23 Your client admitted it. I could smell it. That's all we
24 know.

25 The Judge is going to charge you that the State has

1 to prove more than mere consumption. It's not illegal in
2 the State of Georgia to drink and drive. It's only
3 illegal in the State of Georgia to drink and drive when
4 it's less safe for you to do so. So mere consumption,
5 that alcohol is present, tells us nothing, other than the
6 fact of it confirms what he's already smelled and what my
7 client's already told him.

8 So, Deputy Embrey does the best that he can given the
9 circumstances, makes a decision. We make our decisions.
10 We live with those decisions. We rely on our decisions.
11 And we deal with those decisions, sometimes they come back
12 and we have to deal with those decisions and that's why
13 we're here today.

14 But then he takes him back to the detention center
15 and he conducts a breath test. A breath test on a machine
16 that the State has given you zero information about. What
17 they've done -- and I anticipate what the State will do is
18 they'll say, we have -- you know, the defense sits here
19 and says we haven't given you any information to justify
20 the arrest here with all these clues. And they're going
21 to say, here it is and this is the information I'm giving
22 you. It's a .120.

23 Well, what about the foundation for that information?
24 Where does that information come from? How is it derived?
25 How do we get it? They haven't told you anything about

1 the inner workings of the machine. They haven't told you
2 anything about how it calculates its results. They
3 haven't told you anything about how this entire thing
4 actually works. As a matter of fact, Deputy Embrey
5 admitted that in his own manual it specifically states --
6 and I read him the question, you are not required to know
7 and, in fact, know nothing about the Intoxilyzer 5000 or
8 your jurisdiction's breath instruments. You know nothing.
9 The State has told you nothing.

10 The only person in this courtroom that has given you
11 any information about the Intoxilyzer 5000 and how it
12 operates -- and quite frankly he admitted sometimes it
13 does operate correctly, sometimes it does work. The
14 science behind it is there. It's being employed in a lot
15 of different machines throughout the State. But what did
16 he tell you about the machine that we have here in the
17 State of Georgia?

18 The first thing is, it's an old machine, okay. The
19 second thing is there are safeguards in place, but they're
20 certainly not adequate. The third thing is that they said
21 the quality control measures that are put in place in
22 order to make sure this machine is operating on a very,
23 very functional basis are not just substandard, but
24 they're horrible. Are there states that do this
25 appropriately, they do it the right way? Certainly, there

1 are. Georgia is not one of them.

2 It is not our job to prove anything. The State of
3 Georgia bears the burden of proof. And they have to prove
4 to you that this machine was operating properly and gave
5 an appropriate result. They have to prove that this
6 machine works on a consistent basis. They have to -- we
7 don't have to prove -- disprove the machine operates well.
8 That's not our job.

9 But what we did do is we did give you a lot of
10 information with regards to this Intoxilyzer 5000 and the
11 problems that it can have. So what is the best evidence
12 that there's a problem with that machine? Exactly what
13 you see with your eyes.

14 Now, Deputy Embrey is going to testify -- he
15 testified to the fact, and I assume Mr. Park is going to
16 argue tolerance. It had to have been his tolerance that
17 affected this. If you can hold your liquor, if you can
18 deal with this stuff, that's got to be what affected his
19 ability to perform well on the physical dexterity tests
20 and still blow such a high level.

21 You're going to have -- and this is the next point
22 we're going to have to get into is this similar
23 transaction. There's a similar transaction by my client
24 that the State has used as, so to speak, their trump card.
25 The rest of their case is weak at best. And so what they

1 want to do is they want to talk about his past. They want
2 you to sit there and they want you to say, well, shoot, he
3 did it once, so he must have done it again.

4 My client, back in 2007, was involved in an incident
5 in this county that he blew over the limit, accepted
6 responsibility, he's paid his price, and he's moved on.
7 He said, I'm guilty of that incident. There's no
8 contesting that. Today he sits before you saying, I'm not
9 guilty. That's the big difference here, the biggest
10 difference.

11 Okay. The other differences are, what did we have in
12 that case? You heard Corporal Thompson testify that he
13 had six out of six clues on the HGN evaluation, similar to
14 this case. Okay. But what did we have in that case that
15 we don't have here? Bloodshot eyes, strong odor of an
16 alcoholic beverage, three out of eight clues on the walk
17 and turn. You start to do the math and it adds up to the
18 .10 that we have in that case.

19 During that time period as well, Corporal Thompson
20 indicated that he saw vertical nystagmus, which would
21 indicate a high level of alcohol for him. A lower result,
22 but a high level of alcohol for the client. Deputy Embrey
23 testified that at a .120, according to what the machine is
24 registering on this date, no vertical nystagmus, therefore
25 not a high level for the client.

1 Well, I'm sure Mr. Park is going to say, well, look,
2 he's had three years to figure this thing out. Maybe he's
3 been practicing drinking. Maybe he's been just hammering
4 them down and his tolerance has gotten better. The State
5 didn't present any evidence to you whatsoever that during
6 the year period that my client was on probation did he
7 ever have any revocations, any issues, any problems
8 whatsoever. If you look through this paperwork and if you
9 listen to things, no problems.

10 So, previous case all these clues, all these things
11 add up to this test result that we have, which is a .102
12 which is lower than the test result we have here. More
13 clues, more independent verification, more things that if
14 we rely on our life experience that we can verify. We
15 don't just have to trust Corporal Thompson what he's
16 telling us. We can verify this test result with what
17 we're seeing. Today, higher breath test, much less clues,
18 no vertical nystagmus, it just doesn't add up.

19 Another thing during the Reagan administration, if
20 you didn't like his politics, they kept saying with
21 regards to the budget, it was funny math. This is funny
22 math. This doesn't make any sense. It's the best
23 evidence that that test must be wrong. And we don't have
24 to prove anything. We don't have to give you evidence.
25 We just did. It's right there in front of your face.

1 It's on the video. It's just not there.

2 Very clear, coherent speech about what he's talking
3 about, what he's doing, responsive to all his questions,
4 we don't see it. No independent verification of what
5 we're looking for, nothing whatsoever. The State's going
6 to rely heavily -- not only with the breath test that they
7 can't tell you how the machine works, how it operates,
8 what's in the source code, how it calculates its
9 information, they're just going to say trust the result.
10 You've got the slip. I mean, this mystical magic box that
11 prints out this result, you've just got to trust it, okay.
12 I don't mean to insult your intelligence, just trust it.

13 The other thing they're going to rely on is the HGN
14 evaluation. And one of the things we talked about was
15 percentage of reliability with regards to that. One of
16 the numbers that was thrown out was 77 percent. Let's
17 just take it up to 80 just for easier numbers. I mean,
18 look at it terms of this -- and when it comes to the
19 burden of proof and how comfortable you feel with the
20 State's case.

21 What if we were going skydiving, okay. And I told
22 you, look, the guy who's going to be packing your chute,
23 he's really good at what he's doing. He's going to use
24 this procedure to pack your chute. There's a 20 percent
25 chance that that chute may not open. Are you going to

1 jump out of the plane? Because that's the best evidence
2 the State has to prove that this breath test is correct.
3 I ain't jumping.

4 Now, I'm not asking you to trust me. And I haven't
5 posed anything to you that is offering you up some kind of
6 speculation on your part or any type of conjecture or
7 anything along those lines. All I'm asking you to do is
8 just take a look at what's been put in front of you.
9 Don't trust me, trust yourself. Use your own logic and
10 reason. Don't supplant ours for yours. You're the best
11 person in this entire system to be able to figure this
12 stuff out. That's why we chose you to be on this jury in
13 the first place.

14 We could throw experts up all day long. We could put
15 officers that have tons and tons of experience, but at the
16 end of the day, you're the ones that have to look at this
17 stuff and determine and need to be able to -- need to be
18 able to vote guilty. The Judge is going to charge you on
19 bare suspicion. If the facts that have been put in
20 evidence merely points to a bare suspicion that the client
21 may be guilty of these charges, you can't convict them.
22 That's not enough.

23 Again, if the clues were there, if the math added up,
24 if it were six out of six, four out of four, two -- four
25 out of eight, two out of four, whatever it may be and we

1 had a breath test result that was something along these
2 lines that made sense with what we saw with our own eyes,
3 again, I wouldn't be standing here talking to you. But,
4 quire frankly, this just doesn't make sense. He testified
5 500 arrests, minimum, and only four or five times has he
6 ever seen anything like this.

7 The State wants you to believe that this machine just
8 can't mess up. And I'm sorry but machines -- we know how
9 machines work. They can have problems. We saw it on the
10 video when he doesn't -- when something as simple as a
11 mike pack doesn't work. What about this machine that has
12 all these complex codes that we don't even know how it
13 works and all this other stuff? Is it possible that it
14 could have had a problem? Yes. Based upon what we see
15 here, is it possible that it could have had a problem, and
16 justify that even more?

17 Again, don't trust me, don't trust the State, trust
18 yourself. And I think when you go back there and you
19 reflect upon the facts as you remember them and as you saw
20 in the video -- take a look at the video again, if you
21 want. There's not much to see. But take a look at the
22 video. When you reflect upon all that and you really
23 trust yourself, trust your judgment, trust your
24 experiences, the only appropriate verdict with regards to
25 DUI less safe and DUI per se is a not guilty.

1 We'll take whatever we can get, but at the end of the
2 day approximately 85 miles an hour, convict him of the
3 speeding in excess. Convict him of the no headlights.
4 I'm not even going to contest it. I can pick my battles.
5 But trust yourself. Remember how the evidence went out
6 and do the right thing, which is to vote not guilty.

7 Thank you.

8 THE COURT: Go ahead, Mr. Park.

9 ASST. SOLICITOR GENERAL PARK: Thank you. May I
10 approach? Is the accusation up here?

11 THE COURT: The copy is right there.

12 ASST. SOLICITOR GENERAL PARK: If it please the
13 Court, ladies and gentlemen, opposing counsel. I want to
14 thank you for your time. I'm not going to waste anymore
15 of your time. I told you at the beginning I wasn't going
16 to waste your time. I was going to present the evidence I
17 had just to show it to you in what I believe is a very
18 strong case in this situation.

19 To pick up on a theme that Mr. Pilgrim was talking
20 about. We talked about things and words like trust and
21 trusting your life experiences. And we had experts.
22 There's one question here, and it's not a question, it's a
23 fact. Deputy Embrey, everyone I think we can all agree is
24 an eminently trained officer in DUI detection. Mr.
25 Pilgrim admits as such. And I don't want to -- Mr.

1 Pilgrim makes my job a little bit easier because he's
2 already admitted that there's speeding. He's already
3 admitted that there's headlights, picking and choosing
4 your battles.

5 One thing that is clear and one thing that you bring
6 with your life experiences is that part of life experience
7 is making decisions and owning those decisions. And when
8 you make decisions -- I think there was -- in jury
9 selection there may have been someone who had referenced a
10 prior DUI that they had or a prior -- or some other prior
11 experience and the constant theme that you saw was taking
12 responsibility and I admit to what I did, I did it.

13 And you have in this situation -- and I want to tell
14 you right now, I'm not going to come in here and say,
15 well, he did it once, he must have done it again. And
16 that's not -- we're not seeking to punish him for that
17 incident in 2007. But, as you know with your life
18 experiences especially when you're young, 18, 19, 20, 21
19 years old, and you're in college and you have those
20 experiences you knew people who consumed a lot of alcohol.
21 You knew people who had problems with alcohol. Use those
22 life experiences.

23 When you're sitting in a situation where the decision
24 to drink and drive is made, it's a decision that not only
25 affects you because there are implications. You make that

1 kind of a decision to get out on the roadway and -- and
2 drive, what ends up happening is other peoples' lives are
3 put at risk.

4 And Mr. Pilgrim is going to talk to you -- he talked
5 to you about there's no less-safe act. There's the NHSTA
6 standard. The expert that came in yesterday and testified
7 that speeding is not a less-safe act. Well, you're taking
8 a booklet that says, speeding is not a less-safe act.
9 Y'all know there's always more to the story than just the
10 blanket statement that speeding is not a less-safe act.

11 Take into context the timing of when the speeding
12 occurred. Take into context when and where it happened.
13 And take into context the fact that he's turning his
14 lights off and by Deputy Embrey's testimony, the
15 statements on the video -- and please watch the video. I
16 -- I implore you to watch the video, the front video, the
17 backseat video. There's some very telling, and I would
18 say damning statements made by the defendant on that
19 video. Watch it.

20 He's admitted the speeding. There's no question
21 there's speeding. There's no question the headlights are
22 off. Deputy Embrey -- this is not a situation, as he's
23 testified, he's not out to twist the knife or put the
24 screws to somebody. The entire time Deputy Embrey was
25 professional. He was doing his job. He was polite. The

1 defendant was polite.

2 He was trying to make arrangements after the arrest
3 to get this vehicle towed. And not inquiring or anything,
4 but the first statement that you hear from Mr. Singley
5 right after arrest is, "Is there anyway you could take me
6 to the Waffle House so I could chill out for a bit?" The
7 Deputy responds, "Sorry. It's nothing personal, there's a
8 zero-tolerance policy."

9 A little later on there are some issues about, I'm
10 going to lose my job. Deputy Embrey says, "I'm sorry.
11 You're not going to lose your job, these things happen."
12 You know, I can't get -- I'm going to lose my job, I can't
13 drive there. All of those things, they all come back to
14 one thing, it's the same thing that I think everyone will
15 pull through as you go back and deliberate in this case,
16 it's owning your decisions.

17 And when you make a decision -- and let's -- let me
18 back up for a second. Deputy Embrey came in here and
19 testified to you. To sit here and say that we have to
20 have trust and faith and trust what someone tells you and
21 trust what I tell you, trust what you heard from the
22 witness stand. Trust also that someone who has experience
23 in making thousands -- or hundreds of DUI arrests, trust
24 someone who is not only trained in performing and
25 conducting field sobriety evaluations, trust that someone

1 who is trained to train people to conduct field sobriety
2 evaluations, trust that he knows what he's doing.

3 Trust that he's coming out there, he's going to be
4 the professional. Nothing on the video, nothing that he's
5 done in court gives you any other indication but that he
6 is a consummate professional in what he does, detect
7 impaired drivers impaired by alcohol, other substances on
8 the roadway. That's what he does. The time of the night
9 he's out, that's what he's doing, that's his job. He
10 comes out here and does that.

11 He testifies to you candidly. He testifies to you
12 truthfully. He testified that there was -- this is one of
13 those handfuls of experiences of someone having a high
14 tolerance. And, yeah, we've all been there. We've all
15 known people who have a high tolerance. And some people
16 -- some people call them functioning alcoholics. I'm not
17 going to go that far.

18 But I think given the fact that we've got someone
19 who's got a prior conviction for DUI and is now standing
20 charges on another charge of DUI, I think that's someone
21 who has a documented problem with alcohol. I'm not saying
22 he's a bad guy. I'm not saying he's an evil person.
23 People make mistakes. People have to own their decisions.

24 When you sit there and you make decisions -- and I
25 think Mr. Singley would -- I mean, if -- in watching the

1 video he was quite candid to Deputy Embrey, apologizes for
2 being an idiot, for being stupid.

3 He's concerned about his friend who's passed out or
4 is at least sleeping and not in a position to drive the
5 vehicle away when Deputy Embrey tried to get it driven
6 away. The individual in the passenger -- and this is
7 something that's kind of telling because it shows you that
8 there's not any learning from his mistake from that 2007
9 incident.

10 Take a look at the accusation when you get all the
11 documents. The accusation that was charged on this case,
12 the one that you're deciding, there is an individual by
13 the name of Esteban Docampo with an address of 5060
14 Matthew Meadow Court, Alpharetta, Georgia that was the
15 passenger that Deputy Embrey told you about. Take a look
16 at State's Exhibit 13. Deputy Thompson -- or Corporal
17 Thompson had testified that it was Estavan Cocampo. Could
18 it be just a minor transcription error in terms of the
19 report's concerned? But look at the address. Estavan
20 Cocampo, 5060 Matthew Meadow Court. The exact same guy.
21 Essentially, his partner in crime, ladies and gentlemen.

22 So, if we're talking about trust and experience and
23 life experiences and trusting your eyes, those are all
24 very fair points. Trust your eyes. Trust your ears.
25 Trust -- trust that you will make the right decision.

1 You're the one that has to make this decision for
2 yourself. You have to consider all of the evidence.

3 I'm going to talk to you a little bit about
4 reasonable doubt. Mr. Pilgrim likes to talk to you about
5 percentages and how that's something that needs to -- that
6 the percentage of the accuracy of the HGN evaluation is
7 something that you shouldn't hang your hat on because the
8 HGN as conducted by an expert officer, such as Deputy
9 Embrey -- and let's just get it out of the way. The
10 expert that came in yesterday testified to you that he had
11 no problem with the manner in which field sobriety was
12 conducted, and he had no problem with how Deputy Embrey --
13 took Deputy Embrey as beyond well-experienced and the fact
14 that he observed six out of six clues is, in fact,
15 consistent with his experience from what he knows.

16 This is also a guy who hasn't made a DUI arrest in
17 over ten years. And conveniently makes 90 percent of his
18 income on a fledgling expert-witness endeavor where he's
19 testifying on behalf of DUI defendants, and the other ten
20 percent he's marketing to DUI lawyers at lectures. Kind
21 of -- I mean, you're going to hear issues, you're going to
22 hear instructions about bias. And I'm not going to sit
23 here and say Mr. Singley's not entitled to a defense. But
24 a dog and pony show does not equate to reasonable doubt.

25 Trust your eyes, ladies and gentlemen. Trust your

1 eyes, that's a very definitive statement. But it's a
2 little bit insulting to peoples' intelligence when you
3 hear trust your eyes and then you're presented with smoke
4 and mirrors. It makes no sense.

5 And to say that the State has provided nothing to you
6 in terms of the Intoxilyzer 5000 result and the experience
7 the officer has in conducting field sobriety evaluations
8 and everything that went to Deputy Embrey's arrest of the
9 defendant.

10 Let's take a look at the documents. Everything is
11 here. It's all going to come back to you. You'll have
12 the video. You'll have Deputy Embrey's qualifications.
13 You're going to have the certificate of inspection by the
14 machine, which was conducted just three days before Mr.
15 Singley provided his breath sample. You're going to have
16 the machine subsequent -- or the inspection subsequent to
17 that, which was in October. Both certificates show that
18 the machine passed all inspections.

19 Deputy Embrey, while he -- according to Mr. Pilgrim's
20 handbook says you're not supposed to know anything about
21 the machine, when you are working with the machine on a
22 regular basis and you have familiarity with how that
23 machine operates, when you're doing something on a regular
24 basis, you know when something's not functioning properly.
25 Deputy Embrey's had experience both before and after with

1 regard to that machine.

2 He testified that everything was three. All its
3 component parts were -- all its component parts were
4 functioning. Everything was there. Everything was
5 properly operating. He knows the machine. It's the
6 machine assigned to the sheriff's office. It's a machine
7 that other than a hypothetical, this machine can cause
8 error, you know -- you were given absolutely nothing
9 yesterday afternoon about this particular machine
10 registering something which would have shown some sort of
11 erroneous message.

12 And we're not talking about this is a .081, this is a
13 .082. We're talking about somebody who's one-and-a-half
14 times the legal limit. Given the benefit of the doubt,
15 give him .005, .115 is still over the legal limit; .110,
16 still over; .10, still over; all, the way up to .085.
17 We're, like I said, one-and-a-half times the legal limit.
18 There's no question that this is a valid test.

19 Trust your eyes. Read the Intox slip. This is
20 yours. Like I said, in order to -- there -- and
21 understand also, there are certain requirements the State
22 has to meet. And questions can be raised about a test,
23 but the time for questions is prior to the result coming
24 in. This is the result. It's in. You have the
25 certificates to show that it's in.

1 You need to trust the Court and trust that we do our
2 jobs to present to you the best evidence that you have to
3 consider the case. The best evidence you have to consider
4 the case is already in front of you. You have Deputy
5 Embrey's testimony. You have all the documentation and
6 that should lead you to no conclusion but the fact that he
7 was under the influence of alcohol, driving with an
8 unlawful alcohol content, above the legal limit of .08.

9 And not that I'm conceding anything or throwing
10 anything away, I will talk to you about the DUI less safe
11 case. And Mr. Pilgrim is right. I will talk about issues
12 of tolerance. We're talking about someone who admittedly,
13 on video when Deputy Embrey had the conversation freely,
14 voluntarily -- freely and voluntarily by Mr. Singley
15 talking about where he went to school and it was kind of
16 hard for him getting through college 'cause his parents
17 had been patient with him and kind of, I guess, the rough
18 time he was going through.

19 He volunteered that he went to school at Alabama, was
20 concerned about the football game they were playing. I
21 think they were playing Arkansas. He was making sure that
22 he wanted to get out jail in time to go to watch the game.
23 And the deputy said I bet you had fun there. And he goes,
24 yeah, probably too much. Probably too much.

25 Everyone's had that time. Everyone's had that 19-,

1 20-, 21-, 22-year-old time where they sowed their oats.
2 They may have ingested a little too much alcohol.
3 Everyone's been there. But when you get to a point where
4 those decisions that you either don't have the self-
5 control to keep yourself from getting in the vehicle, or
6 you don't have the friends to say, hey, look, you've had
7 too much, that's when it becomes a problem. That's when
8 it's a problem for me. That's when it's a problem for
9 this county. And that's when it should be a problem for
10 you.

11 Ladies and gentlemen, I submit to you that there's
12 ample evidence of the less-safe charge, based solely on
13 the fact that Deputy Embrey is highly trained. He
14 observed Mr. Singley conduct six of six on the HGN
15 evaluation, driving on Georgia 400 -- while people have a
16 tendency to speed on Georgia 400, I think it's been called
17 the Atlanta Autobahn for a reason. When we're talking
18 about someone doing near 100 miles an hour at 2:00 in the
19 morning in pitch dark, with an intoxicated passenger and
20 you're having one-and-a-half times the legal limit, that's
21 unacceptable.

22 It's time to own your decisions. He owned -- he knew
23 the decision he made that night. He knew the decision he
24 made. He was -- he knew he was guilty at the time. And,
25 like I said, coming and saying here's an expert who has

1 credentials, yet hasn't made a case in ten years,
2 testifies on behalf of the State in a limited capacity in
3 Florida about the Intoxilyzer 8000, like there's some sort
4 of grand evolution between an Intox 5000 and the Intox
5 8000.

6 The Intox 5000 has been the standard in Georgia by
7 the Georgia Bureau of Investigations. Is it a government
8 entity? Yes. Mr. Pilgrim is not suggesting you mistrust
9 your government. I'm not saying you need to
10 wholeheartedly trust your government in everything they
11 do. But at the same time because the State has the burden
12 there are certain procedures and safeguards that have to
13 be employed in order to utilize a test result. Those
14 safeguards and measures were employed in this case. That
15 test result is in. You have it. You have to consider the
16 evidence that's there.

17 The less-safe behavior you see is the driving
18 behavior that you -- that was observed by Deputy Embrey
19 and he testified to and the defendant freely and readily
20 admitted that he was being stupid. He was being an idiot.
21 He was apologizing.

22 Well, the time for judgment is now. This is your
23 decision, ladies and gentlemen. I'm not going to take it
24 any more lightly than that. I don't think you -- I don't
25 think you should take it lightly. I want y'all to take

1 your deliberation seriously. Consider all of the
2 evidence. Watch the videos again.

3 We're here at your -- we're here at your leisure.
4 We'll be here until y'all reach a decision. Consider it
5 carefully because you do owe it to the defendant to review
6 the case. You owe it to the State to review the case
7 fairly and without bias or being partial in any way.
8 That's why you're here. That's why you were selected as
9 jurors.

10 I'm not going to take anymore of your time because we
11 are -- here we are nearing Friday at noon, y'all have been
12 limited for about a week. And we appreciate your time. I
13 think the question and the answer is clear that y'all have
14 to make. And I ask you to find him guilty on all counts.

15 THE COURT: You're considering the case of the State
16 of Georgia versus Derek Michael Singley, which is
17 Accusation Number 10M-514. The defendant in this case has
18 been accused by the solicitor of this county for the
19 offenses of driving under the influence per se, driving
20 under the influence less safe, speeding, speeding in
21 excess, and driving without required headlights.

22 The accusation reads as follows: Count 1, on behalf
23 of the people of the State of Georgia, the undersigned, as
24 prosecuting attorney for Forsyth County, does hereby
25 charge and accuse Derek Michael Singley with the offense

1 of driving under the influence of alcohol, per se, on or
2 about September 25th, 2010, by being in actual physical
3 control of a moving vehicle while having an alcohol
4 concentration of 0.08 grams or more at any time within
5 three hours after such control ended, from alcohol
6 consumed before such control ended, in violation of
7 Official Code of Georgia Annotated 40-6-391(a), (5).

8 Count 2, on behalf of the people of the State of
9 Georgia, the undersigned, as prosecuting attorney for
10 Forsyth County does hereby charge and accuse Derek Michael
11 Singley with the offense of driving under the influence of
12 alcohol, less safe, on or about September 25, 2010, by
13 being in actual physical control of a moving vehicle while
14 under the influence of alcohol to the extent that it was
15 less safe for the accused to do so, in violation of
16 Official Code of Georgia Annotated 40-6-391(a), (1).

17 Count 3, on behalf of the people of the State of
18 Georgia, the undersigned, as prosecuting attorney for
19 Forsyth County, does hereby charge and accuse Derek
20 Michael Singley with the offense of speeding on or about
21 September 25, 2010, by operating a motor vehicle at 85
22 miles per hour on Georgia 400 when the speed limit there
23 was 65 miles per hour, in violation of Official Code of
24 Georgia Annotated 40-6-181.

25 Count 4, on behalf of the people of the State of

1 Georgia, the undersigned, as prosecuting attorney for
2 Forsyth County, does hereby charge and accuse Derek
3 Michael Singley with the offense of speeding in excess on
4 or about September 25, 2010, by operating a motor vehicle
5 at a speed in excess of the posted speed limit of 65 miles
6 per hour on Georgia 400, in violation of Official Code of
7 Georgia Annotated 40-6-181.

8 Count 5, on behalf of the people of the State of
9 Georgia, the undersigned, as prosecuting attorney for
10 Forsyth County, does hereby charge and accuse Derek
11 Michael Singley with the offense of driving without
12 required headlights on or about September 25, 2010, by
13 driving a motor vehicle upon the highways of the State
14 with no headlights on between a half-hour after sunset and
15 a half-hour before sunrise when there was not sufficient
16 visibility to render clearly discernible persons and
17 vehicles on the highway at a distance of 500 feet ahead,
18 in violation of Official Code of Georgia Annotated 40-8-7
19 and 40-8-20.

20 The above offenses having occurred in Forsyth County,
21 Georgia, contrary to the laws of this state, the good
22 order, peace, and dignity thereof. By Leslie Case
23 Abernathy, Solicitor General.

24 The accusation was returned into court on November
25 29th of 2010. And to this accusation the defendant has

1 entered a plea of not guilty.

2 The accusation and the plea form the issue that you
3 are to decide. Neither the accusation nor the plea of not
4 guilty are evidence.

5 This defendant is presumed to be innocent until
6 proven guilty. The defendant enters upon the trial of the
7 case with the presumption of innocence in his favor. This
8 presumption remains with the defendant until it is
9 overcome by the State with evidence that is sufficient to
10 convince you beyond a reasonable doubt that the defendant
11 is guilty of the offense charged.

12 No person shall be convicted of any crime unless and
13 until each element of the crime is proven beyond a
14 reasonable doubt. The burden of proof rests upon the
15 State to prove every material allegation of the accusation
16 and every essential element of the crime beyond a
17 reasonable doubt. There is no burden of proof upon the
18 defendant whatsoever, and the burden never shifts to the
19 defendant to introduce evidence or to prove innocence.
20 When a defense is raised by the evidence, the burden is on
21 the State to negate or disprove it beyond a reasonable
22 doubt.

23 However, the State is not required to prove the guilt
24 of the accused beyond all doubt or to a mathematical
25 certainty. A reasonable doubt means just what it says. A

1 reasonable doubt is a doubt of fair-minded, impartial
2 juror, honestly seeking the truth. A reasonable doubt is
3 a doubt based upon common sense and reason. It does not
4 mean a vague or arbitrary doubt. But is a doubt for which
5 a reason can be given, arising from a consideration of the
6 evidence, a lack of evidence, or a conflict in the
7 evidence.

8 After giving consideration to all the facts and
9 circumstances of this case, if your minds are wavering,
10 unsettled, or unsatisfied, then that is a doubt and you
11 should acquit the defendant. But, if that doubt does not
12 exist in your minds as to the guilt of the accused, then
13 you would be authorized to convict the defendant.

14 If the State fails to prove the defendant's guilt
15 beyond a reasonable doubt, it would be your duty to acquit
16 the defendant.

17 Now, facts and circumstances that merely place upon
18 the defendant a grave suspicion of the crime charged or
19 that merely raise a speculation or conjecture of the
20 defendant's guilt are not sufficient to authorize a
21 conviction of the defendant.

22 It is my responsibility to determine the law that
23 applies to this case and to instruct you on that law. And
24 you're bound by these instructions. It is your
25 responsibility to determine the facts of the case from all

1 the evidence presented. Then you must apply the law I
2 give you in the charge to the facts as you find them to
3 be.

4 Now, evidence is the means by which any fact that is
5 put in issue is established or disproved. Evidence
6 includes all of the testimony of the witnesses and the
7 exhibits admitted during the trial. It also includes any
8 stipulations, which are facts agreed to by the lawyers.
9 It does not include the accusation, the plea of not
10 guilty, opening statements, or closing arguments by the
11 lawyers, or the questions asked by the lawyers.

12 Evidence may be either direct or circumstantial or
13 both. Direct evidence is evidence that points immediately
14 to the question at issue. Evidence may also be used to
15 prove a fact by inference. This is referred to as
16 circumstantial evidence. Circumstantial evidence is the
17 proof of facts or circumstances, by direct evidence, from
18 which you may infer other related or connected facts that
19 are reasonable and justified in the light of your
20 experience.

21 To warrant a conviction on circumstantial evidence,
22 the proven facts must not only be consistent with the
23 theory of guilt, but also exclude every other reasonable
24 theory other than the guilt of the accused. The
25 comparative weight of circumstantial evidence and direct

1 evidence on any given issue is a question of fact for the
2 jury to decide.

3 You must decide the credibility or believability of
4 the witnesses. It is for you to determine which witness
5 or witnesses you believe or do not believe, if there are
6 some that you do not believe.

7 In deciding credibility, you may consider all the
8 facts and circumstances of the case, the manner in which
9 the witnesses testify, their intelligence, their interest
10 or lack of interest in the case, their means and
11 opportunity for knowing the facts about the which they
12 testify, the nature of the facts about which they testify,
13 the probability or improbability of their testimony and of
14 the occurrences about which they testify. You may also
15 consider their personal credibility insofar as it may have
16 been shown in your presence and by the evidence.

17 Now, when you consider the evidence in this case, if
18 you find a conflict, you should settle this conflict, if
19 you can, without believing that any witness made a false
20 statement. If you cannot do so, then you should believe
21 that witness or those witnesses whom you think are best
22 entitled to belief. You must determine what testimony you
23 will believe and what testimony you will not believe.

24 Now, an admission or an incriminating statement as
25 applied to a criminal case is a statement made by the

1 defendant out of court and in advance of trial of a fact
2 or facts pertinent to the issue or tending in connection
3 with other facts to prove the guilt of the accused or to
4 disprove some defense set up by the accused. Whether the
5 defendant in this case did or did not make any admission
6 or incriminating statement is a question of fact for you
7 to determine.

8 I charge you that testimony had been given by certain
9 witnesses who, in law, are termed experts. The law
10 permits persons expert in certain areas to give their
11 opinions derived from their knowledge of that area. The
12 weight which is to be given to the testimony of expert
13 witnesses is a question to be determined by the jury. The
14 testimony of an expert, like that of any other witness, is
15 to be received by you and given only such weight as you
16 think it is properly entitled to receive. You are not
17 required to accept the opinion testimony of any witness,
18 expert or otherwise.

19 Now, the defendant in a criminal case is under no
20 duty to present any evidence tending to prove innocence
21 and is not required to take the stand and testify in the
22 case. If the defendant elects not to testify, no
23 inference hurtful, harmful, or adverse to the defendant
24 shall be drawn by the jury, nor shall such fact be held
25 against the defendant in any way.

1 Sometimes evidence is admitted for a particular
2 purpose. Such evidence may be considered by the jury for
3 the sole issue or purpose for which the evidence is
4 introduced and not for any other purpose.

5 The law provides that evidence of other offenses of
6 this defendant that are similar or connected to the
7 offense for which the defendant is on trial may be
8 considered for the limited purpose of showing, if it does,
9 the bent of mind or course of conduct in the crime charged
10 in the case now on trial.

11 Such evidence, if any, may not be considered by you
12 for any other purpose. The defendant is on trial for the
13 particular offense charged in this accusation only, and he
14 is not on trial for the other offense. The Court does not
15 express an opinion as to whether the defendant has
16 committed any other offense; this is solely a matter for
17 your determination.

18 However, I further instruct you that before you may
19 consider any other offense for the limited purposes
20 stated, you must first determine whether the accused
21 committed the other offense. If so, you must then
22 determine whether the act was similar enough to the crime
23 charged in the accusation such that proof of the other
24 offense tends to prove the crime charged in the
25 accusation, keeping in mind the limited purpose of such

1 evidence.

2 This defendant is charged with a crime against the
3 laws of this State. A crime is a violation of a statute
4 of this State in which there is a joint operation of an
5 act or omission to act and intention.

6 Intent is an essential element of any crime and must
7 be proved by the State beyond a reasonable doubt. Intent
8 may be shown in many ways, provided you, the jury, believe
9 that it existed from the proven facts before you. It may
10 be inferred from the proven circumstances or by acts and
11 conduct, or it may be, in your discretion, inferred when
12 it is the natural and necessary consequence of the act.
13 Whether or not you draw such an inference is a matter
14 solely within your discretion.

15 Criminal intent does not mean an intention to violate
16 the law or to violate a penal statute, but means simply
17 the intention to commit the act that is prohibited by the
18 statute.

19 To prove DUI, the State need not prove that the
20 defendant intended to drive under the influence. But the
21 State must prove the defendant's condition of being under
22 the influence of alcohol to the extent of impairment and,
23 while in this condition, the intent to drive. This
24 general intent may or may not be inferred from the conduct
25 of the accused and other circumstances.

1 Now, this defendant will not be presumed to have
2 acted with criminal intent, but you may find such
3 intention or the absence of it, upon a consideration of
4 words, conduct, demeanor, motive, and other circumstances
5 connected with the act for which the accused is being
6 prosecuted.

7 Now, as to driving under the influence per se, it
8 shall be unlawful for any person to drive or be in actual
9 physical control of any moving vehicle while there is an
10 alcohol concentration of .08 grams or more in the person's
11 blood at any time within three hours after driving or
12 being in actual physical control of a moving vehicle from
13 alcohol consumed before such driving or physical control
14 ended.

15 A person shall not be in actual -- and as to driving
16 under the influence less safe, a person shall not drive or
17 be in actual physical control of any moving vehicle while
18 under the influence of alcohol to the extent that it is
19 less safe for the person to drive.

20 It shall be unlawful for any person, while under the
21 influence of alcohol, to drive or be in actual physical
22 control of any moving vehicle anywhere within this State.
23 A driver or operator of a motor vehicle is under the
24 influence of alcohol when the person is affected by
25 alcohol to the extent that it is less safe for the person

1 to drive than it would be if the person were not affected
2 by alcohol. A driver who is less safe is less efficient.
3 Such a driver is less skillful, less coherent, less able,
4 less qualified, and less proficient.

5 In deciding this issue, you may consider anything in
6 the evidence you find relevant in deciding whether the
7 defendant was a less-safe driver. Specifically, as to the
8 consumption of alcohol, you may consider among other
9 factors, the smell or lack of smell of alcoholic beverages
10 on the defendant's breath and/or person and whether any
11 test indicated the presence of alcohol in the defendant's
12 system.

13 As to whether the defendant was less safe to drive,
14 you may consider the factors you deem relevant including
15 but not limited to, the actual manner of driving the motor
16 vehicle; the defendant's control of his mental and or
17 physical abilities; the defendant's demeanor; the physical
18 condition of the defendant and any expert testimony.

19 Merely showing that the defendant had been drinking
20 or that there was the smell of alcohol on the defendant's
21 breath or person, without proof of the manner of driving
22 or the ability to drive is insufficient to prove the
23 defendant was guilty of driving under the influence of
24 alcohol.

25 Under the laws of this State, a witness who

1 satisfactorily shows that he had the opportunity to
2 observe, and did observe, the condition of another may
3 testify whether that person was under the influence and
4 the extent thereof, stating the facts upon which the
5 opinion is based. A witness may offer an opinion as to
6 whether the defendant was under the influence of alcohol
7 and because of any such intoxication defendant was a less-
8 safe driver.

9 The sufficiency of the facts supporting that opinion
10 must be proven to you beyond a reasonable doubt before you
11 may afford any weight to the opinion in your
12 deliberations.

13 Now, field sobriety evaluations are voluntary and no
14 person may be compelled to submit to such tests. The
15 officer is not required to tell the subject that the tests
16 are voluntary.

17 The horizontal gaze nystagmus or HGN test is based on
18 well-known and medically accepted principles that
19 nystagmus can be caused by the ingestion of alcohol. The
20 HGN test is an accepted common procedure that has reached
21 a state of verifiable certainty in the scientific
22 community and is admissible as a basis upon which an
23 officer can determine whether a driver was impaired by
24 alcohol.

25 You may consider the horizontal gaze nystagmus

1 evaluation as a symptom indicative of, though not
2 determinative of the presence of alcohol. In other words,
3 the presence of alcohol is just one factor that might
4 cause horizontal gaze nystagmus to occur. Horizontal gaze
5 nystagmus or HGN evaluation of a suspect may be subject to
6 human error in its administration or interpretation. The
7 jury must decide what weight, if any, to give the HGN
8 evaluation.

9 Now, as to speeding, a person commits the offense of
10 speeding when that person operates a motor vehicle on a
11 roadway at a specific speed alleged in the accusation
12 above the posted speed limit.

13 As to speeding in excess, a person commits the
14 offense of speeding when that person operates a motor
15 vehicle upon a roadway at a speed above the speed limit.

16 Now, driving without required headlights, every
17 vehicle upon a highway within this State at any time from
18 a half-hour after sunset to a half-hour before dawn shall
19 display lights, including headlights.

20 Now, as to your verdict, if you find the defendant
21 not guilty, the form of your verdict would be, we, the
22 jury, find the defendant not guilty. Should you find the
23 guilty defendant on one or more counts and not guilty on
24 other counts, you should specify in your verdict whether
25 you find the defendant guilty or not guilty as to each

1 count. If you find the defendant guilty, the form of your
2 verdict would be, we, the jury, find the defendant guilty.

3 Now, by no ruling or comment that the Court has made
4 during the progress of the trial has the Court intended to
5 express any opinion upon the facts of this case, upon the
6 credibility of the witnesses, upon the evidence, or upon
7 the guilt or the innocence of the defendant.

8 Whatever your verdict is, it must be unanimous, that
9 is, agreed by all. The verdict must be signed by one of
10 your members as foreperson, dated, and returned to be
11 published in court.

12 You will have with you in the jury room this verdict
13 form and it has a blank for each of the five counts in
14 which you can insert your verdict of either guilty or not
15 guilty, a blank for the date, and signature line for the
16 foreperson.

17 Now, you're only to be concerned with the guilt or
18 innocence of the defendant. You are not to concern
19 yourself with the punishment.

20 One of your first duties in the jury room will be to
21 select one of your number to act as foreperson, who will
22 preside over your deliberations and who will sign the
23 verdict to which all six you freely and voluntarily agree.

24 You should start your deliberations with an open
25 mind. Consult with one another and consider each other's

1 views. Each of you must decide this case for yourself,
2 but you should do so only after a discussion and
3 consideration of the case with your fellow jurors. Do not
4 hesitate to change an opinion if convinced that it is
5 wrong. However, you should never surrender an honest
6 opinion in order to be congenial or to reach a verdict
7 solely because of the opinions of the other jurors.

8 You may now retire to the jury room, but do not begin
9 your deliberations until you receive your accusation, the
10 verdict form, and any evidence that's been admitted during
11 the trial.

12 You may now retire to the jury room.

13 (Whereupon, the jury left the courtroom and the
14 proceedings continued as follows:)

15 THE COURT: Exceptions to the charge?

16 ASST. SOLICITOR GENERAL PARK: None from the State.

17 MR. PILGRIM: No, Judge.

18 THE COURT: All right. Here's the verdict form and
19 the accusation. If y'all will go over the evidence that
20 is to go out.

21 (Whereupon, following a recess while the jury
22 deliberated, the proceedings continued as follows:)

23 THE COURT: All right. We have three questions --
24 actually, it's one question. "We need clarification on
25 Count 3 versus Count 4. What is the definition of

1 speeding versus speeding in excess? And are the
2 definitions reversed in the instructions?"

3 I'll tell them, first off, the definitions aren't
4 reversed. And second off, the speeding is alleged to be a
5 specific speed above the speed limit, whereas, speeding in
6 excess is just going over the speed limit, no speed
7 specified just set out, and that's what I'm going to tell
8 them.

9 ASST. SOLICITOR GENERAL PARK: That's fine.

10 THE COURT: All right. Go ahead and bring them in.

11 (Whereupon, the jury entered the courtroom and the
12 proceedings continued as follows:)

13 THE COURT: All right. You can be seated. I have
14 your question that says, "We need clarification as to
15 Count 3 versus Count 4. What's the definition of speeding
16 versus speeding in excess? And are the definitions
17 reversed in the instructions?"

18 To answer the last question first, no, they're not.
19 What you have is in Count 3 it is alleged that the
20 defendant was speeding a specific speed over the speed
21 limit, that he was driving 85 in a 65 zone. Count 4 just
22 alleges that he was driving over 65 miles an hour, no
23 speed specified.

24 Maybe the language as printed in the instructions
25 isn't quite as clear, but does that clear that question

1 up?

2 THE JUROR: Yes. So speeding in excess is the one
3 that just says they're over 65?

4 THE COURT: Exactly. In excess --

5 THE JUROR: Speeding in excess was -- the in excess
6 says you're way over, the way it sounds.

7 THE COURT: No. It just means in excess of the speed
8 limit. The speeding in excess is really just a short
9 phrase, it's probably shortened a little too much, and it
10 just means speeding in excess of the posted speed limit is
11 really what the whole phrase would be, not excessive
12 speeding.

13 THE JUROR: Right.

14 THE COURT: Which is the way I think the sense that
15 you're picking up.

16 THE JUROR: Right. Exactly.

17 THE COURT: But if it's charged that you were -- you
18 know, you had a charge -- I'm just trying to distinguish
19 these so that the instruction as to both counts is not the
20 exact same instruction. Trying to make some difference --

21 THE JUROR: We were just six of six that it meant
22 exactly opposite of what you said. Excess means way
23 above, way too fast.

24 All right. We've got it.

25 THE COURT: I think in the future, we'll no longer

1 abbreviate it that way, just say speeding in excess of the
2 posted speed limit.

3 THE JUROR: Thank you.

4 THE COURT: Hopefully that will clear that up.

5 (Whereupon, the jury left the courtroom.)

6 THE COURT: Any objection to the Court's response to
7 the jury?

8 ASST. SOLICITOR GENERAL PARK: Not from the State.

9 MR. PILGRIM: No, Judge.

10 THE COURT: All right. That will be marked C-1 and
11 filed with the court reporter.

12 (Whereupon, the exhibit was marked and admitted into
13 evidence as Court's Exhibit Number 1.)

14 THE COURT: All right. We'll be in recess until we
15 hear further.

16 (Whereupon, a recess was had while the jury
17 deliberated, following which the proceedings continued as
18 follows:)

19 THE COURT: I am informed that we have a verdict.
20 Are we ready to receive the verdict?

21 ASST. SOLICITOR GENERAL PARK: The State is ready,
22 your Honor.

23 MR. PILGRIM: Yes, Judge.

24 THE COURT: Let the record reflect the defendant is
25 present with his counsel. The State's attorney is

1 present.

2 Let's go ahead and bring in the jury.

3 (Whereupon, the jury entered the courtroom and the
4 proceedings continued as follows:)

5 THE COURT: All right. You can be seated.

6 Ladies and gentlemen of the jury, have you selected a
7 foreperson?

8 THE JURY FOREPERSON: Yes.

9 THE COURT: Could you please stand. And has the jury
10 reached a verdict?

11 THE JURY FOREPERSON: We have, your Honor.

12 THE COURT: Has it been reduced to writing, signed
13 and dated by you as foreperson?

14 THE JURY FOREPERSON: It has.

15 THE COURT: And could you publish your verdict, that
16 is, read the verdict?

17 THE JURY FOREPERSON: We, the jury, find as follows:
18 Guilty as to Count 1, driving under the influence of
19 alcohol, per se; guilty as to Count 2, driving under the
20 influence of alcohol, less safe; not guilty as to Count 3,
21 speeding; guilty as to Count 4, speeding in excess; guilty
22 as to Count 5, driving without required headlights.

23 THE COURT: All right. If you would, pass the
24 verdict form to the bailiff and if the bailiff would allow
25 Counsel to inspect the verdict form.

1 (Whereupon, there was a pause in the proceedings.)

2 THE COURT: All right. Are there any matters I need
3 to take up with this jury prior to dismissing them?

4 MR. PILGRIM: No, Judge.

5 ASST. SOLICITOR GENERAL PARK: Not for the State.

6 THE COURT: All right. Ladies and gentlemen of the
7 jury, we want to thank you for your service. I know it
8 takes you away from your normal lives and your jobs and
9 your families and everything else that you'd rather be
10 doing.

11 But what you're doing here is very important. You
12 have sat and you have listened, and you have met and you
13 have discussed, and you have voted, and you have decided,
14 and that's democracy. And it doesn't happen just every
15 two years or every four years when we have an election.
16 It happens every day in courthouses just like this all
17 across this country.

18 And as inefficient and inconvenient and frustrating
19 as it may seem, it's the best system anybody's devised.
20 And it's one of the reasons people are lined up for miles
21 wanting to get into this country because this is one of
22 the things that protects the freedoms of the people of
23 this country. And we couldn't do it without you.

24 We thank you for your service. Our clerk, Mr. Allen,
25 is here and he has the checks. On the way out the bailiff

1 is going to want her badge back. Mr. Allen will have your
2 checks and letters evidencing your jury service that you
3 can show your employers, anyone that you need to show that
4 you were -- you actually were on jury duty.

5 The attorneys may want to talk to you about the case
6 on the way out. If you want to talk to them, you can. If
7 you don't want to talk to them, you don't have to, you can
8 just go on about your business.

9 But with that, you can be excused and we thank you
10 for your service.

11 (Whereupon, the jury left the courtroom and the
12 proceedings continued as follows:)

13 THE COURT: All right. Mr. Singley, the jury having
14 found you guilty of Counts 1, 2, 4, and 5 of the
15 accusation, the Court's going to set sentencing, rather
16 than trying to get probation over here.

17 ASST. SOLICITOR GENERAL PARK: I was just texting,
18 possibly. But I don't think we'll be able to get them
19 over here.

20 THE COURT: We'll just go ahead and set sentencing in
21 the case for next Thursday and --

22 ASST. SOLICITOR GENERAL PARK: Your Honor, I'm not
23 going to be here next Thursday.

24 THE COURT: Where are you going to be?

25 ASST. SOLICITOR GENERAL PARK: I'm returning after a

1 -- what I can only categorize as a hectic week. Next week
2 my wife and I are taking our kids to Montana to see my new
3 niece and then I'm going to see some family in Oklahoma.
4 I'll be back after Labor Day. It's a long way.

5 THE COURT: All right. September 8th.

6 ASST. SOLICITOR GENERAL PARK: Perfect.

7 MR. PILGRIM: Fine with me.

8 THE COURT: All right. This will be on the September
9 8th nonjury calendar. The Court will continue the bond.

10 MR. PILGRIM: Thank you, Judge.

11 THE COURT: All right. No further business to come
12 before the Court, the Court will stand adjourned.

13 (Whereupon, the proceedings reported were concluded.)

14 (END VOLUME III)

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