

IN THE STATE COURT OF HENRY COUNTY
STATE OF GEORGIA

STATE OF GEORGIA)
)
vs.) ACCUSATION
) NO. 14SR0290
)
BRIAN WILLIAMS,)
)
Defendant.)

COPY

EXPERT TESTIMONY
JURY TRIAL

JUNE 26TH, 2014
HENRY COUNTY STATE COURT
MCDONOUGH, GEORGIA
HONORABLE JAMES T. CHAFIN, Presiding

* * * * *

DIANE J. DuBOIS
Certified Court Reporter
P. O. Box 2907
McDonough, Georgia 30253-1778
State Court (770) 288-7380
Cell (404) 202-7997

FILED IN STATE COURT
HENRY COUNTY

OCT 27 P 2 13

DIANE J. DuBOIS
Certified Court Reporter

APPEARANCES OF COUNSEL:

For the State:

Brian Johnston, Attorney
Office of Solicitor General
One Judicial Center
McDonough, Georgia 30253
(770) 288-7190

For the Defendant:

Suesan Miller, Attorney
Miller & Key, P.A.
79 Lawrenceville Street
McDonough, Georgia 30253
(770) 515-0951

I N D E X

WITNESS:

PAGE NUMBER:

Matthew E. Malhiot

Direct examination by Ms. Miller.....	4
Cross-examination by Mr. Johnston.....	34
Redirect examination by Ms. Miller.....	51

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

P R O C E E D I N G S

(The following is a transcript of the expert testimony of Matthew E. Malhiot.)

MS. MILLER: Do you solemnly swear or affirm the testimony you are about to give this Court is the truth, the whole truth and nothing but the truth under the penalty of perjury?

THE WITNESS: Yes, ma'am, I do.

Whereupon,

MATTHEW E. MALHIOT

was called as a witness for the Defense, and being first duly sworn was examined and testified as follows:

DIRECT EXAMINATION

BY MS. MILLER:

Q. Have a seat, please.

A. Thank you, Counsel.

Q. And Mr. Malhiot, would you please introduce yourself to the jury and if you could spell your last name?

A. Certainly. My name is Matthew E. Malhiot and it's spelled M-a-l-h-i-o-t and it's pronounced m-y-i-t, my it.

Q. And Mr. Malhiot, how are you currently employed?

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

Q. And how long have you been working with Forensic

1 Alcohol Consulting and Training?

2 A. I started that business September -- August/September
3 of 2010 so we're pushing four years now.

4 Q. Okay. And can you describe to the jury exactly what
5 it is that your company does?

6 A. Certainly. We provide expert consulting services,
7 expert witness services, training services to the legal
8 practitioner in any area that has alcohol as an element, whether
9 it's criminal defense as it is today, criminal prosecution,
10 civil litigation where somebody is suing somebody else,
11 mediation where it's work-related alcohol, but any of the areas
12 where alcohol may be involved.

13 Q. Okay. And you offer the same services to the State --

14 A. I do.

15 Q. Okay. And have you testified for the prosecution in
16 cases?

17 A. I have. In Florida, many times. I used to work for
18 the State, but even in my independent consulting I've gone back
19 to Florida and testified for the State and been retained by the
20 prosecutors in DUI cases, capital murder cases, in Florida. So,
21 yes, I've returned to Florida to testify.

22 Q. And the prosecutor can get the same consulting
23 services from the GBI here --

24 A. Yes. Normally the -- each individual state has a
25 crime lab that offers expert services to the State and their

1 State employees so it's a lot cheaper for them to use State
2 employees than hire independent consultants.

3 Q. And before you started your consulting business, where
4 did you work?

5 A. I worked for the Florida Department of Law
6 Enforcement's alcohol testing program and that's Florida's
7 equivalent to the GBI's implied consent program. Each state has
8 an agency that has oversight over blood and breath testing in
9 DUI enforcement and in Florida it's the FDLE. In Georgia it's
10 the GBI.

11 Q. And how long did you work there?

12 A. 2002 through 2010.

13 Q. And what were your duties there?

14 A. I was responsible for breath testing instruments and
15 breath testing at a hundred police agencies, give or take,
16 depending on how many instruments were in service or out of
17 service. I was responsible for research and development in
18 breath testing. I was responsible for blood analyst permits.
19 Different analysts that worked in different crime laboratories
20 had to have a permit to do blood analytical work and we at the
21 Florida Department of Law Enforcement issued those permits. We
22 did research and development in forensic breath testing. We did
23 instrumentation inspection and repair, calibration. We provided
24 expert testimony and training services, all of the services
25 required to run a state level breath testing and blood testing

1 program.

2 Q. Okay. Did you leave that firm under good terms?

3 A. I did.

4 Q. And in fact your firm Forensic Alcohol Consulting and
5 Training was recommended by your previous supervisor, is that
6 correct?

7 A. Yes. The Twelfth Judicial Circuit in Sarasota,
8 Florida was -- called us based on a recommendation from my old
9 supervisor.

10 Q. Okay. Can you explain to the jury what you did for
11 the State of Florida as an independent consultant?

12 A. Yes. There was a -- a legal challenge in what's known
13 as a Frye standard. The legality and scientific reliability of
14 breath testing was challenged and the prosecutor had to provide
15 an independent consultant to testify as to the reliability of
16 the machine in specific breath testing cases. They could not
17 use State employees because they may have been biased so they
18 hired me as an independent consultant to come down and consult
19 and provide testimony on the Intoxilyzer 8000.

20 Q. Okay. And can you explain the training program that
21 you completed with the Florida Department of Law Enforcement's
22 alcohol testing program?

23 A. Yes. When I was first employed in January 2008 or
24 2010, I'm sorry, it was a nine-month training program. It was
25 full time. I was assigned to a training officer and a forensic

1 toxicologist. I completed training on ethanol and lower
2 molecular structured atoms and molecules, ethanol, methanol,
3 isopropanol, different types of alcohols. I also completed
4 training on toxicology and pharmacology of ethanol,
5 pharmacokinetics and pharmacodynamics. Those are fancy words on
6 how alcohol gets in the body, what the body does to the alcohol
7 molecule, what the alcohol molecule does to the body, how is
8 alcohol metabolized, how does it get out of the body. It even
9 goes into areas of how fermentation and home-brewing and
10 moonshine and how alcohol is made. So it -- training on the
11 complete life cycle of the alcohol molecule.

12 I was sent to Indiana University and completed training at
13 the Borkenstein Institute and Dr. Borkenstein in the 1950's was
14 the inventor of the Breathalyzer, thus the course was named
15 after him, and that course was entitled Highway Traffic Safety
16 Research and Litigation in Alcohol.

17 I returned to Indiana University and completed a course at
18 the management level, how to run and manage a state level
19 program, how to establish quality assurance, how to write state
20 administrative rules, how to work with legislators in the
21 forensic side in the crime lab and the legislators work together
22 to come up with good language for laws. Those type of things.
23 Also how to set up quality assurance in breath and blood testing
24 and how to do quality checks of different steps along the
25 process of forensic analysis.

1 I then went to Lafayette, Louisiana and took a course
2 entitled Ethanol Measurement and Its Interpretation. Ethanol is
3 the alcohol we find in human consumables, beer, wine, liquors.
4 And that course was specifically on different methods of
5 measuring how do we do breath testing, blood testing, urine
6 testing, different bodily substances, and what those
7 measurements mean, how do we interpret those measurements. I
8 also completed specific training on measurement uncertainty, how
9 -- how accurate is the measurements, how accurate or how
10 reliable are those numbers. We hear a number of 1-2-3, is that
11 perfect? What's the measurement uncertainty? What's the error
12 rate? How do we calculate those error rates? So that's
13 specific training in those areas.

14 I also had specific training from the manufacturer CMI,
15 Incorporated out of Owensboro, Kentucky on the Intoxilyzer 5000
16 and 8000 and other breath-testing instrumentation and I went to
17 the factory and completed those courses and I'm certified by the
18 manufacturer on the Intoxilyzer 5000 to operate, repair,
19 maintain, calibrate and as an instructor on the instrument.

20 That's a brief synopsis on the Florida training.

21 Q. Okay. You've had a lot of training.

22 A. I have.

23 Q. Okay. Before you worked for the State of Florida,
24 where did you work?

25 A. I was with the Cascade County Sheriff's Office in

1 Montana and at that time Montana also used the Intoxilyzer 5000.

2 Q. And what were your duties with Cascade County
3 Sheriff's Office?

4 A. I was responsible for the breath testing operations
5 for the county Sheriff's Office, the city Police Department,
6 that particular division of the Highway Patrol and Malmstrom Air
7 Force Base which was located in Cascade County and responsible
8 for the at that time weekly inspections of the Intoxilyzer,
9 repairs, calibrations and I was certified by the Montana
10 Division of Forensic Science to do those tasks.

11 Q. Okay. And before you would at the Sheriff's Office,
12 where did you work?

13 A. I served 20 years in the Air Force in law enforcement.
14 I retired in 1999 from the Air Force after 20 years in law
15 enforcement. Sixteen of those years were spent in Montana, four
16 years in Germany.

17 Q. Okay. And in the Air Force, is that when you became
18 to work with forensic alcohol?

19 A. Yes. When I was stationed in Montana I started my
20 work with the Montana Division of Forensic Science. I, through
21 basic law enforcement academy, had training in standardized
22 field sobriety, training through the Montana Highway Patrol, but
23 when I was an Air Force police officer I was also a shift
24 commander responsible for other police officers. I was a
25 training officer. So I worked most jobs within the police

1 department.

2 Q. Okay. Can you explain to the jury your formal
3 education after high school?

4 A. Certainly. I hold a Bachelor of Science in Criminal
5 Justice Administration with course work in anatomy, physiology,
6 criminalistics, forensics, the basic sciences.

7 Q. Okay. You don't have a PhD or a master's degree --

8 A. I do not have an advanced degree, no.

9 Q. Okay. Do you have any training in the area of DUI
10 enforcement?

11 A. Yes. Starting basic law enforcement academy way back
12 in the 70's. Then when I was in Montana I took course work
13 with the Montana Highway Patrol on standardized field sobriety.
14 I also completed standardized field sobriety instructor level
15 course and taught those courses in Montana and Florida.

16 I also completed a course from the U.S. Department of
17 Transportation entitled Instructor Workshop to be able to teach
18 National Highway Traffic Safety Administration curricula and
19 when I was in Florida I also completed the Florida instructor
20 techniques and was certified by the Standards and Training
21 Commission as a law enforcement instructor to teach at any law
22 enforcement academy in the state of Florida.

23 I also went to the University of North Florida Institute of
24 Police Technology and Management and completed standardized
25 field sobriety update courses. As curricula changed and updates

1 and new research was developed they update instructors
2 throughout the nation.

3 Q. So you taught other police officers how to administer?

4 A. I've taught police officers, prosecutors, defense
5 attorneys and was invited and taught at judges' conferences for
6 three consecutive years in Florida on breath testing and
7 standardized field sobriety.

8 Q. Now do you have any training in alcohol toxicology?

9 A. Yes. As I mentioned earlier alcohol toxicology,
10 pharmacology, pharmacokinetics and pharmacodynamics, all of those
11 areas.

12 Q. And you also have training about alcohol in the human
13 body, is that correct?

14 A. Yes, that is toxicology and pharmacology.

15 Q. Have you attended any other courses on DUI alcohol
16 testing or any other others that would be relevant to this case?

17 A. Yes. When I was with Florida and in Montana I was a
18 member -- still am a member of the International Association of
19 Chemical Testing and they have annual meetings where we have
20 cross training between the states.

21 Also, the Intoxilyzer machine is used by many states,
22 different versions, 5000, 8000, 9000, and they have what's known
23 as an intoxilyzer users group where people from most states get
24 together and exchange information and exchange training and
25 teachings.

1 Also teach and have been a student at the Florida Annual DUI
2 Alcohol and Drug Impaired Driving Symposium which is annually.
3 So I keep up with the latest research and attend conferences when
4 I can.

5 Q. Okay. And you have specific training on the CIM --
6 CMI. I'm sorry. CMI Intoxilyzer 5000EN which is used currently
7 in the state of Georgia, is that correct?

8 A. Yes. I've had certification from the manufacturer to
9 operate, maintain, repair, calibrate and as an instructor on the
10 instrument. Also used it in Montana and in Florida.

11 Q. So you are familiar with the device they used here?

12 A. I'm very familiar with the device.

13 Q. Now are you familiar with the Georgia inspection
14 procedure?

15 A. Yes. Georgia currently does a quarterly inspection on
16 the instrument. All of the procedures and tasks in that
17 inspection protocol I've personally done. I'm very familiar with
18 it.

19 Q. You've also had training in the area of field sobriety
20 testing?

21 A. Yes. I'm a certified instructor through the Montana
22 Division of Forensic Science and completed the National Highway
23 Traffic Safety Administration curricula as an instructor.

24 Q. Okay. And that includes the area of Horizontal Gaze
25 Nystagmus, is that correct?

1 A. Horizontal Gaze Nystagmus, yes ma'am.

2 Q. Okay. And how many courts have you testified in?

3 Let me change that. How many courts have declared you an expert?

4 A. Probably hundreds. Between Montana, Georgia, Florida,
5 different states, federal courts, military courts, probably close
6 to a hundred. I don't want to say hundreds, but close to a
7 hundred.

8 Q. Okay. In what areas have you been qualified as an
9 expert to testify?

10 A. That are relevant today, standardized field sobriety,
11 forensic breath testing, Intoxilyzer 5000, Horizontal Gaze
12 Nystagmus. Most areas of DUI.

13 Q. Have you been qualified as an expert before in this
14 court?

15 A. I have.

16 MS. MILLER: Your Honor, we would like to offer Mr.
17 Malhiot as an expert in the areas of standardized field
18 sobriety testing, Intoxilyzer 5000, and forensic breath and
19 alcohol analysis.

20 THE COURT: All right. Any objection?

21 MR. JOHNSTON: State will reserve any questions.

22 THE COURT: All right. He is tendered and will be
23 considered an expert in the fields enumerated by the defense
24 counsel.

25 BY MS. MILLER:

1 Q. Mr. Malhiot, you charge for your services, is that
2 correct?

3 A. I do. I charge a flat fee to review the case, review
4 the video, get the records, have consultation with you, provide a
5 report, watch the videos, give an opinion, and then I charge to
6 be compensated for my time while in the court here.

7 Q. How much did you charge to review this case?

8 A. It's a flat fee of \$600 for the complete case review,
9 report and consultation.

10 Q. Okay. Now every case that you review do you always
11 testify in court on those?

12 A. No. It's somewhere in the area of about 20% of the
13 cases I am retained for I go to court on and it's a number of
14 reasons why not. Sometimes the client can't afford to pay.
15 Sometimes I find something so good or bad, whichever way you look
16 at it, that the breath test is thrown out. Sometimes I can't
17 find anything wrong with the entire process. So there's a number
18 of reasons and to be honest the vast majority I don't hear back
19 after I have a consultation report and I don't know the exact
20 outcome.

21 Q. Now in this case you reviewed several things, is that
22 correct?

23 A. I did.

24 Q. And what did you review for this case?

25 A. I reviewed the police report, the video, the breath

1 test slip and I also reviewed what's known as the quarterly
2 inspection reports for a complete year for that breath test
3 machine. I also completed a review of the Georgia standards for
4 breath testing and a review of measurement uncertainty
5 calculations and CMI publications and International Association
6 of Chemical Testing publications in the area of measurement
7 uncertainty.

8 Q. Okay. And the first test that you reviewed in this
9 particular case was the Horizontal Gaze Nystagmus, the first
10 field sobriety test.

11 A. It was.

12 Q. Okay. And what was your findings on the Horizontal
13 Gaze Nystagmus?

14 A. When you review a Horizontal Gaze Nystagmus, unless you
15 have closeup cameras on somebody's eyeballs you cannot validate
16 what the officer saw and you can't discredit what the officer
17 saw. So all you can do is review to see did the officer do what
18 he was trained to do in the manner he was trained and I found
19 that the officer provided -- conducted the Horizontal Gaze
20 Nystagmus in accordance with the National Highway Traffic Safety
21 Administration standards. He did it the way he was supposed to
22 and the way he was trained.

23 Q. But you can't really tell what he saw with the eyes, is
24 that correct?

25 A. I can't, right.

1 Q. Okay. Now is that test a hundred percent accurate?

2 A. No. The original research put it at about 80% accurate
3 to find persons with an alcohol concentration above a .10. Later
4 research is kind of contradictory because it says it could be as
5 high as 94% accurate but it still may have a 28% error rate for
6 persons below an 0-8. So what the research is saying is that if
7 they're above an 0-8 it's 94% accurate. If they're below an 0-8
8 it can have a 20% error rate. So it's kind of wishy-washy
9 research, but it's not a hundred percent.

10 Q. Okay. Now the second test that you reviewed would have
11 been the Walk and Turn, is that correct?

12 A. Correct.

13 Q. Okay. And what were your findings on the Walk and
14 Turn?

15 A. I'd have to review my notes.

16 Q. Certainly. You did prepare a report for this, is that
17 correct?

18 A. I did. [Pause.]

19 I reviewed the officer's report and there are specific clues
20 that the officer is looking for. When the field sobriety was
21 adopted by National Highway Traffic Safety Administration they
22 tried to make it an objective standard, is there specific clues
23 that the officer is supposed to be looking for, and in this one
24 the specific clues are during the instructional phase do they
25 stay heel-to-toe. That's one. And two is do they start before

1 they're told to start. So those are two clues.

2 Then the officer during the walking stages is watching do
3 they touch heel-to-toe, do they keep their arms to their side, do
4 they keep walking and not stop, do they turn properly; those type
5 of things. And the officer wrote that he was swaying during the
6 instructions. That's an observation on the officer and if he
7 sees it he can document it but it is not a validated clue.

8 He also documented that he didn't do a proper turn. My
9 review of the video he appeared to do what the officer
10 demonstrated and told him to do. I disagreed with that -- that
11 finding. The -- the officer also documented that he missed heel-
12 to-toe on a number of steps. Well with the camera angle of the
13 video you couldn't see if he missed or did or not miss. You
14 can't say -- you couldn't validate those clues.

15 Q. Okay. You can only validate one clue in this, is that
16 correct?

17 A. Correct.

18 Q. Okay. And you also reviewed the One Leg Stand test, is
19 that correct?

20 A. I did.

21 Q. And what were your findings on the One Leg Stand?

22 A. The officer observed two clues on that and I validated
23 that those clues were evident on the video.

24 Q. Now do either of those tests, the One Leg Stand or the
25 Walk and Turn, do either of those tests test your driving skills?

1 A. No. They're divided attention tasks and they do not --
2 they're not driving tests.

3 Q. Okay. Are these tests a hundred percent accurate?

4 A. No. No field sobriety test is a hundred percent
5 accurate. The Walk and Turn and One Leg Stand are probably in
6 the areas of 76 to 84% reliability.

7 Q. Okay. And who are these tests usually designed by or
8 administered by?

9 A. They're designed by numerous researchers and tweaked in
10 the research laboratories but they're designed to be used by law
11 enforcement.

12 Q. And the agency that teaches everyone how to do this is
13 called NHTSA, is that correct?

14 A. Well, kind of but not really.

15 Q. Maybe you can explain --

16 A. The National Highway Traffic Safety Administration
17 commissioned the research to be done by different universities.
18 There was three specific research studies, one done in
19 California, one in Colorado, one in Florida.

20 Then the National Highway Traffic Safety Administration
21 along with the International Association of Chiefs of Police
22 published the curriculum and they gave the curricula to each of
23 the states and it's up to the states, each individual state law
24 enforcement academies, to do the teaching. So NHTSA doesn't
25 certify or physically do the teaching. They publish the

1 curricula for the states to use.

2 Q. Okay. But most police officers say that they do these
3 by NHTSA standards, is that correct?

4 A. There is a -- that is a NHTSA standard and, yes, every
5 state in the nation uses this, military police. It's adopted
6 nationwide as the gold standard for field sobriety.

7 Q. Okay. Now the last two tests, the officers are also
8 supposed to take into account a subject's weight or age or
9 physical agility, is that correct?

10 A. Yes. There are specific limiting factors with field
11 sobriety. If a person is more than 50 pounds overweight they may
12 have trouble. If they're over 65 years old they may have
13 trouble. So those are two of the limiting factors with the Walk
14 and Turn and One Leg Stand.

15 There's also unwritten limiting factors and, for instance,
16 if you do a traffic stop, get up to the -- and find the person is
17 a paraplegic they obviously can't do Walk and Turn, but those
18 aren't written as limiting factors laundry list anywhere but they
19 are.

20 Q. Okay. So these tests aren't a one size fits all sort
21 of thing?

22 A. No, they're not.

23 Q. Okay. Now during your review of this did you have a
24 chance to review the machine --

25 A. I did.

1 Q. -- the Intox 5000?

2 A. I did.

3 Q. And what were your findings on the Intox 5000?

4 A. I did what's known as an instrument audit and found
5 that the instrument was inspected just hours after this breath
6 test. Probably six to ten hours later it was inspected for its
7 quarterly inspection. The quarterly inspections met all the
8 standards of the GBI. They did not fail any of the inspections.
9 The quarterly inspection is a very, very limited cursory check of
10 the instrument. It's not a calibration. It's not a repair.
11 It's not a preventative maintenance. It's just a quarterly check
12 of some of the features of the instrument.

13 Q. Okay. So was this machine calibrated at that time?

14 A. It was not calibrated.

15 Q. Okay. Can you tell me the last time the machine was
16 calibrated?

17 A. I cannot. It was not calibrated during the year I
18 looked at the inspection reports.

19 Q. Okay. Now is this machine still manufactured?

20 A. It is not.

21 Q. Okay. In what year did they stop making this
22 particular machine?

23 A. Within the last couple of years CMI no longer makes the
24 Intoxilyzer 5000. It's had its life expectancy and is being
25 phased out.

1 Q. Okay. And currently there's obviously more modern
2 equipment available, is that correct?

3 A. Correct.

4 Q. Okay. And the state of Georgia is getting ready to
5 move to another intox machine, is that correct?

6 A. They've already -- about 20% of the agencies in the
7 state have already moved to the new instrument and it's the
8 Intoxilyzer 9000 and the entire state must be completed a hundred
9 percent transition by the end of 2015.

10 Q. And from looking at this machine can you tell -- this
11 particular machine that Mr. Williams was tested on, can you tell
12 when it was manufactured?

13 A. It's an estimate based on the serial number and that
14 serial number being 13 224 and it would probably be the late
15 90's, early 2000's.

16 Q. So about 14 years old, give or take?

17 A. Give or take, yes.

18 Q. Okay. Now can you explain to the jury how the Intox
19 5000 works?

20 A. Certainly. The Intoxilyzer brand instrument is what's
21 known as an infrared spectroscopy instrument, meaning it uses
22 infrared light absorption as the science to measure alcohol. And
23 what it has inside is what's known as a sample chamber and to
24 picture that sample chamber, if you go home and you take a roll
25 of paper towels and take all the paper towels off the roll and

1 you're left that cardboard tube, that's about the exact size of
2 the Intoxilyzer sample chamber. And at one end of that cardboard
3 tube is a projector lamp, very much like in this power point
4 projector or video projector, and it shines light down through
5 that sample chamber. At the other end of that sample chamber is
6 a light meter. If you go to a photographer's studio and they
7 hold a light meter up before they take your portrait, they're
8 measuring light energy. The same way with the Intoxilyzer.

9 Right in front of that light meter is a filter wheel with
10 filters on it and what that does is it filters out all of the
11 other light except for specific wave lengths of infrared light.
12 The theory is that all molecules will absorb light energy at
13 different wavelengths. So they filter out all the other light
14 except for that infrared wavelength at the three micron level
15 that will absorb energy with alcohol. As a person blows into
16 that instrument the light shines down. The alcohol molecules
17 will absorb some of that energy, so the amount of light hitting
18 the detector is reduced. From when there's just air in there
19 it's a certain voltage that is reduced when somebody blows and
20 has alcohol. Those electrical currents go to a little computer
21 inside the machine and then it generates a alcohol result, grams
22 of alcohol per 210 liters.

23 A good way to understand or picture this is at 6:00 in the
24 morning in the winter when you drive to work it's dark out and
25 your headlights will shine for five, ten blocks. The very next

1 day you drive to work and you take the exact same route but it's
2 foggy out now so your lights only shine one block. What's
3 happening is the moisture in the air is absorbing that light
4 energy. Same thing with breath testing but it's at specific
5 wavelengths that alcohol is absorbing the light energy. And
6 that's the basic science of the Intoxilyzer.

7 Q. Okay. Can you explain what a partition ratio is?

8 A. Certainly. As you can see in this exhibit, breath
9 testing in Georgia is reported in what's known as grams/210L and
10 that stands for grams of alcohol per 210 liters of breath and 210
11 liters is about 55 gallons. People don't blow 55 gallons into
12 these machines. That's just a unit of measurement. And what
13 that comes from is the blood-to-breath ratio. Breath testing is
14 trying to measure the alcohol that's circulating in the body.
15 When we breathe in we breathe in oxygen, we breathe out carbon
16 dioxide. Those gases exchange or transition in the lung and pass
17 that barrier very easy between the lung and between blood and
18 breath. The alcohol molecule also passes. So in order to have
19 an alcohol concentration there's got to be a ratio of alcohol and
20 breath and alcohol and blood and that ratio is 2100 to one.
21 Therefore, when it's reported it's 210 liters or 2100
22 milliliters. And that is based on a population statistic. It is
23 not saying Mr. Williams is that. It's not saying any person is
24 that. That unit of measurement is based on a statistic of
25 population and not specific individuals.

1 Q. Okay. So there are different partition ratios for
2 different people, is that correct?

3 A. Correct. They vary for different people and a
4 individual's partition ratio can vary over time.

5 Q. Okay. How would the variation in an individual's
6 partition ratio affect the accuracy of this breath test?

7 A. Well, it doesn't affect accuracy. It's still going to
8 measure within the same accuracy standard. But what it's going
9 to affect is how the alcohol gets out of the blood and into the
10 breath.

11 Partition ratio is very dependent on temperature. It must
12 have a constant temperature. So hypothetically if a person has a
13 fever and their body temperature is elevated by one degree
14 Celsius their breath alcohol will be elevated by seven percent.
15 Not their alcohol circulating in the body but the breath alcohol
16 because that partition ratio changes because it's dependent on
17 core body temperature.

18 Now, having said that, if their body temperature is elevated
19 one it's going to raise it seven percent. If their body
20 temperature is reduced by one degree Celsius, it's going to
21 reduce the breath alcohol by seven percent. So it goes both
22 ways. It is not an absolute fixed number.

23 Q. Okay. So technically if you have a .07 it could raise
24 it to a .11?

25 A. Well, if you have a 30 or 40% differentiation in the

1 partition ratio. That is at the extremes. It's not going to --
2 you're not going to have a hundred percent difference.

3 Q. Right. And it could go both ways.

4 A. It can go both ways, yes.

5 Q. Now when you were reviewing this case you did review
6 the breath test in this case?

7 A. I did.

8 Q. And what were your findings on this particular breath
9 test?

10 A. The state of Georgia and all states and the
11 accreditation agency for breath testing says that we need to look
12 at measurement uncertainty, error rates, accuracy standards and
13 that goes to how accurate is the machine, what's our variable,
14 how reliable is the result and the new machine, the Intoxilyzer
15 9000, being used in Georgia is going to report that right on the
16 breath test print card. It's going to say plus or minus whatever
17 that error rate is. The 5000 doesn't do that internally. We
18 have to do that in interpreting the results. And presently
19 Georgia has a five percent accuracy standard applied to the
20 machine and a seven percent measurement uncertainty applied to
21 breath testing with two samples. So that's what I looked at in
22 this case and applied the instrument accuracy and the measurement
23 uncertainty to the breath test result.

24 Q. Now when you apply that standard, do -- the breath test
25 was a .086, is that correct?

1 A. That is the lower of the two numbers, yes.

2 Q. Okay. And using the measurement uncertainty what were
3 your findings?

4 A. Well, measurement uncertainty -- instrument accuracy,
5 if I can explain it, the two, and the difference.

6 Q. Yes, please.

7 A. Instrument accuracy is how accurately can this machine
8 measure a known standard. Once a quarter they do an inspection
9 and they bring a .08 in and they know it's a .08. They buy it
10 certified at a .08 and they test the machine against this known
11 .08. How accurate is that and what's -- how much are they
12 allowed and that's five percent, plus or minus. So when they do
13 that quarterly inspection as long as the results are between .076
14 and an .084, that's five percent. The machine is good to go and
15 it stays in service.

16 When you test a human being it's not a known standard. You
17 don't know what the human is. You're trying to determine what
18 their alcohol is. So then you must apply measurement uncertainty
19 and measurement uncertainty is described as seven percent of the
20 mean of the two samples.

21 Okay, what does that mean? If you take the two samples, in
22 this case an 0-9-0 and an 0-8-6, what is the mean, what is the
23 average of those two samples? The average is an .088, okay? So
24 measurement uncertainty is going to be seven percent of that .088
25 and seven percent of that is an .00616 and you can probably get a

1 calculator with a lot of numbers and take it out a lot farther.

2 So what does that mean? That means that .00616 should be
3 added and subtract to the lower of the two numbers. So when you
4 apply the measurement uncertainty to this particular breath test
5 we can say his true alcohol, what was his true alcohol at the
6 time he was tested, was somewhere between .079 and an .092.
7 Could have been higher, could have been lower.

8 The best way to describe measurement uncertainty is we get
9 up in the morning and we go into the bathroom and we step on the
10 scale and it says we weigh 175 pounds. We don't like that number
11 so we step off and we step on again and it says now we weigh 173
12 pounds. We didn't loose two pounds. Measurement uncertainty,
13 how accurate is that scale? So the same thing applies to breath
14 testing in any forensic measurement, how accurate is the number?
15 For breath testing it's seven percent and then it gets very
16 complicated in statistical analysis, seven percent with a 99%
17 confidence level.

18 Q. Okay. Now can you explain to the jury what an
19 observation period is?

20 A. Certainly. In breath testing we have analyzation and
21 samplization. We collect a sample and we analyze the sample.
22 The first step is to collect the sample. In breath testing the
23 sample is collected by the breath test operator, the arresting
24 officer. It could be different people. And then it's analyzed
25 and it's all done at the same time. If we go to the hospital or

1 the doctor and they want to do a blood test they clean the area,
2 collect the blood, put it in a vial. That's samplization,
3 collecting the sample. They send it off to the lab and the lab
4 analyzes it. Breath testing, it's all done at the same time.

5 The first step in samplization or collecting the sample is
6 the 20 minute observation. In Georgia they published that the 20
7 minutes immediately preceding the sample the individual must be
8 in a controlled environment and they must be monitored for two
9 things. One, not to consume anymore alcohol. Kind of makes
10 sense, but they can't consume any alcohol.

11 And the second thing is they must be monitored for
12 regurgitation, make sure stomach alcohol doesn't come back in the
13 oral cavity. Obviously the most obvious form of regurgitation is
14 to vomit but if they burp and belched regurgitation is suspected
15 and they may have brought content back up into their mouth. They
16 have to do a new 20 minute observation because you don't want
17 digestive alcohol or alcohol that's in the digestive tract
18 affecting the breath test which is the respiratory system they're
19 trying to get measurement from.

20 Q. What is the effect of not having this proper
21 observation period?

22 A. Well, the 20 minute observation period is step one in
23 ensuring scientific reliability. That's why we do it, is we
24 watch them for 20 minutes, make sure there's no residual alcohol,
25 make sure they don't have any chewing tobacco, gum, anything that

1 can trap alcohol, make sure they don't drink anymore, make sure
2 they don't regurgitate anymore so that we can make sure that we
3 have a valid sample.

4 Q. Okay. What are the protocols for the Intox 5000
5 exactly?

6 A. Well --

7 Q. For the observation period?

8 A. -- for Georgia the breath test operator is responsible.
9 It's their responsibility. And the reason they make it the
10 breath test operator's responsibility is if you have a police
11 officer and you tell that police officer, hey, keep an eye on
12 this guy. Well that police officer is going to make sure they
13 don't escape, they're not a threat to others, they're not a
14 threat to themselves. If you tell a breath test operator to watch
15 somebody they're going to watch for regurgitation, belching,
16 burping, consumption of alcohol. They're going to watch for
17 those things. So the breath test operator has been specifically
18 trained that's what they're supposed to watch for, so it's
19 ultimately their responsibility.

20 They must be in a controlled environment. Now, it doesn't
21 have to be a staring contest. We don't have to stare at the
22 individual for 20 minutes to make sure. We have to reasonably
23 ensure. That means you have to be in the same room, you have to
24 be in close proximity and you have to watch to make sure they
25 don't regurgitate that alcohol back into the oral cavity. That's

1 step one in getting a valid sample.

2 Then you have to instruct them how to blow into this
3 machine. You can't just (making short puff sound) do a little
4 puff. You have to take a deep breath and you have to blow. So
5 you have to explain how to blow into the machine. The operator
6 has got to understand what the displays mean.

7 So those are all part of samplization.

8 Q. Now in reviewing all the records for this case, was
9 proper protocol followed in this case?

10 A. Well, I was -- I was kind of surprised when I saw the
11 print card, State's Exhibit 6 it looks like, because on the
12 lefthand side about two-thirds, three-quarters of the way down,
13 there's a block that says time first observed and that's intended
14 to write in there when the individual was brought into a
15 controlled environment, when the observation -- when that 20
16 minute observation begins and the timing here 04:56 is the time
17 of the breath test. So based on the documentation there was not
18 a 20 minute observation done.

19 Q. Okay. And when there is no 20 minute observation done
20 what kind of effect can that have on the test?

21 A. Well, it's step one in scientific reliability. If you
22 don't follow the procedures to ensure the reliability you don't
23 have a reliable test.

24 Q. So is this a valid result?

25 A. Not in my opinion, no.

1 Q. Okay. Can you explain to the jury why it is not a
2 valid result?

3 A. Well, one, the time first observed is the same time as
4 the breath test. There is no documented 20-minute observation.
5 Dr. Dubowsky, who is probably the nation's leading expert in
6 breath and blood testing, published in the Journal of Analytical
7 Toxicology lapses in quality control, and his publication and his
8 work says that improper documentation and conducting a 20-minute
9 observation is probably one of the most important lapses in
10 forensic breath testing in this nation and that was published way
11 back in the 90's. So it's not a new issue. That 20-minute
12 observation documentation is paramount to the reliability of the
13 test.

14 Q. Okay. And that was not followed in this case, is that
15 correct?

16 A. It was not.

17 Q. Okay. If there is even one drop of alcohol in a
18 person's mouth, what would that do to the test ultimately?

19 A. There's three specific things that can do. A drop of
20 alcohol in the mouth will do one of three things. One, it will
21 exponentially raise that alcohol result so high beyond the
22 measurement of the machine and it will print an error message
23 that says range exceeded. Anything above a .70 is above the
24 range exceeded and is not humanly possible so the machine will
25 just print out range exceeded.

1 The second thing it will do is print out an error message
2 saying invalid sample, meaning it detected that mouth alcohol.
3 What it has inside is a slope detector. A slope detector is an
4 algorithm that looks at the slope. The machine is looking to
5 expect a continuous rise and leveling off. Well if there's a
6 drop of alcohol in the mouth it will continue to rise and sharply
7 drop off. That's what the algorithm's looking for. Well, if it
8 drops off it gives that invalid sample. That's the second thing
9 that could possibly happen.

10 The third thing that could possibly happen is that that
11 algorithm is not violated and the drop off wasn't drastic enough
12 and it accepted it as a valid number.

13 Q. Now even if they had followed all the protocols they
14 should have in this case, is this machine a perfect machine?

15 A. No, it -- a perfect -- there's nothing made by man that
16 is perfect, but this test result is subject to measurement
17 uncertainty. Even if this is a perfect as it can be, it's still
18 potentially below an 0-8-0. It's potentially an 0-7-9 alcohol
19 concentration at the time of the test.

20 Q. Now based on your review of all the records in this
21 case it's your opinion that this is not a valid breath test, is
22 that correct?

23 A. Correct.

24 Q. And it's also your opinion that this machine was not
25 properly calibrated, is that correct?

1 A. No, I didn't say it's not properly calibrated. They do
2 not do calibrations but even if --

3 Q. So it wasn't calibrated at all?

4 A. Well, it's not calibrated at all and -- but when you
5 say is it properly calibrated, there's no requirement to
6 calibrate it. You don't have to calibrate it. Even if it is
7 properly calibrated it's still subject to measurement
8 uncertainty. The farther out the calibration the more the
9 measurement uncertainty and accuracy standard is, but in this
10 case measurement uncertainty accuracy standard even in a
11 perfectly working instrument apply to every breath test.

12 Q. Thank you.

13 A. Thank you, Counselor.

14 THE COURT: All right, you may cross-examine the
15 witness.

16 MR. JOHNSTON: Thank you, Your Honor.

17 **CROSS-EXAMINATION**

18 BY MR. JOHNSTON:

19 Q. Good afternoon, Mr. Malhiot.

20 A. Afternoon, Counsel.

21 Q. Just a few quick questions concerning your
22 qualifications and whatnot. Number one, when you were out in
23 Montana and out in the Air Force you were primarily working as a
24 law enforcement officer at that time, is that correct?

25 A. Correct. That was my -- the primary and majority of my

1 work was as a law enforcement supervisor, yes.

2 Q. And you did -- you did some breath testing work out
3 there that it was, I would guess, somewhat limited as compared to
4 what you're doing now and what you did in Florida. Would that be
5 correct?

6 A. Correct. I was responsible for it but it was a weekly
7 job not a full time job, but once a week I had to inspect and
8 repair and check calibrations. In Florida it was a full time
9 job.

10 Q. Okay. And while you were a law enforcement officer did
11 you make DUI cases?

12 A. I did.

13 Q. Okay. And when you did DUI cases, did you -- when you
14 would initially make a pullover and pull somebody over for
15 whatever reason and it comes time to determine if they're
16 impaired, whether you're going to make an arrest or not, did you
17 use standardized field sobriety evaluations?

18 A. Sometimes I did, yes.

19 Q. Okay. And that would depend upon whether the person
20 was able or capable of doing those field sobriety evaluations,
21 correct?

22 A. Or willing, yes.

23 Q. Okay. Or willing, of course. And so if they were not
24 overly obese or had some sort of problems with their legs or
25 whatnot or head injury of some sort that would affect the

1 Horizontal Gaze Nystagmus you would go ahead and you would use
2 that -- that was the battery of tests that you would use.

3 A. Yes.

4 Q. Okay. And as you stated, that was your words before,
5 they're considered to be the gold standard for in-the-field
6 observation and decision-making in the field about whether to
7 effect an arrest on somebody for driving impaired.

8 A. As far as the physical tests. But as you're well aware
9 the totality of the circumstances determine arrest/don't arrest
10 but the standardized field sobriety, the gold standing for the
11 physical maneuvers, has to be performed in the field.

12 Q. Well, I would presume you've made arrests on people
13 where you didn't actually observe a less safe act while they were
14 driving.

15 A. Yes.

16 Q. Okay. And you've made arrests on DUI's when you pulled
17 somebody over for failing to maintain their lane?

18 A. I have.

19 Q. Okay. And you've -- when you were doing things like
20 that you were using these standardized field sobriety
21 evaluations. Now, you indicated that the curriculum for teaching
22 these, these standards or somewhat, come from the National
23 Highway Traffic Safety Administration, correct?

24 A. Yes, in conjunction with the International Association
25 of Chiefs of Police.

1 Q. Okay. But that -- those are the NHTSA standards that
2 we're talking about, correct?

3 A. Yes.

4 Q. And you would agree with me that according to the
5 training of NHTSA that on the Horizontal Gaze Nystagmus that six
6 out of six clues on that, and you gave a range of accuracy, that
7 indicates -- generally indicates within that range of accuracy
8 that we were talking about that the person's blood alcohol
9 content as a .10 or above, is that correct?

10 A. The initial research at 77%, yes. The later research
11 was at a .08 --

12 Q. Okay.

13 A. -- but --

14 Q. -- .08 and so we're -- the later research I think you
15 said 94% accurate, is that correct?

16 A. For persons above an 0-8. Persons below an 0-8 had a
17 28% error rate, meaning officers misidentifying them as being
18 above an 0-8 when they weren't.

19 Q. A false positive --

20 A. Correct.

21 Q. -- in other words. But -- so that 72% was still
22 getting it right --

23 A. Correct.

24 Q. Okay. I sort of jumped ahead of myself. I am a little
25 punch drunk, so I'm sorry. I apologize.

1 A. I understand, Counselor.

2 Q. Backing up just a minute, we'll get back to that in
3 just a second. I did want to talk about that you were primarily
4 a police officer out there. Your academic training, where --
5 what sort of degree do you have did you say?

6 A. It's a bachelor of science in criminal justice
7 administration.

8 Q. Okay. And that's out of what college, university?

9 A. Park University in Parkville, Missouri.

10 Q. Okay. And you did -- I didn't hear you mention
11 Missouri. Were you at --

12 A. No, I physically was not at the campus. They had
13 satellite locations at different military installations and I
14 physically took the classes --

15 Q. Okay.

16 A. -- on base.

17 Q. So you took that as part of while you were in the Air
18 Force?

19 A. Yes.

20 Q. Okay. I understand. And this degree in criminal --
21 bachelor of science in criminal justice, that is not considered a
22 natural science degree, is it?

23 A. It is not. It's not like a biology degree or
24 chemistry degree, but it is a bachelor of science versus a
25 bachelor of arts.

1 Q. So you are not degreed in biology?

2 A. No, sir.

3 Q. You're not degreed in chemistry?

4 A. I am not.

5 Q. You're not degreed in physics?

6 A. I am not.

7 Q. Not degreed in forensics either?

8 A. No.

9 Q. Okay. You did have some course work as per normal with
10 another graduate degree with some natural sciences or something
11 like that?

12 A. I did have some natural sciences. I did have
13 criminalistics, I had forensics, and those were specific to the
14 criminal justice program.

15 Q. But not specifically enough to merit a degree in any of
16 those?

17 A. Correct.

18 Q. Okay. Let me go back here, I'm sorry to jump around,
19 and you are testifying here today, you said that you charge \$600
20 for -- to look at the case --

21 A. Correct.

22 Q. -- initially and issue a report and do you charge for
23 appearances in court?

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

25 Q. What is the rate at which you're compensated?

1 A. \$180 an hour.

2 Q. Okay. And since you have been -- opened your company
3 here in 2010, is that what you said?

4 A. Correct.

5 Q. In Georgia, have you ever testified for the
6 prosecution?

7 A. I have not. Not yet.

8 Q. Okay. Have -- primarily since you've opened your firm
9 here in 2010 have you been doing primarily consulting or
10 testifying in the courts in the state of Georgia or primarily in
11 Florida at the time?

12 A. I don't have the breakdown but I would probably guess
13 it's 60% Georgia, 40% Florida and other states.

14 Q. Okay. And have you testified for the prosecution in
15 any other state other than Florida?

16 A. Montana.

17 Q. Okay. Are you -- well, I'm talking about as an expert.

18 A. Oh, yes, as an expert.

19 Q. Okay.

20 A. Not since I've started the business.

21 Q. How about since you started the business?

22 A. In just Florida.

23 Q. Just Florida.

24 A. Yes.

25 Q. Okay. And have you testified more since you started

1 this here and your Florida cases, have you testified more the for
2 defense or more for the prosecution in Florida?

3 A. More for the defense.

4 Q. Okay. And exclusively for the defense in the state of
5 Georgia, is that correct?

6 A. Not necessarily. I've done a lot of civil work but I
7 have not worked for the criminal prosecution in the state of
8 Georgia.

9 Q. Okay. Fair enough. Let's go back to where we were
10 before and I apologize for jumping around. In regard to the HGN
11 you observed Officer Ramsey's performance in giving that HGN and
12 you did not see any problems with his performance on that?

13 A. Correct.

14 Q. Okay.

15 A. He conducted the evaluation in accordance with the
16 standards.

17 Q. And presuming that he is reporting his acts -- his
18 responses accurately, his -- then given what you saw there, his -
19 - the responses he reported would be valid as long as he's being
20 honest about it, is that correct?

21 A. Well as long as he is interrupting the clues properly
22 and reporting them properly I have no reason to doubt his
23 findings in that case --

24 Q. All right.

25 A. -- in that test.

1 Q. All right. And, once again, at above a .08 some 94%
2 accurate in showing that according to the latest studies, is that
3 correct?

4 A. According to research studies, yes.

5 Q. Okay. And on the Walk and Turn you indicated that the
6 officer reported two clues but you only saw one, is that correct?

7 A. I believe so. I can -- I disagreed with the
8 observation that he had about the turn.

9 Q. How many clues did you -- the officer -- isn't it true
10 the officer in his report indicated three clues out of the eight?

11 A. Yes, he did.

12 Q. Okay. So you're saying not one clue -- you're saying
13 two, then, is that correct?

14 A. I'm sorry?

15 Q. You're saying that you would have observed -- you
16 verified two clues instead of one.

17 A. No. I disagree with his clue on the turn, how he did
18 it. My review of the video he appeared to do it as instructed
19 and then demonstrated. And then the touching of heel to toe I
20 couldn't observe at all because of the angle of the camera. I
21 couldn't validate that clue.

22 Q. Okay. So but there's no reason if the officer -- you
23 don't have anything to dispute what the officer is saying about
24 that.

25 A. I am not disputing that clue. I'm just saying I

1 couldn't validate it.

2 Q. Okay. And -- but you did validate his raising his arms
3 more than six inches from his side, correct?

4 A. I did.

5 Q. Okay. And those are the three clues that the officer
6 indicated.

7 A. Correct.

8 Q. So between the one that you don't have any reason to
9 question him on, which is the heel-to-toe steps and raising his
10 arms, that would be two clues out of eight, is that correct?

11 A. That's correct.

12 Q. And according to NHTSA standards that two out of eight
13 is the threshold for indicating impairment on the nine-step Walk
14 and Turn.

15 A. Well, indicates an alcohol concentration above an 0-8
16 or above a 1-0 depending on what research --

17 Q. But within the state of Georgia .08 and above is
18 considered per se impaired, is that correct?

19 A. Correct. Per se violation of the statute.

20 Q. Okay. I'm sorry, I completely missed what you said
21 concerning the One Leg Stand. Could you repeat that for me,
22 please?

23 A. I said that the officer reported during the One Leg
24 Stand that there was two clues and my review of the video
25 validated the two clues observed by the officer.

1 Q. Okay. And so based upon that, two clues there would
2 indicate according to NHTSA standards -- once again, we're going
3 to go round and round on impairment versus one of, I say
4 impairment, you say the 1-0 standard, but either way it passes
5 that NHTSA mark for that, correct?

6 A. The decision point for the officer is two clues, so
7 yes.

8 Q. So given the Horizontal Gaze Nystagmus result, the
9 result on the nine-step Walk and Turn and on the One Leg Stand,
10 based upon all three of those clues using your vernacular would
11 indicate a alcohol concentration above a .10, is that correct?

12 A. Well, yes, it could.

13 Q. Okay. So I would assume, given the totality of the
14 circumstances looking at that, you evaluate somebody on giving
15 instructions and an officer doing field sobriety on that that you
16 would indicate that he would be well within his discretion to
17 arrest the person given those results on the field sobriety
18 evaluations?

19 A. Well, the threshold for arrest is a very low threshold
20 and the discretionary authority to make that arrest and that
21 threshold to meet that discretionary authority --

22 Q. I'm asking simply on the evaluation of -- of the tests
23 here. You don't have any qualm with him arresting the defendant
24 in this case, do you?

25 A. Well, not that I second guessed him, but no I have no

1 qualm with him using the field sobriety as a decision making tool
2 for the arrest.

3 Q. And it would be fair to say that in your law
4 enforcement career, given how these tests go, that you probably
5 arrested somebody giving the same number of clues here.

6 A. It's very probable, yes.

7 Q. Okay. Now the reporting on the breath sample here, we
8 go out to three digits, is that correct, on that?

9 A. Yes.

10 Q. Okay. So is -- below anything beyond those three
11 digits is going to be rounded up, is that correct?

12 A. No, sir. They are truncated. You do not round in
13 breath testing. You take the fourth and subsequent digits and
14 you delete them, truncate them.

15 Q. Okay. You delete them. So at a point -- the taking of
16 -- within that -- within the rate you're talking about, within
17 the measurement uncertainty on that, anything that would put the
18 defendant below a .08 is at the far end of the possibility
19 spectrum on that. That would be the most extreme issue within
20 that screen of uncertainty to place you below a .08.

21 A. Correct. The range would be 0-7-9, which is one one-
22 thousandth of a gram below, all the way up to 0-9-2.

23 Q. Okay.

24 A. So, yes, it is the low end of that range.

25 Q. But if we were -- for example, you're talking about

1 truncating as opposed to rounding. If we were to take that
2 completely fully out, the number that we would be at is a .07998
3 if I'm correct on that.

4 A. Yes, yes.

5 Q. Okay. And that, once again, is on the far extreme of
6 possibilities there, correct?

7 A. Correct. It's --

8 Q. Okay.

9 A. -- it's at the end of the range.

10 Q. All right. In regard to the mouth alcohol question and
11 the observation period, your determination that the observation
12 period was not followed in this case is based solely upon this
13 written indication in there of 04:56 that's written on the -- on
14 there, correct?

15 A. That and there's some other assumptions but, yes.

16 Q. Okay. But those are assumptions, correct?

17 A. Well, they're -- they're based on information provided.
18 If the traffic stop was at 04:29, field sobriety, you look at
19 timing, drive to the jail and the breath test was 04:56. The
20 timing works out, unless the stop was right across the street
21 from the jail and I don't know the driving distance. It would be
22 very iffy.

23 Q. Okay.

24 A. And those are the assumptions.

25 Q. What time did the police report indicate that the stop

1 was?

2 A. If I may refer to it -- 4:05.

3 Q. Okay. So we're talking at that point some 50 minutes
4 between that and what the 04:56 that's put on there, correct?

5 A. Correct. The 4:29 time is the time of arrest when they
6 were still at the location --

7 Q. -- right --

8 A. -- field sobriety was over and I assume that's the time
9 implied consent was done.

10 Q. And that's well within -- the 56 minutes we're talking
11 about there, or 50 minutes we're talking there, is well in excess
12 of 20 minutes, correct?

13 A. Well, yes, but the 20 minute threshold is not in
14 custody or the entire totality at the time of the encounter. The
15 20 minute observation is a controlled environment being observed.

16 Q. Okay. With that in mind, at any time did you interview
17 the arresting officer in this case, Officer Ramsey, to ask him
18 about any observation period done?

19 A. I did not.

20 Q. Okay. Did you at any time interview the intox operator
21 about any observation period done?

22 A. I did not.

23 Q. Okay. And you were speaking about the -- the test or
24 the certificate of inspection, the quarterly inspection that was
25 done on the same day as the defendant's test, correct, and you

1 said that you looked over it and it appeared to be -- and all the
2 paperwork appeared to be in order, correct?

3 A. Correct. The machine met the minimum standards of the
4 State for that quarterly inspection.

5 Q. And what are the -- what are the different checks that
6 they do at that time?

7 A. Well, they do numerous checks. They do what's known as
8 an F10 reprint where they print the last breath test done on the
9 machine and what they look at in that breath test is did the
10 officer properly log it in. They do cleanliness, is the area
11 clean. They do an interferent check to make sure that the
12 machine can tell the difference between acetone and alcohol,
13 acetone being something that a diabetic may produce. They make
14 sure that it can detect mouth alcohol in mouthwash as a trooper
15 blows into it. They do what's known as a difference check. Two
16 breath samples must be within 0-2 of each other. So they blow a
17 high alcohol and then a no alcohol and make sure the machine can
18 do the math. Then they do the calibration check at .08. They do
19 a radio frequency check. They make sure external radio
20 frequencies don't interfere. They take a -- a trooper takes a
21 police radio and keys it right next to it to make sure he gets
22 the error message.

23 Q. Okay. And although they do not do a calibration at
24 this time to check itself, shows that the machine is properly
25 calibrated within the acceptable limits, correct?

1 A. For the 0-8 level, yes.

2 Q. Okay. And they did do that on that particular one, did
3 they not?

4 A. They did.

5 Q. Okay. And the results on that standard .08 sample came
6 in at a .078 to .079, is that correct?

7 A. If my recollection is correct, yes.

8 Q. Okay. And in regard to the partition ratio, the
9 partition ratio, I know my understanding is if you want to do a
10 direct comparison to the level of alcohol that's registering in
11 the breath and do a direct comparison to what it would be
12 registering in the blood, is that correct?

13 A. Well, it -- you have to use the partition ratio, one,
14 correct. Two, if you're trying to say that the breath alcohol
15 represents the alcohol circulating in the body you have to apply
16 the partition ratio to ensure that it's an accurate
17 representation of the alcohol in the body.

18 Q. Okay. You would agree with me, though, that the
19 standards within the state of Georgia allow -- there's two basic
20 standards. You have the standard .08, given the ratio between
21 that and a given quantity of blood, and an equally, legally
22 proper standard is the breath test, which is the grams per 210
23 liters, correct? They're considered -- legally they're
24 considered equal.

25 A. Well, you're asking for a legal conclusion. I don't

1 know if I can give that. What I can say is that the statute
2 requires it be reported in grams per 210 liters and that's the
3 way it is on the print card.

4 Q. And that's set up by statute based upon your knowledge,
5 is that correct?

6 A. Yes.

7 Q. Okay. And in regard -- I'm sorry to keep jumping
8 around. I keep thinking of things. In regard to the 20-minute
9 observation period, you testified earlier that you felt like that
10 that should be the operator of the machine that's doing the
11 controlled 20-minute observation period. Isn't it true that you
12 have taught at least that that can be done by the police officer
13 -- the arresting officers themselves, and still be a valid
14 situation?

15 A. There -- that's a multi-part question. One, it is in
16 Georgia the curricula requirement makes it the breath test
17 operator's responsibility. It does not say he must do it.
18 Florida, I taught -- and Florida rules are different and
19 specifically say anybody can do it. Georgia makes it the breath
20 test operator's responsibility. The bottom line is whoever does
21 it has to know what they're looking for. Breath test operators
22 are specifically trained to know regurgitation, vomitus and those
23 types of things.

24 Q. Do -- are you aware of Officer Ramsey's training,
25 whether or not he would know to look for those things?

1 A. I don't. I don't.

2 Q. Okay. And are you aware of any evidence from any of
3 the sources that you looked at, any indication that the defendant
4 at any time ingested more alcohol or regurgitated?

5 A. I have no evidence to show that.

6 Q. All right. I believe that's all the questions I have
7 at this point.

8 A. Thank you, Counselor.

9 THE COURT: Redirect?

10 MS. MILLER: I just have a few.

11 **REDIRECT EXAMINATION**

12 BY MS. MILLER:

13 Q. You're not a lawyer, correct?

14 A. I am not an attorney.

15 Q. Okay. You can't state how the law should be applied,
16 is that right?

17 A. No. And if I were to try I'm sure somebody would
18 object.

19 Q. Okay. Now, you could be hired by the prosecution at
20 any time, is that right?

21 A. Anytime, yes.

22 Q. Okay. And generally you're not because they get that
23 from the GBI for free, is that right?

24 A. Correct.

25 Q. Okay. Now I believe Mr. Johnston asked you if you

1 spoke to Officer Ramsey. You did not, is that correct?

2 A. I did not.

3 Q. In reviewing his report and in reviewing his video, did
4 he say anything about observing my client?

5 A. No, it was not mentioned in his report.

6 Q. Okay. And that's the only information that you have to
7 go on, is that correct?

8 A. Correct. And the documented time on the print card
9 from the breath test operator.

10 Q. It's not like you were allowed to be in here while the
11 officer testified, is that correct?

12 A. Correct.

13 Q. Okay. So the only information you had is what they
14 documented, isn't that right?

15 A. That's the limit of the information I have, yes ma'am.

16 Q. Okay. And usually in your experience as a police
17 officer usually they document these things right after the
18 arrest, is that correct?

19 A. Soon after, yes, depending on how busy they are that
20 shift, but yes.

21 Q. Okay. And so they're not writing reports two and three
22 months down the road to prepare for trial, is that correct?

23 A. Correct.

24 Q. Okay. Thank you.

25 THE COURT: Re-cross?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. JOHNSTON: No, Your Honor.

THE COURT: All right. Can the witness be released?

MS. MILLER: Yes, Your Honor.

MR. JOHNSTON: No objection.

THE COURT: All right. You are excused.

(Thereupon, the testimony of the
expert witness was concluded.)

C E R T I F I C A T E

STATE OF GEORGIA)

COUNTY OF HENRY)

I, Diane J. DuBois, Certified Court Reporter, do hereby certify that the foregoing proceedings were taken down by me as stated in the caption; that the foregoing proceedings were reduced to print by me, that the foregoing pages 3 through 53 represent a true and correct transcript of the proceedings, that any and all exhibits remain unaltered and that any and all copies and/or facsimile are true and correct to the best of my knowledge and ability.

I further certify that I am neither kin nor counsel to any of the parties and am not financially interested in the outcome of the action.

This certification is expressly withdrawn and denied upon the disassembly or photocopying of the foregoing transcript of the proceedings or any part thereof, including exhibits, unless said disassembly or photocopying is done by the undersigned certified court reporter, and the signature and original seal is attached thereto.

This 27th day of October, 2014.

COPY


Diane J. DuBois
Certificate No. 2485