

IN THE COUNTY COURT OF THE  
17TH JUDICIAL CIRCUIT IN AND  
FOR BROWARD COUNTY, FLORIDA

STATE OF FLORIDA,

Case No. 99-9249MM10A

vs.

Judge Ginger Lerner-Wren

CHARLES RICH,

Defendant.

-----

Broward County Courthouse  
Fort Lauderdale, Florida  
October 26, 1999

EXCERPT - TESTIMONY

The above-entitled cause came on for trial  
before the HONORABLE GINGER LERNER-WREN as Presiding Judge,  
at the Broward County Courthouse, Fort Lauderdale, Florida,  
on the 26th day of October, 1999.

APPEARANCES:

MICHAEL J. SATZ, STATE ATTORNEY

By: CRAIG ESQUENAZI, ESQ.,

DARA HELLER, ESQ.,

Appearing on behalf of the State of Florida.

ALAN H. SCHREIBER, PUBLIC DEFENDER

By: VIVIANE GARIBOLDI, ESQ.,

Appearing on behalf of the Defendant.

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DEFENSE WITNESS

RICK SWOPE

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1 Thereupon, the following was had:

2 MS. GARIBOLDI: The Defense calls Rick Swope.

3 Thereupon,

4 RICK SWOPE,

5 having been duly sworn to tell the truth, the whole truth  
6 and nothing but the truth, testified as follows:

7 THE CLERK: State your name and spell your last  
8 name for the record.

9 MR. SWOPE: Rick Swope, S-W-O-P-E.

10 DIRECT EXAMINATION

11 Q. (BY MS. GARIBOLDI) Good afternoon, Mr. Swope.

12 A. Hi.

13 Q. What do you do for a living, what is your  
14 occupation?

15 A. I do accident reconstruction work, although about  
16 ten percent of my business deals with the Intoxilyzer or  
17 other breath testing machines. I do some work in that area  
18 and I do some writing of articles and studies and things  
19 like that.

20 Q. Are you charging for your services today?

21 A. Yes.

22 Q. Will that affect your testimony in any way?

23 A. No.

24 Q. In fact, have you ever testified for the  
25 prosecution?

1           A.    Sure.

2           Q.    How many times, approximately?

3           A.    I don't know, several hundred when I was a deputy  
4           sheriff. I did some testimony after I went out on my own as  
5           well.

6           Q.    What is your educational background?

7           A.    I have a Bachelors Degree in Criminal Justice, St.  
8           Thomas University. I have a Masters of Science Degree in  
9           technology and engineering, University of Miami. I was a  
10          police officer for 15 years. I'm certified to teach by the  
11          National Highway Traffic Safety Administration. I also hold  
12          certification to teach from Criminal Justice Standards of  
13          Training Commission, from Florida Department of Law  
14          Enforcement, and I also hold status to teach at the high  
15          school or college level in the State of Florida, and I have  
16          also taught seminars either on accident reconstruction or  
17          the Intoxilyzer or field sobriety exercises around the  
18          country. I taught at Emory University in Georgia, Harvard  
19          Law School. I taught at quite a few places around the  
20          country.

21          Q.    Have you ever spoken at seminars?

22          A.    Yes.

23          Q.    How often?

24          A.    I don't speak at as many now. I generally speak at  
25          about three or four seminars per year. I did do as many as

1 12 or 13 seminars per year and that was all around the  
2 country in various cities, municipalities. I did them for,  
3 I believe it is ATLA(phonetic), the trial organization, and  
4 also Florida Bar. I also taught classes, I believe, in 18  
5 or 19 different states.

6 Q. Have you published any articles?

7 A. Yes, I have.

8 Q. How many?

9 A. I think I published six different articles, most of  
10 those dealt with either field sobriety exercises or they  
11 dealt with the Intoxilyzer. I have also done accident  
12 reconstruction outlines. I have also done a chapter in a  
13 book involving vehicular homicide, reconstruction involving  
14 the drinking driver.

15 Q. Have you testified as an expert witness in the  
16 past?

17 A. Yes, I have.

18 Q. And in what fields have you testified?

19 A. Again, I testified primarily in accident  
20 reconstruction. I do engineering activities, that is  
21 primarily what I do. And I also testify in criminal cases  
22 on either field sobriety exercises or on breath machines,  
23 primarily the Intoxilyzer, that seems to be the major  
24 machine used.

25 Q. Is that the Intoxilyzer 5000?

1 A. Yes, it is actually the Series. There are actually  
2 three models to the Series. It is the 5000 Series, it's  
3 called.

4 Q. Are you familiar with the Series we are using in  
5 this case?

6 A. Yes, I wanted to just check, I think it is the 66  
7 series, yes.

8 MS. GARIBOLDI: Your Honor, at this point in time I  
9 would like to ask the Court to declare Mr. Swope as an  
10 expert in the Intoxilyzer 5000, 5000R, rate of  
11 absorption of alcohol and detection for pullovers.

12 THE COURT: Any objection?

13 MR. ESQUENAZI: Yes, Judge, I would like to Voir  
14 Dire the witness.

15 THE COURT: Okay.

16 VOIR DIRE EXAMINATION

17 Q. (BY MR. ESQUENAZI) Good morning, Mr. Swope, how are  
18 you?

19 A. Fine. How are you?

20 Q. Are you familiar with the curriculum vitae?

21 A. Yes.

22 Q. Do you have one?

23 A. Well, it depends on which one you have. I don't  
24 know if I have --

25 Q. Do you have one yourself?

1 A. On me?

2 Q. Do you print one?

3 A. Sure, my office does one, yes.

4 MR. ESQUENAZI: Your Honor, may I approach the  
5 witness?

6 THE COURT: Yes, Sir.

7 Q. (BY MR. ESQUENAZI) Would this be your curriculum  
8 vitae?

9 A. It's an old one, yes, but it's probably about two  
10 years old I suppose, yes.

11 Q. Do you have a site on the internet, Mr. Swope?

12 A. Yes, there is a site that my office has, yes.

13 Q. And that would be your office, you're in charge of  
14 that office?

15 A. Sure, I own the company, yes.

16 Q. So that you would -- then it would be fair to say  
17 that you're in charge of what goes on in your internet site,  
18 would that be fair to say?

19 MS. GARIBOLDI: Objection, relevance.

20 MR. ESQUENAZI: I will tie it up.

21 THE COURT: Overruled.

22 A. I don't know what you mean, "in charge".

23 Q. (BY MR. ESQUENAZI) Do you put some things on your  
24 internet?

25 A. I don't put anything on the internet, that goes on

1 by other people that are paid to work and put information on  
2 the site. I don't look at the site, I don't maintain it.

3 Q. But you put your curriculum vitae on site and you  
4 don't look at the site. Is that what you're saying to the  
5 Court right now?

6 A. What I'm saying to the Court and the jury very  
7 simply is, I don't oversee every dot and "I" on my business.  
8 It goes on the internet site based on a company that I have  
9 retained that keeps my curriculum up to date, and they are  
10 currently updating the new web site.

11 Q. Okay. Well, Mr. Swope, isn't it in fact true that  
12 a curriculum vitae is something you show the Court to show  
13 that you're an expert witness, isn't that something that it  
14 is used for, to show the Court your training and experience  
15 or other people that you're an expert in the field, isn't  
16 that true?

17 A. I carry those with me to show -- I certainly don't  
18 show the Court anything off the web site because that's not  
19 a secured site. Sometimes things get mishandled on there.  
20 I carry curriculums with me.

21 Q. But you don't have one on you today?

22 A. Sure I do, you didn't ask for one.

23 Q. You do have one?

24 A. Sure.

25 Q. So this is not the most recent one?



1 A. No, it isn't.

2 Q. But it is still on the internet site?

3 A. I don't know, I haven't look at the internet site  
4 in a long time.

5 Q. Okay. I want you to take a look at, Mr. Swope -- I  
6 mean, you have one on you, right? You can take a look at  
7 your own if you want, I don't know.

8 A. I have a newer one, but --

9 Q. Don't you think, Mr. Swope, if you come to court  
10 and proffer yourself as an expert witness that you would  
11 bring the correct documentation so the Court could view it?  
12 The only thing I have to go on is something that I pulled  
13 from your internet site today, which is the most current  
14 thing I have up to date.

15 A. No, that's certainly a very unfair statement and  
16 you are certainly misleading the jury by that. Your office  
17 has correct copies which I faxed to your office probably 25  
18 times in the past month.

19 THE COURT: Counsel, do not argue with the witness.

20 Q. (BY MR. ESQUENAZI) Okay. Mr. Swope, I will  
21 withdraw the question.

22 A. I thought so.

23 Q. I want you to look at that first publication.  
24 Could you tell the jury what the first publication is?

25 A. On this one?

1 Q. Yes.

2 A. It says field sobriety test, parts I and II.

3 Q. Okay. Now, does that publication have anything to  
4 do with the Intoxilyzer 5000? Does that have anything to do  
5 with it, as far as maintenance goes on the Intoxilyzer 5000?

6 A. Specifically, no.

7 Q. It has nothing to do with it?

8 A. It has something to do with field sobriety  
9 exercises.

10 Q. Okay. And the second article, driving under the  
11 influence of alcohol, at the scene of an accident  
12 investigation.

13 A. I don't recall it saying that. I don't recall it  
14 saying that. It's different than what you said.

15 Q. That's the second article listed?

16 A. It's at the scene accident, it is different than  
17 what you termed.

18 Q. Does that have anything to do with the Intoxilyzer  
19 5000, as far as maintenance?

20 A. I don't think that one does, no.

21 Q. Was that ever published?

22 A. Sure.

23 Q. Where was that published?

24 A. It's probably on there, I believe the DUI Law and  
25 Science Journal, although I'm not sure. Whatever the

1 publication would be on that, I'm not exactly sure.

2 Q. Well, it says here the Broward County Community  
3 College of Criminal Justice. Was it published there?

4 A. I don't know. Again, I don't know without having  
5 my correct copies with me if that was published at the  
6 college or published at the DUI Law and Science, I'm not  
7 sure.

8 Q. Well, was it subject to peer review?

9 A. It depends on what you mean "peer review". In  
10 other words, people in my field review it, people that work  
11 with me or have worked with me, but it's not given to a --  
12 in other words, it's not published nationwide in a journal  
13 like some publications would be so, therefore, it falls  
14 under peer review with me, but it doesn't fall under peer  
15 review nationally.

16 Q. I'm talking about scientific peer review. Is the  
17 data that you compile, if you do compile data, is that  
18 subject to peer review?

19 A. It can be, sure.

20 Q. Is the data in those articles subject to peer  
21 review?

22 A. No, just peer review in the local area.

23 Q. Who is in the local area? I am trying to ascertain  
24 who. What peers of yours review this?

25 A. Well, Dr. Jensen has looked at my articles. I

1 think I sent them to probably, I believe, a guy named  
2 Charlie Smith that reviews articles. People who work in  
3 this field generally read each other's articles before  
4 publication.

5 Q. Now, you said that field sobriety test, the first  
6 one listed here, is listed in the DUI Journal Laboratory and  
7 Science, is that correct? I mean, I will show it to you I'm  
8 not going to --

9 A. No, it is the DUI Law and Science Journal.

10 Q. I'm sorry, Law and Science Journal. How many  
11 articles have you published within that journal?

12 A. Probably four or six. I am not sure.

13 Q. And could you tell the Court who publishes that?

14 A. Whitaker(phonetic) Publishing out of New Jersey, I  
15 believe is the publisher.

16 Q. Do you know who sits on the editorial board of that  
17 publication?

18 MS. GARIBOLDI: Objection, relevance.

19 THE COURT: Overruled.

20 A. I know that there are a couple of defense  
21 attorneys, that was pointed out to me recently. But until  
22 then, I had no knowledge. I still have no knowledge who  
23 sits on the board. The publication goes in and I don't know  
24 who the board people are.

25 Q. (BY MR. ESQUENAZI) Mr. Swope, do you remember

1 trying to be qualified as an expert witness on March 23,  
2 1999, in Marion(phonetic) County, do you remember that?

3 A. No.

4 Q. Okay. Well, I have here a transcript from that  
5 court in which you were asked the same exact question about  
6 who sits on the editorial board --

7 A. Right.

8 Q. -- and you're aware that Richard Essen sits on that  
9 board, is that correct?

10 A. I believe they made it aware to me that Richard  
11 Essen was one of the people who sits on the board and I  
12 notified them. I didn't know that he did or not, but it was  
13 on the sheet.

14 Q. And who in fact is Richard Essen?

15 A. Richard Essen is an attorney.

16 Q. And isn't he a prominent DUI defense lawyer?

17 A. You have to ask him if he is prominent or not.

18 Q. You do a lot of work for him, don't you?

19 A. I do some work for his firm. I don't work for him  
20 directly. I haven't worked for him directly in probably ten  
21 years.

22 Q. His firm essentially does DUI defense work, right,  
23 do they?

24 A. You have to ask them, again, what they do. I don't  
25 know what a law firm does, that's up to them. I'm hired on

1 certain cases for their firm. What they do is up to them.  
2 I don't run their office.

3 Q. Isn't it in fact true, Mr. Swope, that in March of  
4 this year you were made aware of it and you just told the  
5 Court that you didn't know, but you did know in March, isn't  
6 that true?

7 A. That's not what I said. What I said was, I was  
8 made aware that Richard Essen sits on the board. I have no  
9 idea who the other board members are or what their  
10 affiliations are. I read Newsweek magazine, too, I don't  
11 know what the editorial board is.

12 Q. When you talk about your peers and peer review, you  
13 are talking about DUI defense lawyers essentially and --

14 A. No, people that I mentioned are not lawyers at all.  
15 Lawyers do not read the articles for peer review and you're  
16 aware of that.

17 Q. Well, let me ask you this question, have you ever  
18 -- do you have a certification in the maintenance of the  
19 Intoxilyzer 5000?

20 A. No, only police officers can have certifications.  
21 I had a certification when I was an officer. After I left  
22 police work in 1990, only police officers or aides that work  
23 in police departments can have certifications.

24 Q. You don't have a maintenance certification?

25 A. I already told you, no. I don't have a

1 certification by the State because I am not a law  
2 enforcement officer.

3 Q. Do you have a certification by the company who  
4 makes the Intoxilyzer 5000?

5 A. No, they don't give out certifications, there is no  
6 such thing.

7 Q. Okay.

8 MR. ESQUENAZI: May I approach, Your Honor.

9 THE COURT: Yes.

10 Q. (BY MR. ESQUENAZI) Mr. Swope, I'm showing you  
11 something that says completion and competency certificate of  
12 the Intoxilyzer 5000.

13 A. Go ahead.

14 Q. You know what that is?

15 A. Sure, it is for law enforcement officers only, from  
16 the company. They do not teach anyone who is not law  
17 enforcement certified. It is simple, it is just what I just  
18 said.

19 Q. No, Mr. Swope, if I'm not correct, you said that  
20 the company does not give anybody certification in the  
21 Intoxilyzer 5000 and I'm showing you now what is a  
22 certification, isn't that correct?

23 A. No, that's not correct. The company does not  
24 certify anyone unless they are in law enforcement or unless  
25 they are certified by law enforcement, that's it.

1 Q. But it's possible to get a certification from the  
2 company who makes the machine, isn't that correct?

3 A. If you are a law enforcement personnel or employed  
4 or paid by a law enforcement agency or state agency. You  
5 cannot get it if you own a private machine. There is  
6 absolutely no way, they will not do it.

7 Q. In fact, isn't it true that you have purchased a  
8 private machine?

9 A. I have worked on purchasing one. I got one  
10 purchased for three different individuals and I currently  
11 work also at Florida International University on theirs,  
12 correct.

13 Q. Would one of those individuals that you tried to  
14 purchase a machine for, was that Richard Essen?

15 A. Sure, that was his firm, correct.

16 Q. Mr. Swope, let me ask you a question. As far as  
17 the machine that's in question today, have you had any  
18 opportunity to perform any maintenance checks on the machine  
19 that we're discussing today in this courtroom?

20 A. No. This particular model number?

21 Q. Yeah.

22 A. No.

23 Q. You can't testify today about any readings on that  
24 machine or how that machine was maintained, can you?

25 A. Sure, by State forms. How the machine is



1 maintained is all on the forms, they are notarized and  
2 signed by the operators and also by the maintenance person.  
3 It has to meet a certain criteria and all machines are built  
4 exactly the same.

5 Q. Let me ask you this question, Mr. Swope, as far as  
6 the publications that you made in the area of certification  
7 and maintenance on the Intoxilyzer, I want to ask you in  
8 regards to that, have you ever compiled data and taken that  
9 data and statistically done something to that data and  
10 published that, have you done that?

11 A. I have not, no. Others have, the group I work  
12 with. As I indicated, we all work a certain portion of the  
13 machine and then give the data to that individual and it's  
14 published. I am currently working now on publication with  
15 Florida International University where all of the work we  
16 have done on the machine will be published in the future.  
17 It is just a matter of getting it all together, which takes  
18 quite some time.

19 Q. You yourself have not done any compilation of data  
20 as far as maintenance goes on the Intoxilyzer 5000 machine?

21 A. As far as peer review, no. I have done plenty of  
22 information on it, but it has not been published, no.

23 MR. ESQUENAZI: I have no further questions as far  
24 as declaring Mr. Swope as an expert witness; however,  
25 the State, if you want to go side-bar on an issue ---

1 THE COURT: Why don't we do this, I will take a  
2 few minute recess instead. I think the jurors need a  
3 break. So why don't we take a couple of minutes,  
4 please. We will call you back in a few minutes.

5 (Thereupon, the jurors exited the courtroom.)

6 THE COURT: All parties are present, the State,  
7 Defense and Defendant.

8 MS. GARIBOLDI: I know the rule is invoked and I  
9 see Deputy Zager sitting in here. I don't know if they  
10 are planning on calling him for rebuttal.

11 THE COURT: They have already indicated they are  
12 planning on calling him.

13 MS. GARIBOLDI: Right, and he is sitting here  
14 during Mr. Swope's --

15 THE COURT: I allowed him in the courtroom. I  
16 understand or believe they will be calling him for  
17 rebuttal, and my understanding of the rules is, an  
18 expert is entitled to hear another expert.

19 MR. ESQUENAZI: Your Honor, at this point there has  
20 been no testimony brought out at this point that Mr.  
21 Swope has published anything, compiled any data that  
22 is scientifically valid in the area of maintaining an  
23 Intoxilyzer machine.

24 As far as if he is qualified as an expert in this  
25 area, the argument goes, it will heighten credibility

1 with the jury. Mr. Swope and Counsel has demonstrated  
2 no issues that he has any training sufficient enough to  
3 testify to the Intoxilyzer 5000 machine. The  
4 publications he spoke of are in defense law journals,  
5 subject to no peer review and no scientific validity.  
6 So Mr. Swope is basically a CSA officer. It's my  
7 understanding that CSA officers are not allowed to  
8 testify about maintaining a machine. Therefore, I can't  
9 see how Mr. Swope can sit in this courtroom and testify  
10 that he has sufficient knowledge about maintaining the  
11 Intoxilyzer 5000.

12 Your Honor, additionally, Mr. Swope admits that he  
13 never tested the machine we're talking about today, in  
14 general. He has never published anything about  
15 maintenance on the Intoxilyzer 5000. I can't see how he  
16 can testify as being an expert in that area.

17 THE COURT: Defense.

18 MS. GARIBOLDI: Your Honor, Mr. Swope has been  
19 qualified numerous, numerous times as an expert  
20 regarding the Intoxilyzer. Even by this Court he has  
21 been certified as an expert, and just because --

22 THE COURT: Let me say one thing, I don't certify  
23 anybody.

24 MS. GARIBOLDI: Or qualified.

25 THE COURT: Let me be clear, I don't qualify

1 anybody. And the recent decision by the Florida Supreme  
2 Court is Courts are not supposed to do that nor have I  
3 ever done that. The issue is, it's presented and either  
4 there are objections and it's noted and there are Voir  
5 Dires and, you know, if I permit them to go forward,  
6 just let the record reflect, I do not affirmatively  
7 vouch for, certify, qualify, anybody as an expert. I  
8 just want to the make that real clear.

9 MS. GARIBOLDI: I understand. But what I meant to  
10 say, he has been allowed to testify as an expert in  
11 numerous cases, even in this court. Just because he  
12 hasn't published articles to the State's -- just because  
13 he hasn't published specific articles regarding, I don't  
14 even know what he was asking, but he's saying that just  
15 because he hasn't published specific articles that he is  
16 not an expert. He has got plenty of qualifications,  
17 he just testified to that. And just because he doesn't  
18 have a certificate as far as maintenance is concerned,  
19 doesn't mean he is not an expert. I think the State is  
20 trying to pigeonhole him and they're looking for  
21 specific areas of publication.

22 THE COURT: Why don't we talk about this, and just  
23 let the record reflect that I have allowed Mr. Swope to  
24 testify on a limited basis in this courtroom in the  
25 past. And let the record reflect also, that the State

1 has never to my recollection Voir Dire'd this witness as  
2 succinctly and, quite frankly, raised issues as they're  
3 doing here today. So I just want to be fair in terms of  
4 my assessment and my determination that one, yes, I have  
5 and it has been limited, and in the past this Court has  
6 not gone through a similar type of Voir Dire by the  
7 State. So the only reason I'm saying that is, there may  
8 be new and different issues raised and I'm not going to  
9 preclude those issues from being raised simply because  
10 they have not been raised before. I don't want any  
11 prior rulings from this Court to interfere with or  
12 preclude the State from having any determinations made.

13 I guess one of the issues, Counsel, is given the  
14 fact you have raised these issues here today, what is  
15 the law in terms of qualifications in expertise and do  
16 you have any authority that you can cite to me.

17 MR. ESQUENAZI: Your Honor, it's clear on the  
18 evidence code 702.3 that, "An expert's opinion may not  
19 be based on speculation, it must be based on reliable  
20 scientific principles." Mr. Swope has not testified  
21 that any of his publications in the area of DUI  
22 maintenance have peer review and are subject to valid,  
23 scientific principle. Obviously, when we have peer  
24 review and we are publishing something, that is subject  
25 to scientific principle. All his publications that deal

1 with anything, were never subject to that. So anything  
2 he testifies on is as good as a lay person can testify  
3 on. He is not an expert in the area of DUI maintenance.

4 THE COURT: Defense.

5 MS. GARIBOLDI: According to 90.702, "If  
6 scientific, technical, or other specialized knowledge  
7 will assist the trier of fact in understanding the  
8 evidence or in determining a fact in issue, --" this is  
9 exactly what he would be doing, is assisting the jury in  
10 understanding the breath results and the breath machine,  
11 " -- a witness qualified as an expert by knowledge,  
12 skill, experience, training or education may testify  
13 about it in the form of an opinion." Mr. Swope just  
14 testified he has knowledge, he has got experience in  
15 this area, he has got training, education. He has  
16 taught classes, he has published, he has spoken at  
17 seminars, he was a police officers for 17 years. He  
18 definitely has the experience, training and education to  
19 testify about this area.

20 MR. ESQUENAZI: Your Honor, however, this I think  
21 rests on a scientific principle, the maintenance of the  
22 Intoxilyzer and results of an Intoxilyzer clearly rest  
23 upon scientific principle. It's not about knowledge and  
24 expertise in the area, it is about scientific principle.  
25 Counsel has brought up no testimony that Mr. Swope has

1 any training in the scientific principles and  
2 maintenance of the Intoxilyzer 5000. He has no  
3 certification in the area of the Intoxilyzer 5000,  
4 therefore, he should not be declared, he should not be  
5 subject to those questions, therefore, giving him  
6 heightened credibility for the jury to review. It  
7 should not be done.

8 THE COURT: I can't recall all of your inquiry of  
9 this witness.

10 MR. ESQUENAZI: And clearly Frye states that in the  
11 evidence code.

12 MS. GARIBOLDI: If the Court would allow me, I  
13 could inquire specifically as to what the State is  
14 concerned about.

15 THE COURT: Okay. Go ahead.

16 VOIR DIRE EXAMINATION

17 Q. (BY MS. GARIBOLDI) Mr. Swope, are you familiar with  
18 scientific principles regarding the Intoxilyzer 5000?

19 A. Of course.

20 Q. And could you please tell me how you're familiar  
21 with those?

22 A. Well, I'm familiar by those, first of all, by  
23 taking the maintenance class at, by taking the maintenance  
24 class when CMI was in Minturn, Colorado.

25 THE COURT: When what? I am sorry.

1           A.    Taking a maintenance class of the Intoxilyzer in  
2   Minturn, Colorado, that is initially where CMI was located  
3   before they moved to Owensboro, Kentucky.  I also have been  
4   working with breath testing devices, which are basically all  
5   similar, since 1974.  I, besides doing, assisting in  
6   maintenances for over 15 years in law enforcement, I also  
7   did approximately two thousand maintenances either at the  
8   college, in working to maintain and work on machines at the  
9   college --

10           THE COURT:  What machines are you talking about?

11           MR. SWOPE:  There are four training machines at the  
12   academy, which I worked with for ten years.  I assisted  
13   in maintaining those machines during that ten year  
14   period of time.

15           Q.    Which academy are you talking about?

16           A.    Broward County Community College, during that ten  
17   year period of time.  Also, I worked with Dr. Jensen --

18           MR. ESQUENAZI:  Your Honor, I have to object at  
19   this time to being non-responsive, not being responsive  
20   to any of the questions.  He is going on and on about  
21   something, I'm not sure he is answering the question.

22           MS. GARIBOLDI:  Yes, he is answering the question.

23           THE COURT:  I have to say, I'm not getting -- I  
24   mean, I will allow you to Voir Dire him.  The question  
25   was simple and I'm not clear on the answers.  I don't



1 know, I'm not clear on what he is talking about. Maybe  
2 you want to re-ask your question, if you can be specific  
3 I'd appreciate it.

4 MS. GARIBOLDI: Okay.

5 Q. (BY MS. GARIBOLDI) Are you familiar with the  
6 scientific principles regarding the breath machine?

7 A. Yes.

8 Q. And how are you familiar with these scientific  
9 principles, can you tell me about this scientific principle?

10 A. Just, I'm familiar with training from the company,  
11 I'm familiar with training by the State of Florida, State of  
12 Michigan, State of Kansas, doing experiments on the machine  
13 with other engineers, working with Florida International  
14 University on the scientific principles on the machine,  
15 tearing them apart and putting them back together. That is  
16 as easy as I can make it, I guess.

17 Q. Do you have any experience as far as the scientific  
18 reliability of these tests?

19 A. Yes.

20 Q. And could you explain to the Court how you're  
21 familiar with those?

22 A. That's really the same way, through the experiments  
23 I conducted that I worked with people on, what the factory  
24 has shown us, what the State has shown us, doing blood and  
25 breath correlations, doing maintenance on the machine,

1 repairing the machine, taking parts from one of the machines  
2 to another, interchanging. For 25 years I have been working  
3 with that type of machine.

4 Q. Can you compare your expertise to that of a  
5 maintenance operator who works for BSO, for example Deputy  
6 Zager.

7 MR. ESQUENAZI: I have to -- this is not relevant  
8 to this questioning, knowledge of maintenance expertise  
9 as compared to Deputy Zager. It calls for speculation.

10 THE COURT: Let me ask a question. I am really  
11 concerned at this point. And I guess the issue is, if  
12 he was going to be offering testimony, what capacity  
13 would he be offering it.

14 MR. ESQUENAZI: Your Honor, a maintenance  
15 person cannot offer testimony as far the maintenance of  
16 a machine without a certification in the State of  
17 Florida. We cannot do it. A CSA cannot do it. A CSA  
18 officer can't come in here and testify about the  
19 maintenance of the Intoxilyzer 5000, a CSA not a  
20 maintenance officer, I apologize. You can't do it  
21 without certification. I don't know how Mr. Swope is  
22 going to come in here and testify about the Intoxilyzer  
23 5000, he has no certification, nor has he published  
24 anything that is reliable as far as the Frye standards  
25 go. The Frye standards clearly state there has to be

1 scientific reliability as far as when an expert or  
2 proposed expert is going to testify about anything.  
3 There has been no data that he has compiled, he stated  
4 that, in any of these articles. I can't see how he can  
5 testify about maintaining a machine.

6 MS. GARIBOLDI: Your Honor, he just testified that  
7 he took a maintenance class and that he has maintained  
8 over two thousand machines over ten years.

9 THE COURT: I think the State has a point.

10 MS. GARIBOLDI: He has taken these machines apart.

11 THE COURT: You know, I have never been through,  
12 again, you know, in prior trials I have not had the  
13 State raise these issues before. I think they got  
14 validity. I understand that the Defense is looking for  
15 this witness to testify in some expert capacity, but the  
16 State raises some very interesting and relevant  
17 objections that for the first time, truly, have been  
18 reviewed before this Court, and I don't know where he  
19 has scientific background or expertise in order to  
20 testify as to this particular instrument.

21 MS. GARIBOLDI: Your Honor --

22 THE COURT: What is the proffer, are you from a  
23 proffer standpoint going to be eliciting from him, in  
24 terms of the testimony?

25 MS. GARIBOLDI: Would you like me to proffer the

1 testimony?

2 THE COURT: Briefly.

3 MS. GARIBOLDI: It's going to take a while, it  
4 can't be done briefly.

5 THE COURT: What are you looking to have in terms  
6 of line of questioning.

7 MS. GARIBOLDI: As far as the validity of the  
8 breath test, the way the machine works, the standard  
9 deviations. The State has put Deputy Zager on the stand  
10 who testifies in favor of the State and he, I don't know  
11 he has written scientific articles about the reliability  
12 or scientific reliability of this machine. He has taken  
13 the same exact --

14 MR. ESQUENAZI: Your Honor --

15 THE COURT: Let her finish.

16 MS. GARIBOLDI: -- class and he has maintained over  
17 two thousand machines. He takes them apart, he puts  
18 them back together. He has got plenty of experience.

19 THE COURT: Well, I don't know that taking a  
20 machine apart and putting it back together qualifies you  
21 as an expert. I don't know how that qualifies you as an  
22 expert, by taking a machine apart and putting it back  
23 together properly, with all due respect.

24 MS. GARIBOLDI: On how the machine works.

25 MR. ESQUENAZI: Your Honor, it is clear, with all

1 due respect to Counsel, I can take apart some parts of  
2 my car but that doesn't qualify me as an expert in the  
3 automotive industry, it just doesn't.

4 However, additionally, Your Honor, when she talks  
5 about Deputy Zager, Counsel had an opportunity to do the  
6 same thing to Deputy Zager if she wanted to at the time  
7 Deputy Zager was testifying. She chose not to. That's  
8 not the State's fault, what Counsel wanted to do to  
9 Deputy Zager. She had an opportunity to ask him any  
10 questions at the time she wanted to and I did not stop  
11 her from doing that. It was my opportunity to ask Mr.  
12 Swope those questions. There was testimony brought out  
13 that he has no scientific reliability in any of this, in  
14 all areas of maintenance. I can't see how he can  
15 testify and heighten credibility in the area of  
16 maintenance and breath testing of a machine.

17 MS. GARIBOLDI: He can testify because he has taken  
18 the class and he has done over two thousand  
19 maintenances. That will qualify someone to testify --

20 MR. ESQUENAZI: Not in this area.

21 MS. GARIBOLDI: -- about the maintenance of a  
22 machine. And furthermore, the State has known that we  
23 were planning on calling Mr. Swope and they could have  
24 filed a motion out of pure courtesy. That's what I  
25 would have done if I would have attempted to strike

1 Deputy Zager.

2 MS. HELLER: I am going to respectfully submit that  
3 notice was given two days before the trial.

4 MS. GARIBOLDI: No, it wasn't.

5 MR. ESQUENAZI: It was.

6 MS. GARIBOLDI: I spoke to Mr. Zaccor way before  
7 that and he had no objection whatsoever.

8 MR. ESQUENAZI: In the rules of criminal procedure,  
9 Counsel, I do not have to do that and it's within my  
10 auspice to Voir Dire an expert witness to see if he is  
11 qualified to testify as one. That's within the rules,  
12 Your Honor, Counsel, and I don't think I was intending  
13 to show you any disrespect or the Court any disrespect.

14 MS. GARIBOLDI: Mr. Swope just told you he took the  
15 maintenance class, I guess that is what the State is  
16 looking for, and that he has maintained over two  
17 thousand machines. That in itself should entitle him to  
18 testify about the maintenance of this machine. He has  
19 taught at seminars, he has taught classes. What more  
20 can a Court ask for. I mean, Deputy Zager isn't a  
21 scientist. I mean, the rules don't require for someone  
22 to be an expert to be a scientist.

23 THE COURT: All right. I'm going to, you know,  
24 Counsel, you had an opportunity to Voir Dire the  
25 witness, you will have an opportunity to cross this

1 witness, you know, for the limited purposes of whatever  
2 his, I guess, limiting it to administer -- I mean, I  
3 don't know what to limit it to in terms of scope. What  
4 is it that he is really -- when you said he maintained  
5 two thousand instruments or machines, what instruments  
6 or machines are you referring to?

7 MS. GARIBOLDI: Can I ask him? I can't remember, I  
8 mean, he just --

9 VOIR DIRE EXAMINATION

10 Q. (BY MS. GARIBOLDI) Mr. Swope, what kind of machines  
11 have you maintained?

12 A. Well, primarily I guess we are talking about the  
13 Intoxilyzer, that came in effect in 1984, 1985, so there  
14 were other machines prior to that but the Intoxilyzer came  
15 to Florida in 1985.

16 Q. Do you have experience as far as maintenance on the  
17 Intoxilyzer 5000?

18 A. Yes.

19 Q. And could you explain to us what that experience  
20 is?

21 A. Well, as I indicated I took the maintenance --

22 MR. ESQUENAZI: Your Honor, this was already asked  
23 and answer.

24 THE COURT: I need to clarify, please.

25 Go ahead.

1           A.    I took the maintenance class from CMI itself, that  
2 was done in Colorado, a three day, I think three and-a-half  
3 days, but it was a three-day course. I took the State  
4 required course. At that time we had one permit. The  
5 maintenance operators had the same permit that everyone had.  
6 It was one permit, and I think now there are two. We had  
7 one permit and that was initially where I got the training.  
8 The training was similar to what we had on the 4011 Series,  
9 but I had the three days from the company, five days from  
10 the State and an additional five days from the State at a  
11 later period of time. We had to be requal'd(phonetic), and  
12 again in 1986, '87, I don't know if we were requal'd eight  
13 or six hours. It has changed at some point. We then began  
14 to repair the machines sometime in '86.

15           THE COURT: Who is "we"?

16           MR. SWOPE: I say "we", the division: Dave Fries,  
17 myself and a guy named Mike Hunt. There were all three  
18 of us, we did it together. The three of us did it  
19 together, the maintenance and repairs.

20           THE COURT: In what capacity? I'm sorry, I'm  
21 missing something.

22           MR. SWOPE: At that particular point in time there  
23 was a CSA, Judge. We are not -- because of the, they  
24 didn't want the deputies in court. The CSAs did the  
25 maintenance on the machines with us, but they signed off



1 on the paperwork. In other words, the paperwork from  
2 1984 until probably 1986 was signed off by a community  
3 service aide. He appeared in court. I think Dave Fries  
4 then started appearing on the maintenance documents in  
5 '86 or '87, I'm not sure which. Even though all three  
6 of us did maintenance, or myself and Dave would do  
7 maintenance, or myself and Mike Hunt would do  
8 maintenance, or Mike Hunt and Dave Fries.

9 THE COURT: So 13 years ago you did certain work as  
10 a CSA?

11 MR. SWOPE: CSA's would be the only ones  
12 testifying.

13 THE COURT: Is that what you are indicating?

14 MR. SWOPE: At that particular point in time CSAs  
15 would work with us and we'd all do the maintenance  
16 together and the purpose of that was, if somebody was on  
17 vacation or if somebody was sick or somebody was ill,  
18 that either two of us or three of us were always  
19 available to do maintenance.

20 THE COURT: Thirteen years ago?

21 MR. SWOPE: Well, that is when it started. Then I  
22 did maintenance along with Dave Fries up until 1990. I  
23 left the department in 1990. I haven't been on any  
24 documents since 1990, obviously, because I wasn't there.  
25 That's how the maintenance was done. I think we had

1 four machines, I think, maybe five.

2 Q. (BY MS. GARIBOLDI) After 1990, what kind of  
3 experience or involvement did you have regarding the  
4 Intoxilyzer?

5 THE COURT: Can you limit it please to the  
6 Intoxilyzer 5000 Series.

7 Q. (BY MS. GARIBOLDI) The 5000 Series.

8 A. Well, when I left the Sheriff's Office in July of  
9 1990, I continued teaching the police academy through 1994.  
10 There were four training machines out there. They did not  
11 need to be, in other words, the State did not have to do  
12 maintenance on them but we did maintenance on them, myself,  
13 once a month. There was myself, Dave Fries I think did it  
14 in 1990 with me, 1991. In 1992 to 1995 I did the  
15 maintenance on a monthly basis myself, even though it was  
16 not required. The machines were used in training for all of  
17 the new people that were being Intoxilyzer certified.

18 Q. So from 1990 to 1995 you did maintenance on four  
19 machines?

20 A. That's correct.

21 THE COURT: On training machines.

22 MR. SWOPE: They were training machines, the same  
23 machines, they are Intoxilyzer 5000 Series but they are  
24 machines used when guys like Deputy Zager and those get  
25 re-qualified once a year. They use those machines.

1 They don't use departmental machines. They use machines  
2 at the Broward Police Academy. So everybody in the  
3 county that gets retrained once a year uses those  
4 machines. Those are the only times they are used, in  
5 training. They do not use machines from their  
6 department, they use training machines at the police  
7 academy.

8 Q. (BY MS. GARIBOLDI) When did you teach at the police  
9 academy?

10 A. I taught there up to 1995, I believe January or  
11 February of '95.

12 Q. And after 1995?

13 A. After 1995 I maintained machines for private, there  
14 were two private law firms that had the Intoxilyzer 5000.  
15 There was also Florida Power & Light that had the 5000 that  
16 I maintained for them. And in 1998, I believe, it might  
17 have been late '97, early '98, the Intoxilyzer was  
18 purchased, the 5000 Series was purchased by Florida  
19 International University. And it's currently still in  
20 effect, and I'm doing the maintenance for them on that  
21 machine.

22 THE COURT: State.

23 MR. ESQUENAZI: First of all --

24 THE COURT: What are my options here?

25 MR. ESQUENAZI: Well, Your Honor, I think that your

1 options are, one, not to let him testify about the  
2 scientific reliability of the machine; or two, cut him  
3 off at any conclusory statement that he may make  
4 regarding the machine. I don't see how he can make a  
5 conclusory statement regarding the reliability of any of  
6 these machines.

7 I mean, additionally, Your Honor, I haven't heard  
8 no proffer, testimony, and I'm not sure exactly at this  
9 point what he is going to testify to. I don't know and  
10 Counsel hasn't brought that out. I know he has done  
11 some maintenance work, training things, but I don't know  
12 what he is going to testify to in the area of the  
13 Intoxilyzer 5000. I think any statements he might make  
14 to the jury might be unduly prejudicial to the State  
15 because of the fact that he has no basis in scientific  
16 reliability for any of Mr. Swope's opinions. Therefore,  
17 giving him heightened credibility under the Frye  
18 standard would be an opposition of what the law states.  
19 The law states under Frye that an expert witness needs  
20 to have scientific reliability in the area such as this,  
21 which is scientific reliable. He has shown none of that  
22 up to this point, therefore, giving him the option of  
23 making conclusory statements would be prejudicial to the  
24 State.

25 THE COURT: Defense.

1           MS. GARIBOLDI: I would have him, first of all,  
2           testify to the deficiencies in the machine, problems  
3           with the machine. I can go through a whole proffer, but  
4           it would take a long time. I haven't addressed the  
5           Widmark(phonetic) theory. Deputy Zager testified to  
6           that. That's a scientific formula. I didn't hear of  
7           specific training or education as far as the scientific  
8           reliability of that theory.

9           MR. ESQUENAZI: With all due respect to Counsel, I  
10          can't -- and let me say this, with regards to the  
11          machine that we are talking about today, I don't see how  
12          you can take Mr. Swope's testimony from what he said and  
13          use it to say anything about the Intoxilyzer 5000  
14          machine that was used to test the defendant. Because if  
15          he can't testify that any of his work was scientifically  
16          reliable and he is going to testify, come here and  
17          testify about the machine that was used on the  
18          defendant, that is so prejudicial. I don't know how it  
19          could be used. I don't know. It has nothing to do with  
20          the machine that we're talking about today, nothing.

21          THE COURT: Let me just say, again, that I do think  
22          there is a lack of showing of scientific reliability and  
23          I do think there is a lack, a significant lack of  
24          showing of any credentials from the scientific or  
25          engineering community that would qualify this witness to

1 testify with regards to the reliability of this  
2 instrument. I know, and I don't know, if I'm wrong let  
3 the record reflect and I will stand corrected. But,  
4 again, in the past no prosecutor has raised these issues  
5 to the Court before, no prosecutor that has been in this  
6 courtroom has done this prior to, and I do think that  
7 there has been no scientific elicitation of credentials,  
8 authority, in order to have this witness testify in any  
9 scientific capacity. He is not a doctor, he is not an  
10 engineer, he has no credentials.

11 MR. SWOPE: Excuse me, I am an engineer.

12 THE COURT: You are an engineer?

13 MR. SWOPE: Yes.

14 THE COURT: In what field?

15 MR. SWOPE: I am an industrial engineer. It is on  
16 my curriculum. I'm an engineer. I testified to that  
17 earlier today. I have a Masters of Science --

18 THE COURT: My apologies.

19 MR. SWOPE: -- at the University of Miami, in  
20 technology and engineering.

21 THE COURT: And what is that credential, I'm sorry.

22 MR. SWOPE: It is a Masters of Science.

23 MR. ESQUENAZI: Your Honor, I have a copy printed.

24 MR. SWOPE: Engineering from the University of  
25 Miami.

1 MR. ESQUENAZI: That would show --

2 THE COURT: Just let the record reflect, I'm  
3 looking at a curriculum vitae.

4 What is industrial technology?

5 MR. SWOPE: A science.

6 THE COURT: I know it's a science.

7 MR. SWOPE: Mathematical, Judge, statistical. That  
8 is primarily what it deals with.

9 THE COURT: Statistics?

10 MR. SWOPE: Yes, statistical analysis.

11 THE COURT: Of what?

12 MR. SWOPE: Of whatever you are analyzing. That is  
13 why it's a science degree. It's whatever system that  
14 you're working with, you're analyzing. In other words,  
15 if I run a thousand experiments on a machine, the  
16 ability to find out what mathematically --

17 THE COURT: You are not -- are you a professor?

18 MR. SWOPE: No, no.

19 THE COURT: Just for the record, what specifically  
20 do you teach at the Criminal Justice Institute? I mean,  
21 are you currently teaching or how many years have you  
22 done that?

23 MR. SWOPE: No, I taught out there ten years,  
24 Judge. The only teaching I do now is seminars that I'm  
25 asked to speak at. I taught the Intoxilyzer course for

1 four years around the country with Dr. Jensen out of  
2 Minnesota. The last course I taught there was in 1998.

3 THE COURT: Well, you know, there is expertise. I  
4 mean, there is some expertise.

5 MR. ESQUENAZI: If you want me to go into  
6 everything on there I can. I went through some of it,  
7 some of it is publications which are indicated and are  
8 not actually what they pertain to be. None of those  
9 areas have anything to do with the Intoxilyzer 5000,  
10 Your Honor.

11 THE COURT: I understand.

12 MR. ESQUENAZI: With all due respect.

13 Your Honor, for the Court's purpose, Mr. Swope has  
14 stated that the curriculum vitae that you're looking at  
15 actually is incorrect to begin with and we don't --

16 THE COURT: Thank you.

17 MR. ESQUENAZI: I would not want the Court to be  
18 mis-led in any way, because Mr. Swope doesn't have a  
19 copy of the curriculum vitae that he said was updated.  
20 I don't want the Court to look at it and say everything  
21 on there is actually true because Swope said it's  
22 actually not.

23 MR. SWOPE: They have it.

24 MR. ESQUENAZI: I don't have it on me, Mr. Swope,  
25 if I did I would show it to the Court, I'm sorry.



1           MR. SWOPE: You have it because I gave it to you  
2 the last trial.

3           MR. ESQUENAZI: You didn't give it to me.

4           MR. SWOPE: Yes, I did.

5           MR. ESQUENAZI: No, you didn't, Sir.

6           THE COURT: One of the concerns is, I am concerned  
7 about the lack of scientific credentials in this field,  
8 and that is the purpose that you are, my understanding  
9 is, that you will be eliciting expert opinions as to the  
10 reliability of this instrument.

11          MS. GARIBOLDI: More specifically, the margins of  
12 error, things that Deputy Zager has testified about.

13          THE COURT: I understand. Deputy Zager is a  
14 maintenance officer for this particular instrument.

15          MS. GARIBOLDI: I understand.

16          MR. SWOPE: How could he be? He can't get a  
17 license. How could it be. If not a law enforcement --

18          MR. ESQUENAZI: Your Honor, I don't know that's  
19 necessarily accurate. We haven't gone into that, and if  
20 we are going to take Mr. Swope's word for everything he  
21 says, that's one thing, if the Court wants to do that.  
22 I'm not sure that's exactly true.

23          THE COURT: I'm sorry?

24          MR. ESQUENAZI: I'm not sure that it is exactly  
25 true, that a police officer is the only person that can

1 get them. I mean, honestly, I don't know that to be  
2 true.

3 MS. GARIBOLDI: He just told us --

4 MR. ESQUENAZI: If I can bring Mr. Zager in for  
5 rebuttal, I'm sure he has knowledge of the question, if  
6 the Court cares --

7 MR. SWOPE: Ask Zager.

8 MR. ESQUENAZI: Your Honor, for the purpose of  
9 this, I asked Deputy Zager that specific question.  
10 Deputy Zager told me he is aware of other people  
11 probably getting certifications for that machine who are  
12 not police officers.

13 And additionally, Your Honor, if I may proffer Mr.  
14 Swope as to the events that took place that day, I mean,  
15 I don't really need to go through it. I can guarantee  
16 you that Mr. Swope is going to have no testimony, okay,  
17 about anything that took place on that day. All Mr.  
18 Swope is going to testify to --

19 THE COURT: So you know, I have never allowed him  
20 to testify with regards to field sobriety exercises,  
21 since my review and interpretation of Meador is that  
22 these are not scientific tests, and I'm not allowing  
23 expert opinion, and I never did allow expert opinion  
24 regarding that.

25 MR. ESQUENAZI: I understand that. This is the

1 State's point as it stands now, as far as it goes, Mr.  
2 Swope has no independent recollection or independent  
3 knowledge of testing the machine on that day. But Mr.  
4 Swope is going to sit here and testify that his  
5 independent test is scientific reliable, therefore, he  
6 is going to testify that the machine that was used on  
7 the defendant is not reliable. If there is no  
8 scientific reliability in what Mr. Swope does, how can  
9 he testify about the scientific reliability on the  
10 machine that was used on the defendant. It doesn't go.

11 THE COURT: I think that's a good point, and maybe  
12 that's -- I'm kind of batting this around and I am sorry  
13 it is taking this long. I do think it is an important  
14 point, with all due respect to Mr. Swope. I think the  
15 State has a good point and I'm not going to permit him  
16 to testify.

17 MR. ESQUENAZI: Thank you.

18 MS. GARIBOLDI: I am going to ask this Court that I  
19 be allowed to proffer his testimony for the record.

20 THE COURT: Sure. Let me do this. How long do you  
21 think that will take? I need to make decisions  
22 regarding that.

23 MS. GARIBOLDI: I don't know.

24 THE COURT: Should I excuse the jury at this point  
25 and have them come back on Thursday? I will not be here

1 tomorrow.

2 The only other thing I can suggest, Mr. Swope, is  
3 that we move forward. Are you going to be going to  
4 another courtroom?

5 MR. SWOPE: They are waiting for me now.

6 THE COURT: Why don't you go ahead and report to  
7 another courtroom and let's continue maybe at least a  
8 little bit longer and maybe you can come back and do a  
9 proffer, if it's possible. I don't know how long you  
10 will be.

11 MR. SWOPE: I don't know how long I will be up  
12 there either.

13 MS. GARIBOLDI: We are basically done because he is  
14 my only witness, unless he wants to testify.

15 MR. SWOPE: Can I talk to her?

16 THE COURT: Yes, you bet. If so, you can do a  
17 colloquy with your client and if everybody is rested we  
18 could move into closings. You can proffer during  
19 deliberations.

20 MS. GARIBOLDI: Okay.

21 (Thereupon, the above was concluded.)  
22  
23  
24  
25

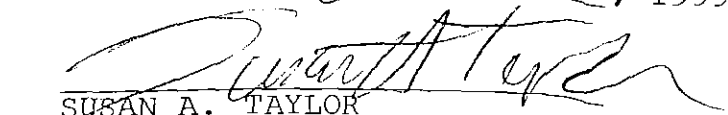
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CERTIFICATE

STATE OF FLORIDA )  
COUNTY OF BROWARD )

I, SUSAN A. TAYLOR, Court Reporter, Certify that I was authorized to and did stenographically report the foregoing proceedings and that the transcript is a true and complete record of my stenographic notes.

Dated this 29 day of October, 1999.

  
SUSAN A. TAYLOR  
Court Reporter