

Zager Deposition Questions

State v. Daniel, Broward County

Garett M. Berman, Florida TSRP

Opinion

1. Introduce 17th Judicial Circuit in and for Broward County, Florida Administrative Order No. III-03-D-6

2. Do you understand that we are taking your deposition for the purposes of finding out what exactly you will be testifying to should this case go to trial?
 - a. Do you also understand that unless you have reviewed the necessary materials and documents relevant to this case, have an opinion on or about this case or what you have been hired to give an opinion about, and are prepared to state that opinion, this deposition would be a waste of time and taxpayer money?
 - b. Have you reviewed all the materials and documents that you feel would be necessary to form an opinion(s) in this case?
 - c. On what subject have you been hired to give an opinion(s) on in this case?

- d. Are you prepared to state that or those opinions here today?
 - e. Is there anything you feel you did not have or review in order to form an opinion on or about this case today?
3. What is that opinion?

Subpoena Duces Tecum

4. You were served with a subpoena duces tecum, that requested for you to produce certain information or documents at a date prior to this deposition, correct?
5. You provided a response to the SDT, correct?

- a. The response was submitted by Mr. Carlos Canet on your behalf on November 8, 2012, correct?
6. For some of the questions you indicated that you were answering in accordance with the Court order, correct?
 - a. Percentage of income, correct?
7. You are aware that Mr. Canet was arguing on your behalf to have the SDT quashed, or that he was arguing to not have you be ordered to produce certain documents, correct?
8. Since he was representing you or your interests at these hearings, you are aware then that the Court ordered you to provide the case names, counties, and areas of expertise for which you were hired, for all criminal DUI cases for which you are currently being retained or consulting on, correct?
9. That this was the judge's order as of the date of that hearing which was November 19, 2012?
 - a. Did Mr. Canet tell you that this was what the judge ordered?
 - i. If so, when?
 - b. So you could have started compiling this information at that time, correct?
 - c. Did you and Mr. Canet discuss this issue?
 - i. What did you discuss?
10. When did you become aware that Mr. Canet was filing a motion for the judge to reconsider his decision with regards to this information requested from the State?
11. Did you do anything at all to compile or produce this information for the State, pursuant to the SDT, and ordered by the Court, thus far?
 - a. You could have compiled or gathered this information in the meantime, in case the Court decided to uphold its initial ruling, and could have been ready to provide that information to the State, correct?
 - i. But you did not?
12. You indicated on your response that revealing this information without client consent would violate your contractual and fiduciary obligations, correct?
13. When you say that you have a contractual and fiduciary obligation to the defendants, what do you mean?
 - a. What contractual obligation? Yours to them? Theirs to you?
 - b. What fiduciary obligation? Yours to them? Theirs to you?
14. Are these obligations listed in your JZFC retainer agreement?
 - a. If so where?
15. Are these obligations listed in some other sort of contract you have with these defendants?
16. Do you have different retainer agreements for different defendants regarding JZFC?
 - a. If so, what are the differences? Please provide a copy

1. *Case retainer = \$1000*
 2. *Case report = \$500*
 3. *Court (per day) = \$1000 (not including travel and lodging)*
 4. *Deposition fee = \$1000 (minimum per scheduled day)*
- ii. Was this fee schedule only for Mr. Lopez and defendant Calabrese?
 - iii. You said the fee schedule in this case does not exist in documentary or written form, but did you discuss a fee schedule or arrangement with Mr. Canet for this case?
 1. If not, where did the \$3000 fee he paid you come from?
 2. If so, what are the specific terms of that fee schedule?
 - a. Case retainer fee?
 - b. Case report?
 - i. Did Mr. Canet ask for one?
 - ii. Did you offer one?
 1. Do you find that it usually is not in your or the client's best benefit to produce a written report, since it will have to be turned over to the State in discovery?
 - c. Court fee (per day)?
 - d. Deposition fee?
 - e. Anything else?
21. In your response to paragraph 2 of the subpoena duces tecum asking for copies of all of you academic degrees, you indicated that these "do not exist," correct?
- a. Is that because you do not have copies of them, or because you do not have any academic degrees?
 - i. *He has no academic degrees!!!*
22. In response to paragraphs 6 and 7 of the subpoena duces tecum, you indicated that this information was "attached" and you provided a list of 32 cases since July 2008, where you provided breath alcohol testimony, correct?
- a. You are aware that paragraph 6 requested those cases in the last five (5) years where you were declared an expert in breath testing and/or the I-8000, and to specifically note in which are of expertise you were recognized as an expert, correct?
 - i. That is what the subpoena duces tecum requested, correct?
 - ii. Yet, you did not delineate which areas in which cases you were recognized as an expert in, correct?
 - b. This list also encompassed the answer to paragraph 7 of the subpoena duces tecum, which requested a list of cases during the past five (5) years in which you were not declared an expert in breath testing and/or the I-8000, correct?

- i. You also did not delineate in which cases you were not recognized as an expert, correct?
 - c. Breakdown the list you provided to the State according to the information requested in the subpoena duces tecum that you should have already provided.
 - i. Have you testified in any deposition, hearing or trial, since submitting your response to the State’s subpoena duces tecum on November 8, 2012?
 - 1. What about State v. Tiffany Deonativia, in Pasco County for defense attorney Richard Zaleski sometime in mid-November?
 - a. *November 13, 2012*
- 23. Your response to paragraph 10, requesting the inspection or maintenance records, repair invoices, and certificates of calibrations for any I-8000 used to conduct any test or experiments that would be all or part of the basis for your opinion testimony in this case was “not kept or in the possession of the witness,” correct?
- 24. For paragraph 11, the State requested the serial number, certificate of registration and name of the owner of the instrument used to conduct any and all tests or experiments participated in by you that fully or in part formed the basis of your opinion in this case, correct?
 - a. Your response was that the “serial number attached,” correct?
 - i. Your answer was 80-001146?
 - b. You also did not indicate who the owner of this instrument was?
 - i. Do you own this Intoxilyzer 8000
 - 1. Where did you obtain this instrument from?
 - a. *Mississippi private corporation that conducted breath testing for the DOT sold it to a defense attorney in MS who then sold it to Jay Zager*
 - 2. How much did it cost?
 - ii. So your answer to paragraph 11 of the subpoena duces tecum says that you are indicating that you used this instrument to conduct any or all the tests or experiments that fully or partially forms the basis for your opinion testimony in this case, but you don’t have the certificate of calibration for it?
 - iii. So you used this instrument to conduct tests or experiments that are all or in part the basis of your opinion testimony in this case, but you have no certificate of calibration for this instrument?
 - 1. How do you know that the results of your tests or experiments conducted on your instrument, for which you have no certificate of calibration, inspection or maintenance records or repair records, are correct?
 - a. You are stating that your opinion in this case is based on those tests and experiments, but you have no proof that the

instruments you used (any of them) were properly calibrated or maintained, correct?

- i. *The gate swings both ways; the defense cannot merely make allegations that the instrument they used to show our instruments are not working properly is correct, without at least proving that their own instrument were working properly*

- c. Did you use of that instrument form all or any part of your opinion testimony in this case?
 - i. Do you have any of the documented requested in paragraph 10 of the subpoena duces tecum for your instrument?
25. For paragraphs 14, 15, 16 and 18, you answered for each that the information “does not exist in documentary or written form,” correct?
 - a. Do you know the answers to these questions?
 - i. What are those answers?
 1. Paragraph 14?
 2. Paragraph 15?
 3. Paragraph 16?
 4. Paragraph 18?
26. Did you ever tell anyone at the Broward Sheriff’s Office, at any time, that if the State hired you as a witness in these DUI breath cases, that the State would not lose as many cases at trial?
27. On cases where you are currently consulting, where there is no retainer agreement in place, there would be no contractual or fiduciary obligation, correct?
28. There is no contractual or fiduciary obligation that you have to the defendants whose cases on which you are currently consulting that would prevent you from divulging their names, case numbers, county of the case, or what area of expertise you are hired on, correct?
 - a. At least not in any actual contract that you have signed, correct?
29. The names of the defendants who you are currently consulting for, the names of those individuals are public record, correct?
 - a. As well as the crimes they have been charged with, correct?
 - b. You can go to a county clerk website and pull up the name of a defendant and see what they are charged with, correct?

30.

31.

Pre-Deposition questions

32. Did you prepare at all for this deposition?
33. How did you prepare for this deposition?
34. When was the last time you reviewed anything regarding this case for which you are here to testify about?
35. What materials/items did you review in order to form your opinion(s) in this case?
36. Do you hold yourself out as an expert?
 - a. If so, in what areas?
37. You have given depositions before, correct?
 - a. As a state witness and as a defense witness, correct?
 - b. So you know that when a person may be asking you a question but not necessarily stating it in the proper terms, you're still experienced enough as a witness for both sides, to know what that person is actually asking you, correct?
 - i. *Example: If I ask you about the results taken on the Breathalyzer instrument were accurate and reliable, you could honestly answer, "no, they were not" because the samples were not taken on a "Breathalyzer" instrument, but the "Intoxilyzer 8000," correct?*

Curriculum Vitae

38. You have a couple different CVs that you have submitted either in deposition or hearings this year:
 - a. One is dated with a deposition exhibit marking noting the date as 07-16-12,
 - b. The other is noted in the CV itself as being "updated January 25th, 2012"
 - c. Which CV is the most current?
 - d. Why would you have submitted a CV after January 25, 2012 in a case where you gave a deposition on July 16, 2012?

CV ("updated 01-25-12," provided in Pasco County on 11-13-12)

39. This CV indicates that you are a certified expert witness in forensic breath alcohol testing, standardized field sobriety testing and DUI police procedure, correct?
 - a. Who certified you as an expert witness in these areas?
 - b. How did they (this organization, etc.) certify you?
 - i. What did you have to do to be certified?
 - c. Do you have copies of these certifications?

- d.
40. This CV indicates that you were trained in Laboratory/Board Certification Overview in 2011 from the American Board of Forensic Toxicology, correct?
- a. You are not a member of the American Board of Forensic Toxicology, correct?
 - b. You are not certified as a Forensic Toxicology Specialist by the American Board of Forensic Toxicology, correct?
 - i. To be certified as such would require you to hold a bachelor's degree in a natural science, correct?
 - ii. As well as submit to an examination administered by the Board of American Board of Forensic Toxicology, correct?
 - c. You are also not certified as a Diplomate of the Board of the American Board of Forensic Toxicology, correct?
 - d. When in 2011 was this training conducted?
 - i. *The training is web-based and is provided online by RTI International*
 - e. Where did this training take place?
 - f. Explain what the training consisted of?
 - i. *The training is an "introduction to the American Board of Forensic Toxicology"*
 - ii. *The purpose of the training (which is web-based audio and visual presentation) is to "provide an overview of the American Board of Forensic Toxicology and the requirements for ABFT certificate and laboratory accreditation"*
 - iii. *The opinions, findings, and conclusions or recommendations expressed in the course are those of the contributors and do not necessarily represent the official position or policies of the US Department of Justice*
 - g. How long was this training for? *Website indicates it is approximately 60 minutes*
 - h. Do you have a certificate indicating that you completed this training?
 - i. Isn't it true that it is possible to skip through all of the training, and get to print out a document that says you met the requirements for the online course?
 - i. *Yes it is (although expect him to say he doesn't know)*
 - ii. *You may want to refresh his recollection of this training with the RTI course materials*
41. This CV indicates that you received "factory training" at CMI on the Intoxilyzer 8000 in 2003, correct?
- a. When in 2003 did this training occur? *March 14, 2003*
 - b. Where did this training occur?
 - c. What did this training consist of?
 - d. Were you trained to fix and/or repair the Intoxilyzer 8000?
 - e. Did you receive a certificate that stated you completed such training and that you were qualified to fix and/or repair the Intoxilyzer 8000?

- f. Who issued you this certificate?
 - i. The certificate you received actually says that you “successfully attended an orientation seminar in the operation of the Intoxilyzer 8000 breath alcohol testing instrument,” correct?
 - ii. The certificate you received actually states that “completion of this orientation qualifies this individual to operate the Intoxilyzer 8000 breath alcohol analysis instrument,” correct?
 - iii. In fact, the certificate says nothing about certifying you to fix or repair the Intoxilyzer 8000, correct?
 - iv. It only certifies that you are qualified to operate the Intoxilyzer 8000 instrument, correct?
 - v. So, you have never been certified by CMI, the manufacturer of the Intoxilyzer 8000, to actually:
 - 1. Fix the Intoxilyzer 8000? (other than routine maintenance)
 - 2. Repair the Intoxilyzer 8000?
 - 3. Disassemble or reassemble the Intoxilyzer 8000?
42. This CV indicates that you are currently an active board member of the Broward County Commission on Alcoholism, since 2002, correct?
- a. And that currently you are still a member of that board, correct?
 - b. So the Broward County Commission on Alcoholism is still in effect?
 - c. So in 2002, it was still called the Broward County Commission on Alcoholism?
 - d. Is that organization or entity still called the Broward County Commission on Alcoholism?
 - i. Isn't it true that the Broward County Commission on Alcoholism started in 1968?
 - ii. It later evolved into the Broward Court Alcohol and Substance Abuse Program (BCASAP) in the 1980s and 1990s, correct?
 - iii. It later became the Broward-Dade Safety Council, correct?
 - e. What do you do for this organization or entity?
 - f. As a board member, does the board meet regularly?
 - i. How often?
 - ii. Who is a member of the board?
 - iii. Who is the chairman of this board?
 - g. What is your position on this board?
 - h. The Commission, or the Broward-Dade Safety Council, conducts victim impact panels for those persons arrested or convicted for driving under the influence, correct?
 - i. *He sits on the board of an organization who provides educational programs related to traffic safety, including state certified DUI programs,*

special supervision services for persons with suspended licenses, substance abuse education classes for persons charged with DUI and victim impact panels in association with Mothers Against Drunk Driving, yet your business consists almost exclusively of providing consultation services to people arrested and charged with DUI whereby he testifies on their behalf in order to keep them either out of jail, have their performance on SFSTs suppressed or mitigated, and have their breath test results called into question.

43. This CV indicates that you were a member of the FDLE/IPTM Alcohol Rules Committee Member in 1999?
 - a. How many times did you meet as part of this committee?
 - b. What did you do as part of this committee?
 - c. How long did you remain on this committee?
 - d. In 1999, the Intoxilyzer 8000 was not being used in Florida for evidentiary purposes, correct?
 - i. The Intoxilyzer 5000 was being used, correct?
 - ii. So, the curriculum you indicate that you helped to design was for the Intoxilyzer 5000, correct?
44. This CV indicates that you were a member of FDLE's Curriculum Design Committee in 2000?
 - a. Did you actually design the curriculum yourself, or were there other involved?
 - i. So you, along with several others, assisted in the designing of this curriculum?
 - b. In 2000, the Intoxilyzer 8000 was not being used in Florida for evidentiary purposes, correct?
 - i. The Intoxilyzer 5000 was being used, correct?
 - ii. So, the curriculum you indicate that you helped to design was for the Intoxilyzer 5000, correct?
 - c. The curriculum you helped design had nothing to do with the Intoxilyzer 8000, correct?
 - d. How long did you serve on this committee?
 - e. Did you ever sit on the committee as a member closer to 2002 when the instrument was being
45. This CV indicates that you were a member of the FDLE/IPTM Breath Alcohol Instrumentation Committee in 2002, correct?
 - a. That would actually be the "IPTM Technical Advisory Committee, Subcommittee on Breath Test Instrumentation" correct?
 - i. *Would you like a pen to correct your CV so it is correct for the future (or would you just like to keep it incorrect?*
 - b. How many times did you meet for that subcommittee?

- c. What did you do as part of that subcommittee?
 - d. You indicate that you “approved the Intoxilyzer 8000 as Florida’s next breath alcohol testing instrument,” correct?
 - i. You didn’t approve it yourself, correct?
 - e. Are you saying that this subcommittee actually made the decision to approve the Intoxilyzer 8000 for use in Florida?
 - f. Isn’t it true that this sub-committee was one of four subcommittees under IPTM’s Technical Advisory Committee?
 - i. And that this sub-committee you were a member of, merely recommended the Intoxilyzer 8000 to be evaluated for approval for use in the State of Florida, correct?
 - ii. This was the topic of discussion on Tuesday, January 29, 2002 at the subcommittee meeting held in Maitland, Florida, correct?
46. The training that you received in 1998 by the National Highway Traffic Safety Administration (NHTSA) DWI Instructor Course at IPTM in Jacksonville, FL, was that for all Standardized Field Sobriety Tests, or one in particular?
- a. Are you aware that the certificate you provide the Broward County State Attorney’s Office with, with your name on it as having completed the course from August 24-28, 1998 indicates that this course was for:
 - i. “DWI Instructor”
 - ii. It specifically indicates “National Highway Traffic Safety Administration Approved Instructor Training in Horizontal Gaze Nystagmus Sobriety Test Procedures”
 - iii. Specifically HGN test procedures, not all SFSTs?
 - b. Do you have any certificate that indicates that you completed any course as a DWI Instructor for the other SFSTs?
47. This CV indicates that you were “certified in Intoxilyzer repairs” in 1997, correct?
- a. It also indicates that this certification came from FDLE, correct?
 - b. Is this the same training certification that came from CMI on August 14, 1997?
 - c. Is this the same training certification that came from your completion of the Intoxilyzer 5000 Refresher course, given by the Broward Community College Criminal Justice Institute, that you completed on August 18, 1997?
 - d. If not, do you have any documentation that indicates that FDLE certified you in “Intoxilyzer repairs” in 1997?
 - e. Who taught this course?
 - f. Where was this course given or held?
 - g. For which Intoxilyzer instrument was this certification given?
 - h. This was not for the Intoxilyzer 8000, correct?

Papers authored

48. As a person who is considered to be an expert in certain scientific areas, what would be your definition of “published” as it pertains to articles found in scientific journals, periodicals, textbooks, etc.?
- a. Would you agree that the term “publish” infers printing for general dissemination of one’s own thoughts and findings?
 - i. What about “to issue for sale or distribution to the public”?
49. In your section entitled “papers,” are these papers that have been published in actual publications, merely printed in newsletters or actually presented at conferences?
- a. Indicate which papers, if any, were not presented at a conference?
50. Have you ever submitted a paper for publication to an actual journal and not at an organizational annual meeting or conference?
- a. If so, which paper/conferences?
 - b. Are you aware that most scientific journals and other publications will usually not accept papers that have been previously published in any form?
 - i.
51. Was your paper “A Brief Walk in the Shoes of a Convicted Drunk Driver” peer-reviewed before being presented at the International Association of Chemical Testers annual meeting in 2000?
- a. Are you currently a member of the International Association of Chemical Testers?
 - b. Since when?
52. Was this paper presented at a breakout session at the annual meeting?
- a. If so, how much time were you given to present this paper?
 - b. Was this paper printed in the IACT Newsletter?
 - i. Describe the IACT Newsletter?
 1. *IACT Newsletter is printed three (3) times per year by the IACT Publications Committee*
 2. *It contains timely information pertinent to our membership such as meeting recaps, regional reports, letters from the President, and committee reports*
 3. *Any scientific articles in the Newsletter are not peer-reviewed but are simply reports from the contributor*
 - c. Are you aware that IACT does not produce a scientific journal containing peer-reviewed scientific literature?
 - d. You have never submitted anything for publication to the IACT newsletter, correct?
 - i. If not, what/when?
53. Was your paper “Hit Me With Your Best Shot: Lack of Effect on Forensic Breath Alcohol Testing With Recent Facial Dousing of Pepper Spray” peer-reviewed before being presented at the 2001 American Academy of Forensic Sciences conference?
- a. This was not published in the AAFS’s Journal of Forensic Sciences, correct?

- b. This paper was written with another person, correct?
 - i. Who? “AO Estevez” or “Annette O Estevez”
 - c. Who is Annette O. Estevez?
 - i. Is she related to you at all?
 - ii. How?
 - 1. Isn't she at the University of Pittsburgh's School of Medicine in the Department of Neurology?
 - 2. What is neurology?
 - 3. Does neurology have anything to do with whether a breath testing instrument is capable of being affected by pepper spray or oral care strips?
 - iii. Was she a doctor in 2001 when she co-wrote this with you?
 - d. That year the AAFS Conference was held in Seattle, Washington on February 19 through February 24, 2001, correct?
 - e. Are you currently a member of the American Academy of Forensic Sciences?
 - i. If so, since when?
 - f. Was this paper presented at a breakout session at the annual meeting?
 - i. If so, how much time were you given to present this paper?
54. Was your paper “Life Behind the Wheel at .609% BAC” peer-reviewed before being presented at the International Association of Chemical Testers Annual meeting in 2002?
- a. This was basically a presentation you gave at this annual meeting, correct?
 - i. If so, how much time were you given to present this paper?
 - b. Was the half-page description of the facts of the case you were presenting your “paper” that you refer to in your CV?
 - i. So this is not really a “paper” per se, similar to the two we just discussed, where you actually conducted some sort of experimentation and reported on it, but just a brief recitation of facts from a case that you described to attendees, correct?
 - c. Was this paper written with anyone?
 - d. What did you do during the presentation?
 - 1. *According to sources, Zager showed a video of an extremely intoxicated individual and provided a recap of the case report among with the case final disposition*
 - e. Your CV states that this was a paper that was published; what was actually published?
 - i. Was it the “High Times” abstract sheet that discusses the facts of the case and what happened to the defendant in that case?

- ii. So your paper basically consisted of a brief recap of the facts of the case taken from the arresting officer's police report, what the defendant was charged with, and the disposition of the case, correct?
 - f. So this "paper" was really just a case report on a DUI case where the defendant had an extremely high blood alcohol content results, correct?
 - i. Did your "published paper" contain anything that couldn't be gleaned from reading the officer's report or the case file in that case?
 - 1.
- 55. Was your paper "Lack of Effect on Evidential Breath Alcohol Analysis with Blood in the Oral Cavity" peer-reviewed before being presented at the International Committee on Alcohol, Drugs and Traffic Safety meeting in 2002?
 - a. Was this paper written with another person?
 - b. Who is "M Estevez"?
 - i. Is this the same person with whom you co-authored the pepper spray paper?
 - c. Any idea why this person would refer to themselves under "AO Estevez" in that paper, but as "M Estevez" in this article?
 - i. Was she a doctor in 2002 when she co-wrote this with you?
 - ii. Did you actually go to the meeting in Montreal, Canada that year?
- 56. Was your paper "Lack of Effect of Over-the-Counter Oral Care Strips on a Forensic Breath Alcohol Testing Device" peer-reviewed before being presented at the International Committee on Alcohol, Drugs and Traffic Safety meeting in 2004?
 - a. Was this paper written with another person?
 - b. Who is "M Estevez"?
 - i. Is this the same person with whom you co-authored the pepper spray and blood in the oral cavity papers?
 - ii. Is this person also related to you?
 - iii. If so, how?
 - c. Did you actually go to the meeting in Glasgow, Scotland that year?
 - i. That meeting was held from August 8 to August 13, 2004, correct?
 - d. In this particular paper you conducted experiments using an Intoxilyzer 5000 and an Intoxilyzer 8000, correct?
 - e. When did you conduct the experiments that you used as the basis for this paper?
 - i. You left BSO on September 5, 2003, correct?
 - ii. FDLE had not yet approved the Intoxilyzer 8000 for use in Florida at that point, correct?
 - iii. Whose Intoxilyzer 8000 instrument did you use to conduct these experiments?

57. Was your paper “The Breath Alcohol Test: A Continued Call for the Pretest Observation Period” peer-reviewed at the American Academy of Forensic Sciences annual meeting in 2012?
 - a. Was this an actual paper that you wrote and presented at the meeting, or a presentation that you gave on why a pre-test observation period is required?
 - b. This paper was not written with someone else or any other family members, correct?
58. Let’s talk about what you mean by peer-reviewed and published...
 - a. You submit these papers for presentation at a seminar or conference?
 - i. Are they reviewed by persons in the field for which you are presenting them before you present them?
 - ii. Isn’t more like the organization you send it to sends the paper out and you may get questions or comments back, correct?
 - iii. It’s just generally sent to members of the organization who may or may not give you feedback, correct?
 1. In fact, they may not even actually review it, correct?
 - iv. So it’s not necessarily actually “peer-reviewed,” but more like an optional, “do-it-if-you-want-to” type of review, correct?
 1. It’s not a peer-review where the organization or people accepting submission must review the materials before they are published, correct?
 - a. It’s a different discipline, correct?

Lectures

59. Are the lectures indicated on this CV in the “lectures” section ones you have given or attended?
60. You stopped giving lectures on the “Dangers of Drinking and Driving” to Broward County high schools in 2004, just one year after you left BSO, correct?
 - a. When you gave these lectures, each year from 1996 to 2004, were you paid to give these lectures to the Broward County high schools?
 - i. *No money in it, that’s why he stopped doing it!!!*
 - b. You were giving these lectures about the dangers of drinking and driving to high school students because it went along with your job as part of BSO and later the DUI Unit, correct?
 - i. *Now that you were no longer with BSO, and weren’t getting paid to give these lectures, there was no reason to continue doing it?*
61. Your lecture on “Intoxilyzer 8000 Overview” at the University of Mississippi in 2004, was that put on by the actual University of Mississippi?
 - a. Or was the lecture just located at the University of Mississippi?
 - b. Who actually organized or put on the lecture?

- c. Were you paid to lecture?
 - i. How much?
- 62. This CV indicates that you lectured for a course titled “New Challenges in Handling DUI Cases” that was put on by the American Bar Association in 2004?
 - a. Was this an actual course with attendees, or was this an online course that registrants signed up for and merely watched online?
 - b. Where was this lecture actually held?
 - c. What was the purposes of this lecture?
 - d. Was there anyone else who lectured with you?
 - i. Who?
 - e. How long was this lecture?
 - i. *ABA CLE Now! listing indicates that this was 60 minutes in duration*
 - f. How much time did you yourself actually spend lecturing?
 - g. Were you paid to lecture?
 - i. How much?
- 63. This CV also indicates that you were a guest lecturer for the National College of DUI Defense at a seminar they held at Harvard Law School in 2006, correct?
 - a. This seminar they presented, it had nothing to do with Harvard Law School, correct?
 - i. Other than the fact that it was held at that location, correct?
 - ii. Were you paid to lecture?
 - 1. How much?
- 64. This CV lists that you lectured at an “Intoxilyzer 8000 Operator’s Course” in Tunica, MS, New Orleans, LA and Fort Lauderdale, FL?
 - a. When did you lecture on this topic in Tunica, MS?
 - i. For what organization or entity?
 - ii. What was this lecture about?
 - iii. Did you use any materials for this lecture?
 - 1. Who prepared these materials?
 - iv. How much of this topic did you actually lecture?
 - v. Were you paid?
 - 1. How much?
 - b. When did you lecture on this topic in New Orleans, LA?
 - i. For what organization or entity?
 - ii. What was this lecture about?
 - iii. Did you use any materials for this lecture?
 - 1. Who prepared these materials?
 - iv. How much of this topic did you actually lecture?
 - v. Were you paid?
 - 1. How much?

- c. When did you lecture on this topic in Fort Lauderdale, FL?
 - i. For what organization or entity?
 - ii. What was this lecture about?
 - iii. Did you use any materials for this lecture?
 - 1. Who prepared these materials?
 - iv. How much of this topic did you actually lecture?
 - v. Were you paid?
 - 1. How much?
65. This CV also indicates that you lectured for a course titled “Intoxilyzer & SFST Overview Course” in Panama City, FL and Fort Lauderdale, FL in 2010, correct?
- a. When did you give this lecture in Panama City, FL?
 - i. For what organization or entity?
 - ii. What was this lecture about?
 - iii. Did you use any materials for this lecture?
 - 1. Who prepared these materials?
 - iv. How much of this topic did you actually lecture?
 - v. Were you paid?
 - 1. How much?
 - b. When did you give this lecture in Fort Lauderdale, FL?
 - i. For what organization or entity?
 - ii. What was this lecture about?
 - iii. Did you use any materials for this lecture?
 - 1. Who prepared these materials?
 - iv. How much of this topic did you actually lecture?
 - v. Were you paid?
 - 1. How much?
66. This CV indicates that you gave a lecture at “Mastering Scientific Evidence” for the Texas Criminal Defense Lawyers Association, correct?
- a. In Atlanta in 2004?
 - i. What was this lecture about? What did you do?
 - ii. Did you use any materials for this lecture?
 - 1. Who prepared these materials?
 - iii. How much of this topic did you actually lecture?
 - iv. Were you paid?
 - 1. How much?
 - b. In Dallas in 2005?
 - i. What was this lecture about? What did you do?
 - ii. Did you use any materials for this lecture?
 - 1. Who prepared these materials?
 - iii. How much of this topic did you actually lecture?

- iv. Were you paid?
 - 1. How much?
- c. In Dallas in 2006?
 - i. What was this lecture about? What did you do?
 - ii. Did you use any materials for this lecture?
 - 1. Who prepared these materials?
 - iii. How much of this topic did you actually lecture?
 - iv. Were you paid?
 - 1. How much?
- d. In New Orleans in 2011?
 - i. What was this lecture about? What did you do?
 - ii. Did you use any materials for this lecture?
 - 1. Who prepared these materials?
 - iii. How much of this topic did you actually lecture?
 - iv. Were you paid?
 - 1. How much?
- e. And did you also lecture at the 2012 conference that was held March 22-24, 2012 in New Orleans, LA?
 - i. What was this lecture about? What did you do?
 - ii. Did you use any materials for this lecture?
 - 1. Who prepared these materials?
 - iii. How much of this topic did you actually lecture?
 - iv. Were you paid?
 - 1. How much?
- f. Assistant State Attorney or State prosecutors are not able to attend these conferences, correct?

Things not currently on CV

- 67. This CV indicates that you've been to several Intoxilyzer 5000 users group meetings.
 - a. You have never attended an Intoxilyzer 8000 users group meeting, correct?
 - b. Have you ever attended an Intoxilyzer 8000 Breath Test Operators Course?
 - i. When?
 - ii. Where?
 - iii. Who conducted or managed this course?
 - iv. Do you have a certificate of completion?
 - c. Have you ever attended an Intoxilyzer 8000 Agency Inspector Course?
 - i. When?
 - ii. Where?
 - iii. Who conducted or managed this course?
 - iv. Do you have a certificate of completion?

68. In February 23-25, 2012, did you conduct an SFST and breath test instrument overview with a person named Lance Platt, in Kansas City?
- a. Who is Lance Platt?
 - b. This course was also presented in association with two other DUI defense attorneys, correct?
 - i. Matthew Guilfoil and Brian Leininger?
 - c. What did this course consist of?
 - d. Did you have materials for this course?
 - i. What?
 - ii. Who created these materials?
 - e. The course was only open to criminal defense attorneys, correct?
 - f. How many people attended this course?
 - g. How much of the course did you actually lecture on?
 - h. What specific areas did you lecture on?
 - i. How much were you paid to conduct this course?
 - j. You and Mr. Platt actually charged attendees \$1,250 to take part in this course, correct?
69. In September 20-21, 2012 you took part in a panel discussion “Effectively Using an Expert at Trial,” at the Blood, Breath & Tears conference in Orlando, correct?
- a. Blood, Breath & Tears is a DUI defense conference, correct?
 - b. It is put on by the Florida Association of Criminal Defense Lawyers, correct?
 - c. You sat on the panel with Matthew Malhiot and Stephan Daniels, correct?
 - d. What was this panel discussion about? What specifically was discussed?
 - e. You and the two other panelists do consult or testify as “experts” for DUI defense attorneys, correct?
 - i. Are you aware that Stephen Daniels, this expert panelist, was actually convicted of DUI in 2004?
 - f. Assistant State Attorney or State prosecutors are not able to attend these conferences, correct?
70. You were also scheduled to lecture at a seminar titled “Man vs. Machine II” that will be put on by a DUI defense attorney named Steven Epstein, on December 7, 2012 in New York, correct? Did you?
- a. What will you lecture about at this seminar? *The Portable Breath Test: Science Made Simple*
 - i. What specifically will you be discussing as part of this lecture?
 - b. Will you be getting paid for this lecture?
 - i. How much?
 - c. This seminar is designed to assist defense attorneys who defend DUI cases on the science of breath testing and how to make that science work for their client in the courtroom, correct? *Because that’s what the registration form says*

- d. That form also states that the course is “what you need to know to understand the science of breath testing and the weapons you need to defeat it,” correct?
71. Provided with your submissions to the Broward State Attorney’s Office in the Calabrese case, you included a document titled “Breath Alcohol Testing/SFST Overview Class, correct?
- a. For what “class” is this for?
 - b. When have you conducted this class?
 - c. How much do you charge for people to attend this class?
 - d. Do you conduct this training yourself or with others?
 - i. If so, who are the others?
 - e. Now, you have attended the Borkenstein Alcohol Course at Indiana University, correct?
 - i. The purposes of that course, at least some of the topics, was to instruct the students on the science behind alcohol testing in breath and blood, correct?
 - 1. History of it?
 - 2. Science of it?
 - 3. Instrumentation?
 - 4. Calculations of Widmarks, retrograde extrapolation, measurement uncertainty, and certain statistical calculations?
 - a. How did you like that by the way? Was Rod Gullberg still teaching that part of the class when you took the course?
 - f. Getting back to your Breath Alcohol Testing/SFST Overview class, what is the purpose of this class?
 - i. Is any part of that purpose to assist defense attorney in challenging the breath test results in DUI cases in Florida?
 - ii. In reviewing the agenda you provided, under the part of the course for the “Overview of Breath Alcohol Testing” you have sections to discuss:
 - 1. Errors during rising BAC = false positive results
 - 2. Breath temperature issues
 - 3. Ranges of error in breath alcohol analysis
 - iii. In the section of the class under “Overview of the I-8000” you discuss:
 - 1. breath volume measurement problems
 - 2. limitations of the FDLE Agency Inspection Program
 - 3. software errors
 - iv. You even have a section titled “Limitations on Breath Alcohol Testing” where you discuss several items, including:
 - 1. Mouth piece false refusal
 - 2. Mouth alcohol detectors don’t always work
 - 3. Acid reflux
 - 4. Dentures

5. Asthma and breath inhalers
 6. Breathing patterns / holding your breath
 7. Air blank issues / environmental concerns
 8. Blood hematocrit errors
 9. Breath tests are not specific for ethanol
 10. Alcohol absorptive phase = up to 230% error in breath test
 11. Breath alcohol simulators = the weak link
- g. You discuss at least eleven (11) limitations to breath testing in this one section for 1 ½ hours, the longest section in this course (along with the overview of issues with the I-8000), correct?
- i. Did you have these same concerns when you were working with the Broward Sheriff's Office and conducting breath alcohol testing for them?
 - ii. Did you ever say that breath testing just has too many limitations for me to be able to testify that the results from the instrument I was using are accurate and reliable?
- h. Since you left BSO, and not including cases on which you were called back to testify for the State as part of your previous employment responsibilities with BSO, did you ever testify that the results on an Intoxilyzer 5000 were not accurate and reliable?
- i. If so, when and where was that case?
 - ii. Have you ever testified in any case anywhere that the results of an Intoxilyzer 8000 were accurate and reliable?
 1. If so, where and when? What case?

Education

72. Graduate High School?
 - a. From where?
73. Undergraduate education? (*said he was close to getting it in 2006; how about now?*)
74. Graduate education?
75. At the college or university level or higher, you have never taken any medical courses, correct?
 - a. Biology?
 - b. Chemistry?
 - c. Anatomy?
 - d. Physiology?
 - e. Toxicology?
 - f. If so, please indicate where and when?
76. Never taken any toxicology courses, correct?
77. You are not an electrical engineer, correct?
78. You are not an engineer of any sort, correct?

79. You are not a toxicologist, correct?
80. You are not a forensic toxicologist, correct?
81. You have no training in forensic toxicology, correct?

Employment

82. Your CVs indicate that from 1988 until your retirement in 2003 you worked for the Broward County Sheriff's Office, is that correct?
83. In fact, you were employed by the Dania Beach Police Department before it was merged with BSO, correct?
 - a. When did Dania Beach PD merge with BSO?
84. And at least one of these CVs state that you worked for BSO as a law enforcement officer and Deputy Sheriff, correct?
 - a. Is it possible to be a Deputy Sheriff without being a law enforcement officer?
 - b. Is it possible to be a law enforcement officer without being a Deputy Sheriff?
85. You weren't a Deputy Sheriff the entire time from 1988 to 2003?
86. You weren't a law enforcement officer the entire time from 1988 to 2003?
87. In fact, you were a Community Service Aide from 1988 until you graduate from the Police Academy in 1991, correct?
88. Community Service Aides are not sworn law enforcement officer are they?
 - a. You weren't a sworn law enforcement officer for those first three years, until 1991, correct?
 - b. Is there a difference between being a Community Service Aide and a Law Enforcement Officer?
 - i. What's the difference?
 - ii. Can a Law Enforcement Officer do things, or do they have authority, that a Community Service Aide does not?
 - iii. Arrest persons?
 - iv. Issue traffic violation citations?
 - c. *Walker trial, 28*
 - i. *JZ was a CSA with the Dania Police Department, when BSO took it over in 1988*
 - ii. *JZ attended the police academy in 1990 and graduated in March 1991*
89. What were your responsibilities as a Community Service Aide?
 - a. *Manned the front desk, answer calls*
 - b. *Nothing of high priority or anything like that*
90. What were your responsibilities with Dania Beach PD?
 - a. *Booking officer*
91. What were your responsibilities with the Broward Sheriff's Office?
 - a. Arrests?
 - b. Breath tests?

- c. Maintenance of instruments?
 - i. Instruments used?
 - ii. Never used Intoxilyzer 8000 for evidentiary use?
- 92. When you were with BSO, and there was an issue with a breath test instrument, the Intoxilyzer 5000 at that time, was it your responsibility to fix the instruments?
 - a. *Walker, page 32 – “Well, not to fix them, to inspect what the problem was. If I was capable of fixing them, which I was certified to do, then I would identify the problem and have them fixed.”*
- 93. These problems that you say you “fixed,” with the Intoxilyzer 5000, what types of problems were they?
 - a. *Walker, page 32 – “and these problems were something where you did something very minor, cleaning a printer, things of that nature.”*
 - i. *“Nothing actually inside the instruments, like cleaning out the chamber or anything of that nature.”*
 - 1. *Would have sent the instrument back to the manufacturer for that*
- 94. You were never employed by CMI, Inc. the manufacturer of the Intoxilyzer 8000, correct?
- 95. You were never employed by any of the authorized repair facilities that are authorized to repair the Intoxilyzer 8000, correct?

Income

- 96. Companies
 - a. Forensic Consulting
 - i. Who is president/CEO?
 - ii. Are you a director of that company?
 - iii. Who is Hollie Zager?
 - iv. Didn't you remove yourself as the Director of Jay Zager Forensic Consulting, Inc., and install her as the director in 2006?
 - v. Why?
 - vi. Are you an employee of this company?
 - b. US Investigative Agency?
 - i. Is this an actual company registered with the Florida Division of Corporations?
 - ii. Or is US Investigative Agency being used as a “fictitious name”?
 - c. Are JZFC and USIA two separate business entities?
 - i. One has nothing to do with the other, except for your involvement with the two?
 - ii. They are not the same business, correct?
 - iii. They don't share corporate banking accounts, correct?
 - iv. You don't inter-mingle the funds from JZFC and USIA, correct?

- d. Would there ever come a time where you have been hired under JZFC and USIA?
 - i. Explain?
 - e.
 - f. Would there ever come a time where JZFC is hired to consult on a DUI case, and monies paid to you (as Jay Zager) would be deposited into the bank account of USIA?
 - i. Why would you have received monies paid to you for services for which JZFC was contracted for, yet the monies received were deposited into the account of USIA?
 - 1. *Deposition fees paid to him by Edward Lopez in the State v. Calabrese case*
97. What percentage of the total amount of your income for the year comes from your JZFC consulting business?
- a. What percentage of that comes from criminal cases?
 - b. Of that, what percentage comes from working for the defense?
98. Retainers
- a. Are you on retainer for any DUI criminal cases right now?
 - i. Currently, how many DUI criminal cases are hired on, are doing work on or consulting for?
 - a. *Not asking for the names of the defendant's, but how many as it would go to show how much time he would be able to devote to the issues in this case*
 - 2. How many cases for the particular issue for which you are going to give your opinion in this case?
 - a. In Florida?
 - 3. How many deal with breath testing or breath test instruments?
 - a. In Florida?
 - ii. What is your normal retainer?
- b. What are your rates?
 - i. Preparation/investigation?
 - ii. Depositions?
 - iii. Testifying (hearings vs. trial)?
 - iv. Travel expenses included?
 - 1. If so, what? (food, travel, lodging, etc.)?
- c. Do you get a bonus for the successful outcome of a case?
 - i. When you do testify do you stay for the outcome of the hearing or trial?
99. Who retained you in this case?
- a. When were you first contact about possibility being hired in this case?
 - i. Was it you who presented this issue to Mr. Canet, or did he present this issue to you?

- b. When were you retained?
 - c. How were you retained?
100. How many times have you been hired, testified for, or been a witness for Mr. Canet or his clients?
- a. When was the first time (ever) that you were hired by Mr. Canet?
101. What is the total amount of time you have spent on this case (or the cases similarly situated here in Broward)?
- a. What the total you have billed thus far?
 - b. Would you be testifying in this case or cases if you were not going to be paid by Mr. Canet?
 - i. *Not doing out of the kindness and charity of your heart?!?!*
 - ii. *Not doing it because you believe so strongly in what you are testifying to, that it would such an injustice to see people wrongly convicted using this instrument?!?!*
 - c. If you were informed that you would not be able to be paid for this case (now or in the future) would you still be testifying here – after all, you have a business to run, correct?
102. Is JZFC and USIA the only business for which you are involved that make up your income?
- a. Any other business entities that you are a part of?
 - i. Prestige Air Conditioning Systems, Inc.? *JZ is the VP*
103. As of March 19, 2012, you filed for registration of another fictitious name, “Certified Legal Investigations,” correct?
- a. Is that in addition to or in replace of USIA?
104. Do you count the monies you make from lecturing as part of the percentage you claim to make from your consulting services?
- a. Is the money you make from lecturing paid to you personally or as part of JZFC?
105. Are you Jay Zager, JZFC or USIA, currently the subject of any civil actions against you or them (i.e. bankruptcy proceedings, liens, etc.)?
- a. If so, for what?
 - b. What is the case name and status?
106. What is your retainer in this case?
- a. How much have you been paid so far? (*\$3,000*)
 - b. Are you expected to be paid any more from Mr. Canet?
 - c. Do you have a fee schedule for this case?
 - d. Did you, or JZFC, enter into any retainer or employment agreement with Mr. Canet?
 - e. So, other than your word, there is nothing else to prove how much money you will be receiving in this case, correct?

- i. Have you entered into retainer or employment agreements with other defense attorneys in the past?
 - 1. But you have not in this case?
 - 2. Why not now with Mr. Canet?
 - f.
107. Are you Jay Zager, JZFC or USIA, currently a party to any civil actions brought against anyone on your or their behalf?
- a. If so, for what?
 - b. What is the case name and status?
 - c. For what reasons are these actions being brought?
 - i. *JZFC is suing defense attorney Edward Lopez and defendant Gretchen Calabrese in Broward County Court for damages between \$5,000 and \$15,000; case is set before Judge Dishowitz and was filed on 07/12/12 in case COCE12013854*
 - ii. *According to the pleading filed by Zager and/or JZFC three (3) causes of action are listed:*
 - 1. *Breach of Contract*
 - 2. *Deception and Unfair Trade Practices*
 - 3. *Civil Theft*
 - d. Did Mr. Lopez and/or the defendant satisfy their financial agreement with you or JAFC according to the retainer agreement they signed?
 - i. So they paid you what you were entitled to under the agreement you all entered into, correct?
 - ii. They didn't owe you anything else under that agreement for that case, correct?
 - e. How much in damages are you seeking in the civil action you are bringing against Mr. Lopez and Gretchen Calabrese?
 - i. *Pleadings indicate that the amount sought is less than \$15,000*
 - f. Did you ever enlist or retain the services or assistance assistance of Mr. Canet to represent your interests with regards to getting paid by Mr. Lopez or the State for the production of documents in the Calabrese case?
 - i. If not, did you ever communicate with Mr. Canet in any way with regards to obtaining what you were owed from the production of the oducments in the Calabrese case?
 - g. You submitted to the State in the Calabrese case an invoice for production of documents per court order by Judge John Fry in the amount of \$3,413.50, correct?
 - i. Are you seeking more in damages than what you invoiced the State for?
 - 1. So let me get this straight, your costs involved with producing these documents came to \$3,413.50 but you are seeking between

\$5,000 and \$15,000 in the action against Mr. Lopez and defendant Calabrese?

- ii. Part of invoice also included what you billed 1.75 hours for, for conference calls with Mr. Lopez, correct?
 - 1. So you charged \$250 per hour, at 1 ¾ hours for a conference call with the attorney who retained you, correct?
 - a. 1 ¾ hours at \$250 hours comes to \$437.50, would you agree?
 - 2. So not only were you seeking to be compensated for the researching of these materials and copying them, you also wanted the state to pay for almost two (2) hours of conference calls between you and Mr. Lopez?
 - 3. And you were on retainer with Mr. Lopez pursuant to your retainer agreement with him, correct?
 - a. That was what he paid you \$1,000 for, correct? To be retained on the case?
 - b. And another \$1,000 for your trial appearance, correct?
 - 4. Normally, do you charge the attorneys or clients that retain you or the services of JZFC for communicating with them over the phone?
 - a. What about fax, e-mail or text messaging?
- iii. Your normal retainer agreement states that you get paid by the person(s) who retain you \$1,000 minimum per scheduled day excluding travel correct?
 - 1. As you are charging the attorney or client that retains you for your deposition, so you also charge the State Attorney's Office who is taking your deposition for that time as well?
 - a. Would that be akin to "double-dipping?"
- h. Your normal retainer agreement states that you are not to be listed as a witness in a case until your retainer agreement has been executed, correct?
 - i. It further states that any representation that you will be a witness or if Jay Zager is listed as a witness by the Client and/or his or her attorney, shall place this contract in full force without signatures?
 - 1. You haven't entered into a contract or retainer agreement with Mr. Canet, so a contract/retainer agreement similar to the one in the Calabrese case would apply to him and his client, even though he didn't enter into it, correct?
 - 2. Did you speak directly with any of the other defendants or clients who have filed similar motions to that of Mr. Canet's to see if they

listed you as a witness without first entering into your retainer agreement?

- a. Would your retainer agreement now be in full force with those attorney or defendants without their signatures?
- b. Do you plan on seeking damages against them for listing you as a witness in their cases without first consulting with you or entering into your retainer agreement?

- i. Let me ask you, not that you have researched and “found” all these documents that you provided to the State in the Calabrese case, they should be pretty easy to produce in the future should this or another State Attorney’s Office subpoena them again, correct?

Jay Zager Forensic Consultant, Inc.

108. When established? *June 5, 2006*

- a. Are you the sole owner of this corporation?
- b. Are you the sole director or agent of this company?

109. Are you the owner of this corporation?

- a. In what capacity do you serve in this corporation?

110. Is there anyone else affiliated with this corporation?

111. Are you the registered agent for this corporation?

- a. If not, who is?
 - i. And as of when?

Internal Investigations

112. While you were employed with BSO, you were investigated by Internal Affairs for “distraction of duty,” correct?

- a. This was in 1998, correct?
- b. You found to have clocked in for work and then went to a fellow officer’s home to watch a boxing match on TV, correct?
 - i. And this was while you were on duty?
- c. The allegations against you were sustained, and you were suspended one day without pay, correct?

113. In August, 2003, the month before you left BSO, you were being investigated for another allegation of “distraction of duty,” correct?

- a. You gave a sworn statement in this investigation on August 28, 2003, correct?
- b. I’ll get into whether the allegations were sustained or not, but for now do you know what the specific findings of that investigation were?
 - i. That you were rarely on time for work?

- ii. That you used “flex” time, even though that was not an authorized procedure by the Broward Sheriff’s Office?
- iii. That there was concern that a then-recent judgment to garnish your wages, coupled with absences from work, caused concern as to whether you were conducting personal business on BSO time?
- iv. That there were rumor circulating around that were, at that time, planning on quitting BSO and going to work for defense attorneys as a consultant in DUI cases?
 - 1. And lo and behold, no more than a week after you gave your statement to the BSO investigator on August 28, 2003 did you resign from BSO (on September 5, 2003) and begin private consulting in DUI cases, correct?
- c. Did this investigation have anything to do with your resigning from BSO?
- d. Did your filing of bankruptcy or the garnishment of your wages at BSO have anything to do with your leaving BSO?
 - i. *So it’s all just a weird coincidence that you were having financial problems, being investigated by BSO Internal Affairs for distraction of duty, and rumors about your resignation from BSO to work for the defense, all just seemed to happen around the same time you resigned from BSO?*
- e. What were the results of that investigation? (*Not sustained*)
 - i. But you did not know that before you left, correct?
 - ii. The disposition of that investigation was not decided upon until October 8, 2003 and memorialized in a BSO memo dated October 9, 2003, correct?

Experience with Intoxilyzer 8000

114. Have you ever taken any of the FDLE:
- a. Intoxilyzer 8000 Breath Test Operator course?
 - i. When?
 - ii. Where?
 - iii. Were you given a certificate of completion for this course?
 - iv. Do you have it?
 - 1. Why wasn’t this provided to the State, either in this case or in State v. Calabrese?
 - b. Intoxilyzer 8000 Agency Inspector course?
 - i. When?
 - ii. Where?
 - iii. Were you given a certificate of completion for this course?
 - iv. Do you have it?

1. Why wasn't this provided to the State, either in this case or in State v. Calabrese?
115. Do you currently hold a valid:
 - a. Breath Test Operator permit?
 - b. Agency Inspector permit?
 - c. Department Inspector permit?
 116. How many courses have you taken on how to fix and maintain the Intoxilyzer 8000?
 - a. Where?
 - b. When?
 - c. Who conducted or organized these courses?
 117. Were you ever trained to conduct an Agency Inspection on the Intoxilyzer 8000?
 - a. If so, by who?
 - b. When?
 - c. Where?
 118. Were you ever trained to conduct a Department Inspection of the Intoxilyzer 8000?
 - a. If so, by who?
 - b. When?
 - c. Where?
 119. Have you ever operated a Florida Intoxilyzer 8000 that was approved was evidentiary use?
 - a. If so, when?
 - b. Where?
 120. Did you ever have occasion to operate an Intoxilyzer 8000 while with BSO?
 - a. When?
 - b. How did you come across this instrument?
 - c. What did you do with this instrument?
 - i. Breath tests?
 1. On who?
 - ii. Studies?
 - iii. Experiments?
 121. When did you purchase the Intoxilyzer 8000 (serial number 80-001146)?
 - a. How much did you pay for it?
 - b. Who sold this instrument to you?
 122. Before coming into possession of your own Intoxilyzer 8000, how many times have you had the opportunity to operate an Intoxilyzer 8000?
 - a. When?
 - b. Where?
 - c. What did you do with the instrument?
 123. Before coming into possession of your own Intoxilyzer 8000, how many times have you had the opportunity to disassemble or reassemble an Intoxilyzer 8000?

- a. When?
 - b. Where?
 - c. What did you do with the instrument?
 - d. Since you have not been certified by the manufacturer to disassemble or reassemble an Intoxilyzer 8000, how can you be certain that the results you would get on the instrument you disassembled or reassembled were accurate and reliable?
 - e. Did you know anything about the history of these instruments that you had access to?
 - i. How many times it has been disassembled or reassembled?
 - ii. By whom?
124. Do you use your Intoxilyzer 8000 to run studies or experiments of your own?
125. Have you used someone else's I-8000 to run studies or experiments on?
 - a. What kind of studies or experiments have you conducted?
 - i. Do you have any written results for these experiments?
126. Do you use the results of the studies or experiments that you have conducted, either on your own I-8000 or someone else's I-8000, as any part of the basis for your "expert" opinions testified to in court?
127. Would you agree that in order to make sure an instrument such as the I-8000 is working properly and producing accurate and reliable results, it must be maintained correctly?
 - a. Inspected to make sure it is working analytically
 - b. Tested with alcohol reference solutions
 - c. Tested with dry gas solutions
 - d. Tested with acetone solutions
 - e. Maintained on a regular basis
128. The Intoxilyzer 8000s that you have used (that you don't own) that forms any part of the basis of your expert testimony in this case, how do you know it was or had been properly maintained?
 - a. Do you have any documentation of the maintenance?
129. The Intoxilyzer 8000s that you own, or have used, for studies or experiments, that have been the basis for your expert opinion, how do you maintain it?
 - a. In other words, how do you ensure that when you use it, for whatever reasons, it is giving you accurate and reliable results?
 - i. Do you have any documentation of the maintenance?
130. Have you used your I-8000, or someone else's, to conduct any studies or experiments that will serve as any part of the basis for your expert opinion in this case?
 - a. What studies or experiments have you conducted, specifically with regards to the issue in this case?
 - b. Whose instrument(s) have you used to do this?

131. What would you need for a scientifically accurate and reliable breath test result?
- Minimum of two samples?
 - Sufficient volume?
 - Proper slope?
 - Samples being within certain range of each other?
 - Proper 20 minute observation?
 - Anything else?
132. How many breath tests would you say you have conducted on an I-8000 that meets that criterion?

Prior Testifying as an Expert

133. Since leaving BSO (and not counting cases on which you returned to testify for the State on cases you were a part of prior to leaving BSO), how many times in criminal cases have you been declared or allowed to testify as an expert, or give your opinion (not as a fact witness) in court?
- In the specific area of breath testing, in general?
 - In the specific area of the FDLE rules?
 - Rules governing the Intoxilyzer 5000?
 - Rules governing the Intoxilyzer 8000?
 - In the specific area of the Intoxilyzer 5000?
 - In the specific area of the Intoxilyzer 8000?
134. Since leaving BSO (and not counting cases on which you returned to testify for the State on cases you were a part of prior to leaving BSO), how many times have you testified in criminal cases on behalf of the defense as an expert in those areas?
- It should be 100%*
135. Do you testify at all in civil cases?
- If so, how many times for the plaintiff? How many times for the defendant?
 - Have you been declared an expert in any civil cases?
 - If so, when where, etc.?
136. In Florida...
- How many times?
 - Where? What counties?
 - When?
 - In what areas?
137. In what areas do you hold yourself out to be an expert in?
- Is it true that the more areas you hold yourself out as an expert in, the more you could possibly be hired by the defense and potentially make more money?
 - For example, you have no real training in what it takes to certify or have a laboratory certified by the American Board of Forensic Toxicology, but*

taking a 60 minute online course, and putting it on your CV makes it look like you have had some real training on the subject, correct?

138. Have you ever been declared not to be an expert on the Intoxilyzer 8000?
- Where?
 - When?
 - What case?
139. Have you ever had your testimony limited or not allowed by the court with respect to the Intoxilyzer 8000?
- Where?
 - When?
 - What case?
140. Has your testimony ever been deemed to be not credible in any courts?
141. Have you ever testified under oath in any court hearings or trials with respect to the issue or issues that you are testifying to in this case?
- If so, which case and where? Defense counsel? Defendant?
 - What issue or issues?
 - How many times?
- 142.

Jay Zager's Intoxilyzer

143. Where got?
- From defense attorney in Mississippi, Victor Carmody*
 - It is a DOT instrument, sold by CMI to Freeman Drug Testing in Mississippi*
144. Registration number?
- 80-001146, according to Jay Zager's response to State SDT*
145. Software on instrument
- According to CMI, the software contained on 80-001146, is DOT approved, but not State specific; it is generic software for Freeman Drug Testing*
146. Would the analytical portions of the software contained on your instrument be the same as any other Intoxilyzer 8000?
- Otherwise, how could he say any tests he has conducted on it would be the same results that would be seen from a Florida instrument*
 - In order for him to say that results of his experiments on his I-8000 would be also found in the I-8000 instruments from Florida, he would have to agree that they analyze samples the same; otherwise, he can't analogize results*
147. You had rules to follow with BSO for maintaining their breath testing instrument, correct?
- Maintenance?
 - Breath tests?

- c. Repairs? (must be done at CMI authorized facility)
 - d. You had specific rules to follow for almost everything concerning the breath test instrument, correct? Otherwise, you could have the results of one or even several cases, suppressed, correct?
 - i. And that wouldn't look good upon you as the "Coordinator of the Breath Alcohol Testing Program," correct?
148. Now that you're on your own, not affiliated with BSO, you don't have any rules to follow as far as:
- a. Conducting maintenance inspections, correct?
 - i. Similar to FDLE agency inspections?
 - ii. Similar to FDLE department inspections?
 - b. You don't have any rules to follow rules when it comes to conducting a breath test, correct?
 - i. If so, show me the rules?
 - ii. Where are these rules?
 - c. You can do whatever you want with regards to the way you conduct inspections and breath tests and testify in court about it, correct?
149. So, for the Intoxilyzer 8000 your purchased, did you just purchase sight unseen, or had you seen or used this particular instrument before?
- a. Before buying it, did you ask for any of the documentation on it regarding when it was manufactured?
 - i. For who?
 - ii. When it was shipped from the manufacturer?
 - iii. What it had been previously used for?
 - iv. The owner history of the instrument?
 - v. If the instrument has had any problems with it in the past, such as major fixes or repairs; problems with the software, hardware, motherboard, memory, sample chamber, micron bands, internal circuitry, etc.?
 - b. Do you know anything about the history or lineage of the Intoxilyzer 8000 you purchased?
150. Did you run any tests on this instrument before buying it?
- a. *Did you kick the tire son it like when buying a used car, or just take the dealers word for it that it runs fine?*

Expert's Preparation

151. Breakdown the time you spent on this case?
- a. When did you first become aware of this purge valve modification as an issue to the I-8000's accuracy and reliability?
 - i. How did you become aware of this is modification?

- b. How long (in hours) did you spend researching or investigating the issue or issues in this case?
 - i. What exactly did you do to make yourself familiar with this issue?
- c. What things did you do in order to prepare to assist you in coming to your opinion in this case?
- d. What, if any, reports, articles, documents, papers or anything else, did you review?
 - i. Articles?
 - ii. Transcripts?
 - 1. From what case?
 - 2. Where?
 - 3. When?
 - 4. Who testified?
 - 5. Completed own testing
 - 6. Reviewed someone else's experiments/testing
 - 7. Disassembled your own instrument and reviewed the hole
 - 8. Disassembled someone else's instrument and reviewed the hole
- e. Did you review any report, studies, evaluations, or approval evaluations from FDLE?
 - i. Documents from CMI?
 - ii. Code of Federal Regulations?
 - iii. Florida Administrative Code rules?
- f. Have you ever seen the actual exhaust port check valve, removed from the Intoxilyzer 8000 instrument, in person?
 - i. Actually held it in your hands?
 - ii. If so, were you able to actually see the hole in the exhaust port check valve?
 - 1. *Simply removing the exhaust port block will not allow you to see the hole drilled into the check valve*
 - a. *You would have to remove a plate that covers the actual check valve before being able to see the hole*
 - iii. If so, was this from your instrument, or from someone else's I-8000?
 - 1. If someone else's I-8000, then whose instrument was it?
 - a. Do you have any knowledge of that instrument?
 - i. Where it came from?
 - ii. What state it was manufactured for?
- g. Did you speak with anyone who had actual knowledge of the change to the instrument the defense alleges in this case?
 - i. Who?
 - ii. When?

- iii. Where?
 - iv. What did you discuss?
 - 1. *Matt Malhiot and Roger Skipper were the only person present at CMI when this hole was drilled into the exhaust block check valve*
 - v. Did you speak with Matthew Malhiot about this issue?
 - vi. Did you speak with Roger Skipper about this issue?
 - vii. Did you speak with anyone from CMI about this issue?
152. Were you present at CMI Headquarters in Owensboro, KY, when the decision to make this change was decided?
- a. Were you present at CMI headquarters when this hole was drilled into the exhaust port check valve?
153. When you came to your opinion in this case...
- a. Was this before or after Mr. Canet had retained you in this case?
 - b. How many times have you spoken to Mr. Canet about the issue in this case or the testimony you would be providing at the deposition or hearing?
 - i. *Not about depo or hearing scheduling, but the actual issue, the change, what the change possibly affects, whether the instrument is approved, etc.)*
 - ii. Do you keep a record of the dates and times, and the length of time you speak to the attorney or client who hired you in a case when you speak with them over the phone or in person?
 - 1. *If not, then how do you know how long you spoke with Mr. Lopez for in conference calls so that you were able to attempt to bill the state for 1.75 hours of conference calls with him?*
 - 2.
 - c. Describe, specifically, what you discussed those times?
 - d. When was the last time you spoke to or met with Mr. Canet regarding this case?
 - e. When was the last time you saw Mr. Canet at his office building, located at 12 SE 7th Street, in Fort Lauderdale, FL?
 - i. *Zager was seen walking North on SE 1st Avenue, beside the 110 Tower, on Thursday, November 29, 2012 at approximately 1:15p; he was wearing khaki pants, dress shirt and a dark blue/black sport coat, carrying a letter-sized manila file*
 - ii. We had a depo scheduled for November 30th, correct?
154. Did you review any of the agency or department inspections conducted on any of the I-8000 instruments in Broward with regards to the issue you will be testifying about in this case?
- a. If so, which ones for which instruments?
155. Did you review any of the breath test affidavits of any of the defendants from any of the I-8000s used in these cases with regards to the issues you will be testifying about?

156. Did you review any of the FDLE Intoxilyzer 8000 Year-End Subject Test Statistical Data Review Summaries with regards to the issue you will be testifying about?
157. Did you review the FDLE rules governing breath testing with regards to the issues you will be testifying about?
- a. Which ones from which year?
 - b. What specifically about the rules you reviewed support your position/opinion in this case?
158. Did you review any parts of the Code of Federal Regulations with regards to the issue you will be testifying about?
- a. Which parts?
 - b. What specifically about the rules you reviewed support your position/opinion in this case?
159. After coming to your opinion in this case, did you discuss it with any:
- a. Toxicologists?
 - b. Engineers?
 - c. Anyone from FDLE?
 - d. Anyone from CMI?
 - e. Any other defense attorneys?
 - f. Any other DUI defense experts?
 - i. Charles Smith?
 - ii. Rick Swope?
 - iii. Matthew Malhiot?
 - iv. Stephen Daniels?
 - v. Stefan Rose?
 - g. What did you discuss with them?
160. Did you review the motion to suppress filed by Mr. Canet, and other defense attorney, in these cases? (give copy)
- a. If not, ask how can he be sure that he will be testifying as to the issues that the defense has alleged in this case?
 - b. You were hired by the defense to give your “expert” opinion in this case, supporting the allegations in the defense’s Motion to Suppress for Lack of Substantial Compliance, correct?
 - i. Your opinion testimony will be supporting the defense position there is a lack of substantial compliance by the State, for the reason outlined in the motion, correct?
 1. *Otherwise why would you be testifying?*
 2. *You discuss the cases and issues with defense attorney before taking the stand so they know what you position is before testifying for them; in case your opinion does not help them*

- a. BTW, how many times have you been approached by a defense attorney to consult for their client and your opinion was that the results from the Intoxilyzer 8000 were accurate and reliable?
 - b. Have you ever testified in court, having been hired by the defense, that the breath test results from an Intoxilyzer 8000 were accurate and reliable?
 - i. If so, where and when? County? Case?
161. Pointing your attention to paragraph 9, the defense alleges that “in 2004 it was discovered that the Intoxilyzer was experiencing issues with accurate measurement of breath volume,” correct?
- a. Do you know what these issues were in 2004?
 - i. Who discovered them? When?
 - ii. Do you have documentation of these supposed issues measuring breath volume?
 - iii. What evidence do you have of these issues?
 - b. Did they have anything to do with measuring breath volume?
 - c. Do you know what was done to correct these issues?
 - d. The defense’s motion also states that these problems were “traced to the flow sensor hardware,” correct?
 - i. What evidence do you have of these “problems traced to the flow sensor issue?”
162. Pointing your attention to paragraph 10, the defense alleges that “in August, 2004, CMI altered the flow sensor hardware by literally drilling a hole in the flow sensor valve,” and that “it was felt that this dramatic alteration of hardware would cure the flow sensor issues,” correct?
- a. Do you agree with the defense’s allegation that a hole was drilled into the flow sensor valve?
 - i. Do you know who, as alleged by the defense, “felt that this dramatic alteration of hardware would cure the flow sensor issues?”
 - b. The flow sensor is situated in the I-8000 before the actual analytical process in conduct by the instrument, correct?
 - c. However, there was no hole drilled into the flow sensor of the I-8000, correct?
 - d. So, the defense’s allegations in paragraph 10, would be completely false, correct?
 - i. If not, why not?
163. So, if there was no hole drilled into the flow sensor valve, was there a hole drilled at all?
- a. If so, where?
 - b. How do you know this?
 - c. When did you first become aware of this?

- i. How?
- d. Do you know why the hole was drilled or what led to the decision to drill the hole in the first place?
 - i. Was this due to issues with breath volume measurement?
 - ii. Wasn't this due to results being outside of tolerance range when conducting certain simulator testing on the Intoxilyzer 8000 in 2004?
 - 1. This had nothing to do with measuring a person breath volume, correct?
 - 2. It had nothing to do with measuring actual person's breath test samples at the time, correct?
 - 3. This was because results from simulator testing were coming back outside the tolerance range?
 - a. Do you know whether the results that were being produced were over the tolerance range or below the tolerance range?
 - iii. How do you know what was the cause of these outside of tolerance range results?
 - 1. Where did you get this information?
- e. Isn't it true that the hole referenced in the defendant's motion was made into the exhaust port block check valve, correct?
 - i. The exhaust port block check valve is one of the last areas of the instrument that a breath samples passes through before being expelled from the instrument, correct?
 - 1. Hence the reference name, exhaust port, correct?
 - ii. In the schematics of how a breath sample given by a person, through the breath tube, flows through the instrument, the exhaust port block check valve, is actually after the instrument has already analyzed the breath sample in the instrument, correct?
 - 1. PLUMBING FLOW DIAGRAMS
 - a. Indicate the direction of the flow of a subject's breath sample through the instrument on the diagrams filed by the defense as exhibits
 - b. Indicate where the instrument's analysis of a breath sample is conducted or analyzed?
 - i. Is this before or after the exhaust block check valve?

164. Pointing your attention to paragraph 11, the defense alleges that "at no time did CMI provide written notice to the FDLE of the hole drilling alteration as required by the above referenced regulation," correct?

- a. And by “above-referenced regulation,” it is referring to
 - i. FAC 11D-8.003(5), which was effective at that time and until December 9, 2004, correct?
 - 1. That rule is stated in the defense motion in paragraph 5, correct?
 - a. Is that the full and complete rule that was in effect at that time?
 - ii. The first part of that rule required that a manufacturer of an instrument approved by the department (FDLE) to notify the Department in writing prior to making any modification or adding new option to such instrument, correct?
 - iii. Your CV stated you were on the rule-making committee of FDLE/IPTM in 1999, and the FDLE/IPTM Breath Alcohol Instrumentation Committee in 2002, correct?
 - iv. So given that, and the fact that you are a prior Coordinator of the BSO Breath Alcohol Testing Program, you are aware that the rules governing breath testing, must be substantially complied with, correct?
 - 1. Not strictly complied, correct?
 - v. Did you have any input as to the creation of this particular rule or part of the rule?
 - vi. Do you know what was the intent of this particular part of the rule was?
 - 1. Isn't it true that the intent of the rule was so that CMI, being based in Kentucky, did not make any modifications or add any new options to the I-8000 without notifying Florida, since Florida would otherwise have no way of knowing if such modification was made or option added?
 - 2. In other words, it was to make sure FDLE knew of any modification or options added, correct?
 - 3. Are you aware that two FDLE Department Inspectors were present at CMI headquarters in Kentucky, when the decision to implement this modification was made?
 - a. That these two FDLE Department Inspectors actually knew of the change being made to the I-8000 instrument before it was implemented?
 - b. So, the Department (FDLE) was giving notice about this modification or option added?
- b. So, knowing that FDLE had notification (albeit not in writing) of the modification or option added in this case, do you believe that this is still a violation of that part of the rule that was in place at the time?
 - i. So this would not be strict compliance with that part of the rule, correct?
 - ii. Could this still be substantial compliance with that part of the rule?

- c. Looking at the second part of that rule, it states that the Department (FDLE) shall evaluate modifications or options to an approved breath test instrument and determine whether they affect the instrument's method of analysis or analytical reliability, correct?
 - i. And that is what the defense noted in their motion, correct?
 - ii. Did you have any input in the creation of that part of the rule?
 - iii. Do you know what was the intent of this particular part of the rule was?
 - iv. What is the Intoxilyzer 8000's method of analysis?
 - 1. *Non-dispersive infrared light absorption*
 - d. Do you know whether the implementation of this modification (drilling of a hole) into the exhaust port check valve, would affect the instrument's method of analysis (non-dispersive infra-red light absorption)?
 - i. If so, does it change the method of absorption?
 - 1. If so, what does it change the method of absorption to?
 - ii. How does it change the method of absorption?
 - e. Do you know whether the implementation of this modification (drilling of a hole), into the exhaust port check valve, would affect the instrument's analytical reliability?
 - i. If so, how does it affect the instrument's analytical reliability; specifically?
 - 1. What evidence do you have that proves that the instrument's analytical reliability of a person's breath test by the existence of this hole?
 - f. Have you conducted any studies or experiments yourself on a Intoxilyzer 8000 with a hold in the exhaust port check valve, and one without a hole in the exhaust port check valve, to compare the results?
 - i. If so, was this with simulators or actual subjects?
 - ii. If so, do you have anything to prove that the instrument's analytical reliability is affected by this hole?
165. Pointing your attention to paragraph 12, the defense alleges that "FDLE never performed a modification evaluation as was required by existing law," correct?
- a. What is a modification evaluation?
 - i. Is this listed specifically in the rules?
 - 1. If so, where?
 - b. Is this the same evaluation as referenced in Form 34?
 - c. Are you aware that FDLE conducted Form 34 instrument evaluations on:
 - i. April 19, 2005?
 - ii. December 12, 2005?
 - iii. January 14, 2006?
 - iv. August, 1, 2006?

- v. October 9, 2006?
 - d. These evaluations were conducted in accordance with Form 34, correct?
 - e. Have you seen any of these evaluations?
 - i. If so, then you would agree that subsequent to these changes (hole being drilled) made to the Intoxilyzer 8000, that FDLE did in fact conduct evaluations of the instrument?
 - 1. If not, why not?
 - f. Are you aware that the purpose of these evaluations is to assess the instrument's capabilities, and that the methods used provide accurate and scientifically reliable analytical results?
 - i. Isn't that what is stated under the "purpose" section of these evaluations?
 - g. Are you also aware that these evaluations "are not intended to approve individual parts or components of the breath test instrumentation"?
 - i. That is also stated in the "purpose" section, correct?
 - h. So, knowing that at least five (5) Form 34 instrument evaluations were conducted on the Intoxilyzer 8000 prior to being used for evidential use in Florida, would you agree with the defense's allegation that FDLE never performed a modification evaluation as required by the existing law?
 - i. If not, why not?
 - 1. How?
166. Are you familiar with the report of the Results of Special Testing of the Florida Intoxilyzer 8000 conducted by Ed Conde for the Department of Transportation on August 6, 2007?
- a. That the Intoxilyzer 8000s submitted for testing were found to meet all applicable requirements for being placed on the NHTSA Conforming Products List for evidential breath testers, correct?
 - b. So, DOT has evaluated the Intoxilyzer 8000 and found it to meet the applicable requirement for being on, and remaining on, the Conforming Products List, correct?
 - i. If not, why not?
167. Form 34 for instrument evaluation procedure states that only breath test instruments listed on the US DOT Conforming Products list will be evaluated, correct?
- a. Does it make any requirement that FDLE makes sure that CMI, Inc. inform the Federal Department of Transportation of any changes to the instrument?
 - b. Does CMI even have an obligation to notify Federal DOT of any changes to a breath test instrument that is listed on the CPL?
 - i. If so, where is this requirement?
 - ii. Do you know if there is a specific office within the Federal DOT that must be notified of a change?
 - 1. If so, what is that office?

2. Is it still in existence?
 - a. If so, how do you know?
 - iii. If that office no longer exists, and there is no office to which to submit these changes, would you agree that it would be difficult, if not impossible, to comply with such a requirement?
168. Paragraph 14 of the defense motion says that “the modification evaluation had an important and legal scientific purpose, correct?
 - a. What modification evaluation is this referring to?
 - b. The defense motion further states that “the Department (FDLE) itself stated it was intended to determine whether the modification “affect the instrument’s method of analysis or analytical reliability,” correct?
 - i. Where does the Department (FDLE) state this, specifically?
169. Paragraph 16 of the defense motion states that “the FDLE’s failure to engage in an evaluation intended to determine the analytical accuracy of the device following a significant hardware modification was a substantial deviation from required regulatory compliance,” correct?
 - a. You are aware of at least five (5) Form 34 Instrument Evaluations that were conducted on Florida Intoxilyzer 8000s between April 2005 and October 2006, correct?
 - i. Do you still believe that no instrument evaluations of the Intoxilyzer 8000 with these modifications were conducted?
 - b. Hardware modifications?
 - i. What would you consider a significant hardware modification?
 - ii. If the hardware modification does not affect the instruments accuracy and reliability of subject breath tests, would a modification still be considered a significant hardware modification?
 - iii. Would putting 3 inch rubber feet on the bottom of the instrument be a significant hardware modification?
 1. Making this modification would alter the design of, and change, the Intoxilyzer 8000, correct?
 2. But that wouldn’t be a significant hardware modification, correct?
 - a. Because it doesn’t affect the instrument’s accuracy or reliability of the breath test results, correct?
 - iv. Would putting more memory chips into the instrument so that it could hold more subject’s breath test information be a significant hardware modification?
170. Since you were on the rules committee for FDLE and IPTM back in 1999, did you have anything to do with the creation of the Form 34 – Instrument Evaluation procedures?

- a. While you were on this committee, did you amend or change the Form 34 evaluation procedures?
 - i. If so, what specifically did you have a part in doing or changing to Form 34?
 - b. Form 34 was actually revised in March 2002, correct?
 - c. Do you know what the intent was of having a requirement that only breath test instruments listed on the US DOT Conforming Products List be evaluated as part of Form 34?
 - i. Isn't the intent of the rule to have the instrument previously be tested or evaluated by an entity or organization that has no connection with FDLE, before FDLE evaluates it themselves?
 - ii. Isn't that just another requirement that would verify whether a breath test instrument produces accurate and reliable results?
 - d. If FDLE removed this requirement from Form 34 that they could only evaluate instrument from the US DOT Conforming Product List, they could choose to evaluate any instrument, correct?
 - i. And it wouldn't matter whether, in the case of an Intoxilyzer 8000, if it had this hole or not, correct?
 - ii. All they would have to do is conduct a Form 34 evaluation on the instrument, and if it passes those procedures, it could be approved for evidential use in Florida?
 - e. Is it your opinion that because FDLE chooses to evaluate only instruments that are listed on the DOT Conforming Products List, that they must somehow control, or ensure, that CMI forwards any changes in the instrument to the US DOT?
171. Have you conducted any tests, studies or experiments on whether the hole that was drilled into the exhaust block check valve affects the instrument analytical reliability?
- a. If so, what did you do? Describe your tests.
 - b. Did you compare the results produced by an I-8000 instrument with a hold in the exhaust block check valve and the results from an instrument without a hole in the exhaust block check valve?
 - c. Any written materials documenting the procedures you followed or the results of your testing?
172. Have you reviewed any studies or experiments that were conducted on the I-8000 with respect to this exhaust block check valve and the hole that was drilled?
- a. Do you have any opinion as to the study or the results from that study?
 - b. If so, what are those opinions?
 - i. What is your basis for those opinions?
173. Did you review rule that was in place at the time of this change?
174. What is I-8000 method of analysis? *Infrared absorption analysis*
- a. Is that changed?

175. Has the analytical reliability of the instrument changed?
- a. If yes, then how do you know?
 - b. What is the basis of that opinion?
 - c. How certain are you that it has changed?
 - i. Could it change for benefit of the defendant?
176. The area in which the hole was drilled is in the exhaust block check valve, correct?
- a. Is this area before or after the instrument has conducted its analysis of the breath samples?
 - i. In the travel of a breath sample through the instrument, this would be one of the last places that the sample would pass through before being expelled from the instrument, correct?
 - b. How does that affect anything that is being analyzed by the instrument in the sample chamber?

Approval of Instrument

177. According to the defense the I-8000 was approved for use through FAC rule promulgation by FDLE that became effective November 5, 2002.
- a. Do you agree with that statement?
 - i. You were still BSO on November 6, 2002 correct?
 - ii. And when did BSO obtain the Intoxilyzer 8000 that you say you had access to before you left BSO?
 - b. So then based on the fact that you agreed that the I-8000 was approved for use through the rule promulgated by FDLE that was effective November 5, 2002 , on November 6, 2002 you could have just used the instrument that BSO had in its possession to conduct breath tests without any problems, correct?
 - i. If not, why not?
 - c. Besides the rules saying that the instrument itself can be used in Florida, are there any other steps before the instrument can actually be used for evidentiary purposes in the State of Florida?
 - i. Instrument manufactured?
 - ii. Instrument delivered to agency?
 - iii. Registration of the instrument?
 - iv. Department Inspections conducted?
 - v. Agency Inspection conducted?
 - d. Do you know what the instrument number was of the I-8000 that you claim you had access to at BSO before you left your employment there?
 - e. Have you ever reviewed the registration documents for each of the I-8000s that are used in Broward County?

- i. Are you aware that an instrument cannot be used in the State of Florida until that instrument has been registered and the “Registration of Evidentiary Breath Test Instrument” documentation has been filed?
 - 1. That is FDLE/ATP Form 12 – Revised January 2006, correct?
- ii. And that Form lists the instrument manufacturer, model, serial number, owner, and date of registration?
 - 1. And the form also states that “the above instrument is hereby approved for evidentiary breath alcohol testing in the State of Florida pursuant to Chapter 11D-8, FAC.”
- f. So, would you agree that just because the FAC rule states that the instrument itself is approved for use, that that is but one step in the entire approval process?
 - i. After all, you can’t just use any I-8000 instrument in the State of Florida for evidentiary purposes, correct?
 - 1. Can’t bring in an I-8000 from say Mississippi, put Florida software into and just start using it, correct?
 - 2. That instrument would to have a department and agency inspection performed on it, correct?
 - a. It would have to purchased by a law enforcement agency here in Florid, correct?
 - b. It would have to be registered and the proper forms filed, correct?
 - 3. All of that would have to be completed before the instrument is actually approved for evidentiary use, correct?

Purge Valve Change

- 178. Is it present in every I-8000 manufactured for Florida?
 - a. Do you know?
 - b. If so, how do you know this?
 - i. Have you spoken to the manufacturer?
- 179. For every I-8000 manufactured anywhere?
 - a. For which states?
 - b. Do you know under what circumstances a state would receive an I-8000 with a hole and without a hole in the exhaust port check valve?
- 180. How does this drilled hole change the analytical reliability of the Intoxilyzer 8000?
 - a. How do you know specifically?
 - b. How would you conduct a study or experiment to determine whether the hole affect the instrument’s accuracy and reliability, versus and instrument without a hole?

- i. Would you run concentrations of known alcohol solutions through simulators into the instrument on both types of instruments (with and without a hole) and compare the results?
 - ii. Would you have persons blow concentrations of known alcohol solutions from the headspace of simulators into both types of instruments with and without a hole), through the breath tube, and compare those results?
 - iii. Would you have persons dosed with specific alcohol concentrations provide breath samples into both types of instruments (with and without a hole), and compare those results?
 - iv. If you had the results of a study that indicated that it makes no difference to the instrument's analytical reliability whether there is a hole or not in the exhaust block check valve, would that change your opinion as to whether the hold affects the instrument's analytical reliability?
181. You have seen this hole, correct?
- a. In person or through photos?
 - b. How large is this hole?
 - c. Do you know what the purpose of this hole was? Why did they do it?
 - i. What is it supposed to do, not do, or cause or prevent from happening?
182. You are not a software engineer, correct?
- a. You are not familiar with the programming software for the Intoxilyzer 8000, correct?
183. Would you agree that the Intoxilyzer 8000 is capable of showing that it is accurate and reliable?
- a. When properly tuned and properly used?
 - b. And that it can be so to within .005?
 - i. Or .003, which is what the manufacturer says that the accuracy and precision for obtaining a sample could be?
 - c. Would you agree that between the Intoxilyzer 5000 and the Intoxilyzer 8000, the I-8000 has tighter precision for its reported results?
 - i. It doesn't show as much variability as the I-5000, correct?
184. How many depositions would you say you've given where you have testified regarding results obtained on an Intoxilyzer 8000?
- a. Hearings?
 - b. Trials?
 - c. Have you ever stated in any of them, besides this one today, these issues for which you're testifying in this case?
 - i. That the instrument was not approved?
 - ii. That this drilled hole affects the Intoxilyzer 8000's method of analysis?
 - 1. That it affects the I-8000's analytical reliability?
 - iii. If so, where, when?

- d. When was the first time you discussed this issue in a depo, hearing or trial, other than today?
- e. You gave a deposition in a case State v. Calabrese to a couple of ASAs from the Broward State Attorney's office on February 11, 2011, correct?
 - i. You didn't mention this as an issue regarding the defendant's breath test in that case, correct?
 - 1. Why not?
 - ii. Don't you think that this was important in the grand scheme of things, considering that the Implied Consent Statute requires that a person's breath be tested on an approved instrument or with an approved test?
 - 1. But you didn't mention that this change could have affected the instrument's analytical reliability?
 - a. That this was concern since the breath test results being used to convict the defendant of DUI may not have been scientifically and analytically reliable?
- f. You also gave a deposition in a case, State v. Lister to a prosecutors with the Broward SAO on July 16, 2012 and continued it on September 7, 2012, correct?
 - i. You did not note this case down in the list you provided to the State, correct?
 - 1. Even though you gave this testimony within the five (5) year period requested by the State, correct?
 - a. *If he or Canet objects that that information was not what we asked for, refer to the e-mail sent by Mr. McGee that indicates that the Judge rules Zager does not have to provide current cases where he has NOT given testimony under oath in a hearing, deposition or trial.*
 - ii. You didn't mention this as an issue regarding the defendant's breath test in that case, correct?
 - 1. Why not?
 - iii. Don't you think that this was important in the grand scheme of things, considering that the Implied Consent Statute requires that a person's breath be tested on an approved instrument or with an approved test?
 - 1. But you didn't mention that this change could have affected the instrument's analytical reliability?
 - a. That this was concern since the breath test results being used to convict the defendant of DUI may not have been scientifically and analytically reliable?
 - iv. In the Lister case there was also an issue with how the agency inspector conducted acetone testing, correct?

1. And in that case it was important because the defendant may have been diabetic or have an insulin pump, and the effects of diabetes could have been causing his appearance of impairment, correct?
 - v. So, this issue of the hole affecting the I-8000's analytical reliability wasn't important enough to mention in a case like that?
 - g. When you are hired on a case, to review possible issues with breath testing, do you just focus on what the defense attorney wants you to focus on, or do you give them a complete picture of all the issues involved?
 - i. If you give them a complete picture of all the issues, why wouldn't you tell them about this hole that affects whether the instrument is approved or not, and that is affecting the analytical reliability?
 1. *Is it because you're not getting paid for that*
 - h. When you were contacted by Mr. Canet, did he tell you about the motion he had filed first, or did he ask you what you knew about this issue?
 - i. When was this?
 - ii. When did you receive your payment from Mr. Canet?
 1. The check you received was dated 11/2/12, correct?
 - iii. Into which business account did you deposit this check, JZFC, USIZ, or Certified Legal Investigations?
 - iv.
185. Specifically, how would this hole being present in the exhaust block check valve affect breath test results on the I-8000?
- a. *Ambient air expelled by the instrument from a subject breath test or control test could be sucked back into the instrument through this hole?*
 - i. If so, then wouldn't that contaminated ambient air be again expelled from the instrument during the next air blank?
 - ii.
186. In order for this contaminated ambient air to be sucked back into the instrument through this hole, wouldn't there have to be some sort of positive pressure outside the instrument near the valve to push the air back through the hole?
- a. Similarly, wouldn't there have to be some sort of negative pressure from within the instrument that would actually suck that air back into the instrument?
 - b. Where are these pressures coming from?
 - c.
187. Specifically, how much are the breath test results affected by this hole?
- a. Specifically, how much increase (or decrease) does the hole affect on a subject's breath test that was exactly .080?
 - b.
188. The defense has provided to the State in discovery a copy of an engineering change request/notice. Have you seen these documents?

- a. What can you tell me about them?
 - b. How do they affect your opinion in this case?
 - i. Why?
 - c. Is there anything specific in the data that would suggest having this hole in the exhaust block check valve affects the accuracy or reliability of breath tests conducted on a Florida I-8000?
 - i. What specifically?
 - d. What specifically about them reinforces your opinion in this case?
 - e. Is there anything in these documents that weakens your opinion in this case?
 - i.
 - f. The change request/notice states that the reason for the change is “compensation for leaks in recirculation path, correct?
 - i. Describe this recirculation path?
 - 1. What does it do?
 - ii. Is the recirculation path in place or utilized when a subject is providing a breath test?
 - 1. If not, then how can you say this change affects breath test results?
 - iii.
189. The defense also provided to the State in discovery a copy of an FDLE study titled “Check Valve Research Study Data.” Have you seen these documents?
- a. What can you tell me about them?
 - b. How do they affect your opinion in this case?
 - i. Why?
 - c. Is there anything specific in the data that would suggest having this hole in the exhaust block check valve affects the accuracy or reliability of breath tests conducted on a Florida I-8000?
 - i. What specifically?
 - d. What specifically about them reinforces your opinion in this case?
 - e. Is there anything in these documents that weakens your opinion in this case?
 - i.
190. The defense also provided to the State in discovery a copy of the Federal Register Provisions Vol. 58, No. 179, dated September 17, 1993. Have you seen these documents?
- a. What can you tell me about them?
 - i. How do they affect your opinion in this case?
 - 1. Why?
 - 2. What specifically about them reinforces your opinion in this case?
 - 3. Is there anything in these documents that weakens your opinion in this case?

191. The defense also provided to the State in discovery a copy of three diagrams. Have you seen these documents?
- a. One diagram is a plumbing flow diagram, correct?
 - i. Another is a plumbing diagram, correct?
 - ii. And the last is a system block diagram, correct?
 - b. What can you tell me about them?
 - i. How do they affect your opinion in this case?
 1. Why?
 2. What specifically about them reinforces your opinion in this case?
 3. Is there anything in these documents that weakens your opinion in this case?
 - c. Can you show me specifically on these diagrams your opinion in this case?
 - i. Show me how and where exactly the hole in the exhaust block check valve would affect breath test sample analysis?
192. The defense also provided to the State several photos of the internal components of an I-8000. Have you seen these photos?
- a. Are these photos of the internal components of an I-8000?
 - i. From a Florida I-8000?
 1. How do you know?
 - b. Where did these photos come from?
 - i. How do you know?
 - c. What is in the photos?
 - d. Do these photos depict the exhaust block check valve as it sits in the I-8000?
 1. *Technically no! there is usually a metal plate that is screwed onto the top of this valve. It was obviously removed for the taking of this photo*
 - ii. And do these photos depict the hole that was drilled into the exhaust block check valve?
 - iii. How large is this hole?
 - iv. How much contaminated ambient air gets back into the instrument and affects a breath sample?
 - e. In some of the other photos submitted by the defense, there is a person standing over what seems to be an I-8000, correct?
 - i. Do you know who that person is?
 - ii. When you were with BSO, did you ever know anyone to disassemble any breath testing instrument in such a way?
 1. Using a bath mat as a table covering on which to lay the instrument?

2. Being in socks, standing on a chair with a foot on the table where the instrument is resting?
- iii. Is this the same instrument from where the photos of the exhaust block check valve came from?
 1. Whose instrument is this?

193. Hypothetical:

- a. If allegations similar to these brought by the defense were brought up when you were with BSO, and with the Intoxilyzer 5000, and you were presented with the same evidence you have in this case, defense motion, rule in place that was later changed, CMI never tells US DOT of the change, FDLE approved instrument before the changes, modification to the instrument is made with no written notice to FDLE but you were one of the persons at CMI when the change was made, and FDLE conducted five (5) Form 34 evaluations on the instrument after the change, would you have refused to testify as part of your job as Breath Alcohol Testing Program Coordinator because the instrument was not “approved”?

194.