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COUNTY COURT
ARAPAHOE COUNTY
COLORADO
7325 SOUTH POTOMAC
CENTENNIAL, CO 80112

THE PEOPLE OF THE STATE OF
COLORADO
Plaintiff,

And
NICHOLAS JOSEPH GUINN
Defendant,

For Plaintiff:
JESSIE DUBOIS
DANIELLE JARAMILLO

For Defendant:
RICHARD HERNANDEZ

FOR COURT USE ONLY

Case No. 12T7803
Division 405

The matter came on for hearing on February 27, 2014, before the HONORABLE ADDISON ADAMS, Judge of the County Court, and the following FTR proceedings were had.

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FEBRUARY 27, 2014

JURY TRIAL

(THIS TRANSCRIPT IS FOR THE TESTIMONY OF MR. JAY ZAGER)

THE COURT: (1:36:13) And let me just check with Mr. Hernandez. Are, are there any witnesses you intend to call, Mr. Hernandez?

MR. HERNANDEZ: Yes, Judge, we do.

THE COURT: All right, whenever you're ready, sir.

MR. HERNANDEZ: Judge, we would call Mr. Jay Zager.

THE COURT: All right, Mr. Zager, if you'd please come forward, sir? Thank you, sir. If you'd raise your right hand? Do you solemnly swear or affirm upon the penalty of perjury that the testimony you're about to give shall be the truth, the whole truth, and nothing but the truth?

WITNESS: Yes, I do, Your Honor.

THE COURT: Thank you, sir. Please have a seat.

DIRECT EXAMINATION OF MR. JAY ZAGER

BY MR. HERNANDEZ:

Q Good afternoon, sir. Could you state your full name and spell your last name for the record, please?

A Yes, my name is Jay Zager. It's spelled Z-A-G-E-R.

Q Mr. Zager, what do you do for a living?

A I'm a retired police officer from Broward County, Florida, and I currently work as a consultant, as a law enforcement consultant on impaired driving cases.

1 Q And are you a forensic consultant?

2 A A forensic consultant related to the breath alcohol
3 side of a breath DUI case.

4 Q And if you could just give us a little more info? What
5 do you mean by a forensic consultant?

6 A Well, of course, forensics means that which port of
7 science which will be used in, in a courtroom of evidence and
8 that nature, but my area is limited to that of impaired driving,
9 which means the, the police procedures surrounding that, the
10 breath alcohol test evidence that's used, as well as the
11 investigation that surrounds the motorist who's been arrested for
12 DUI.

13 Q And what education do you have in that area?

14 A Well, I, as I men- -, mentioned, I was a police officer
15 with the Broward Sheriff's Office which is in Fort Lauderdale,
16 Florida. It's about a 6000-member department. I was employed
17 there, and I was a member of a DUI task force which was a full-
18 time position. My main focus on that was overseeing the breath
19 alcohol testing portion of that where I would conduct the
20 inspections on the breath test machines, the Intoxilyzer 5000s at
21 the time, provide testimony, expert witness testimony in the
22 Courts, as well as work as a deputy sheriff, as a police officer
23 in effecting DUI arrests and investigation and providing the
24 testimony in Court concerning that.

25

1 Q And what years were you a police officer from starting
2 and ending?

3 A Let's see, I worked from the Broward's Sheriff's Office
4 from 1988 till I retired 2003. Before that I was with a smaller
5 department also in the same county.

6 Q And after you left the law enforcement job, what did
7 you do next in this area, specifically in this area, education or
8 training?

9 A Well, the education, training that, that I would
10 continue receiving would have been whatever courses I could
11 continue on with concerning breath alcohol testing, whatever
12 training classes I could conduct myself as far as teaching
13 others. Generally, at that point or this point, it's attorneys
14 and judges that would attend the sort of trainings.

15 Q And how many times have you testified as an expert in
16 the area of DUI, DWAI investigation breath testing?

17 A It's not a number I, I, I kept track of. The total
18 number of cases where I provided testimony either for a, you
19 know, administrative hearings, criminal cases, motions, etcetera,
20 is well over a 1,000. The number of those times where it was
21 providing expert testimony has to be at least half of that, if
22 not more, cause I was full-time handling, most of those were for
23 the government when I was working with them, the majority of
24 those.

25

1 Q And when you say that most of those were for the
2 government, are we talking about during your employment as a
3 police officer, or?

4 A During my employment going to the Courts of law in our
5 jurisdiction.

6 Q And have you had any continuing education training
7 regarding the Intoxilyzer?

8 A The, the Intoxilyzer training concerning the 5000, no,
9 because I received the training. There's been no further updates
10 on that particular 5000 device. I did receive training on later
11 generation devices that came out and other breath testing
12 machines, later generation devices as well, but the 5000, I, I
13 did that training originally back at the factory quite some time
14 ago, back in the 90s.

15 Q And do you know who manufactures the Intoxilyzer 5000?

16 A The 5000 is manufactured by a company called CMI.
17 They're in Kentucky just outside of Nashville.

18 Q And do you know what CMI stands for?

19 A Originally it stood for Colorado Mining Industries
20 where, then they shortened it. They couldn't get that name, and
21 so they chose CMI. They used to be based in, in this state at
22 Midturn, Colorado, some years ago.

23 Q And have you ever had any training and education from
24 CMI, the manufacturer themselves?

25

1 A Oh, yeah, I've been to, as I mentioned, to the factory
2 originally for the Intoxilyzer 5000 course where I traveled to
3 the factory and spent a, I believe it was a week course back in
4 the late 90s for the Intoxilyzer 5000 series at that time. We
5 learned to perform calibrations. We'd disassemble it down to the
6 bare bones, put it back together, and I had the certification as
7 an instructor to teach others, as an operator, of course, and,
8 and as a technician. And then the factory would put on yearly
9 these update courses, the Intoxilyzer user groups, which I used
10 to attend as well. When they introduced later generation
11 devices, we would get access to that and learn additional
12 training or get additional training on that as well.

13 Q And, excuse me, and at CMI- -well, let me back up. Is
14 the 5000 and the 5000EN the same machine or different machines?

15 A They're, they're the same, but they're different.
16 There, there's, internally there's some changes to the 5000EN.
17 EN stands for enhanced. It was originally put out there at the
18 recommendation of the state of Minnesota. It was actually the
19 Minnesota model. They did some modifications inside in, in
20 collaboration with the manufacturer, and it just made servicing
21 of the device easier. They added some extra filters for a little
22 bit more specificity. But essentially the way they, they're both
23 so called infrared light absorbing breath testing instruments.

24 Q And have you published any, have you had any
25 publications in this area?

1 A I have. Several times I've made papers and presented
2 these findings before scientific bodies. I've presented these
3 papers that were, essentially, they had to go through committees
4 and, and be peer reviewed before they were accepted. I just
5 presented one last week in Seattle at the American Academy of
6 Forensic Sciences. That one was dealing with a, an equation
7 called the Widmark equation, W-I-D-M-A-R-K, that's to try to
8 quantify the amount of alcohol that's in a body. But I've had
9 several, and some of them dealt with specifically the 5000
10 device.

11 Q Now, I'm looking at your resume, and you have on here
12 The Breath Alcohol Test: A Continued Call for the Pretest
13 Observation Period is the title presented at the 64th American
14 Academy of Forensic Science annual scientific meeting in Atlanta,
15 Georgia, 2012. Was that on the 5000?

16 A Not specifically. That, that one was on breath testing
17 as a whole, just surrounding the, the, the procedure, procedural
18 aspect of conducting a, the importance of conducting a proper
19 observation period prior to taking a breath test. It was a
20 reconfirmation that it's still necessary to do that.

21 Q And you've also lectured in this area?

22 A Oh, yeah, I, I've lectured, I was responsible for, as a
23 member, a subject matter expert in the state of Florida for
24 producing the, the manuals that we used as law enforcement, the
25 curriculum for both the operator, so-called push button operators

1 that take the breath test as well as the inspectors that would
2 check the machines as well.

3 MR. HERNANDEZ: And, Judge, we would offer Mr. Zager as
4 an expert in the Intoxilyzer 5000EN operation care and
5 maintenance and the proper procedures for conducting a test on
6 said machine.

7 THE COURT: All right.

8 MS. DUBOIS: And, Your Honor, the People would renew
9 our objection from earlier that this witness is not an expert in
10 those fields.

11 THE COURT: All right. The Court will find, pursuant
12 to Rule 702, that he is qualified to be an expert in the area of
13 the care, operation, and maintenance of the machines and
14 procedures required to operate the machine. Go ahead, sir.

15 MR. HERNANDEZ: Thank you, Judge.

16 Q (by Mr. Hernandez) Now, Mr. Zager, in this particular
17 case, let's start off with who hired you?

18 A Well, I was retained by, by your office on behalf,
19 behalf of Mr. Guinn to review the police reports, the breath
20 alcohol testing, so to- -

21 Q - -And what were you given in order to review the test
22 that was conducted in this case?

23 A Well, I, let's see, I, I was paid a, a fee to do, to do
24 that, you talking about the, the document-wise?

25

1 Q Yes, it was a poor question, though. It was poor,
2 sorry- -

3 A - -Oh, okay. I received copies of the police reports
4 that, concerning the arrest affidavit, the breath test documents,
5 the implied or Express Consent documents, and also a package of
6 information concerning the history and the use of the Intoxilyzer
7 machine.

8 MR. HERNANDEZ: And if I may approach the witness?

9 THE COURT: Yes, sir.

10 MR. HERNANDEZ: Thank you, and if I, I'm showing the
11 documents to the prosecution.

12 THE COURT: Yes, sir.

13 Q (by Mr. Hernandez) Can you flip through those and see
14 if those are the documents that you reviewed in this case and
15 without referring to them individually?

16 A They appear to be, yes.

17 MR. HERNANDEZ: If I may take the exhibits, Judge?

18 THE COURT: I, I think they're right there, but I'm not
19 sure.

20 MR. HERNANDEZ: Yeah, (inaudible).

21 Q (by Mr. Hernandez) And I'm showing you what's been
22 marked as People's Exhibits 1, 2, 3, 4, 5, and 6 is here as well,
23 but it has nothing to do with testing. It's just a (inaudible).
24 Taking a look at 1, 2, 3, 4, 5 of those exhibits, did you review
25 those?

1 A I did, yes, sir.

2 Q And the pack that I showed you, clearly a lot more
3 documents- -

4 MR. HERNANDEZ: - -and if the Court could reflect I'm
5 holding these documents away from the jury's view?

6 THE COURT: Yes, sir.

7 Q (by Mr. Hernandez) A lot more documents than those 5?

8 A Yes, sir.

9 Q That had to do with the Intoxilyzer 5000?

10 A Correct.

11 Q Now, in your review of those documents, did you find
12 anything about the Intoxilyzer 5000 that would be pertinent to
13 this test?

14 A Well, the, the one thing that, that certainly sticks
15 out that, to me is one of the calibration points from this
16 Intoxilyzer on 07/05/2012 where the calibration read a .096 which
17 is outside of factory specs of .003. Also a high percentage of
18 cases where it's indicated recertification on the device as well.

19 Q And let me, let me just get the number of the exhibit
20 that you're talking about?

21 A Number 3.

22 Q And so on the 07/05 entry, you're looking at page 2,
23 the last line?

24 A Yes.

25 Q And you said that calibration is out of factory spec?

1 A Well, if you apply the, the factory specs for the
2 device, yes, it is. It read outside that.

3 Q And what does that matter?

4 A Well, it, it matters because the factory says the
5 accuracy precision of the Intoxilyzer 5000EN model, the one
6 that's currently used here, is .003 plus or minus. Here they use
7 .0, they use .010, which is 10. The factory uses 3. It's just 1
8 point. I also noticed there was another document where there,
9 it's not up here, but I recall that the machine was taken out of
10 service. It had a failure of some sorts.

11 Q Would it refresh your memory to take a look at the
12 documents you reviewed?

13 A I would have to see those.

14 MR. HERNANDEZ: If I may approach?

15 THE COURT: Yes, sir.

16 A It's there in here somewhere. It's on the, the service
17 history.

18 Q (by Mr. Hernandez) Let's just take that document out,
19 and we can show it to the district attorney first.

20 A Okay.

21 MR. HERNANDEZ: If I may approach the witness, Judge?

22 THE COURT: Yes, sir.

23 Q (by Mr. Hernandez) If you can tell us what that
24 document is and what it relates to?

25

1 A This one indicates in, in October 17th, 2011, that there
2 was an internal standards. That, that means the, the ability for
3 the device to look at what it believes to be a certain number and
4 check to see if its own workings inside is, is correct, on-
5 target. It had a failure of that. So they had to do some pretty
6 significant repairs by changing the motor inside of it and, and
7 the actual source of producing the infrared light which is a
8 little quartz bulb in there. It's fairly typical of, of these,
9 of an aging machine. This machine is quite, at this point, it
10 was probably over 10 years old at that point.

11 Q And why does it make a difference that it was over 10
12 years old?

13 A Well, in, in, in my experience from using these in, in
14 my program, when they get to be that age, they, the service life
15 is, they start giving you, just like anything, it's like a, a car
16 that gets old. If it gets more and more use, it has a higher
17 probability of coming out of having problems, having failures,
18 and being on top of that.

19 Q And I'm sorry, what was the date of that failure?
20 Before or after Mr. Guinn's testing (inaudible)?

21 A That was October of 2011.

22 Q So it would have been before Mr. Guinn's test?

23 A Yes.

24

25

1 Q Now, in reviewing Officer Kisselman's report, did you
2 notice anything that may have affected the breath test in Officer
3 Kisselman's report?

4 A Well, the thing that, that certainly sticks out is, is
5 the fact that, that there was tobacco in the mouth and having
6 tobacco in the mouth with no rinse just prior to the breath test.

7 Q And when we're talking about tobacco we're talking a- -

8 A - -Chewing- -

9 Q - -kind, or chews and particles, a wad of chew? Are we
10 talking about the kind that goes in front of your mouth and
11 (inaudible) or the kind that goes inside of your mouth
12 (inaudible)?

13 A Yeah, it's, it really doesn't, it's the loose type, not
14 the one that's in the package- -

15 Q - -Okay- -

16 A - -is what.

17 Q And what about chewing tobacco could affect a breath
18 test on Intoxilyzer 5000EN?

19 A Well, the, the main problem is if you don't allow the,
20 the motorist to, to rinse their mouth out is you've got all this
21 debris in there, you know, from chewing tobacco. If you don't,
22 you know, when you're, when you're done with it, and you rinse y
23 our mouth out, and it takes a few times to get all that, that out
24 of there, the residue out because it disperses. Someone, anyone
25 who chews would know that. So it's important when you come

1 inside that to allow, even if you have somebody that had the
2 little packages that are neatly, like the premade snuff ones that
3 you just pop in there, even then you can sometimes get some
4 residue. But the loosely packed one is, is, has a problem with
5 that.

6 Q And you said rinse. Is there something that you're
7 supposed to rinse with, or?

8 A Well, what, what, the ideal way to do it, there's a 20-
9 minute observation period that's required. You have to prepare
10 somebody, and that's the most important phase in, in breath
11 alcohol testing. It's the cornerstone. And during that period
12 you have to make sure nobody has anything to eat, drink, belch,
13 burp, regurgitate, you know? So prior to that, having somebody
14 rinse optimally with room temperature is rinse out, and then at
15 that point once it's all clear then start your observation
16 period.

17 Q And in reviewing Officer Kisselman's report, did you
18 see any note in there where Mr. Guinn was afforded the
19 opportunity to rinse his mouth out prior to taking the test?

20 A No.

21 Q Did you see any in the Intoxilyzer documents that Mr.
22 Guinn was afforded the opportunity to rinse?

23 A No.

24 Q And so we're talking about tobacco. How would tobacco
25 read as alcohol on the machine?

1 A Well, you have to keep mind the, and maybe I have to
2 talk about the way that the Intoxilyzer, it works. It, I
3 mentioned the word, it's an infrared light absorbing instrument.
4 And infrared light is something that the, we can't see. We can
5 feel heat from it, but essentially as a person, if this was the,
6 the breath hose, this microphone, you'd put a brand new mouth
7 piece on there for each, each breath test, and you provide your
8 sample through there. It goes through a series of, of valves and
9 whatnot until it reaches a point inside of the sample chamber,
10 and the sample chamber is about 11 inches long. It kind of looks
11 like the size of an empty paper towel piece of cardboard, that
12 cardboard inside there. At one point, there's a bulb. The bulb
13 is producing infrared energy. At the other end, there's a
14 detector on there. The detector is recording that amount of
15 energy that's coming from point A to point B. If debris gets
16 inside there, it can obstruct the path and cause readings to
17 fluctuate. If you have something that's leeching out, oftentimes
18 with these tobaccos they douse them in alcohol. If it's in
19 there, potential, not as bad as getting the device clouded up
20 with the debris is a real problem, and the pathway that the
21 person blows is quite different than the way that the machine is
22 performing the calibration. So you can perform a calibration all
23 day long, but it's not gonna follow the same pathway because
24 that, if this was, there is something called a simulator, the
25 simulator used to check the calibration of the machine. If this

1 was a simulator, the simulator looks like, it looks like an
2 empty, old, Skippy peanut butter jar. It's about that size. It
3 holds 500 milliliters of water. There's a known amount of
4 alcohol in that water. You heat the water up. On top of the
5 water there's a space called the head space. That is laden with
6 then alcohol, bottles of alcohol. That is then injected into the
7 machine to check calibration. The pathway that that goes is
8 different. It's through the side port. So it doesn't follow the
9 same thing. That's the dangers of, if you somebody with- -

10 Q - -Can we, can we back up? You might have lost me
11 there. When you said it doesn't follow the same thing, it
12 doesn't follow the same hose as a person blows into?

13 A Right, it doesn't follow the same plumbing.

14 Q Okay, I'm with you.

15 A It, it injects it differently and changes the valving
16 to go in there, so you get a different entry way that it goes in
17 the machine. It's why it, it, it's the most important thing to
18 prepare somebody to take a breath test, no different than when
19 you take a blood test, a doctor's no eating no drinking 8 hours,
20 12 hours beforehand. If you, if you have a, you know, have a big
21 thing of orange juice in the morning, you're gonna peak the test
22 out, and you're gonna think, wow, what's wrong here? The same
23 thing, you have to make sure that the person's a proper candidate
24 at that point.

25 Q Now, take a look at- -

1 MR. HERNANDEZ: --If I may approach, Judge, to get the
2 number of the exhibits?

3 THE COURT: Yes.

4 Q (by Mr. Hernandez) We'll need to have 4 and 5. Do you
5 have those in front of you?

6 A I do.

7 Q Now, we see that the observation period, I believe, is
8 on 4?

9 A Starts at 2223, yes, sir.

10 Q And ends at?

11 A 2244.

12 Q Now, during that 20-minute observation period, are you
13 supposed to be doing anything like talking, asking questions,
14 having them fill out forms, any of those things?

15 A The, the, the test that generally what, you know, that
16 I would train the, would write as far as the forensic rules is
17 you have to reasonably ensure that somebody hasn't belched,
18 burped, regurgitated, put anything in their mouth, had anything
19 in their mouth, checked the mouth, and the way you do that is by
20 giving the person your attention. I'm not saying you need to sit
21 there and stare at them, but you need to be in their, in their
22 presence and observing them. You need to be, to use your ears to
23 make sure that if somebody could have a belch. Use your nose.
24 If you may not hear it, you may smell something, and obviously

25

1 looking at them. So you need to use reasonable senses in doing
2 that.

3 Q And is that information provided to people when they're
4 certified as an operator as an Intoxilyzer, of the Intoxilyzer
5 5000?

6 A In varying degrees, dependent upon the program, the
7 importance of the observation period. It's the frontline defense
8 cause the device has--the answer is yes, yes.

9 Q Take a look at--

10 MR. HERNANDEZ: --If I may approach, Judge?

11 THE COURT: Yes.

12 Q (by Mr. Hernandez) I believe it's Exhibit number 4 and
13 specifically number 2 which talks about the 20-minute observation
14 period.

15 A Okay. Do you want me to read this, or?

16 Q No, if you could just take a look at it and see if
17 that's what you were discussing and what the operator gets?

18 A It, it does, it is, yes.

19 Q Is there anywhere in there in tells the operator that
20 he should allow them to rinse at room temperature water?

21 A No, no.

22 Q And is there any part of the training that allows the
23 officer to have the subject tell him when he burped,
24 regurgitated, or anything else?

25 A No, we never taught that, no. We don't do that one.

1 Q I, I noticed you laughed. Why?

2 A Well, you can, you can't give the motorist a, a, be in
3 charge of their own observation period. I, just they can't do
4 that.

5 Q Any part of the training allow you to tell the motorist
6 how what you do in step number 2 could affect the test?

7 A Generally we, we won't tell somebody, if you please
8 don't burp because if you burp, belch, regurgitate, it's gonna
9 flaw the test because if you imprint that, if you tell somebody
10 that, then many times then they'll do that just to avoid it for
11 variant reasons. So we conduct the observation period reasonably
12 to make sure if it does happen we can report it, then start it
13 over, and then if it happens again, you could go from there.

14 Q Now, the Intoxilyzer 5000EN, does it have a spit trap.

15 A It has a, the mouth piece itself actually has a spit
16 trap inside of it. Going inside some of the valve there's, there
17 are other components inside as well. There's a small screen. So
18 it has the capability to try and catch things, but it can't
19 always do that cause things can get inside there. I know it from
20 taking these things apart, and you take apart the sample chamber,
21 if you have a machine that's giving you failures, it could be
22 that you had some debris, and the small parts can get inside.

23 Q And that small screen inside, small enough to catch
24 tiny particles?

25

1 A To a degree, but not, it can't catch everything.
2 Otherwise, you, you have to be able to breathe through it.
3 Otherwise, the resistance to your breathing, your exhalation
4 would be so great. Earlier versions had, they were more
5 difficult to blow into. Later generations, they have bigger
6 tubing and such that it's easier to blow into them.

7 Q And does this machine have a mouth alcohol sensor?

8 A It has what's, it, it does, yes.

9 Q What does a mouth alcohol sensor do?

10 A Well, a mouth alcohol, what it is, it's alcohol that
11 could come up that's in the mouth. It could be caused from
12 alcohol that's in the lungs that you may belch up. It could be
13 caused by things inside the mouth that could cause potential
14 false readings on the device. The sensor, what it is is as a
15 person blows into the device, it's essentially a graph. It's,
16 it's drawing a line and bringing the graph up looking at that
17 alcohol exhalation, and then what it should do is it should sort
18 of plateau off and then rise maybe a little more once you breathe
19 long enough that you're in the deep part of the lung. The
20 detector is, what it does is, if it sees a rise, and it sees a
21 sharp decline, that would set the alarm off. So that, that's
22 the, the purpose of it is to catch alcohol that's not coming from
23 the blood.

24 Q And are you familiar with the Wigmore study regarding
25 mouth alcohol and the Intoxilyzer 5000EN?

1 A Sure. Jim Wigmore, I can't remember. I, I saw him
2 speak last year, but I'm familiar with his work on the 5000.
3 He's out of, he's out of Ottawa, Canada. He wrote a paper
4 concerning the 5000 years ago. I, I made presentation, and I
5 remember he was either before or after me. I can't remember if
6 it was that one or another one.

7 Q And does it refresh your memory if I told you that the
8 title of that study was A Simulation of the Effect of Blood in
9 the Mouth on Breath Alcohol Concentrations of Drinking Subjects?

10 THE COURT: Could you repeat that slowly, sir?

11 MR. HERNANDEZ: Sure. A Simulation of the Effect of
12 Blood in the Mouth on Breath Alcohol Concentrations of Drinking
13 Subjects.

14 A That, that one's different.

15 Q (by Mr. Hernandez) Okay- -

16 A - -He did that paper as well. That, that was
17 concerning blood in the mouth. I did, I had a paper like that as
18 well, but there's another paper he wrote concerning the use of
19 the 5000 and mouth alcohol.

20 Q Sorry, try this one: A Simulation of- -oh, same one.
21 Let me get to the right one. It's the, it's his paper on mouth
22 alcohol, is that the topic- -

23 A - -Jim Wigmore, yes, sir. I, I have copies of it
24 somewhere here.

25

1 Q Okay. What, what did that study say about mouth
2 alcohol?

3 A Well, it, it really, it shows that the observation
4 period, if it's violated, can cause false readings on the breath
5 machine, the Intoxilyzer 5000 device, and I think that paper's
6 probably maybe 15 years old at this point, so, but I'm, I'm
7 familiar with it.

8 Q So somewhere around '99, 2000?

9 A Somewhere around then. I'd have to pull the paper out
10 to see.

11 Q Okay, and with regard to the 5000EN, did they have
12 anything in that study about how well the mouth alcohol sensor
13 works in the 5000EN?

14 A No, no, I mean, the, the EN, the, the algorithms, they,
15 they all are gonna operate virtually the same as far as looking
16 for mouth alcohol, that graph that we're looking at, but I, I
17 said it looks for the, the decline that it's gonna see, you know?
18 Comparing one result to the past and then looking at it is the
19 way that it, it analyzes that. If it sees that, that drop,
20 that's a sign that it's alcohol, or something's in the mouth
21 causing a false reading, and it can sound the alarm, but it
22 doesn't always work. I think Wigmore said maybe 30 percent he
23 saw at times.

24 Q The- -

25 A - -It could be fooled.

1 Q 30 percent of?

2 A It works maybe about 30 percent of the time.

3 Q The alarm itself?

4 A At times, yes.

5 Q Okay, and now moving on to the breath result in this
6 case, and if you could tell me what exhibit number that is?

7 A The, the evidence ticket is number 5- -

8 Q - -Yes, thank you. So taking a look at Exhibit number
9 5, what is the minimum breath volume that someone has to blow
10 into the machine before it reads it?

11 A Well, the, the volume is minimum on the 5000 is 1., no
12 5000's 1.1 liters. It much reach as a minimum, you have to start
13 at another factory it was .17 liters per second to initiate it,
14 and then you have to maintain .15 liters per second. But 1.1 is
15 the minimum sampling volume.

16 Q And if you take a look at the subject's first test on
17 Exhibit number 5, what's the breath volume?

18 A The breath volume on here is 4.494 liters.

19 Q So 4 times the amount that the machine needs, is that
20 fair?

21 A Yes, sir.

22 Q And then there's the 3-minute blank, and there's a
23 second blow in there?

24 A Yes.

25 Q And that also has to be 1.1 liters?

1 A Correct.

2 Q And what is the second breath sample volume?

3 A 5.2.

4 Q And looking at that, well, more than, more than 4 times
5 the amount, right?

6 A That's a lot.

7 Q Why do you say that's a lot?

8 A It's, it's kind of rare to see these numbers of, of
9 breath. Somebody, either, either your calibration point is off
10 on that, or you have, Mr. Guinn was, blew and kept blowing,
11 blowing, blowing. It's, you don't normally see them this high.
12 It's a lower percent of the times. It can happen, but it's sort
13 of rare.

14 Q And taking a look at those, you see that the 4 liter
15 test, the first one, is a 156 result?

16 A Yes.

17 Q And then the 5.-whatever liters is 169, correct?

18 A Correct.

19 Q Why does it have more volume and higher number for a
20 BAC?

21 A Well, it could be simply that the, the longer you blow,
22 the, the deeper in the lung that you, you get where it's more
23 profuse with blood is one reason.

24 Q And with regard to the alcohol in the lungs, how
25 accurate is this test compared to the blood test?

1 A Generally, if, if it's, if a person is not absorbing
2 alcohol anymore, in other words, all the alcohol is in their
3 breath, the breath test will underestimate what they, what the
4 underlying blood is, so you can get a bit of a discount from what
5 your true BAC is. If the person is still absorbing alcohol,
6 that's the time where it's reversed, and the alcohol in the
7 breath would overstate what's in the blood.

8 Q Okay. Now, taking a look, at in this particular case,
9 Mr. Guinn's test, is that, does that cause you any concern that
10 you have 2 different tests and that high of a breath volume?

11 A Well, as we mentioned, the breath volumes are high, but
12 I didn't see anything as far as calibration records of the volume
13 detection on this device. There was nowhere where I saw that
14 that was being checked at least in what I was provided.

15 Q And any of the exhibits contain any of that information
16 about calibration checks?

17 A Not that I saw, no.

18 MR. HERNANDEZ: And if I may approach, Judge? Exhibit
19 1 has multiple pages.

20 THE COURT: Yes, sir.

21 Q (by Mr. Hernandez) I want you to take a look at these 2
22 cause there's multiple pages in here.

23 A I, I, yes, actually, there's one back in 2006 where it
24 says they checked the flow rate to factory specs.

25 Q Anything more recent than 2006?

1 A No, sir.

2 Q Thank you. Now, moving onto the other features of the
3 Intoxilyzer 5000EN, if you notice on I believe it's number 5,
4 that breath sample?

5 A Yes.

6 Q It has temperatures listed on that page. Do you see
7 the, anything that refers to temperatures?

8 A Yes, I, I see that by that simulator, that device that
9 I mentioned, that, that jar that has alcohol in it.

10 Q What does the temperature on the 5000EN do? What is
11 that reading?

12 A Well, they're reading it, one's 33.9. One's 34.0.

13 Q Why are those numbers important, if they are?

14 A 34 is a, 34 degrees centigrade is a number that's used.
15 It's supposed to mimic that of what the temperature of a person's
16 mouth is. 34 degrees Celsius equates out to roughly about 92 or
17 so degrees Fahrenheit, so that breath that we breathe out. That
18 simulator device that I said, that jar that contains alcohol and
19 water, what it's trying to do is simulate what's in a lung, You
20 know, a breath alcohol lung. So there's a, there's a temperature
21 probe in there that's checking what the temperature is inside
22 that water is set at 34 degrees. 34.0 was an old average that
23 what a drinking person would have as far as the, the temperature
24 of the breath as it comes out. It was actually found to be a
25 bit higher, about, by 1 degree higher.

1 Q And does the person's breath temperature make any
2 difference on the 5000EN?

3 A Sure, absolutely, without question. If you hold your
4 breath, it's, it, the breath alcohol is an indirect measurement.
5 So the direct form, form would be if you took a blood test. With
6 that, you'd get a direct measurement. Because you're taking an
7 indirect measurement of what's coming off, you're gonna have
8 variability, no different than, than a guy at the circus looking
9 at somebody and saying I can guess your weight versus jumping on
10 the scale. The scale in this case would be a blood test. So
11 there's indirect. There's a lot of variability. So, if you were
12 to hold your mouth closed, you could raise your, your breath
13 temperature. If you were to cool it off, hyperventilate, you
14 could lower it, as simple as that.

15 Q And does the 5000EN have the ability to tell you what
16 somebody's breath temperature is?

17 A No, the later generation machines do but not this one.

18 Q And is there any literature to indicate what a person's
19 breath temperature change could result in, the deviation- -

20 A - -The common, the common numbers that we generally
21 would use would be roughly around 7 percent, 6.8. 6.9, it can on
22 average, degree. So for each degree centigrade it can cause a
23 corresponding either increase of about 7 percent or decrease
24 dependent upon where the person's temperature is in the end
25 result.

1 Q And so once the test is done, and like in this case we
2 have something in the mouth when the test is done, is there any
3 way to tell if that's an accurate test or not?

4 A Well, one method is to save a sample. When the sample
5 comes out the back of the Intoxilyzer, the, the evidence could be
6 saved inside a device called a, a TOX-TRAP, T-O-X-T-R-A-P, trap,
7 and that would hold onto the sample and create that evidence that
8 could then be reanalyzed to check to see what is there. You
9 know, we could look to see is there particles of things other
10 than alcohol in there. Do, you know, do we see some air laden
11 with the fumes of tobacco? There's many things you could do with
12 that.

13 Q And then reviewing the documents for the Intoxilyzer
14 that was used in this case, was it capturing a second sample?

15 A No.

16 Q So without that second sample, how can we tell this is
17 a valid test?

18 A Well, 2 samples were taking. I want to be clear on
19 that. You're talking about saving the sample- -

20 Q - -Yeah, a separate saved sample for- -

21 A - -right, saving, right, that was not done.

22 Q And when we're talking about the 2 samples, that's the
23 1 and then the 3-minute and then doing the second blow?

24 A Correct.

25

1 Q Okay, and then the saved sample would have been in
2 addition to those, too?

3 A Correct, that would have been an independent test that
4 could be put forth so you can have that analyzed independently,
5 like a second opinion, kind of like that, is what it would be.

6 Q And so having these results now without a second
7 sample, is there a way to figure out what the actual breath
8 alcohol content was on that night?

9 A Not by looking at it a second time, no, that's, at the
10 back, there's the port, the evidence would be gone. You can't
11 put the genie back in a bottle.

12 Q Thank you, Mr. Zager, nothing further.

13 A You're welcome.

14 THE COURT: Thank you. Cross examination?

15 MS. DUBOIS: Yes, Your Honor.

16 MR. HERNANDEZ: Oh, if I may retrieve the documents
17 from (inaudible)- -

18 THE COURT: - -Oh, yes, sir. Thank you.

19 MS. DUBOIS: May I have just one moment, Your Honor?

20 THE COURT: Yes.

21 MR. HERNANDEZ: 1(inaudible)

22 WITNESS: This one?

23 MR. HERNANDEZ: Judge, may we approach briefly?

24 THE COURT: Sure.

25 MR. HERNANDEZ: (inaudible) witness (inaudible)?

1 THE COURT: If you want to step outside and talk
2 (inaudible) that might be best.

3 MS. DUBOIS: (inaudible) Your Honor (inaudible) I don't
4 (inaudible) any conversation (inaudible).

5 THE COURT: I can ask.

6 MR. HERNANDEZ: (inaudible)

7 THE COURT: Okay, folks, we'll get started in a moment.
8 I think Mr. Guinn may be, had talked or was talking with the
9 gentleman seated there. That's Mr. Groff. Could you overhear
10 any conversation? Could you hear any words, anything at all?
11 I'm getting nos. Okay, thank you so much.

12 **CROSS EXAMINATION OF MR. JAY ZAGER**

13 BY MS. DUBOIS:

14 Q Good afternoon, Mr. Zager.

15 A Good afternoon.

16 Q Now, I'd like to start by talking to you about your
17 education and training. It's fair to say that the majority of
18 your education and training on the Intoxilyzer is from your time
19 spent in law enforcement?

20 A Practical experience with it, yes, but it, it always
21 continues forward, whatever may come out in the field later on,
22 but.

23 Q And you have no formal training in the field of
24 biology?

25 A As a biologist?

1 Q Yeah, in biology in general?

2 A No, I'm a, I was, I was a cop- -

3 Q - -Okay, or toxicology?

4 A No, those are the blood guys.

5 Q Okay, or medical laboratory technology?

6 A No, not a medicine.

7 Q Or any formal education in applied sciences?

8 A Only as it relates to breath testing, you know, from
9 the law enforcement perspective.

10 Q Okay, and you don't hold a PHD?

11 A No, I don't.

12 Q Or a, a master's degree?

13 A I don't, no.

14 Q Or a bachelor's degree?

15 A No.

16 Q Okay. Now, since your time that you've been retired,
17 you've been doing DUI or DWAI consulting, is that true?

18 A That, that is correct.

19 Q And as part of your position as a DUI consultant,
20 you're compensated for your time that you spend on a case?

21 A Usually, I usually am.

22 Q Okay, and in this case you've been compensated?

23 A I have for, correct.

24

25

1 Q Now, how long would you say you spent on this case in
2 particular in preparing your opinion for this case, about 2
3 hours?

4 A I, I don't, I'd say with this one there was quite a bit
5 of documents I went through and a lot of preparing for trial.
6 I'd say probably there's, there's probably at least 6 maybe 8
7 hours, maybe more.

8 Q I'm sorry, what was that? 6 to 8 hours?

9 A Easily.

10 Q Okay, and are you paid per hour for your work in this
11 case or for your opinion in, in, in general?

12 A I, I'm paid for my flat fee to do the, the prep work to
13 do the forensic review and the consulting, and then I'm paid per
14 day if I go to trial.

15 Q So there's an increase in your payment for coming and
16 testifying in a case cause it would be more of your time?

17 A There is, but percentage-wise very few of those cases
18 actually end up in trial.

19 Q Okay, and you're, you're from Florida, right? Is that
20 where you live currently?

21 A I do.

22 Q Okay. So your travel expenses are also paid for?

23 A Generally, yes.

24 Q And in this case?

25 A In this case, yes.

1 Q And do you received a per diem for your time that you
2 spend in Colorado on this case?

3 A I do.

4 Q Okay. Now, I want to talk about, about your knowledge
5 specifically about the Intoxilyzer 5000EN. The model that
6 you've had your training and experience on is not the Colorado
7 model, is that fair to say?

8 A Not exactly. The, the original model that I did was
9 not the EN because it wasn't being produced at that point, but
10 then as I mentioned, as the EN was produced, the factory did have
11 training. I remember specifically when they came out with the,
12 the device. They were sort of parading it around. This is our
13 new device. And we did receive updated training and, as far as
14 those user groups.

15 Q But I guess, and maybe I'm not using the right
16 terminology. You would agree that there's a difference in the,
17 in the systems on these models or its software that comes with
18 the Florida version versus the Colorado version?

19 A The, the software is usually specific to whatever
20 state, you know, the heading that they're gonna put on there:
21 state of Florida, state of Colorado, state of New York,
22 commonwealth of Kentucky.

23 Q Uh-huh.

24

25

1 A But the way that they analyze alcohol, the, the so-
2 called optics, the bench inside this device is virtually the
3 same.

4 Q Okay, and you were certified with the Intoxilyzer in
5 Florida?

6 A Yes.

7 Q Now, and that certification doesn't carry over to
8 Colorado, is that correct?

9 A Not the, the state one, but from the manufacture or the
10 Department of Transportation, (inaudible) sort of Federal
11 workplace, that would carry, but not to (inaudible) for. I'd
12 have to be working in law enforcement here. They're, they're
13 more closed door here in Colorado where Florida anybody could go
14 and take the course. Here, for whatever reason, they, they won't
15 allow anybody who's outside law enforcement in.

16 Q Okay. So that's a no? You're not certified to, for
17 the models in Colorado?

18 A In, in relation to doing the evidential work, like in a
19 case like this- -

20 Q - -Yeah- -

21 A - -I couldn't pop into the station and run a test, no.

22 Q So you haven't been to the Englewood Police Department,
23 the place where this particular test occurred?

24 A No.

25

1 Q And you've, your testimony today is based off of your
2 experiences and the training with the, the system that's used in
3 Florida, or the Intoxilyzer that you've had the opportunity to
4 use in Florida, whether it be your own or the one during your
5 time as an police officer?

6 A Well, not 100 percent. I certainly gain knowledge from
7 looking at other programs and being to the manufacturer, which
8 would cover all the devices, and whatnot. But once again, I'm
9 not certified in the state of Colorado.

10 Q Right, and it's fair to say then that your time that
11 you spend as a police officer in Florida, you relied on the
12 Intoxilyzer in making arrests in your cases or charging?

13 A Well, right, not so much making the arrest but
14 providing the forensic support as necessary. If, if it was found
15 to be a properly working device without error, then we can start
16 looking at the numbers that are produced on there.

17 Q And you've also testified to the reliability of these
18 machines when you were in law enforcement, to the reliability of
19 the Intoxilyzer, isn't that correct?

20 A Oh, absolutely.

21 Q I think you said around 1,000 maybe times that you
22 testified?

23 A Oh, for the government it was, total cases was well
24 over 1,000 proceedings.

25

1 Q Right. Now, your testimony today is, is based off,
2 well, it's, you were not, you're test- -, testifying today to
3 forensics, so you were not present when this test was taken,
4 correct?

5 A No, no.

6 Q Okay. So your testimony today is also based off of
7 possibilities that may have occurred when this test was taken?

8 A More a probability I'd say that, but I understand what
9 you're saying, yes.

10 Q So when you were reviewing the reports in this case,
11 and there's nothing in the reports that indicate that the
12 defendant still had tobacco in his mouth, would you agree with
13 that?

14 A No, there's nothing that says that I, that, that any
15 debris was located inside the.

16 Q So your testimony, testimony today about that is the
17 possibility of if there was, not really a probability?

18 A Well, it's, it's more from knowing and doing testing
19 with persons who have tobacco, chewing tobacco, loose chewing
20 tobacco and then not rinsing it out. I have not seen a situation
21 where somebody did not have that residue left in the mouth. It's
22 possible, but I just haven't run across it.

23 Q Okay. Now, I want to talk to you more about this
24 tobacco situation. You're familiar with the Wigmore study, the
25 one, I believe, that's called The Effect of Swallowing or Rinsing

1 Alcohol Solution on the Mouth, Alcohol Effect, and Slope
2 Detection of the Intoxilyzer 5000?

3 A Yes, yes.

4 Q Okay, and you're familiar with it cause you've actually
5 cited it in your opinion in this case?

6 A It sounds reasonable. I mean, I'm familiar with the
7 paper. I generally do cite that.

8 Q All right, would you, would it help refresh your
9 memory- -

10 A - -No, not- -

11 Q - -if I showed you a copy of your opinion- -

12 A - -No, I, I agree that it's there. There's others that
13 I could cite, but I'm familiar with that.

14 Q Okay. Now, in that study, the research found that in
15 order to eliminate the presence of mouth alcohol, there would
16 need to be an observation period in place as well as 2 testing, 2
17 times a subject to give a sample would ultimately need to be in
18 place, would you agree with that?

19 A Yes.

20 Q Okay. Now, or they call it a duplicate breath
21 analysis?

22 A Yes.

23 Q Which is when somebody just blows twice into the
24 machine?

25 A Correct.

1 Q And gets 2 different readouts of the results. Now, in
2 this case, you know from what you've read that the defendant did
3 have an observation period put in place before he gave the test
4 sample?

5 A Yes.

6 Q And that the defendant also was permitted and gave 2
7 different test samples, or- -

8 A - -Correct- -

9 Q - -2 different, he blew twice into the machine?

10 A Correct.

11 Q And so you're familiar then with the proposition that
12 the Wigmore study holds that, as long as you have an observation
13 period for 10 minutes, that would eliminate any possibly of mouth
14 alcohol, an observation period along with 2 samples being given?

15 A There- -

16 THE COURT: - -I'm sorry, did you say 10 minutes?

17 MS. DUBOIS: Yes, I did, Your Honor.

18 THE COURT: Okay. I just want to be clear.

19 MS. DUBOIS: Yes.

20 A Wigmore does talk about that, but the thing that is not
21 in that paper is the notion of, of having debris, but- -

22 Q (by Ms. Dubois) - -And, and I, I will get to that. I'm
23 just asking you about the paper that you cited and relied upon in
24 your opinion- -

25 A - -Generally, yes.

1 Q And so you're aware then that in that study that you
2 relied on, the 10 minutes was sufficient to eliminate any mouth
3 alcohol, and in Colorado we provide a 20-minute observation
4 period?

5 A Yes.

6 Q And that 20-minute observation period is in place so
7 that the subject doesn't drink during that time, is that correct?

8 A Yes.

9 Q And that they don't burp or belch?

10 A Correct.

11 Q Or throw up? And that they remove everything from the
12 mouth?

13 A Yes.

14 Q So you would agree then that based on the evidence
15 you've been provided there's no evidence to support the
16 conclusion that there was anything in the defendant's mouth or
17 any type of alcohol that wouldn't have been eliminated during
18 that 20-minute observation period?

19 A No, I wouldn't agree.

20 Q So you, you're saying that you believe because there
21 was debris in the mouth from the tobacco cause there was no
22 rinsing that that created mouth alcohol?

23 A That could create a false positive on the result and
24 invalidates the observation period. It doesn't matter how great
25 the numbers are, and I wouldn't trust the numbers when somebody

1 has debris in their mouth. The numbers become irrelevant as far
2 as trying to quantify the amount of alcohol that's in there.

3 Q So I want to talk about another study then because you
4 would agree that the Wigmore study actually doesn't even mention
5 tobacco in the mouth at all? That's more about rinsing with
6 alcohol or spitting it out or having alcohol in the mouth,
7 correct?

8 A Yes.

9 Q Okay. So in, let's talk about studies that do mention
10 tobacco in the mouth. You're aware of the peer-reviewed paper by
11 Bradford C.- -and I want to make sure I get this right- -Talaya
12 (phonetic) of the Oregon State Police, and this one is called The
13 Effects of Ethanol-Laden Chewing Tobacco on Accuracy of Breath
14 Testing Devices?

15 A Yes.

16 Q Now, in that study, the used 3 different brands, or 3
17 different brands or types of chewing tobacco, correct?

18 A Yes.

19 Q And some of them were the, the snuff, I think you call
20 it, the packaged ones?

21 A Correct.

22 Q And some were loose tobacco?

23 A Correct.

24 Q Okay, and during, what they had is the subjects put the
25 tobacco into their mouth, and then they kept it in their mouth

1 for a period of 5 minutes or 10 minutes or 20 minutes and then
2 blew into the breathalyzer?

3 A Yes.

4 Q And the results came back as zero, correct?

5 A Okay, but these are drink, these are not people that
6 have alcohol already on board.

7 Q Right, but that didn't add any additional- -

8 A - -It, right, so the study means that a person that
9 comes in there with zero- -

10 Q - -Uh-huh- -

11 A - -if you want to do it correctly, the best way is to
12 dose somebody up with alcohol- -

13 Q - -Right- -

14 A - -because the problem is the mouth alcohol detector,
15 when you already have somebody who has some alcohol on them,
16 let's say their alcohol level is, is .04, they've got something
17 come in there, that detector has an even more difficult time to
18 work- -

19 Q - -Uh-huh- -

20 A - -because it doesn't have to, that graph is met at a
21 plateau (inaudible) there, so it could miss it as well.

22 Q So I guess what I'm saying, at least just right now
23 from that study, that kind of showed that chewing, chewing
24 tobacco on its own doesn't have alcohol in it. It wouldn't
25 affect the results just cause, chewing tobacco on its own?

1 A They, they didn't specifically inject any debris into
2 the device. When you de- -, inject debris in there, then you can
3 cause readings on that device.

4 Q Yes, certainly, but what I'm asking is the fact that
5 just, just the fact that someone has chewing tobacco in their
6 mouth wouldn't give a false result on the breathalyzer because of
7 any alcohol that would be in chewing tobacco cause there is no
8 alcohol in chewing tobacco- -

9 A - -Generally, if you wait the amount of time, but the
10 problem once again is introducing and having foreign objects in
11 the mouth, and then you just, it's an improper observation
12 period. You can't get past that.

13 Q Right, and you're aware then that, and you testified to
14 it before that there is the, the spit trap on the Intoxilyzer
15 5000EN, the one that was used in this case, correct?

16 A Well, there's a trap that, on there, but it doesn't
17 always work. You can, I have one here. You can blow right
18 through it.

19 Q Right.

20 A It will, it, its main job there is to try to capture
21 condensation, but when you get debris through there, you can
22 shoot it right through.

23 Q Except that there's a screen that's also behind that.

24 A There, there's a small particulate screen as well.

25

1 Q Right, so that would inevitably stop the debris. It's
2 a double extra measure- -

3 A - -But the, the problem is the debris still could
4 potentially have something in there that could leech through.
5 It, it shouldn't be there is the problem.

6 Q Right, and what evidence did you see in the reports
7 that were provided to you that any debris bypassed the spit trap
8 and the screen?

9 A There, nobody introduced the mouthpieces into evidence
10 that I saw. It was, I didn't see- -

11 Q - -Right, and I'm just asking you more about the
12 reports that you relied in in coming to your opinion. There was
13 nothing that really supports that that happened; you're just
14 testifying to your, the possibility of that happening?

15 A Right, the probability of that, if you have something
16 in your mouth, it invalidates the pretest observation period.

17 Q Right. Now, also in that study, not only did they just
18 take tobacco or chewing tobacco and put it in someone's mouth and
19 have them breathe into the Intoxilyzer, but they also took
20 chewing tobacco and then doused it with whisky, right?

21 A Okay.

22 Q Do you remember that?

23 A That's common.

24

25

1 Q Okay, and they had the people now the whiskey-doused
2 chewing tobacco in their mouth and then without an observation
3 period blow into the machine.

4 A Okay.

5 Q And the, then that also really didn't have a level that
6 affected the BAC of the subjects.

7 A You, you can get false positive results cause you're
8 putting alcohol into the device- -

9 Q - -Right- -

10 A - -and some of the manufacturers, I don't know if they
11 still do, but they, the Jack Daniels type and many others,
12 (inaudible) they pour on there. So you can get results on there
13 that could bypass. We could do that all day long.

14 Q Right, if the chewing tobacco's still in their mouth
15 cause in, in that study, anyways, what I'm referring to, they
16 didn't have a 20-minute observation period.

17 A Right, you have to bypass the observation period.

18 Q Right, and then when they did actually observe the
19 observation period, they found that any mouth alcohol was
20 completely dissipated at that point.

21 A Yes.

22 Q Okay. There's another study that I'd like to discuss
23 with you. This one is the effect of mouth alcohol on the
24 Intoxilyzer 5000, and that's by Julie Evans (phonetic).

25 A Uh-huh.

1 Q In that test, are you aware that she noted that the
2 presence of chewing tobacco in the mouth when the breath sample
3 was given did not affect the results?

4 A Yeah, I don't know who, who she is.

5 Q Okay. You don't know who Julie Evans is?

6 A That's not a researcher I'm familiar with.

7 Q Okay.

8 A Where is that published?

9 Q I believe that this one is published in the same place
10 that you had indicated you were published which is the IACT
11 newsletter from the International Association of Chemical
12 Testing.

13 A Yeah, that, that's not a peer review, so I didn't- -

14 Q - -Okay- -

15 A - -I actually didn't mention that one cause it's not a
16 peer review.

17 Q Okay, but you are familiar with it?

18 A Sure, I'm a member of that.

19 Q Oh, okay. So you do know who Julie Evans is?

20 A I don't.

21 Q Okay.

22 A But I'd have to review what you have there. I don't,
23 I'm not familiar with it off the top of my head.

24 Q Okay. So you're not familiar with her proposition that
25 safe guards like a deprivation period greater than 10 minutes

1 along with giving 2 samples or 2 breath tests eliminate any
2 falsely elevated results?

3 A No, I, I would generally agree with that- -

4 Q - -Okay- -

5 A - -so long as we have the, the notion that there's no
6 debris left in there that can get inside.

7 Q Okay.

8 MS. DUBOIS: Your Honor, may I have one moment?

9 THE COURT: Yes.

10 Q (by Ms. Dubois) Now, I guess to make things, to clarify
11 for me, in these, you're stressing the importance of rinsing the
12 mouth because of possible residual tobacco?

13 A I'm stressing the notion that you must properly prepare
14 somebody for a breath test and not take it lightly, yes.

15 Q Right, and you're aware then, then in the studies, at
16 least the ones that you agreed that you've heard of before,
17 nobody rinsed their mouth out before giving the test?

18 A Correct, but these are all individuals, at least the
19 one they, that they have zero alcohol on board.

20 Q Uh-huh, okay, and you're aware that nobody rinsed their
21 mouth out with water, or the chewing tobacco was still in their
22 mouth. It was the observation period that created the ability to
23 give a zero result because it eliminated the mouth alcohol,
24 rinsing or not.

25

1 A It, correct, but you still have to properly prepare
2 somebody. Then, I, I wouldn't want to defend this. If it was my
3 test, it'd be the same position. I would not accept the results
4 when somebody said they had debris. If, if a, one of my techs
5 said, oh, I forgot this- -

6 Q - -And I, I, I understand that you wouldn't, but I'm
7 just asking your belief is contrary to the conclusions in these
8 studies then?

9 A No.

10 MR. HERNANDEZ: Judge, I'm gonna, I'm gonna ask for
11 specificity. When we say these studies, we've covered several.

12 THE COURT: Okay. I know you mentioned I think 3.

13 MS. DUBOIS: I did, Your Honor, yes.

14 THE COURT: So if you, yeah, can just pin them down?

15 Q (by Ms. Dubois) Okay. Your conclusions today or your
16 opinions or probabilities as you call them is contrary to
17 Wigmore, a study that you cited in your opinion?

18 A No, it's not. Wigmore, I agree, if you wait the
19 prescribed amount of time, your mouth alcohol, but that doesn't
20 include the notion of having debris. The other ones said, yes,
21 we had this, and it came back as zero as well, and those didn't
22 include persons that had alcohol already in their system. So
23 there, there's quite a bit of difference there.

24 Q Okay.

25 MS. DUBOIS: Your Honor, if I may have one moment?

1 THE COURT: Yes, ma'am.

2 Q (by Ms. Dubois) But it's all, it's fair to say that,
3 you know, you said you would never have accepted that, but you've
4 actually never done experimental testing with an Intoxilyzer
5 5000EN in your training and experience?

6 A I, I've done quite a bit. I own 3 of them. From time
7 to time I've contracted to do some work on them, whatever it may
8 be, from airbag powders and, and all sorts of things, tobacco- -

9 Q - -Uh-huh- -

10 A - -so, yes.

11 Q And these conclusions from your studies have not been
12 peer-reviewed in a paper?

13 A They're not large enough of studies to do them. The
14 paper that I've done that before- -

15 Q - -Uh-huh- -

16 A - -if I gather enough data, then I would put one and,
17 and do it that way, but I don't think they're, they're, they're
18 smaller studies.

19 Q Okay. I want to talk about something you discussed on
20 your direct examination. You, oh, and I'm sorry. If you, if I
21 could just have one moment? Now, you talked about how, oh, thank
22 you. You talked about, one of the things you talked about is on
23 the service history that you noticed that there, the flow rate
24 had not been calibrated, is that accurate? Is that what you
25 testified to?

1 A That's what I observed from the documents I was
2 provided up here.

3 Q Right. You said since 2006, I believe?

4 A From what I saw.

5 Q Okay, and you, so you have that document in front of
6 you? It's, I believe, exhibit 1. It's part of the packet.

7 A Yes.

8 Q Okay. So you would agree with me then, if you took a
9 look at that, that the flow rate and the calibration has actually
10 been checked to factory specifications over 4 times, 4 different
11 years that span further than 2006?

12 A You're talking newer, later than that?

13 Q Yeah, you, you had mentioned during your direct
14 examination that you only saw, it was the calibration flow rate
15 was checked in 2006, and that you never saw that it was
16 rechecked, but actually that document indicates that, would that
17 be fair to say, on page 2 of 3 of the service history?

18 A Yes, yes, yes, I didn't see.

19 Q Okay.

20 A But the, the last one would be 2008.

21 Q Okay.

22 A 4 years before.

23 Q Now, you also talked in the actual, in the log sheet I
24 think it's called, the one with all of the different samples that
25 had been taken throughout the- -

1 A --Yes--

2 Q --time period, you talked about how the calibration
3 specs were out of whack, that the number was, was off. I think
4 you said, you know, .096, that's not where it needs to be; it
5 needs to be .003, right?

6 A That's if you, just as it says here (inaudible) want to
7 check that to factory specs on the flow rate, same things if the
8 Intoxilyzer has a calibration, known calibration or pre--, so-
9 called precision and accuracy, the precision and accuracy device,
10 you should match that to what the factory is.

11 Q Right, and I think if I remember correctly you said
12 that the calibration on one date that you noted in particular was
13 .096?

14 A Correct.

15 Q So, you understand, though, that that's not the
16 calibration; that's the calibration verification?

17 A That's correct.

18 Q And that you would agree that those 2 things are very
19 different?

20 A Well, they are different. One, one is one when you're
21 setting it up, you're putting a known sample in there.

22 Q Right.

23 A If this, this is water, but if this was 100, you know,
24 it had an alcohol level of 100, and we know that because we've

25

1 exposed it to a higher field of calibration, gas chromatography,
2 and then you're injecting this into the device. That's- -

3 Q - -I guess what I'm asking is it sounded like on your
4 direct you had said that that was the calibration, but you would
5 agree with me now that that's actually the calibration
6 verification which is different?

7 A It's different, but it's just as, it's something, it's
8 even, it's important that you check the verification- -

9 Q - -Right, so you- -

10 A - -to make sure the device is working correctly and
11 make sure to fall within factory specs. If it was off during the
12 calibration setup, then you could check out what the error is,
13 but in this case here there's nothing, it doesn't indicate
14 anything was done beyond that.

15 Q Okay. So that's a yes, it's different than what you
16 had originally said?

17 A It's different, but it's just as important.

18 MS. DUBOIS: And, Your Honor, if I may have just one
19 moment, I'm sorry?

20 THE COURT: Yes.

21 Q (by Ms. Dubois) Also, on that log sheet you had
22 mentioned in your direct examination how the machine needed to be
23 recertified a few times?

24 A Yes.

25

1 Q Okay. Are, are you familiar with the Colorado log
2 sheets and how they are printed out?

3 A Not really. I don't understand, if you're talking
4 about in- -

5 Q - -I guess I just- -

6 A - -in a printer, I don't understand.

7 Q Right, yeah, have you seen a log sheet before for a
8 Colorado machine? I mean, I guess they may be different where
9 you're from, I don't know- -

10 A - -I, I have, yes.

11 Q Okay. So you are familiar then with the fact that
12 that's not the machine being re- -, recertified; that's an
13 officer who's doing his own recertification?

14 A I see, okay.

15 Q Okay. So did you know that, or you did not?

16 A I didn't know that.

17 Q Okay.

18 MS. DUBOIS: Your Honor, I have no further questions at
19 this point.

20 THE COURT: Thank you. Redirect, sir?

21 **REDIRECT EXAMINATION OF MR. JAY ZAGER**

22 BY MR. HERNANDEZ:

23 Q I just want to clarify some of the things you said on
24 your cross examination. One of the things you said is, if the

25

1 test is found to be completed without errors, we can assume it
2 was a valid test. Do you remember that?

3 A Yes.

4 Q Okay. Is the reverse also true? If there are errors,
5 can we assume it's an invalid test?

6 A Correct.

7 Q Now, the prosecution asked you if it, that there was
8 nothing that said that there was tobacco in the, in Mr. Guinn's
9 mouth, correct? Do you remember that question- -

10 A - -Correct, yes.

11 Q That it was a possibility?

12 A Right.

13 Q You read Officer Kisselman's report, correct?

14 A Yes.

15 Q And in Officer Kisselman's report, he states: I
16 observed that Guinn had chewing tobacco in his mouth. Do you
17 remember that?

18 A Yes, sir.

19 Q And if it would refresh your memory, take a look at the
20 rest of his report and see if there's anywhere in there that he
21 says he took it out?

22 A No, I recall it didn't say that.

23 Q And we, now, we have the instruction in Appendix 2A
24 which I believe is exhibit 4 or 5, Appendix 2A.

25 A 2A?

1 Q It should be the one on the left of the 2 left up
2 there.

3 MR. HERNANDEZ: If I may approach, Judge?

4 Q (by Mr. Hernandez) It should be this one. I'm sorry, I
5 (inaudible), this one.

6 A Oh, okay.

7 Q So exhibit 4- -

8 A - -So it was 4, okay.

9 Q That one has the instructions in number 2 of how to
10 conduct an observation period, right?

11 A Yes.

12 Q Anything on there say that Officer Kisselman actually
13 did it the way it says?

14 A I, no, I mean.

15 Q Anything in his report say that I followed the
16 instructions in Appendix 2A, number 2, with the observation
17 period?

18 A No.

19 Q Now, one of the other things that the prosecution asked
20 you about was whiskey-dosed tobacco, and I believe you said
21 that's common. What do you mean by that?

22 A Well, it's, it's common to put some, you know, maybe a
23 tablespoon or so of alcohol into some of the tobacco to kind of
24 smooth out the flavor.

25

1 Q And anything in the officer's report about whether he
2 checked or smelled to see if that had some kind of alcohol in it?

3 A No.

4 Q One of the other phrases that prosecution kept asking
5 about and you, you were both using was peer reviewed. What does
6 that mean?

7 A Well, the, the notion of peer review means that, if, if
8 you have a, a paper, you have a, a comment that goes to an
9 editor, or you have a scientific body that is recognized to
10 accept these types of papers in a forensic sense like that, that
11 they go before a committee that is gonna send it to individuals
12 who are in the field related to that and whether or not they'll
13 have comments on it or approve it as it is- -generally, when I've
14 sent these in, there's, there's gonna be a comment of, you know,
15 what do you think, what about this? What about that? You know,
16 it could be anything.

17 Q And is that done prior to you then presenting to that
18 body?

19 A Right. If it moves through whatever committees,
20 initial committee, up to the specific area in the organization,
21 and then eventually, if it's approved or, then you could make a
22 presentation, or if you're doing it in a regular, to make in the
23 regular journal, the monthly journal, you could send it in that
24 way, so there's different methods of it. But that particular one
25 by, by IACT is just, you could just write anything out and

1 generally it's just gonna, gonna go in there. It's kind of a
2 newsletter versus a journal.

3 Q And specifically I think you said it was an improper
4 observation period; you can't get past that. Do you recall
5 saying that?

6 A Yes.

7 Q And so, going to your Breath Alcohol Test: A Continued
8 Call for the Pretest Observation Period that was presented in
9 2012, that was peer reviewed, correct?

10 A Yes.

11 Q And that was peer reviewed by the American Academy of
12 Forensic Sciences, correct?

13 A Yes, sir.

14 Q And what do you mean specifically about you have an
15 improper observation period; you can't get past that?

16 A Well, it means that, if the observation period is
17 improper, just as the, the example I gave of taking a blood
18 sample, you know, for a medical (inaudible), if you violate what
19 you're doing, the probability is you could get a false result.
20 You could bring in whatever studies you want. You can't get past
21 that. It, it draws into doubt the end results. The forensics
22 surrounding it, when you're producing forensic evidence, it must
23 be properly obtained, just as if we were gonna take a blood test
24 in the traffic law enforcement, you know, wipe the guy down with

25

1 alcohol and have the doctor take the blood out. It's the same
2 here. You just can't, you need to properly prepare somebody.

3 Q Thank you, Mr. Zager.

4 MR. HERNANDEZ: Nothing further, Judge.

5 THE COURT: All right. Please approach. (inaudible),
6 all right. Any (inaudible) and any more issues?

7 MS. DUBOIS: I'm not going to be requesting
8 (inaudible).

9 THE COURT: Okay.

10 MS. DUBOIS: (inaudible) Mr. Groff (inaudible).

11 THE COURT: I'm sorry?

12 MS. DUBOIS: We do have an issue with, regarding Mr.
13 Groff, and I'm not sure (inaudible) needs to be addressed before
14 he testifies.

15 THE COURT: Oh, sure.

16 MS. DUBOIS: So I didn't know if the Court wanted to do
17 that now since we're already here.

18 THE COURT: Okay, (inaudible). We need to, he's going
19 to be excused. You need to (inaudible).

20 MS. DUBOIS: Oh, okay, (inaudible), okay.

21 THE COURT: (inaudible), so we'll talk about
22 (inaudible) okay. All right. All right, let me just check with
23 the jurors, folks. Did you have any questions that you'd like to
24 s- -, submit? Got a few? You were popular. Okay. Can this be
25 (inaudible)?

1 MS. DUBOIS: No objection, no.

2 MR. HERNANDEZ: (inaudible)

3 THE COURT: Okay (inaudible).

4 MS. DUBOIS: (inaudible)

5 MS. JARAMILLO: (inaudible)

6 MS. DUBOIS: (inaudible) the documents he has
7 (inaudible).

8 THE COURT: Okay.

9 MS. DUBOIS: Okay.

10 THE COURT: Oh, he's talked about the different
11 calibrations, so I (inaudible).

12 MS. DUBOIS: No, we're fine with it not being
13 (inaudible). We (inaudible) object (inaudible)- -

14 THE COURT: - -Yeah, let me just indicate, Mr.
15 Hernandez, (inaudible) from my recollection he specified 15 to 20
16 states (inaudible), and I think they probably had to (inaudible)
17 calibrations. I think he can respond, so I don't think it's a
18 (inaudible).

19 MR. HERNANDEZ: (inaudible)

20 THE COURT: Oh, you know, I (inaudible).

21 MS. DUBOIS: I don't think (inaudible).

22 MR. HERNANDEZ: (inaudible)

23 THE COURT: Okay. Let me give you this other one.

24 MS. DUBOIS: The People would actually be objecting to
25 that, him answering that question.

1 THE COURT: I thought you said that was okay.

2 MS. JARAMILLO: I, it was my (inaudible), sorry. I'll
3 just stay quiet.

4 MS. DUBOIS: No, it's okay. The People would be
5 objecting because he is not (inaudible) with other states'
6 documents (inaudible).

7 THE COURT: And you folks can ask him questions about
8 it, okay? Okay, take a look at this one. I like their
9 questions.

10 MS. DUBOIS: (inaudible)

11 MR. HERNANDEZ: (inaudible)

12 THE COURT: Okay, he can say I can't tell you, or
13 (inaudible).

14 MS. DUBOIS: (inaudible)

15 THE COURT: Okay. I think I know what they're trying
16 to get at, and (inaudible) maybe (inaudible) that they have
17 (inaudible), okay? Thank you, folks. All right, sir, let me
18 just ask these questions. Is it a general procedure for a proper
19 rinse before the 20-minute preparation with or without tobacco
20 part of the equation? Make sense?

21 WITNESS: Yes, it, it- -

22 THE COURT: - -Let me hand it to you.

23 WITNESS: The answer would be only when there's tobacco
24 that's been removed from the mouth. If, if there was no exposure
25 to chewing tobacco, then there's no reason to do a 20-minute, or

1 excuse me, to do a rinse unless somebody was to put something in
2 their mouth besides tobacco- -

3 THE COURT: - -Uh-huh- -

4 WITNESS: - -or regurgitate into the mouth.

5 THE COURT: Can I see their question again? Let me
6 see. All right, I'm gonna allow the attorneys to follow up on
7 that and let your answer stand. Okay, what is the impact of a
8 subject talking during the observation period as it relates- -I'm
9 gonna add this- -as it relates to the test result?

10 WITNESS: The only thing is if, if you're dividing your
11 attention during the observation period, if you're talking and
12 not paying attention, I don't, if you're just asking questions,
13 and you're still watching the person, I think that's, that's
14 fine.

15 THE COURT: All right, it's saying what is the impact
16 of a subject. I don't think they're talking about the officer.
17 I think they're talking about the defendant.

18 WITNESS: I don't know of any impact the- -

19 THE COURT: - -Okay, if subject is not drinking plus or
20 minus 40, for 40, plus or minus 40 minutes, why does the second
21 sample increase, stated you should get a discount? I think you
22 used that expression.

23 WITNESS: I, I think I was talking about breath versus
24 blood, that breath will generally underestimate what's in the

25

1 blood, the underlying alcohol level unless the person has alcohol
2 that's still on the rise is what I meant there.

3 THE COURT: Okay. Now, if you could answer this: If
4 subject is not drinking plus or minus 40 minutes, why does the
5 second sample increase, if you know?

6 WITNESS: It could be the, the, many reasons. It could
7 be the contamination. It could be the, the length of the blow.
8 It could mean the duration of the blow.

9 THE COURT: Okay. Thank you, sir. All right, all
10 right, could these be clarified, these questions be clarified?
11 How often should the breathalyzer be inspected to be sure the
12 machine is calibrated correctly?

13 WITNESS: In, in my program, I was doing a
14 comprehensive inspection of the device twice per week by multiple
15 calibration levels to make sure that the device was reading
16 correctly across the board. So, if somebody was testing at a
17 lower level than an 0, 08 versus a .16, I wanted to have
18 calibration points that touched that. There's no, there's
19 nothing clear cut as far as the minimum or the maximum. More is
20 better because you get always a better handle on it.

21 THE COURT: Okay, sir, second question. From the
22 documents submitted, when was the machine last inspected, and was
23 it calibrating correctly to factory standards? Let me give that
24 to you.

25

1 WITNESS: I think the last inspection, I understand the
2 question, was, it was last inspected in Dec- -, from the
3 documents I have, from, in December, 2011.

4 THE COURT: Thank you, sir. Any follow-up questions?
5 I'll allow you to start first, Mr. Hernandez.

6 MR. HERNANDEZ: Judge, if I could see the first
7 question?

8 THE COURT: Oh, sure, let me give you both, all 3
9 questions to you, sir, just in case.

10 MR. HERNANDEZ: Thank you. Now, on the general
11 procedure for a proper rinse, there's nothing in the instruction
12 number 2 on the observation period required here that says you
13 can't rinse, is that fair?

14 WITNESS: No, no, it's, it can be part of training
15 where you train the operator, if a person regurgitates in their
16 mouth, if there's anything potentially in their mouth, that you
17 can afford them an opportunity to rinse their mouth out to get
18 rid of whatever debris.

19 MR. HERNANDEZ: Okay. Now, when you were talking about
20 the, the second question, second half of the second question, if
21 the subject's not drinking for plus or minus 40 minutes, why does
22 the second sample increase, and when you look at the breath
23 result page, the second sample also increases because of breath
24 volume increase, does that correlate?

25 WITNESS: The second volume is higher, yes.

1 MR. HERNANDEZ: And it's higher and has a higher breath
2 volume, is that?

3 WITNESS: Correct.

4 MR. HERNANDEZ: Okay. I'm, I'm probably not asking the
5 right scientific question, but common sense tells me if you have
6 more air, and you can detect more alcohol on it, is that fair?

7 WITNESS: Correct.

8 MR. HERNANDEZ: Okay, and this is, the first test was 4
9 times the amount of air necessary to be blown into the machine?

10 WITNESS: Yes, sir.

11 MR. HERNANDEZ: And the second one was 5 times or close
12 to?

13 WITNESS: Close to.

14 MR. HERNANDEZ: Now, when you're asking about, when
15 you're asked about calibrations and inspections, does that change
16 from state to state?

17 WITNESS: It does.

18 MR. HERNANDEZ: And how many states have you been found
19 to be an expert in?

20 WITNESS: I've testified, I, I should add them up- -

21 MS. DUBOIS: - -Objection, Your Honor, this is outside
22 the scope of the questions asked by the jury.

23 THE COURT: Overruled.

24 WITNESS: Approximately 15 or 20, somewhere around
25 there.

1 MR. HERNANDEZ: And each one of those states can
2 dictate which standards they want to use, is that fair?

3 WITNESS: As far as the state to state, but there's a
4 Federal guideline as far as, but that would be Department of
5 Transportation separate from the criminal cases.

6 MR. HERNANDEZ: Thank you. And, Judge, I'll leave the
7 3 questions up here for the prosecution, if they- -

8 THE COURT: - -Okay, thank you, Mr. Hernandez- -

9 MR. HERNANDEZ: - -would like that.

10 THE COURT: You've got a visitor.

11 MR. HERNANDEZ: I'm sorry?

12 THE COURT: You've got a visitor.

13 MR. HERNANDEZ: Didn't notice that.

14 THE COURT: I know you didn't. That's why I told you.
15 Yes, Ms. Dubois.

16 MS. DUBOIS: Thank you, Your Honor. Mr. Zager, you
17 would agree, though, about the amount of breath and the level of
18 the result that the higher the volume of breath, the more actual,
19 the more, the closer the result is to the actual BAC?

20 WITNESS: If everything is correct, the longer you
21 blow, the deeper you go into the lung, the closer you should get
22 to the blood.

23 MS. DUBOIS: So when you have more breath, it's giving
24 a more accurate result of what the BAC is in that particular
25 subject?

1 WITNESS: If everything is being handled correctly, if
2 the observation, and it's a proper candidate an all that, yes.

3 MS. DUBOIS: Okay. Now you looked through the
4 documents just now to answer one of the questions and talked
5 about that last servicing for this machine, and you had indicated
6 you believed it was 2011?

7 WITNESS: That's what is up here, yes.

8 MS. DUBOIS: Right, and what, are you looking at
9 Exhibit 1 on page 3 out of 3, the service history?

10 WITNESS: I'm looking at the second to last page here
11 where it ends at December 13th, '11. That's what I have here.

12 MS. DUBOIS: Okay, and do you see the top of that
13 service history page that talks about the last annual being
14 January 5th, 2012? On the top of the page you were just looking
15 at, it's actually, the Bates stamp on the very bottom is 47, or
16 actually, I guess (inaudible) on there, page 3 out of 3 of the
17 service history.

18 WITNESS: Okay, on January 12th then.

19 MS. DUBOIS: Right.

20 WITNESS: Okay.

21 MS. DUBOIS: So it's fair to say you're not as familiar
22 with the documents in Colorado as maybe you are in Florida?

23 WITNESS: Well, each state has a separate set of
24 documents on it.

25 MS. DUBOIS: Yeah, exactly, so these ones- -

1 WITNESS: - -I don't have them memorized, so.

2 MS. DUBOIS: Right. So that's something that you
3 didn't take into consideration when preparing your report in this
4 case because you didn't notice that until just now?

5 WITNESS: No, cause it, it really, the machine could be
6 the best calibrated thing in the world, but it doesn't get past
7 the notion if, of an improper procedures and collection.

8 MS. DUBOIS: I have no further questions, Your Honor.

9 THE COURT: Thank you. Redirect, sir?

10 MR. HERNANDEZ: Judge, nothing further, thank you.

11 THE COURT: Oh, oh, okay. Any follow-up questions from
12 this gentleman? All right, may your witness be excused?

13 MR. HERNANDEZ: Please.

14 THE COURT: Any objection?

15 MS. DUBOIS: No, Your Honor.

16 THE COURT: All right. Thanks for being here.

17 WITNESS: Thank you. Just, leave these here?

18 THE COURT: Yes, sir.

19 WITNESS: Thank you, Judge. Thank you.

20 THE COURT: All right (3:08:52).

21

22

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CERTIFICATE

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I, Jamie Saifuddin, certify that I transcribed this record from the digital recording of the above-entitled matter, which was heard on February 27, 2014, before the Honorable Addison Adams in Division 405 of the Arapahoe County Combined Court.

I further certify that the aforementioned transcript is a complete and accurate transcript of the FTR proceedings based upon the audio facilities of these CD's and my ability to understand them. Inaudibles are due to microphones not working properly, excessive noises or muffled voices.

Signed this 6th day of May, 2014, in Colorado Springs, Colorado.

Jamie K. Saifuddin

Jamie K. Saifuddin