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STATE OF NORTH CAROLINA
COUNTY OF WAKE
IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
03 CRS 59694

STATE OF NORTH CAROLINA

Plaintiff,

vs.

T R A N S C R I P T

JAMES ARONER

Defendant

The above-captioned case coming on for trial at the
October 17,18, 2005, Criminal Session of the
Superior Court of Wake County, Raleigh, North
Carolina, before the Honorable Carl Fox, Judge
presiding, and a jury, the following proceedings
were had, to wit:

A P P E A R A N C E S

For the State:
Katherine Edmiston
Assistant District Attorney

For the Defendant:
John K. Fanney
Attorney at Law

Melvyn G. Levin
Official Court Reporter

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1 jury.

2 THE COURT: All right.

3 (The exhibits were published to the jury.)

4 THE COURT: All right. Any further evidence
5 from the State?

6 MRS. EDMISTON: Yes, Your Honor. State would
7 call Paul Glover.

8 I'd ask that Miss Todd be excused.

9 MR. FANNEY: I don't have any further need of
10 Miss Todd' this afternoon.

11 THE COURT: She's excused without objection.

12 (Witness excused)

13 THE CLERK: Do you solemnly swear that the
14 testimony you are about to give will be the truth,
15 whole truth, and nothing but the truth?

16 THE WITNESS: I do.

17 THE CLERK: Be seated.

18 DIRECT EXAMINATION

19 MRS. EDMISTON:

20 Q. State your full name for the Court and jury,
21 please.

22 A. My name is Paul Glover.

23 Q. Where do you work?

24 A. I work for the Forensic Test for Alcohol Branch,
25 which is a part of the Department of Health and

- 1 Human services for the State of North Carolina.
- 2 Q. What is your position with the Department of Health
3 and Human Services?
- 4 A. I'm a training specialist and research scientist.
- 5 Q. Could you describe briefly the subject matter that
6 you specialize in?
- 7 A. I deal with issues that relate to breath testing;
8 for alcohol blood testing; for alcohol blood
9 testing for drugs and urine testing for drugs;
10 issues relating to the tests that are done;
11 instrument testing that's involved; the methodology
12 analysis for analyzing blood and breath; the
13 training of the instructors that we have, train
14 those individuals who become analysts; just review
15 scientific issues that relate to those areas.
- 16 Q. And what academic degrees do you have and from
17 where?
- 18 A. I have a BS in biology I got from Florida State
19 University in 1974; masters in biology I got from
20 Florida State University in 1978.
- 21 Q. Do you have any specialized degrees in or above and
22 beyond that?
- 23 A. Yes. I'm certified as a chemical analyst on the
24 Intoxilyzer 5000. I'm certified to do preventive
25 maintenance on the Intoxilyzer 5000. Certified to

1 do maintenance on the Alcosensor.

2 I attended a course of instruction at Indiana
3 University dealing with alcohol in humans, how
4 alcohol gets in humans, where it goes once it get
5 in them, effects that it has on them, various
6 methods how it is eliminated from the body, various
7 methods that are employed to test for the alcohol
8 concentrations in humans.

9 I also attended a course of instruction at
10 Indiana University that deals with the effects of
11 drugs on human psychomotor performance.

12 Q. What jobs have you held since you graduated from
13 FSU?

14 A. I was a research scientist at Oak Ridge National
15 laboratory in Oak Ridge, Tennessee; research
16 scientist at the National Institute of
17 Environmental Health Sciences, Research Triangle
18 Park, research scientist at Burroughs-Wellcome
19 Pharmaceuticals.

20 I was at Oak Ridge four years. I was at NIEHS
21 for five years, and Burroughs-Wellcome for 7 years.

22 Q. Have you had any other positions outside of the
23 scientific field?

24 A. Yes. I've been a reserve police officer for the
25 City of Durham since 1996 for about a year. I was

1 a full time officer in 1997. And then I was
2 employed by the State.

3 Went back to reserve status. That's been.
4 I've been a reserve police officer at the
5 University of North Carolina Chapel Hill since
6 1992.

7 Q. Other than what you have briefly told the jury
8 about some of your duties do you have any other
9 duties as a research scientist?

10 A. Yes. If an issue comes up that's in a case I'll
11 review the peer reviewed scientific literature
12 that's been published in that area if something has
13 been published.

14 If nothing has been, been published there's an
15 experiment that I can do that might shed light on
16 whatever the issue is. I have a laboratory in
17 Raleigh, I'll conduct a study if I'm able to.

18 Q. With respect to the Intoxilyzer 5000 specifically,
19 what are some of the things that you have done with
20 that instrument in your position?

21 A. Well, we have had issues come up about a particular
22 brand of toothpaste would cause a false alcohol
23 reading in an individual, so I got volunteers to
24 brush their teeth with toothpaste, tested them.

25 We have had issues with individuals who say

1 put rubbing alcohol on their arms for some reason
2 and then wanted to say that's where the ethyl
3 alcohol in this test came from. So, we put rubbing
4 alcohol on your arm, wrap it up, wait awhile,
5 administer a breath test.

6 There have been individuals who have claimed
7 that they've been exposed to things like jet fuel
8 and other organic compounds.

9 And with those we didn't test humans, but what
10 we did do was get types of, particular types of
11 gasses, gas concentrations that have been reported
12 to be on people's breath, which would be very, very
13 minute amounts, and then run those gasses through
14 the Intoxilyzer to see if it will respond.

15 Q. Have you taught any particular classes?

16 A. Yes. I teach a class every fall to the new
17 prosecutors at the Institute of Government.

18 I teach a class which is, that deals with the
19 Intoxilyzer 5000 breath testing for alcohol, blood
20 testing for alcohol. Just a kind of a general
21 hour-and-a-half session covering that.

22 The evening session where we had controlled
23 drinking exercises, let the individuals consume
24 alcohol and test them.

25 I have taught alcohol toxicology at the

1 National Advocacy Center in Columbia, South
2 Carolina. I have taught the Intoxilyzer and
3 alcohol to new District Court judges.

4 And then we have had a series of classes we
5 have taught through the Conference of District
6 Attorneys.

7 These were renewal classes where we go to
8 different areas in the state, have a one-day
9 classes on DWI that involved the prosecutors from
10 that region and officers. These classes had 60 to
11 80 participants in it.

12 And then we've done various other controlled
13 drinking exercises. Again, we dose individuals
14 with normal amount of alcohol, then test them.

15 Q. How long have you been in your current position?

16 A. I started my 9 years in September.

17 Q. And have you published any articles in the course
18 of your work?

19 A. I, I published a part of the proceedings, two
20 different special studies that I did. One of them
21 dealt with interfering substances, and that's where
22 I got the interaction of gases, tested them on the
23 Intoxilyzer.

24 This was written up and submitted to the
25 International Consulting of Alcohol Drugs and

1 Traffic Safety. This was accepted for presentation
2 at the 2000 meeting, and was published as part of
3 their proceedings.

4 We looked at effects of heat on blood samples
5 that contained alcohol. We dosed individuals with
6 alcohol, put them in a patrol car for up to 7, 8
7 days with a temperature recording device in there,
8 recorded them every if five minutes.

9 And then we pulled sample tubes out of a car
10 after 30 days, analyze those to see if there's an
11 effect of the heat on the contents of the tubes.

12 This was also written up and submitted to the
13 same organization and accepted for presentation in
14 Montreal. It was presented later at a couple of
15 other meetings, international meetings,
16 International Association for Chemical Testing.

17 Q. And are you a member of any professional
18 organizations?

19 A. I'm a member of the International Association for
20 Chemical Testing where I'm on the executive board.
21 I'm a member of the National Council on Alcohol
22 Drugs and Traffic Safety.

23 Q. Have you testified as an expert in DWI trials
24 before?

25 A. Yes. I have.

1 Q. About how many times?

2 A. About a, 160 times now.

3 Q. And have you assisted in other cases that you
4 haven't testified in?

5 A. I have assisted in probably 400 other cases
6 probably 150 where I may have attended a trial but
7 didn't end up testifying. Others were... one way
8 or the other cases were resolved. I didn't end up
9 having to go testify.

10 MRS. EDMISTON: Your Honor, I would tender
11 Mr. Glover as an expert witness in field of breath
12 alcohol testing on the Intoxilyzer 5000.

13 THE COURT: Any objection?

14 MR. FANNEY: No, not as to that
15 qualification.

16 THE COURT: All right. He's, he's received,
17 qualified to give opinion testimony in that area.

18 MRS. EDMISTON:

19 Q. Could you tell the jury in a little more detail
20 what the Intoxilyzer 5000 is?

21 A. Yes. If I could have the picture of it, it would
22 help me.

23 MRS. EDMISTON: May I approach, Your Honor?
24 State's exhibit number 3.

25 THE COURT: Retrieve it.

1 THE WITNESS: This is the Intoxilyzer 5000.
2 This is a, about a 3/4-size picture, so it is
3 actually somewhat larger. This one happens to be
4 one that's in my laboratory in Raleigh, in North
5 Carolina.

6 The only instrument that's approved for
7 evidence, for breath testing is the Intoxilyzer
8 5000.

9 And so, they have different serial numbers but
10 appearance is the same on them. They have unique
11 serial numbers.

12 This instrument measures alcohol concentration
13 on a person's breath by the observance of infrared
14 light by the ethyl alcohol molecule. That's the
15 simple version of what it does.

16 There is a, a hose that lays down and it can
17 pivot. That's the breath tube at the mouthpiece.
18 It's put on to where the subject would blow in.

19 When the subject blows in his breath goes down
20 the tube, goes into a, chambers in the back. Then
21 it exits out the back of the instrument.

22 We don't actually capture a sample and
23 analyze. Their breath is constantly analyzed the
24 whole time that they're blowing.

25 There's a light source on this end of the

1 chambers. There is a light detector on this end of
2 the chamber on the, actually end of chambers or
3 lens. Lenses would spread light out concentrated
4 in it.

5 In this end the lens is oriented so it spreads
6 light out to insure that light is not touching the
7 chambers in the back. And the other end of it
8 where the lens is turned the other direction so it
9 focuses the light back down.

10 Now, what we're wanting to look for is a
11 specific waive length of infrared light to see if
12 the waive length, amount of it makes it through
13 this chamber decreases, because ethyl alcohol will
14 absorb this specific waive length of infrared light
15 that we're looking at.

16 So, and the absorption on the concentration of
17 alcohol in the sample are directed. Proportional:
18 More alcohol, the more light is absorbed.

19 You can think about it like your headlights in
20 the fog. The more fog it is the shorter distance
21 your headlights are going to shine.

22 And so, the subject blows through here. The
23 breath is being analyzed.

24 This light detector on the end is looking at
25 the light coming though it looking to see if

1 there's a decrease in the intensity.

2 There's a wheel that has three different light
3 filters on it, so it's like three different waive
4 lengths of light.

5 That's to insure that we, we're looking at two
6 waive lengths of light with respect to ethyl
7 alcohol.

8 And the third waive length is a baseline, so
9 it's a reference point for the others in case
10 you're running a different voltage, couple of volts
11 different in the system. That, that other waive
12 length is a baseline.

13 This wheel turns about 2200 times a minute, so
14 every second. That is, subject is blowing through
15 here. Their breath gets analyzed about 35 times.

16 So, in the course of a second, 7 seconds
17 exhalation, they're blowing through. Their breath
18 gets analyzed about 175 times as the exhalation.

19 As the earlier witness had stated, as the test
20 record ticket goes in it records on the entry.

21 When they, when she starts the test and enters
22 all the information it will ask if she's ready to
23 run a test. If she says "yes," it starts the
24 automatic procedure.

25 Then the first thing it's going to do is to

1 draw an air blank. It is putting air through here,
2 making sure there is nothing in there. But it also
3 analyzes that sample when it's going through to see
4 if there's anything in the room that might
5 interfere with the test.

6 Some of our test sites are almost as big as
7 this room. Some of them not much bigger than a
8 broom closet.

9 The subject sits there in there for an
10 observation period breathing in there constantly.
11 They can get enough alcohol in the air. The
12 instrument will see that alcohol when it does that,
13 initial air blank.

14 So, we want to check, make sure there's no
15 alcohol in the room. That's what that first air
16 blank is going to do.

17 We then get a calculation verification. This
18 is the alcoholic breath simulator picture of ethyl
19 alcohol in water maintained at a certain
20 temperature.

21 The instrument will pump air through this
22 hose. Goes down. It comes out. Goes in the
23 instrument. Then it circulates back around that to
24 provide a known standard for the instrument to be
25 able to analyze.

1 It does not calibrate the instrument. It
2 simply gives it a known standard, sort of like if
3 you wanted to check your bathroom scales to see if
4 they were working right.

5 You put a five-pound bag of potatoes on there
6 that said "five pounds." You would know that the
7 scales are working properly.

8 We give it a known sample of alcohol to
9 analyze. If it doesn't, if that concentration is
10 not reported correctly, then the instrument will
11 disable itself and the operator can't use it.

12 My staff that has to go and do maintenance on
13 the instrument to find out what the problem is.
14 You would then do another air blank.

15 We then do the subject test. When it prompts
16 a subject to blow they have to blow long enough
17 and hard enough to get deep lung air.

18 We try to get them to be about 7 seconds with
19 sufficient pressure. And there's a tone that's
20 emitted from the keyboard as they're blowing. If
21 like it's hard enough the tone is constantly
22 emitted.

23 If they stop blowing then they have to start
24 all over again. Then they have a
25 two-and-a-half-minute window during which they can

1 blow.

2 Once they have blown long enough and hard
3 enough a ring will come up indicating they have
4 complied with other air blank subject tests,
5 another air blank.

6 Q. So, as between the two tests that are given and a,
7 and one testing situation how many times is that
8 breath analyzer in the interim working on the
9 machine?

10 A. About each, each time a subject blows it's analyzed
11 about 175 times.

12 Q. Multiply that by two, you get total time each test
13 is analyzed.

14 A. Yes.

15 Q. Who makes the simulator solution?

16 A. Simulator solution is prepared by the State Health
17 lab. They make it for us in 10 milliliter vials.

18 It's got a aluminum top that's on it so it
19 can't be tampered with if it's crumpled.

20 They have to change the solution after 125
21 times, that's it, when used up or every four
22 months, whichever happens first.

23 They mix it up in biometric glasswear to 500
24 milliliters. They dump out what's in here, clean
25 the jar, put in the fresh solution.

1 Some of our test sites are very remote, like
2 Okracoke Island. They may even do a dozen tests in
3 four minutes time, so the solution would only be
4 changed every month.

5 Wake County, where we do about 500 tests a
6 year, the solution that has to be changed about
7 every couple weeks because we're approaching that
8 125 test limit.

9 Q. How do you get access to the inside of the machine
10 where the infrared light is doing its thing?

11 A. My field staff can. And we have certified factory,
12 certified trained electronics technicians do any
13 repairs; have done, done instruments.

14 There is a access panel on the side. They
15 take a special key to be able to open it. They're
16 hex heads. You take a real small Allen wrench to
17 actually disassemble it.

18 Power the test button. There are no other
19 buttons that you can actually manipulate without
20 actually opening the instrument up.

21 Q. How long has it been used in North Carolina to
22 measure breath alcohol?

23 A. Since about 1991 it's been used in North Carolina.

24 Q. Intoxilyzer 5000?

25 A. Yes.

1 Q. Could you tell the jury generally what happens in a
2 person's body when they drink alcohol?

3 A. Well, when they initially consume it they typically
4 drink it. Some people have done it IV, other
5 methods.

6 But essentially drinking goes down the
7 esophagus into their stomach. In the bottom of the
8 stomach as a valve that will emit contents of the
9 stomach into the small intestine.

10 Alcohol is a very, very small molecule. It is
11 absorbed through the first 12 inches of the small
12 intestine very, very quickly. People have compared
13 it to pouring water. It goes through almost
14 instantly.

15 There's some alcohol that's absorbed by the
16 lining of the stomach, but the majority of it is
17 going to be absorbed through the small intestine.
18 Goes into the blood, is carried throughout the
19 body.

20 Alcohol has a very high affinity for water,
21 any water-containing tissues. We're looking at
22 brains, blood, muscle, organs, major organs. Many
23 of those water-containing tissues where typically
24 it's going to go.

25 It gets instructed to go throughout the body

1 into the water-containing tissue. It does not go
2 into the fat very well at all.

3 Q. So, how does the alcohol get from your blood into
4 your breath as you breathe?

5 A. Just in breathing . As you breathe out, breathe in
6 oxygen, breathe out CO2, you breathe out a certain
7 amount of alcohol.

8 When you're normally breathing it is not
9 coming from the stomach. It is not coming from
10 residual mouth alcohol from the mouth from
11 drinking. The alcohol is actually coming from in
12 the lungs.

13 Q. After a person stops drinking what happens in their
14 body to that alcohol?

15 A. Well, once they stop their concentration will start
16 to go down. When you drink it starts being
17 circulated.

18 There is a enzyme in the liver called alcohol
19 dehydrogenase. The enzyme breaks down about 90 per
20 cent of alcohol that you drink, so when you drink
21 it goes. And they start being circulated.

22 Some blood is going to go through the liver
23 shortly thereafter.

24 Some of that alcohol will never reach the
25 other parts of your body. Going to be broken down,

1 right, but the bulk of it is going to be
2 distributed.

3 The whole time your blood is circulating, the
4 enzyme is going to be breaking down the alcohol.
5 It breaks down about 95 per cent of alcohol, brings
6 the other 5 percent. You lose three breaths as
7 well as urine.

8 If you think about filling in the breath tube
9 with a drain opener, if you turn water on fast
10 enough the level will start to rise in the
11 bathtub. Water is going down the drain the whole
12 time.

13 That's what happens when you're drinking. If
14 you are drinking at a rate faster than you're body
15 can eliminate alcohol it's still breaking some down
16 but concentration is going up, just like a, water
17 in a tub.

18 When you stop drinking, then the concentration
19 is going to start falling as the liver is able to
20 break down the alcohol.

21 Q. And the Intoxilyzer 5000 tests a person's breath;
22 correct?

23 A. Correct.

24 Q. What exactly does there Intoxilyzer 5000 look for
25 in someone's breath?

1 A. Looking for the ethyl alcohol.

2 Q. Does the fact that alcohol can get into your actual
3 mouth affect how the Intoxilyzer measures the
4 amount of alcohol in the breath?

5 A. No. What we're looking at... You know, again,
6 alcohol is going to be in all the water-containing
7 tissues. It's going to be in your saliva. To a
8 certain extent going to be a wet area, if you will,
9 if you're concerned with your trachea, your lungs,
10 all of that.

11 But ultimately what we're looking at, we're
12 looking at this air that you blow out, a
13 concentration of alcohol in your breath, and that
14 is air that you exhale. That's your breath.
15 That's the concentration of alcohol that we're
16 looking at.

17 THE COURT: We're going do stop here, members
18 of the jury.

19 You can step down.

20 Members of the jury, please regard the
21 admonition during the recess: Do not discuss the
22 case. Don't form an opinion. Keep an open mind.
23 You have yet to hear all the evidence and my
24 instructions.

25 So, well, be back in the jury room at 9:30 in

1 the morning. We'll be under way shortly
2 thereafter. Thank you. Have a nice evening.

3 Everyone else remain seated.

4 (The jury is excused.)

5 (The following proceedings were held in open
6 court outside of the presence of the jury.)

7 THE COURT: All right. All right. The
8 jurors are out of the room. Is there anything we
9 need to take up before we recess?

10 MRS. EDMISTON: No, sir.

11 MR. FANNEY: No, Your Honor.

12 THE COURT: We'll start back with this
13 witness first thing in the morning. All right.
14 We'll take a recess until 9:30 tomorrow morning.

15 THE BAILIFF: This Honorable Court is in
16 recess until 9:30 tomorrow morning.

17 (The court stands at recess.)

18

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16 and further, that I am not a relative or employee
17 of any attorney or counsel employed by the parties
18 thereto, and am not financially or otherwise
19 interested in the outcome of the action.

20

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25

Melvyn G. Levin

Official Court Reporter

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO: 03-CRS-59694

STATE OF NORTH CAROLINA,
PLAINTIFF,

VS.

T-R-A-N-S-C-R-I-P-T

JAMES ROGER ARONER,
DEFENDANT.

Transcript of proceedings taken in Wake County Superior Court,
Raleigh, North Carolina, on October 19th, 2005, before the
Honorable Carl Fox, Judge presiding.

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E X H I B I T S

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1 THE COURT: Good morning. Apparently we have
2 a note from the -- one of the jurors. "Can we take
3 notes?" Here's -- Let me say what I normally tell
4 them and you can decide what your thoughts are.

5 What I normally tell them is I think -- I
6 believe the instruction on that from the pattern
7 jury instruction is that they're free to take notes
8 if they wish to take notes but will provide them
9 with the utensils to do that.

10 However, in my experience no one can take
11 notes as fast as testimony is given in the
12 courtroom, except the court reporter, so unless
13 they're a stenographer they can't do it -- they
14 will lose -- inevitably pick up parts and lose
15 parts, focus on some things and totally miss other
16 things, and none of their notes will be the same.

17 The court reporter does this for a living and
18 she's using -- they're using a mask or a stenograph
19 that types several of the letters at the same time,
20 and that's the only way to keep up.

21 So they're free to do it, but my admonition is
22 that they shouldn't expect their notes to be
23 accurate and they shouldn't expect them to agree.
24 And a lot of times they just avoid doing it once I
25 say that to them.

1 What do you say, Madam Prosecutor?

2 MS. EDMISTON: I'm not opposed to the
3 instruction, Your Honor. I think that's fine.

4 THE COURT: Mr. Fanney?

5 MR. FANNEY: I just would express for the
6 record my only concern is that we're halfway
7 through a trial and there weren't any notes taken
8 prior to today.

9 THE COURT: That's a good question -- That's a
10 good point.

11 MR. FANNEY: And certainly we're dealing with
12 a two-pronged crime. Now we're faced with the
13 prospect of the jury taking notes on only one piece
14 of the puzzle, and I while I would love them to
15 have done it for the whole trial, I have a concern
16 with that.

17 THE COURT: Uh-huh (affirmative). Well, hmm.
18 But I think -- Isn't the law that they're free to
19 do that, or is it entirely at my discretion whether
20 or not they do that?

21 MR. FANNEY: Oh, you're probably correct in
22 that regard, but I do want to express that
23 reservation for the record.

24 THE COURT: How about if I express that
25 reservation to them as well?

1 MR. FANNEY: I'll be glad for you to do that.
2 I don't know how much it'll help, but that's fine.
3 I appreciate that effort. So just for the record,
4 we'd object to it, but if you would give them that
5 cautionary instruction.

6 THE COURT: That I will do. I'm just not a
7 fan of it. I mean, I have a computer up here. It
8 would be all I could do just focusing totally on
9 take-down of what they're saying. Anything else
10 before we bring them in?

11 MS. EDMISTON: Your Honor, I have some brief
12 cleanup matters to deal with.

13 THE COURT: Okay.

14 (OTHER COURT MATTERS DEALT WITH)

15 (JURY ENTERS AT 9:47 A.M.)

16 THE COURT: Good morning. I received a note
17 that indicated can you take notes. Well, yes, you
18 can, and the Court would provide you, through the
19 clerk, with notepads and pens if you wish to do
20 that, but here's my admonition to you, and I'll let
21 you think about it and decide whether or not you
22 want to do that.

23 You're already probably a good third if not
24 halfway through the evidence in this case and no
25 one has taken any notes, so that you're not going

1 you would just raise your hand if you would like a
2 pad and a pen I'll be happy to have the clerk
3 provide one for you.

4 All right. If you change your mind just bring
5 it to my attention, just let me know how many you
6 need and we'll be glad to provide it, because that
7 is not a problem. Okay.

8 MS. EDMISTON: Your Honor, I'd re-call Paul
9 Glover to the stand.

10 THE COURT: All right. You're still under
11 oath.

12 (Whereupon, **PAUL L. GLOVER**, having previously been sworn,
13 testified as follows on **DIRECT EXAMINATION** by **MS. EDMISTON**.)

14 Q Mr. Glover, I believe we left off yesterday
15 afternoon talking about alcohol on a person's breath.

16 A Yes.

17 Q And I'll ask you, if -- the fact that some alcohol
18 may be in a person's mouth, does that mess up the Intoxilyzer
19 breath test?

20 A No. If you're referring to raw alcohol that would
21 be in a person's mouth, no, it will not.

22 Q And can you explain that a little further to the
23 jury?

24 A Yes. If I can draw a picture I think I can explain
25 it better.

1 then it would end up flagging it as an invalid sample.
2 Studies have been done where individuals who are alcohol-free
3 were given an ounce of brandy, hold it in their mouth for two
4 minutes and then spit it out.

5 Fifteen minutes later when they're breath-tested you see
6 no alcohol in their system because it dissipates; that
7 alcohol -- that residual alcohol that's in their mouth
8 dissipates in that -- actually in about ten minutes' time.

9 So that's why we have our 15-minute observation or
10 deprivation period, to insure that if they had consumed
11 something a few minutes before they were tested -- well, a
12 few minutes before their deprivation period that anything
13 that would be in their mouth would be gone.

14 Q And you had Ms. Dodd testify to some degree about
15 the invalid sample?

16 A Correct.

17 Q And is that your understanding what she was
18 referring to?

19 A Yes, it was.

20 Q And do you know how much time elapsed in this case
21 from the actual vehicle stop to when the breath test was
22 performed?

23 A Approximately an hour and twenty-five minutes.

24 Q And is that significant to you at all?

25 A Yes, it is. Because as I understood from the

1 testimony of the officer he didn't let the defendant consume
2 anything from the point that he was stopped, so we actually
3 have an hour and twenty-six minutes, hour and twenty-five
4 minutes, something like that from the time of the vehicle
5 stop until he was tested.

6 Q Now, are you aware of any other ways that alcohol
7 could come back up into someone's mouth other than them
8 actually consuming it?

9 A If they were to regurgitate, throw up some, if they
10 had raw alcohol left in their stomach you might get some,
11 however, it dissipates very quickly.

12 In fact, if someone were to do that you would get an
13 invalid sample response where you would see -- again, it's
14 just like if you squish some in and then you were to blow,
15 you would get the kind of profile where it goes up and then
16 right back down.

17 If you were to regurgitate some and have it in your
18 mouth and then blow you would get the same sort of pattern.

19 Q And can you tell this jury about any general
20 safeguards with the Intoxilyzer 5000 that insure it's working
21 properly on a given test?

22 A Yes. We have a number of safeguards. We have pre-
23 test safeguards; that's before the analyst can even do
24 anything. If they come in and the instrument is not on, you
25 turn it on -- it will tell them that it's not ready.

1 It has to get to a proper temperature. Once it gets to
2 that temperature it will then go through a series of tests --
3 it will check to see if the printer is responding, it will
4 check the program.

5 It has a program in there. It's written on a
6 programmable, erasable chip. It checks to see that that
7 program is intact. If that program were to not be intact,
8 then it would not come out of its diagnostic mode and we
9 wouldn't be able to run a test.

10 It's going to check to see that the filter wheel is
11 turning, because the filter wheel has to be turning to be
12 able to do that test. It's going to go through all of these
13 steps before the analyst can use the instrument.

14 Once we're at the point where we're going to test an
15 individual, it's going to do a number of other things where
16 there are a number of other safeguards.

17 As I said yesterday, it's going to sample the room air.
18 If it were to see volatile alcohol or other volatiles in the
19 air when it does that first air blank, then it's going to
20 indicate that there are ambient conditions and it will reject
21 the test record ticket and the analyst needs to ventilate the
22 room before he's going to be able to set it up again and run the
23 test.

24 It does the calibration verification, has to show the
25 instrument is properly calibrated; if it were to not pass

1 that then the instrument would be disabled and the analyst
2 couldn't run the test.

3 Again, there's a safeguard for mouth alcohol. The
4 instrument has a particular window when the subject can blow,
5 and it will say, "Please blow," and if the subject blows
6 before that it will stop the test, reject the ticket, and the
7 analyst has to go through all the steps again.

8 It will look for interfering substances. There's one
9 substance that can be found on human breath that can absorb
10 one of the wavelengths of infrared light that we're looking
11 at, and that's acetone. People who are diabetic and go into
12 ketoacidosis will have acetone on their breath.

13 The instrument always looks for acetone. If it sees
14 some it will subtract it from the result, the alcohol result.
15 If there's a significant amount of acetone it will subtract
16 it, but it will also indicate on the test record ticket that
17 there was an interferent present and it will subtract it.

18 The reason for that is to let the analyst who's running
19 the test know that this person may be having a medical
20 situation, that they need to pay attention, because if
21 they're in ketoacidosis, being a diabetic they won't get
22 better unless they're treated.

23 The breath tube on the side of the instrument has an
24 antenna in it. The antenna is designed to pick up radio
25 waves that would come from an officer's radio, so if he were

1 right next to the instrument that would key his microphone so
2 his radio is sending out waves. The instrument can detect
3 that. It will stop the test, reject the ticket, start all
4 over again.

5 If there is a high concentration of alcohol it will
6 indicate "Range Exceeded" -- and that level is about a .65,
7 which would be a fatal dose for most people. Nonetheless,
8 that's in there to let them know that you've gone almost
9 beyond the limits of the instrument as far as being able to
10 analyze the alcohol there.

11 Q And you heard Ms. Dodd testify that she got two
12 sequential breath samples from the defendant?

13 A Right. That's one of what we call our procedural
14 safeguards in that we take -- you test a person's breath
15 twice. And those results have to be within .02 of each
16 other, and you use the lower of the two if there was a
17 difference in them.

18 MS. EDMISTON: Your Honor, may I approach
19 Madam Clerk to get State's Exhibit Number 4?

20 THE COURT: Yes.

21 Q Mr. Glover, I'm showing you State's Exhibit
22 Number 4. Do you recognize that?

23 A Yes, I do.

24 Q What is that?

25 A It's the test record ticket that was generated when

1 the defendant was tested.

2 Q And can you look at that ticket and determine
3 whether any of the safeguards that you've just testified to
4 were activated in that particular test?

5 A I can do that, and there's no indication that there
6 were any problems when this test was conducted. There's --
7 The last line that's printed on here is "Reported AC," or
8 reported alcohol concentration.

9 If any of those safeguards had happened you would not
10 get a reported alcohol concentration printed on here, other
11 than if an interferent was subtracted from it you would still
12 get a reported alcohol concentration.

13 But all of the others you would not get a ticket with
14 any of this information on it.

15 MS. EDMISTON: May I approach the witness with
16 this?

17 THE COURT: Yes.

18 Q Now, yesterday you testified when we were going
19 through what you do and your experience that you've done some
20 experiments on human beings --

21 A Correct.

22 Q -- with respect to blowing in the Intoxilyzer.

23 A Correct.

24 Q And generally what do you do when you're doing
25 those types of experiments?

1 A We look at the -- basically the weight of the
2 individual and calculate a dose of alcohol to give them -- to
3 get them to a .08. That's the target that we are aiming for
4 when we dose them.

5 So we will give them alcohol, they will drink it over
6 about an hour, and then we'll do breath tests on them after
7 that.

8 Q And do you make observations of those people who
9 you've giving controlled doses of alcohol to?

10 A Yes, we do.

11 Q And have you seen field sobriety tests be performed
12 on people who you're dosing with alcohol and having blow into
13 the Intoxilyzer 5000?

14 A Yes.

15 Q And you were here yesterday and heard the testimony
16 of Officer Driver, correct?

17 A Yes, I did.

18 Q And after listening to that testimony can you also
19 give an opinion as to whether that result is consistent with
20 what you heard in court yesterday?

21 MR. FANNEY: Just a moment. Objection to this
22 line of questioning. It has to be heard out of the
23 presence of the jury.

24 THE COURT: All right. Members of the jury,
25 let me ask you to step back to your jury room for

1 just a few minutes.

2 (JURY EXITS AT 10:03 A.M.)

3 THE COURT: All right. Let the record show
4 all jurors are out of the courtroom. Madam Court
5 Reporter, can you tell me what -- do you have any
6 way of telling me what that question was, or do you
7 have that question?

8 My recollection was does he have an opinion as
9 to whether or not that result is consistent with --

10 MR. FANNEY: The -- I think the question is --

11 MS. EDMISTON: The observations of the --

12 MR. FANNEY: Well, I'll let her rephrase it --
13 I'll let her tell you.

14 MS. EDMISTON: Whether Mr. Glover in hearing
15 the testimony yesterday from Officer Driver can say
16 whether those observations that he heard in court
17 are consistent with the result on the test ticket
18 based on Mr. Glover's experience as an expert.

19 THE COURT: How can he do that?

20 MS. EDMISTON: He has participated in
21 controlled drinking experiments where he's observed
22 people and the physical manifestations of what
23 impairment would be after giving them a given dose
24 of alcohol and then that person blows in the
25 Intoxilyzer 5000, so Mr. Glover's uniquely situated

1 to say "I've dosed people, I've observed them,
2 they've blown on the Intoxilyzer 5000 and blown a
3 certain reading, and based on my experience in
4 viewing those types of experiments and hearing the
5 testimony yesterday I can say that what Officer
6 Driver testified yesterday to his physical -- " the
7 defendant's physical manifestations are consistent
8 with what Mr. Glover has observed as an expert in
9 the field of breath testing.

10 THE COURT: Well, let me ask you this. Was
11 there any testimony about how much the defendant
12 had to drink? I mean, I know -- Was there
13 testimony about what the defendant had to drink?

14 MS. EDMISTON: The last testimony was he had
15 had two Crown Royals that were heavy. There's also
16 testimony that he had nothing to drink, one beer,
17 two beers, two Crown Royals that were heavy.
18 That's the testimony that's before the jury as to
19 what the defendant consumed.

20 THE COURT: So there's no evidence of exactly
21 how much alcohol he drank.

22 MS. EDMISTON: Yes, sir.

23 THE COURT: Okay. And when was the last time
24 he -- Is there evidence about when he last had a
25 drink?

1 MR. FANNEY: There is. 1:15 p.m., according
2 to statements the night of the arrest.

3 THE COURT: What about -- I'm just -- Okay.

4 MR. FANNEY: Here's the problem I have with
5 that question. Number one, she has tendered him as
6 an expert in breath alcohol testing and the
7 Intoxilyzer 5000.

8 She is now asking a question asking him to
9 render basically a back-door opinion on whether or
10 not his performance of the field sobriety test is
11 consistent with him blowing an eleven.

12 He's not been qualified as an expert on field
13 sobriety testing. I don't know if he's ever even
14 taken a field sobriety test in the course. I don't
15 know what studies have been conducted to show a
16 correlation between that.

17 The State used that evidence to bolster its
18 opinion of appreciable impairment. The percentage
19 given yesterday by the officer said that was a
20 percentage that he was appreciably impaired, not
21 that he was at a certain blood or breath alcohol
22 concentration, and now the State wants this man to
23 come in and testify "You can believe this machine
24 because I heard the way he testified and I heard
25 about his field test results, and based on what

1 I've done in my controlled studies or controlled
2 drinking programs that's entirely consistent."

3 Well, what that means then is that he is being
4 asked to render an opinion on the actual field
5 test --

6 MS. EDMISTON: Your Honor, the State --

7 MR. FANNEY: -- and whether or not the officer
8 conducted them properly, interpreted them properly,
9 and whether or not the statistical data on which
10 all that is based is accurate.

11 He's not qualified to do that. Now, if he
12 qualifies as some sort of physiologist where he can
13 talk about lay observations about the effects of
14 alcohol on the person, what you would expect at
15 certain readings, I think he can that if she can
16 show that he's qualified to do that, but what I
17 don't think he can do is come in and say, "Because
18 I did these controlled drinking programs," with not
19 being qualified as an expert in these fields, that
20 she cannot correlate the results of the field test
21 with the results of an Intoxilyzer. The evidence
22 isn't there.

23 THE COURT: Okay.

24 MS. EDMISTON: The question wasn't directed in
25 any way specific to field sobriety tests. I think

1 that Mr. Glover can testify irrespective of those
2 that he heard the officer describe the slurred
3 speech, the red, glassy eyes, the odor of alcohol.

4 It's not unique to the field sobriety test,
5 it's just generally whether the testimony of
6 Officer Driver and Mr. Glover's experience is
7 consistent with that reading.

8 And Mr. Fanney will have the opportunity to
9 cross-examine Mr. Glover about that opinion.

10 THE COURT: So your question is are the things
11 that he -- the officer observed of this defendant
12 when he stopped him consistent with his
13 observations of a person who has that blood alcohol
14 level? Is that what you're asking?

15 MS. EDMISTON: If the testimony of the officer
16 is consistent in Mr. Glover's experience in doing
17 these controlled drinking exercises with the
18 reading on the Intoxilyzer sheet.

19 THE COURT: Now, you know, I'm just trying to
20 figure out, have I heard any evidence about his
21 conducting controlled drinking testing where people
22 were given performance tests and he observed
23 performance tests and observed those performance
24 tests relative to blood alcohol levels?

25 MS. EDMISTON: Your Honor, he just testified

1 that he did these controlled drinking exercises,
2 observed the subjects generally, gave them a breath
3 test afterwards.

4 He didn't testify about field sobriety tests
5 or administering them, just that he observed them,
6 and I think that as an expert he's uniquely
7 situated to say, "I've observed people who have
8 consumed a known quantity of a substance and blown
9 on the Intoxilyzer, and the observations of Officer
10 Driver are consistent with the result in this case
11 and that's because I've done these types of
12 controlled drinking experiments," and Mr. Fanney
13 can cross-examine him on how he bases his opinion
14 on that.

15 MR. FANNEY: The problem with that broad
16 question is which observations are we talking
17 about?

18 THE COURT: Uh-huh (affirmative).

19 MR. FANNEY: And there's still some issue of
20 statistical correlations to that. I mean, she just
21 asked the broader question, "Well, based on what
22 you heard in court yesterday, is that consistent
23 with the reading we got?" "Oh, yes."

24 Well, what does the jury do with that? If she
25 wants to tailor her questions to go "Well, you got

1 an eight and you did these controlled drinking
2 experiments and you observed these people," I'd
3 like to know what observations that he has that he
4 correlates with the readings.

5 THE COURT: I think that I tend to agree with
6 Mr. Fanney. I think you can ask him if he has
7 observed people who have blown eleven or twelve and
8 what observations he made relative to sobriety
9 testing of those folks, but I don't know that I can
10 say that he can say that based upon an officer's
11 observations of this defendant which -- that he
12 didn't himself observe, whether that's consistent
13 with his blood alcohol reading of .11.

14 I mean, I think he can testify generally what
15 would you expect to see and they can make the
16 decision as to whether or not it's consistent with
17 this.

18 But he didn't actually observe these
19 observations, and the question is -- which I tend
20 to agree, which observations he's saying are
21 consistent with.

22 I think if he -- If you were to ask him a
23 question about what he's seen as far as sobriety
24 testing, results of sobriety testing in his work
25 with regard to persons in that alcohol range, then

1 he can give that, and the question would be how
2 does that compare with what the defendant did on
3 this occasion and then it's for the jury to decide
4 how it links up. Okay.

5 So the objection is sustained as to the form
6 of that question, and you can decide whether or not
7 you want to rephrase it.

8 MR. FANNEY: Well, Judge, if we're going to
9 allow that inquiry to be done in front of the jury,
10 I'd like to voir dire him while they're out about
11 whether or not he's qualified or has any experience
12 with field sobriety testing. I don't know that he
13 doesn't.

14 THE COURT: All right. Go ahead.

15 VOIR DIRE EXAMINATION BY MR. FANNEY:

16 Q Mr. Glover, good morning. I'm John Fanney and I
17 want to ask you a few questions. Tell me, please, about
18 these experiments you've conducted, your controlled drinking
19 experiments.

20 A We take individuals, we get their weights, and then
21 we dose them with a measured amount of alcohol.

22 Q Okay. Is it always a constant measure of alcohol
23 or do you have different subjects at different varying
24 levels?

25 A We have had people at different levels. Typically

1 we aim for a .08. We have times when individuals are higher
2 than a .08 and times when people are lower than a .08.

3 Q And are you personally there at these experiments?

4 A Yes.

5 Q At all of them?

6 A Not all of them. They're done all over the state.
7 I've personally been there for several hundred individuals.

8 Q Okay. And who else attends these?

9 A Excuse me?

10 Q Who else attends these controlled drinking
11 exercises?

12 A Well, my field staff conduct them every week in the
13 operator school, Intoxilyzer operator school. When we do the
14 ones I've been doing, I usually have a couple people from our
15 staff that are present.

16 Q Anyone else? I mean, is it just your staff members
17 that do this?

18 A Well, Bob Farb of the Institute of Government is
19 there for certain ones of them -- I mean, whatever the makeup
20 of the class happens to be. Not everyone is drinking in
21 those, so there are other people, so there are officers and
22 prosecutors present.

23 Q I guess my question would then be, who is present
24 that participates in the administration of the study? Just
25 your staff, correct?

1 knowledge have been conducted with -- by -- Well, let me back
2 up. How many of your controlled drinking experiments of
3 which you have personal knowledge and involve field sobriety
4 testing have been conducted by folks -- officers, staff
5 members or what have you -- who are not certified in
6 standardized field sobriety testing?

7 A You mean how many times someone who has not been
8 through SFST training has done the SFST's?

9 Q Uh-huh (affirmative).

10 A I couldn't tell you. I'm certain that there's some
11 who do it who have not been to the schools.

12 Q Okay. And how did you come to acquire that
13 knowledge? Is it because those were just the ones you went
14 to?

15 A No. It's because when we have a group of forty
16 people there, there are some people who have not been to the
17 schools. They may observe HGM, and so someone will do the
18 HGM examination.

19 You can watch -- You don't have to be trained to be able
20 to observe it; you can demonstrate it very easily in an
21 individual. But the other thing that you observe of the
22 people who are consuming at these things are general
23 impairing effects.

24 Q Okay.

25 A Which you don't have to be trained to observe.

1 Q Okay, all right. Are you trained in the
2 administration of field sobriety tests?

3 A No, I'm not. Not from a formal class, only from
4 the police department, which was not at all a full SFST
5 school.

6 Q Okay. So you would not, then, be able to tell us
7 about any statistical background or studies on these tests?

8 A I know that studies have been done on the -- I'll
9 say the accuracy or reliability of the tests.

10 Q You, though, having not been trained, would not be
11 able to observe the proper administration of those tests.

12 A I could certainly observe the proper administration
13 of the tests. I haven't been to the school.

14 Q Okay.

15 A I can watch somebody who has been trained to
16 administer the tests.

17 Q All right. But you would agree, though, since
18 you've not been to the school and someone else has been to
19 that school, that your knowledge about whether or not those
20 people are administering those tests correctly and
21 interpreting them correctly -- your knowledge is wholly
22 dependent on them doing it the right way and interpreting it
23 the right way, correct?

24 A Yes. But I can still observe someone not being
25 able to maintain their balance, I can still observe them

1 stepping off the line, or doing their nine steps out stopping
2 and not returning, and those are some of the things that you
3 can observe and you don't have to be trained to know -- that
4 the person did not complete the test by coming back, or if
5 you see a person raising their arms you know that that's not
6 correct.

7 Q Okay. Well, you certainly know that it's not
8 correct, but you're assuming, however, that the test itself
9 is sufficient enough to interpret that the cause of that
10 activity is alcohol impairment, right?

11 A Yes. But I've also observed people doing the test
12 who were not impaired who were not having the problems that
13 we observed.

14 Q And if you -- Okay. And those -- Are you talking
15 about your test subjects now, people who had been dosed who
16 did the test just fine?

17 A Or people who do the test before they get dosed.

18 Q Well, that's what I'm referring to.

19 A Yes.

20 Q Okay. And by the same token, you've probably
21 observed folks who have been dosed that did just fine on
22 those tests.

23 A I wouldn't say they did just fine. There are some
24 people who do better on some areas than others.

25 Q Okay. So you agree, then, that the interpretation

1 of those tests isn't always a fair measurement of someone's
2 impairment, because some do better, some do worse.

3 A That's correct, some do better and some do worse.
4 It still is an indication of their impairment.

5 Q Okay. But if it's merely just an indicator of
6 impairment, how, then, can it be some indicator of what
7 someone's BAC level is?

8 A It's not an indication of a specific alcohol
9 concentration. We see impairment in individuals when they
10 are in the ranges that we're looking at. I've seen
11 impairment -- I've seen people with .03's who could not walk
12 ten feet without falling down.

13 So I'm not looking for a specific number; we see a range
14 of behaviors within a range of alcohol concentrations.
15 That's been published for a long time. Everyone doesn't
16 behave exactly the same way.

17 Q Okay. Now, you heard Officer Driver yesterday
18 testify about a figure he believed to be some probability of
19 accuracy.

20 A Yes.

21 Q Remember that testimony?

22 A (Witness nods affirmatively)

23 Q And I think he used a figure of about 70 percent.

24 A Something like that.

25 Q Okay. That's a little better than two-thirds?

1 A Yes.

2 Q If he is correct in his statement that there is a
3 70 percent probability that someone's appreciably impaired,
4 do you agree that, just based on what you heard yesterday,
5 there's still a one-third chance that what he observed was
6 caused by factors other than impairment?

7 A I don't know that it's a prob-- or -- I don't think
8 that's a correct statement, what you just said.

9 Q Can you tell me why?

10 A Because it's not solely on the -- The whole thing
11 is not solely on the SFST's, it's everything -- it's the
12 driving -- There's information in his notes that I reviewed
13 that's consistent with what has been testified to -- we have
14 an admission of drinking, we have an odor of alcohol, we have
15 an individual who is having problems driving, we have an
16 individual who's having problems with slurred speech. It's
17 all of those things.

18 Q Okay. Well, maybe you misunderstood my question.
19 That question was relating solely to the field sobriety test
20 results.

21 A Correct.

22 Q Okay. Not on everything that you heard yesterday,
23 when he issued that -- when he said there's about a 70
24 percent probability I think that the test -- because of the
25 way he performed those tests that he was appreciably

1 impaired. Remember that testimony?

2 A I remember him giving a value of 70 percent.

3 Q Okay. So my question to you is, since that's only
4 about two-thirds, based on what he said yesterday do you
5 agree that there's a third or more -- about 30 percent or
6 some other probability that the results he saw about those
7 tests were caused by something other than impairment?

8 A Again, I don't think that's a correct statement,
9 the way you're -- the way it's being used.

10 Q Okay. But you do agree that his -- that figure
11 wasn't based on everything he saw, it was just merely based
12 on how he looked at those tests yesterday.

13 A His recollection of what those specific field
14 sobriety tests indicated.

15 Q And that's, again, something of which you have no
16 personal experience or training.

17 A I have experience in conducting field sobriety
18 tests. I have not been through the NHTSA course.

19 Q Okay. And have you been through any course, or is
20 it just some kind of pick-it-up-as-you-go?

21 A Well, we got some basic instruction at the police
22 department, and I have watched people do it enough times that
23 I have a good appreciation for what's to be done and how it's
24 to be done.

25 Q And again, your assumption that you do them

1 correctly relies on -- Well, it relies on the hope that
2 whatever you picked up along the way is exactly the way these
3 standardized tests are supposed to be done and the way
4 they're supposed to be interpreted, correct?

5 A Again, I can observe a person having problems doing
6 the test. If someone were to tell them to take ten steps
7 instead of nine, or eight steps instead of nine, and a person
8 cannot maintain their balance, the fact that the test was not
9 dictated to them properly does not invalidate the fact that
10 they can't keep their balance.

11 Q But you can talk about folks not being able to keep
12 their balance, if they indeed lost their balance,
13 irrespective of those tests, can't you? If you heard
14 testimony that someone stumbled out of the car you could say
15 they lost their balance, correct?

16 A Certainly. And you don't have to be trained to --

17 Q (Interposing) You don't have to be trained to do
18 that?

19 A Excuse me?

20 Q I'm sorry. We're talking at the same time.

21 A You don't have to be trained on how to observe
22 someone except from life's experiences when you see an
23 impaired person enough times.

24 MR. FANNEY: Okay. I think that's all the
25 questions I have. Thank you, Mr. Glover.

1 THE COURT: Can I ask you a couple questions,
2 Mr. Glover?

3 VOIR DIRE EXAMINATION BY THE COURT:

4 Q Is there a difference in what you expect to see
5 someone do, based on your experience, from a .08 versus .12?

6 A No, sir.

7 Q All right. What about from a .12 to .18?

8 A Yes, sir. We would -- An individual's experience
9 with alcohol will influence that to a certain extent. In
10 other words, if someone is a chronic abuser we will see their
11 inability to perform certain tests at lower levels.

12 It's, I'll say, out of the norm, okay? But once you
13 start to get up into the higher concentrations you would see
14 more and more egregious problems.

15 Q So -- I refer to the term as "tolerance." The
16 higher tolerance a person has, in other words, a person
17 drinks more often than another person, the person who drinks
18 more often has a higher baseline of operation and can do
19 these tests to some extent better at a little bit higher
20 level than a person who drinks less.

21 A They can do certain ones better. Cognitive skills
22 remained impaired, but there's a certain learning that people
23 do who are, again, I'll say chronic abusers or heavier
24 drinkers, or they adapt -- they are better able to walk, they
25 may be better able to talk, but cognitive skills still remain

1 impaired.

2 Q Can you actually testify that they -- I mean, say
3 for instance a finger-to-nose test, that they may miss their
4 nose more often than a person -- at .18 than they would at
5 .12?

6 A I would expect that, because once you're getting up
7 into the .18 you're getting in -- you're halfway to a lethal
8 dose for a lot of people. That's a serious amount of
9 alcohol.

10 Q What about from a .12 to .08?

11 A You're not going to see a vast difference in
12 individuals in that range.

13 THE COURT: Questions you'd like to ask him,
14 Ms. Edmiston?

15 MS. EDMISTON: No, Your Honor.

16 THE COURT: All right.

17 MR. FANNEY: I don't have any further
18 questions, I just want to be heard one more time
19 before you make a decision.

20 THE COURT: All right. Go ahead.

21 MR. FANNEY: Judge, again, if he wants to
22 testify about lay observations in terms of, you
23 know -- well, if he thinks that driving is indeed
24 something that's a factor he might be able to
25 testify to that; if he thinks the way he talked is

1 a factor he can certainly testify about that; if he
2 thinks something in the way he walked or followed
3 directions or complied -- or did anything other
4 than those two field sobriety tests, I think he can
5 talk about all those things, but now that he's
6 answered the question -- I mean, this is one of
7 those cases that falls in that range where he says,
8 "Well, we really can't tell a difference if it's an
9 .08 or if it's a .12 or if it's below an .08 based
10 on how he does on these tests, and I'm not really
11 qualified to tell you that because I've never
12 attended the school, I've never been properly
13 trained -- I'm hoping that the training that I got
14 was proper."

15 I think that is giving the State -- it is
16 allowing them to corroborate each of their theories
17 when the predicate evidence isn't there.

18 Again, we go back -- She's going to ask the
19 question "Is what he observed and talked about
20 yesterday, is it consistent with the reading that
21 we got in this case?" and he can say "Well, as to
22 some things that I know about in my personal
23 experience in terms of things that we might readily
24 observe in those folks, yes, but when it comes down
25 to those tests, no, because I don't know how to

1 interpret the tests, I've never been properly
2 trained in the tests, and I've already told the
3 Court that there's really no difference."

4 THE COURT: Well, I think you can ask him,
5 Madam D.A., about the individual tests he gave and
6 what -- you know, with regard to the Intoxilyzer,
7 but I don't think you can ask him generally
8 speaking whether the overall results are consistent
9 with a blood alcohol level.

10 I think you can ask him and see if he has an
11 opinion, lay or not, because, you know, I don't
12 know that he -- you know, I don't -- I mean, I
13 don't know that I think this is something that is
14 within an area of expertise; I think it's a very
15 subjective thing whether or not a person does well
16 on a performance test, and as he stated, he doesn't
17 know -- we don't know how much he drinks, how often
18 he drinks, what his baseline is, and whether or not
19 he does better on this performance test than other
20 people similarly-situated or does worse. I think
21 that if you want to ask him --

22 MS. EDMISTON: (Interposing) Your Honor, to be
23 clear, can I ask Mr. Glover when he's doing the
24 controlled drinking experiments and dosing people
25 and then having them blow into the Intoxilyzer 5000

1 -- which is the breath test that he's been accepted
2 as an expert in -- what physical observations of
3 those people that he makes, be it sweating, alcohol
4 odor, glassy eyes, slurred speech, and his
5 observations of how they perform field sobriety
6 tests -- whether they sway, whether they stumble?

7 These are observations that you don't have to
8 be an expert in administering the tests to see, any
9 -- you know, anyone can look at someone doing the
10 test and see a stumble or a sway. Can I ask him
11 about those observations that he makes?

12 MR. FANNEY: I'd say she got it right up until
13 the last bit, because lay opinion is common,
14 everyday experience, not something that's been
15 designed somewhere over studies, and there's been
16 no evidence in this case why those tests were
17 designed, the statistical reliability of them, how
18 they're to be properly interpreted and
19 administered.

20 It was never offered by the State for that
21 reason, never, and now she wants to use it for that
22 reason. If he wants to talk about lay observations
23 -- The officer said yesterday "Standing like this
24 is obviously not a normal thing, this is not what
25 people do every day, and we know from the evidence

1 in the case that he wasn't able to do this." And
2 so maybe he stumbled or he lost his balance.
3 Walking a tightrope line without using your arms to
4 balance is not a normal reaction, and now she's
5 asking him to say, "Oh, yeah, we see those things
6 in the people we dosed."

7 That's not what the evidence that's been used
8 here already is for. And he can talk about
9 whatever lay observations he sees.

10 I mean, if you want to get down to lay
11 observations versus expert opinion, we can look at
12 *State versus Strackfoose* [phonetic], which just
13 came out of the Court of Appeals, where we talked
14 about this issue, and basically it came out that,
15 you know, you can talk about -- if you asked him to
16 do something and he fell over you can talk about
17 it, because everybody knows if you fall over you're
18 drunk, but not whether or not you fail to walk heel
19 to toe and because you couldn't walk heel to toe
20 that you're impaired, or because you used your arms
21 to balance as a normal reaction you're impaired.

22 If somebody asked you to stand up and you fall
23 down, which I think is the language of the case,
24 obviously you can talk about that, but when you
25 start talking about how they do on the test and

1 what did the officer see, I think that creates a
2 problem. So lay observations, sure -- how did he
3 walk, how did he talk, how did he drive?

4 What about the answers that he gave to the
5 questions on the back of the form? What about his
6 demeanor, his attitude, the way he was dressed?

7 THE COURT: Let me say where I am on this,
8 Madam D.A. I think in order for him to testify
9 about observations, the odor of alcohol and how he
10 did on the tests, he would have to be able to give
11 some testimony that he observed those people prior
12 in a sober condition attempting to do those tests,
13 a person in a sober condition attempting to do the
14 tests and observing that person after consuming
15 alcohol and what that person did at that point --
16 not whether that person passed or failed but how
17 that person was able to perform the test after
18 consuming alcohol at this level that we're talking
19 about here.

20 Because I think without any observations prior
21 to he doesn't have any baseline to say whether or
22 not that person could've done the test at some
23 point.

24 MS. EDMISTON: And, Your Honor, I understand
25 that I can't ask Mr. Glover, based on your ruling,

1 to compare to this defendant.

2 THE COURT: Right.

3 MS. EDMISTON: I'm just talking about his
4 observations of people that he's encountered in his
5 controlled drinking studies and what he's observed
6 of them and not in comparison to this particular
7 defendant.

8 THE COURT: Right. The problem is that --
9 Here's the problem, that he has testified that he
10 has seen people who could do these things with
11 blood alcohol levels as low as .03, and so if
12 you're observing at a .03 then the question really
13 is whether -- if someone can't do it at a .03
14 whether having a .12 makes anything they did
15 consistent with .12 as opposed to .03, or as
16 opposed to .06, and that's really sort of up in the
17 air at this point.

18 MS. EDMISTON: Yes, sir.

19 THE COURT: Do you see where I'm going?

20 MS. EDMISTON: Yes, sir.

21 THE COURT: I think that's what Mr. Fanney's
22 point may be, is that there's not -- is what's the
23 baseline, is what is the baseline he's actually
24 using to form an opinion and is it something that
25 requires -- that an expert is able to do any more

1 so than a layperson.

2 MS. EDMISTON: Yes, sir.

3 MR. FANNEY: I understand your ruling, but I
4 just have one question. I mean, for him.

5 THE COURT: Okay.

6 FURTHER VOIR DIRE EXAMINATION BY MR. FANNEY:

7 Q Do you have that experience?

8 A What experience?

9 Q When you did these controlled drinking experiments
10 did you start with a baseline? Did you administer field
11 sobriety tests before anybody drank and then did them again?

12 A We have done that. We always do that. We do
13 observe the individuals. Obviously they start out with no
14 alcohol in them -- we confirm that before they get dosed --
15 and then we observe them. We progress the levels of
16 impairment.

17 Q You said observe the -- My question was how many of
18 those controlled drinking experiments involved the test being
19 done before anybody had anything to drink.

20 A SFST's being done?

21 Q Yes.

22 A I couldn't tell you. Half of them probably. I
23 don't keep a running log of what's going on in all of them.
24 But I always observe a person -- the people progress from
25 being unimpaired to becoming impaired.

1 Q And you mean just in terms of the regular -- or the
2 physiological aspects of impairment.

3 A Yes.

4 MR. FANNEY: Okay. Thank you. Judge -- I'm
5 sorry.

6 THE COURT: I think -- I don't think you can
7 ask him whether or not -- this blanket -- the whole
8 -- everything this officer observed is consistent
9 with the blood alcohol level --

10 MS. EDMISTON: I understand that, Your Honor.

11 THE COURT: I think you can ask him -- If you
12 want to ask him about specific tests, I'll rule on
13 them depending on whether or not there's an
14 objection to it, but I don't know that his -- I
15 mean, honestly I don't know that his opinion is as
16 valid as the officer's opinion in this case who
17 actually observed the situation and observed the
18 person in the car.

19 MR. FANNEY: And I appreciate that, Judge. I
20 can tell you now there are going to be some
21 objections to that, so I would like to, if I can,
22 get a ruling on whether or not it's going to be
23 allowed --

24 THE COURT: Why don't you go ahead and ask
25 whatever questions you think you might want to ask

1 with regard to that and let me see what they are.

2 VOIR DIRE EXAMINATION BY MS. EDMISTON:

3 Q In your controlled drinking studies do you start
4 with sober individuals who have not consumed any alcohol?

5 A Yes, we do.

6 Q And have you made observations of those subjects in
7 their sober condition?

8 A Yes.

9 Q And throughout the controlled drinking exercise do
10 you give the subjects increasing amounts of alcohol?

11 A They're dosed over about an hour window; typically
12 it's three doses.

13 Q And at the end of this exercise do you have them
14 blow into the Intoxilyzer 5000?

15 A Yes, we do.

16 Q And what observations have you made of your
17 subjects in the time that you are giving them this alcohol
18 over that time period?

19 A I observe a progression of cognitive impairment, in
20 other words, your thinking skills becoming impaired, their
21 ability to -- we observe slurred speech, we observe
22 difficulty in basically walking a certain amount of --
23 staggering or swaying, we see initially euphoria where people
24 tend to get happy and as the concentration starts going up
25 the euphoria tends to go down, and just inability to follow

1 directions, inability to perform divided attention tasks.

2 MS. EDMISTON: That's all, Your Honor.

3 FURTHER VOIR DIRE EXAMINATION BY MR. FANNEY:

4 Q What do you mean by "divided attention tasks"?

5 A Where you're required to do more than one thing at
6 one time. Driving is a divided attention task, following
7 instructions -- or listening to instructions and then
8 following those instructions is a divided attention task.

9 MR. FANNEY: That's all the questions I have.
10 If that's what it's going to be, then I don't have
11 a problem with that.

12 THE COURT: All right, all right. Bring the
13 jury back in.

14 (JURY ENTERS AT 10:43 A.M.)

15 THE COURT: Before we continue, members of the
16 jury, I want you to remember my admonition about
17 when we have these; if I send you to the jury room,
18 when you come back you're not to give the evidence
19 that you hear after you're sent out any more weight
20 than the evidence that you heard before, just treat
21 it as if you had been sitting here all along and we
22 just continued questioning throughout the morning.

23 So, all right, with that you may continue.

24 DIRECT EXAMINATION BY MS. EDMISTON CONTINUED:

25 Q Mr. Glover, when you do your controlled drinking

1 experiments, what condition are your subjects in when you
2 start?

3 A They are alcohol-free when they start.

4 Q And during the controlled drinking experiment what
5 do you do with your subjects?

6 A We calculate the amount of alcohol we're going to
7 give them, they're then given that alcohol, typically in
8 three doses over an hour period.

9 Q And at the end of that hour period what do the
10 subjects ultimately do?

11 A They will be breath-tested on the Intoxilyzer a
12 number of different times over the course of the evening.

13 Q And do you observe your subjects in their sober
14 condition?

15 A Yes.

16 Q And do you observe the subjects over the hour that
17 you're dosing them with alcohol?

18 A Yes, I do.

19 Q And what observations of the subjects do you make
20 during that hour when they're drinking alcohol?

21 A We see a change as the alcohol starts to get in the
22 system. We will see euphoria -- they tend to become happy --
23 some people become more talkative, we just see a general
24 progression of -- I'd say almost like a party attitude in
25 some of them. But then we start to see signs of impaired

1 cognitive skills, or impaired thinking skills.

2 Q And can you provide any specific examples of that?

3 A We will see them unable to follow instructions as
4 far as if we're looking at cognitive skills, an inability to
5 do a divided -- perform divided attention tasks, something
6 where they're required to think about two different things at
7 the same time -- those skills diminish as the alcohol
8 concentration goes up.

9 Q Do you make any other observations of their
10 physical body or characteristics?

11 A We start to see slurring speech, difficulty in
12 walking or swaying -- not staggering necessarily, like Otis
13 on Andy, but just a change in their ability to function.

14 Q Now returning back to the Intoxilyzer machine in
15 particular, you indicated yesterday that for each breath that
16 a subject gives, they give that breath for seven seconds,
17 correct?

18 A A minimum of seven seconds.

19 Q And that the machine is analyzing the breath 175
20 times during that seven seconds. Is that right?

21 A Yes. From the time that they start blowing until
22 the time that -- if we can look at seven seconds, until they
23 stop it's analyzed about a hundred and seventy-- it's about
24 35 times a second.

25 Q And at the end of the test there's a two-digit

1 number that's printed out on the test ticket, correct?

2 A Correct.

3 Q Can you explain to the jury how that two-digit
4 number is derived from all these tests?

5 A The instrument is looking at the results, and when
6 it's getting -- when they're getting into this last phase --
7 when it starts to plateau it doesn't go completely flat but
8 it's going to take an average in this window of the values
9 that it's measuring (indicating).

10 It can read out to three digits, which would be out to
11 here, as a level of precision, but by statute results are
12 always recorded just to two digits, and so if there was a
13 value here it's simply dropped off, it's not rounded up or
14 rounded down, it's just like covering it up with my finger,
15 it just doesn't exist (indicating).

16 Q And does that procedure give a reading that goes in
17 favor or against a higher alcohol reading?

18 A Well, if we have a result where this third digit
19 was a "9" that "9" would be covered up, and so that would
20 reflect a lower number. If you were going to do it normally
21 where you would round up, obviously that would give a higher
22 one, but since this one is dropped off there's no weight
23 given to that value.

24 Q And you mentioned that diabetes can cause a change
25 in the Intoxilyzer's reading of breath alcohol. Is that

1 right?

2 A Well, if a person has acetone on the breath the
3 instrument can detect that, and it will subtract that value
4 out if it's present.

5 Q Are you aware of any other chronic illnesses or
6 conditions that a person may have that would prevent the
7 Intoxilyzer from giving an accurate measure of the
8 concentration of alcohol in the breath?

9 A No.

10 Q And you indicated that some regurgitation or
11 vomiting might create mouth alcohol. Is that right?

12 A Well, if you have raw alcohol still in your stomach
13 there's the potential for that, but since the instrument is
14 monitoring the slope of that line as it goes up, if it sees
15 it go up and come back down then it's going to flag that as
16 an invalid sample.

17 Q Have you heard of something called acid reflux?

18 A Yes, I have.

19 Q Do you know generally what that is?

20 A Yes.

21 Q And are you aware of whether or not that condition
22 of acid reflux affects the Intoxilyzer's ability to measure
23 someone's breath alcohol?

24 A There's a study that was conducted on
25 gastroesophageal reflux disease, which is the stomach

1 contents coming up, where individuals were dosed and they --
2 these were people who were going to undergo surgery to fix
3 that, and so they put a device around them that was basically
4 used to air -- to kind of punch them in the stomach and force
5 some contents up and then breath-test them, and the study
6 that was conducted indicated that it did not influence their
7 breath test results.

8 Q Do you know about when that test was done -- that
9 study was done?

10 A When the study was done? It was published in 1998.
11 It was conducted by a number of people, including Dr. Wayne
12 Jones.

13 Q Are you familiar with Dr. Jones, who he is?

14 A Dr. Jones is probably one of the most foremost
15 people in alcohol testing in the world, has probably between
16 250 and 300 publications now on alcohol testing in humans.

17 MS. EDMISTON: That's all for this witness,
18 Your Honor.

19 THE COURT: All right. Cross-examine.

20 MR. FANNEY: Yes, Your Honor. Thank you very
21 much.

22 CROSS-EXAMINATION BY MR. FANNEY:

23 Q Mr. Glover, good morning.

24 A Good morning.

25 Q I'm John Fanney. I want to ask you some questions

1 based on your testimony here today, and if you don't
2 understand my question, sir, please just let me know and I'll
3 try to rephrase it so that you do.

4 You've been here in North Carolina working in the breath
5 testing branch for I think you said about nine years.

6 A Correct. Started my ninth year in September.

7 Q Okay. And in your nine years what were your
8 various duties?

9 A I was initially hired as research scientist and
10 training specialist -- they did not have one in the branch at
11 that time. That was a grant-funded position, and in that
12 position I was reviewing literature, scientific literature,
13 dealing with breath and blood testing for alcohol and drugs
14 and conducting in-service training for field staff -- I have
15 fourteen field staff who do the training on the Intoxilyzer.

16 I also was to evaluate the SBI agents who wanted to get
17 a permit to analyze blood. That was my primary function the
18 first two and a half years. I then became the assistant
19 branch head so I had more administrative duties, but I still
20 had all of the other original duties.

21 Q Okay. And in that nine years how many Intoxilyzer
22 5000 machines has the State acquired that you're aware of?

23 A How many have we acquired during that time?

24 Q How many have you purchased in the nine years
25 you've been there?

1 A Probably a hundred. We have units that are at test
2 sites for people to use, training units. We have I think
3 about 350, and we purchased about a hundred during that time.

4 Q Okay. When was the last time the State purchased
5 an Intoxilyzer 5000?

6 A I don't know the date. Sometime in the last couple
7 years.

8 Q In the last couple of years, okay. And when you
9 purchase one, I'm sure you inspect it when it comes in.

10 A Yes.

11 Q And you're familiar with the paperwork that comes
12 with it?

13 A Well, to a certain extent.

14 Q I mean, it comes in a box from the factory, right?

15 A Yes, it does.

16 Q Okay. And it comes with paperwork.

17 A Some papers.

18 Q I mean, when you buy any device it comes with
19 documents, correct?

20 A Correct.

21 Q So then you're familiar with the warranty that the
22 manufacturer gives on this machine.

23 A Yes.

24 Q Okay. And you're familiar, then, that the
25 manufacturer of this device does not warrant it for any

1 particular use.

2 A I believe that's correct.

3 Q And in your time as head of the forensic testing
4 branch you've been involved in some other -- well, national
5 organizations, correct?

6 A Yes, I have.

7 Q What are those organizations again?

8 A The International Association for Chemical Testing
9 and the International Council on Alcohol, Drugs & Traffic
10 Safety.

11 Q And is that organizations where folks such as
12 yourself go and meet and discuss issues and --

13 A Yes.

14 Q -- talk about things?

15 A Yes.

16 Q Okay. And in meeting people from other states, I
17 assume that's what you've done at these seminars.

18 A Correct.

19 Q And you've talked with folks from other states.

20 A That's correct.

21 Q Okay. About their breath testing programs.

22 A A good bit of talk about them, yes.

23 Q And of course you're aware from those conversations
24 that -- you know that several states use the Intoxilyzer
25 5000.

1 A Yes. There are about 44 states and 12 foreign
2 countries that use the Intoxilyzer. There are a few states
3 who have gone on to other instruments, but I think now there
4 are probably between 25 and 30 states that are still using
5 the Intoxilyzer 5000.

6 Q And you're aware from those discussions and the
7 other states that have gone on to other machines that there
8 are other machines out there.

9 A There are other instruments out there. Just like
10 there are Fords and Chevys, there are other people who
11 manufacturer breath-testing instruments.

12 Q And you're also aware that a number of states are
13 going to other models of the Intoxilyzer.

14 A There are a number of different models out there.
15 Sometimes the -- either a foreign country or a state may have
16 a specific requirement on an instrument and so the
17 manufacturer will build it to whatever their requesting.

18 Q Okay. Well, at one time -- or maybe we still are,
19 but wasn't North Carolina approved to use a device I think
20 called the Intoxilyzer 4011?

21 A I believe at one time it was 4011, 4011-AS. There
22 are a number of -- Intoximeter 3000, Breathalyzer 900, 900-A.

23 Q Okay. And there are now several versions of the
24 Intoxilyzer that you know about which have gone beyond the
25 Intoxilyzer 5000 in terms of its title, what it's called.

1 A In terms of what?

2 Q In terms of what it's called, the model number.

3 A Well, there's the Intoxilyzer 8000, there's --
4 again, time goes by and new models come out.

5 Q Okay. Now, you're also aware -- Now, you talked
6 about -- Well, let me back up. You talked about how the
7 machine functions, about how the test sequence works, and,
8 you know, we've come in and we've purged the sample chamber,
9 then we run a calibration, we purge it again and we run a
10 test, we purge it again, we run another test, we purge it and
11 then it gives the result, correct?

12 A Correct.

13 Q In your experience as head of the forensic testing
14 branch you're aware of all the rules and regulations relative
15 to the administration of the Intoxilyzer, right?

16 A Well, I'm not the head of the branch.

17 Q Oh, I'm sorry.

18 A I haven't gotten that far along. I am familiar
19 with the rules and regulations. I don't have them committed
20 to memory, but I am familiar with them.

21 Q All right. Well, you're familiar with the rights
22 that are read to folks when they're charged with --

23 A Yes.

24 Q -- implied consent offenses which trigger folks
25 going to your agents and having them take these tests.

1 A Correct.

2 Q And you were here yesterday when Agent Dodd
3 testified about the rights that she read.

4 A Correct.

5 Q And she read -- The last right is that the person
6 who is being tested has the right to get additional tests.

7 A That's correct. They do.

8 Q The Intoxilyzer that we use doesn't preserve a
9 sample of the person's breath, does it?

10 A No, it does not. There's no requirement in our
11 state for sample capture; sample capture is I think done in
12 one or two states at this point.

13 Q But you do know from your experience that even
14 though it's not required it's a relatively inexpensive thing
15 to do.

16 A It is an inexpensive thing to do. But the studies
17 that were done quite a few years ago by Dr. Dubowski where
18 they captured a sample and then analyzed that sample and had
19 space gas chromatography confirm that the concentration of
20 alcohol in that captured sample was the same as what the
21 Intoxilyzer had reported, so there's not much value in
22 capturing a sample.

23 Q Okay. But yet if someone were going to exercise
24 that right they couldn't come to the State and say, "Hey,
25 give me the evidence that you have against me so I can go out

1 and get my own test."

2 A You mean to give that actual breath sample to them?

3 Q (Counsel nods affirmatively)

4 A No. But they can certainly go have blood drawn and
5 have their own tests done.

6 Q Uh-huh (affirmative). Now, the test that you -- or
7 the study you just referred to with Dr. Dubowski --

8 A Yes.

9 Q -- that's Kurt Dubowski.

10 A Correct.

11 Q Okay. And he's another well-recognized and
12 respected individual in the field of breath testing.

13 A Yes, he is.

14 Q Okay. That study, what was the name of that study?

15 A I don't have it committed to memory. It was done I
16 want to say sometime in the late Eighties. And he and I had
17 a discussion about that particular study about six weeks ago
18 at our board meeting, but I don't have the title.

19 Q And that study, they just analyzed what was in that
20 little capsule, right?

21 A A person would blow and at some point they would
22 have the sample blown into a glass vial that was sealed up
23 and then they would analyze the contents of that breath that
24 was in the vial.

25 Q So that study, then, didn't do any comparison of a

1 person -- with alcohol that might be in that person's body,
2 right?

3 A In their body. You mean with respect to blood?

4 Q Yes.

5 A I don't know that that one did. In North Carolina
6 we don't have to compare breath to blood. We have a statute
7 that requires either a breath alcohol concentration or a
8 blood alcohol concentration, and so we don't do any
9 comparison of the two.

10 Q But physiologically speaking, or as far as alcohol
11 affects the body, it's the alcohol in the bloodstream that
12 causes impairment, correct?

13 A No, it's not. It's the alcohol that's in the brain
14 that causes the impairment. To get the best measure of the
15 amount of alcohol, with respect to that the best thing to do
16 would be to get a sample of brain tissue to find out how much
17 alcohol is in that person's brain. That's a procedure that's
18 not realistic.

19 Q Of course. And, of course, alcohol gets to the
20 brain, just like it gets to the lungs and everywhere else,
21 through the bloodstream.

22 A That's correct.

23 Q So since we're a breath state, I guess is what
24 you're saying.

25 A We're a breath and a blood state. We can test

1 somebody's blood by sending it to the SBI, or the breath can
2 be tested at different sites where the Intoxilyzer is.

3 Q But then if there's a breath test we apply a breath
4 standard, if there's a blood test we do a blood standard.

5 A That's correct.

6 Q Okay. So that's why it's important for you to get
7 a -- I think what you called yesterday a deep lung air
8 sample?

9 A Yes.

10 Q Tell me why that is.

11 A We want to get a deep lung sample because the air
12 in the mouth and upper airway doesn't have as much alcohol in
13 it and we want to get a concentration -- or a breath sample
14 that's going to have a concentration of alcohol that is
15 consistent I'll say with the alcohol that the person has
16 consumed.

17 Q Isn't a deep lung sample what you would also call
18 an alveolar sample?

19 A Yes.

20 Q And can you tell me where the term "alveolar
21 sample" comes from?

22 A Well, that's a portion of the lung where exchange
23 of oxygen and CO2 occurs, and that's where alcohol would be
24 coming out of the body.

25 Q Okay. So the closer the breath -- or the sample

1 that you get that comes from way down in the lungs, the
2 assumption is that the more true reflection that is of the
3 alcohol that's present in the body?

4 A It's more representative of the alcohol that was
5 consumed by them. When you a dose a person to a certain
6 amount and you want to see how much alcohol is in them, we
7 want the deep lung sample.

8 Q And when you analyze this deep lung sample -- I
9 think you said it analyzes about 175 times per sample --

10 A Over -- It's about 35 times per second, a seven-
11 second blow. It's about 175 -- It depends. If a person
12 blows longer, then obviously there are going to be more
13 analyses made.

14 Q And that analysis is when the device is looking for
15 that rise that you were talking about?

16 A It's not -- Well, it's monitoring the rise but it's
17 looking for when it's going to plateau out, or start to level
18 off. Like I said, it doesn't truly level off, it's got a
19 little bit of slope to the line. But that's when -- where we
20 want to take the sample.

21 Q And does the machine record those results, all
22 those 175?

23 A No. No, it does not.

24 Q What does it do with them?

25 A It measures, measures, measures. I don't know --

1 It doesn't take all of those. It ends up measuring all that
2 time, and it gets to a particular point and when it sees that
3 the level starts to do that (gesturing) then it looks at a
4 series of the measurements and says, "Okay, I'm satisfied
5 this is the concentration." But the numbers are not stored,
6 just the final result is stored.

7 Q Just the final result. So what we get out of 175
8 analyses is one sample every time somebody blows.

9 A I wouldn't say that it's one sample, because it has
10 to be satisfied that the concentration has started to plateau
11 out, and it uses a range of those to evaluate whether the
12 slope has stopped climbing and has leveled out.

13 Q Now, that slope, is that what's commonly referred
14 to as a slope detector?

15 A A slope detector is -- it's not a device. A slope
16 detector is the fact that the instrument is analyzing and
17 it's measuring this slope, so it's a change in concentration
18 over time and this is the slope that it's looking at. It's
19 not a separate device, as a lot of people tend to think it
20 is, it's a way of describing what it's doing.

21 Q So it's part of the computer program.

22 A Yes.

23 Q Okay. And as you -- Just to make sure I understand
24 what you just said, that is part of that 175 analyses, it's
25 looking for the slope.

1 A It's monitoring the slope.

2 Q Okay. And when it gets to the point where it
3 thinks it's satisfied, that "Hey, I've got a deep lung sample
4 and this is not a mouth alcohol sample," it takes a picture
5 basically --

6 A Correct.

7 Q -- and says, "This is what I think the
8 concentration is."

9 A Correct.

10 Q Okay. Now, that assumes some constants, doesn't
11 it?

12 A What constants would you be assuming?

13 Q Does it not assume a constant in the body
14 temperature, in a person's body temperature?

15 A We see that there is a range of body temperature, a
16 range of breath temperature, but it's a rather narrow range,
17 and it does not factor in what the temperature is.

18 Q So it does not factor in body temperature.

19 A No, it does not.

20 Q And it does not factor in breath temperature.

21 A No, it does not.

22 Q How about the composition of a person's blood?

23 A Their hematocrit?

24 Q Yes.

25 A No, it does not look at their hematocrit.

1 Q Okay. Now, you talked a little bit about how the
2 machine detects the mouth alcohol --

3 A Yes.

4 Q -- and how it's insured that it can detect mouth
5 alcohol.

6 A Yes.

7 Q Can you -- What studies were you referring to about
8 that? I think you said that there were some studies done.

9 A Patrick Harding with the Wisconsin program did
10 studies some probably ten, twelve years ago where they were
11 letting people swish brandy in their mouth -- and this was
12 with and without dentures, with and without adhesives and
13 other things that are used to make dentures stay in to see if
14 there was any problem with respect to dentures, but also it
15 was able to show that the rate that it's dissipated.

16 Q Okay. Is that the only study you're aware of?

17 A It's the only one that I can recall right off the
18 top of my head.

19 Q Okay. And I believe you said in that study the
20 slope detection -- or mouth alcohol detection was premised on
21 people who did not have alcohol in their system.

22 A Well, that wasn't so much to look at the slope
23 detection so much as it was to see when the alcohol was going
24 to be gone from their mouth.

25 Q Okay. So you're not aware of any studies about

1 the testing of the slope detection.

2 A No.

3 Q Okay. Does the theory behind the Intoxilyzer -- In
4 terms of how the breath comes in, what kind of breath is
5 received, deep lung air --

6 A Okay.

7 Q -- does that theory assume that the deep lung air
8 stays the same as it travels out of the lungs? In other
9 words, that the concentration doesn't change, the alcohol
10 concentration doesn't change as it travels out of the lungs?

11 A I don't know that it considers that. We really
12 don't care what's happening as that breath is coming out. I
13 know that there are some theories out there that have been
14 promulgated through mathematical models that deal with the
15 mucous in the trachea, the mucous in the mouth and exchange
16 of the alcohol from the -- as the air is coming out and if
17 there's exchanging between these different surfaces.

18 Ultimately what we care about is this breath and the
19 concentration of the alcohol once it gets here; if it starts
20 out one way here and gets modified some way here and it's
21 modified someplace here (indicating), we don't really worry
22 about that, it doesn't matter; it's this air that comes out
23 that we care about.

24 Q Okay. So if you don't care about any modifications
25 along the way, then you don't care if some other alcohol

1 that's perhaps present in the mouth gets mixed in with the
2 sample, or the vapors of alcohol. You don't care about that.

3 A Well, that just becomes part of the whole mix. We
4 know that, as I said yesterday, alcohol goes through the
5 water -- is in the water-containing tissues in the body.
6 That means a person who is drinking alcohol -- And let's say
7 it's an hour and a half after their last sips so there's no
8 residual mouth alcohol. There is going to be some alcohol in
9 their saliva.

10 There are little kits you can buy at 7-Eleven, touch
11 your tongue, wet it, and it'll give -- supposed to give you
12 an idea of how much alcohol may or may not be in you. The
13 kits aren't very reliable, but clearly there's going to be
14 some alcohol in the saliva. Again, we're looking at the
15 ultimate sample that we get.

16 Q Okay. So if someone were to regurgitate and for
17 some reason the slope detection program in the computer
18 didn't pick up on that and then that person rendered a
19 sample, what you're saying is that doesn't matter, that the
20 person was just unfortunate enough to regurgitate and give
21 the sample, it's just stuck with what they've got.

22 A What do you mean by the slope detection didn't
23 detect it?

24 Q Well, for whatever reasons the slope detector
25 didn't catch the drop-off point, it didn't catch the fact

1 that it's not reading like mouth alcohol, it's reading like
2 the plateau that you referred to when it assumes you're
3 giving a lung sample, a pure lung sample.

4 A Well, the slope detector is not a separate device.
5 Like your microwave is here and your refrigerator is here, we
6 don't have a thing here that's called a slope detector and
7 the rest of the Intoxilyzer is over here (indicating).

8 The slope detector is really -- describes a process. If
9 the instrument is functioning -- If it's gone through its
10 diagnostic test, if it's gone through calibration
11 verification, then the instrument is working properly and it
12 will detect the slope as the concentration is going up.

13 It's not like a light bulb that could burn out and we
14 would still go ahead and get a test; it's just not that way.

15 Q All right. I'm sure you didn't mean to, but I
16 don't think you answered my question.

17 A I answered what I thought you were asking.

18 Q Okay. But based on what you said earlier, my
19 question is if it doesn't detect -- or read it as mouth
20 alcohol, if it reads it as some other way, the person who
21 introduced a substance from somewhere other than their lungs
22 and somehow it became interwoven with the breath sample,
23 you're telling the jury that "Tough luck, all we care about
24 is the number that we get after you blow into the machine."

25 A That's not what I'm saying. And you can't just

1 kind of mythically say, "The slope detector didn't -- wasn't
2 functioning." If the instrument's functioning the instrument
3 is functioning. We breathe through our trachea, we don't
4 breathe through our esophagus -- stomach contents would come
5 up through the esophagus.

6 Q And that study you referred to about how acid
7 reflux, gastroesophageal reflux disorder, how all that
8 affects, that was -- how many subjects were in that study?

9 A I'll have to look and see because I don't recall.

10 (WITNESS REVIEWS DOCUMENT)

11 A Five males and five females.

12 Q Ten people.

13 A That is correct.

14 Q Okay. And there's another study out there on this
15 subject by Gullberg, correct?

16 A By whom?

17 Q Gullberg. G-U-L-L-B-E-R-G.

18 A On gastroesophageal reflux? He may have done one,
19 but I don't recall it.

20 Q Okay. Based on your knowledge as a research
21 scientist, studying ten people and drawing a conclusion,
22 that's a pretty small sample of the available population,
23 isn't it?

24 A It is a small sample. But when you're doing human
25 studies there are lots of ethical considerations that come

1 into play, and so people do what they can with the subjects
2 that they're able to find.

3 There have been no other studies with fewer or more
4 people that have said that gastroesophageal reflux disease
5 does have an effect, so this is the standard at this point,
6 and has been -- like I said, it was published in 1998.

7 Q Do you have that article in front of you?

8 A Yes, I do.

9 MR. FANNEY: May I approach the witness, Your
10 Honor?

11 THE COURT: Yes, uh-huh.

12 (COUNSEL REVIEWS DOCUMENT)

13 Q In that study is there any time period or ever a --
14 Well, I guess that's not relevant because we don't compare
15 breath to blood, right?

16 A That's correct.

17 Q But in that study there were some times where the
18 actual breath sample collected, because of the onset of
19 gastric reflux, was actually higher than what was truly in
20 the blood, right?

21 A That's correct.

22 Q Now, if it doesn't matter about mouth alcohol or
23 regurgitation -- Well, let me say that again. If it doesn't
24 matter that the person regurgitates, why do we have a 15-
25 minute observation period?

1 A To insure that the person hasn't -- doesn't have
2 anything remaining in their mouth. It may seem more like
3 a -- I'd say a formality, because most of the time when a
4 person is arrested for DWI we've got -- they're deprived of
5 access to anything to drink at the time they are stopped and
6 we can see an hour or more before they're even able to breath
7 test them, so there's been a big deprivation period.

8 Because there have been in the past issues raised about
9 whether a subject put a penny in their mouth or whether a
10 subject -- all kinds of issues that would get raised at trial
11 saying "Well, this may have affected the case," we end up
12 with a very formal observation period where they're not
13 allowed to put anything in their mouth.

14 Q Okay. And I believe you said that here in Wake
15 County we run a lot of tests.

16 A About 4,500 a year.

17 Q And how many machines are here?

18 A Excuse me?

19 Q How many machines do we have here in Wake County?

20 A There are four instruments.

21 Q Over at CCBI, over in the Wake County jail?

22 A Correct.

23 Q And if there's a lot of tests run -- Well, at 4,500
24 tests, that's a little over -- maybe on the average a
25 thousand tests per machine?

1 A Some of them get used more than others. Sometimes
2 people like to go to the first one or the third one. But
3 pretty much a thousand per instrument.

4 Q Okay. That's somewhere two to three a day on the
5 average?

6 A It would be.

7 Q And I believe that if you experience running a lot
8 of tests it's recommended that you leave the machine on. Is
9 that correct?

10 A It depends on the facility as to whether or not
11 they leave them on or if they turn them off. Again, a high-
12 volume site like Wake County on a Friday or Saturday night,
13 they would probably leave them on, but Ocracoke Island,
14 they're not going to leave it on, it might be a week or two
15 weeks before they get another subject.

16 Q Do you know what the practice is here in Wake
17 County through your experience in the forensic testing
18 branch?

19 A Well, I've not gone over to monitor what they do.
20 If someone knows that they're going to be doing more tests
21 then they'll leave it running; if there's nobody waiting and
22 nobody coming in they have been instructed in the past to
23 turn them off. Again, it just depends on the demand at that
24 test site at that particular time.

25 Q And as I understand it, the diagnostic that the

1 machine runs -- like you said, it runs a diagnostic?

2 A Yes.

3 Q And that happens when you turn the machine on,
4 correct?

5 A It happens when you turn the machine on -- or the
6 instrument on. But it also performs a diagnostic before a
7 test is run, so it's going to check certain parameters when
8 someone is going to -- When you're going to do a test there's
9 a period before the subject can blow where if they blow it
10 will invalidate the test, and during that window, maybe eight
11 seconds before they're instructed to blow, the instrument
12 evaluates the stability of the components in there before the
13 test is done.

14 MR. FANNEY: Okay. Just one second, Your
15 Honor.

16 THE COURT: Sure.

17 MR. FANNEY: All right. Thank you, Mr.
18 Glover. I don't have any further questions.

19 THE COURT: Any redirect?

20 MS. EDMISTON: Briefly, Your Honor.

21 REDIRECT EXAMINATION BY MS. EDMISTON:

22 Q Mr. Glover, can you tell the jury why the
23 Intoxilyzer 5000 doesn't factor in body temperature and
24 breath temperature and this hematocrit?

25 A Well, for a number of reasons. With respect to

1 hematocrit, that would be -- that's a blood issue -- we just
2 -- it's not something that we would be able to do, and it's
3 not significant.

4 As far as body temperature or breath temperature, there
5 have been concerns in the past about whether or not that
6 would influence a test.

7 There is a state where they have monitored breath
8 temperature and made corrections on the results. That
9 process is similar to ours in that they did two tests. They
10 do -- When a person is charged, if there's a difference in
11 the two they're charged with the lower of the two, and they
12 also truncate the third digit like we do.

13 What they have observed since they've been monitoring
14 and correcting for breath temperature is that -- When they do
15 this final truncation they take the lower of the two tests,
16 if there's a difference. They don't see an effect; in other
17 words, it doesn't ultimately change the final result. This
18 is in testing people that have been charged with DWI. And so
19 it's just not necessary.

20 Q Is there anything that you observed on State's
21 Exhibit Number 4, the test ticket, that would indicate to you
22 that any part of the machine was not working properly on July
23 18th, 2003?

24 A No. Everything was fine.

25 Q Does that include the part of the computer program

1 that's the slope detector?

2 A Well, that's part of what analyzes the -- And
3 again, the slope detector is more of a concept than it is an
4 entity. But we would not have gotten a completed test record
5 ticket if there was a problem.

6 MS. EDMISTON: That's all, Your Honor.

7 MR. FANNEY: I just have one or two questions.

8 THE COURT: Yes.

9 RE-CROSS-EXAMINATION BY MR. FANNEY:

10 Q Your statement was that you would not have gotten a
11 breath sample if the slope detector had not been working
12 properly?

13 A We would not have gotten a result.

14 Q Okay. Assume that the slope detector would have
15 had to read mouth alcohol, in other words, if it had just
16 failed to read mouth alcohol it would still give you a
17 sample.

18 A Well, the instrument -- That's not a correct
19 statement. The instrument measures alcohol, and it doesn't
20 look at it as this molecule came from the mouth and this one
21 came from down in the lungs.

22 It's not going to do anything like that. It's measuring
23 the concentration of alcohol that's being blown into the
24 instrument -- if it sees it go up and level off that
25 satisfies the requirements of the instrument.

1 Q Okay. So it can't distinguish where those
2 molecules come from.

3 A That's correct. But if there was raw alcohol in
4 the mouth then you'd get the spike and it comes back down,
5 because as you're blowing you're blowing out high
6 concentrations of alcohol and then that concentration would
7 start to fall very quickly; you're essentially evaporating it
8 off the inside of your mouth, if it was raw alcohol it would
9 spike like that (demonstrating). That's not a characteristic
10 of air alcohol coming from deep in the lungs.

11 Q And that comes from the study that you talked about
12 where you checked the slope detector and they just swished it
13 in their mouth and spit out, correct? And that's supported
14 by this study, right?

15 A The study supports -- That study supports the fact
16 that it dissipates very quickly, in a matter of ten
17 minutes -- we have a 15-minute observation period -- that it
18 dissipates quickly.

19 The fact that it monitors it and it sees it go up and
20 come back down, we can demonstrate -- And we do routinely
21 demonstrate it by wetting our tongue with alcohol, blow in
22 the instrument, you can set it up to display its reading, and
23 you'll see the reading go up and then back down. That's
24 something that we check all the instruments for on a regular
25 basis.

1 Q Where do those checks take place?

2 A They are done at the test site, they're done in the
3 electronics shop before -- If an instrument has a component
4 that fails, it has a motor that burns out, a light bulb that
5 burns out, it's taken to our electronics shop.

6 It's gone through, whatever was broken is fixed, it's
7 set to factory specifications, and then they go through a
8 whole series of tests on it, which include checking it for --
9 to show that it can detect mouth alcohol, it can detect
10 acetone, that it's linear -- in other words, it responds the
11 same if it's a .04, .08, .16, .24, .32.

12 We look at it over that whole range of alcohol
13 concentrations. And that's all done in the electronics shop.

14 Q All right. And some of these other slope detection
15 tests are done out in the field?

16 A Yes.

17 Q And those slope detection tests aren't done by your
18 technicians -- well, they are done by your technicians?

19 A Yes.

20 Q While they're working for the State.

21 A Yes.

22 Q So they would not have been consuming alcohol when
23 they did those slope detection tests, would they?

24 A I would hope not.

25 MR. FANNEY: That's all the questions I have.

1 Thank you, sir.

2 THE COURT: Any redirect?

3 MS. EDMISTON: No, sir.

4 THE COURT: All right, sir. You can stand
5 down. We're going to take our morning recess.
6 Remember not to form any opinions as to the guilt
7 or innocence of the defendant; he is presumed to be
8 innocent until proven guilty beyond a reasonable
9 doubt, and you've not heard all the evidence nor my
10 instructions on the law.

11 So keep that in mind, and we'll take a recess
12 until twenty minutes till twelve -- or ten minutes
13 till twelve -- I'm sorry -- 12:50 -- 11:50.

14 [THE TRIAL RECESSED AT 11:32 A.M., AND RECONVENED AT 11:55
15 A.M. WITH THE DEFENDANT AND HIS ATTORNEY PRESENT IN THE
16 COURTROOM]

17 (JURY ENTERS AT 11:56 A.M.)

18 THE COURT: Will there be additional
19 witnesses?

20 MS. EDMISTON: No, Your Honor. And the State
21 would ask that Mr. Glover be excused.

22 THE COURT: Mr. Fanney? If there's a doubt
23 then --

24 R. FANNEY: No. I think I'm fine with that,
25 Judge. I appreciate it.

1 THE COURT: You sure?

2 MR. FANNEY: I just wanted to think about it
3 for a second before I told you. I'm fine with him
4 being excused.

5 THE COURT: All right. And where are you
6 located, Mr. Glover? In Raleigh?

7 MR. GLOVER: Yes, sir.

8 THE COURT: So if for some reason Mr. Fanney
9 changes his mind I guess we could -- with some
10 delay we could get you back here?

11 MR. GLOVER: I'll be here for a while, but if
12 I leave -- I was supposed to be off today and was
13 actually supposed to be in Williamston and --

14 THE COURT: Oh, I see. .

15 MR. GLOVER: -- when I leave I will be --

16 THE COURT: Oh, you're going to Williamston.
17 Okay. Now, are you sure you're --

18 MR. FANNEY: I'm fine with that.

19 THE COURT: Because that's a drive. That's
20 halfway to -- That's a long way. Okay. Will there
21 be further evidence for the state of North
22 Carolina?

23 MS. EDMISTON: No, Your Honor. The State
24 rests.

25 THE COURT: All right. Will there be

1 evidence for the defendant?

2 MR. FANNEY: There will be evidence for
3 the defendant, Judge, and before that there is a
4 matter we need to take up for the record.

5 THE COURT: All right. Members of the
6 jury, don't hate me, now. I need to send you back
7 for just a minute. I see that look on your faces,
8 but it's just part of the procedure.

9 (LAUGHTER)

10 I promise this won't be very long, but, you
11 know, it's not something that I can -- It's
12 something I can anticipate, but it's just part of
13 the procedure. Sorry.

14 (JURY EXITS AT 11:57 A.M.)

15 MR. FANNEY: Judge, obviously at this
16 time we would move to dismiss the charge of driving
17 while impaired, both under the appreciable
18 impairment prong and the breath reading prong, and
19 I would just rely on the evidence as presented.

20 I would renew my motion to exclude the breath
21 test on the basis of voir dire testimony and ask
22 you to revisit that, if for no other reason, not
23 submit the eleven prong of the statute to the jury.

24 THE COURT: All right. Anything you'd like to
25 say, Ms. Edmiston?

1 MS. EDMISTON: Your Honor, at this point the
2 evidence seen in a light most favorable to the
3 State does not require dismissal at this point, and
4 I'd ask that you deny his motion to dismiss and
5 deny his motion to suppress the Intoxilyzer.

6 THE COURT: At this juncture, at the close of
7 the State's evidence, the motion to dismiss as to
8 each prong of the charge of driving while impaired
9 due to an impairing substance is denied, as is the
10 motion to suppress the Intoxilyzer result.

11 Will there be evidence for the defendant?

12 MR. FANNEY: There is. There will be, Your
13 Honor.

14 THE COURT: All right. Are you ready to
15 proceed?

16 MR. FANNEY: Yes, sir.

17 THE COURT: All right. Go and bring the jury
18 back.

19 (JURY ENTERS AT 11:59 A.M.)

20 THE COURT: Will there be evidence for the
21 defendant?

22 MR. FANNEY: Yes, Your Honor, there will.

23 THE COURT: You may proceed.

24 MR. FANNEY: Thank you, Your Honor. At this
25 time we'd call Dr. Michael Hlastala.