

1 Mr. Morgan?

2 MS. DUFFY: Asked and answered.

3 THE COURT: Overruled.

4 WITNESS: We'd have to process them, yes, sir.

5 MR. GIBSON: Thank you, Judge Spainhour.

6 THE COURT: All right. Anything further?

7 MS. DUFFY: I have nothing further.

8 THE COURT: All right, sir. You may step down.

9 (Whereupon, the witness left the stand.)

10 THE COURT: Further evidence?

11 MS. DUFFY: Yes, Your Honor. I'd like to call
12 Paul Glover.

13 THE COURT: Okay.

14

15 PAUL L. GLOVER, a witness called by the State,
16 having been first duly sworn to tell the truth, was
17 examined and testified as follows:

18

19 DIRECT EXAMINATION

20 BY MS. DUFFY:

21 Q Good morning, Mr. Glover.

22 A Good morning.

23 Q Would you state your name for the Court please.

24 A My name is Paul L. Glover.

25 Q And where are you employed?

1 A Forensic Tests for Alcohol Branch.

2 Q And what is your position within the Branch?

3 A I'm a training specialist and research scientist.

4 Q Could you describe briefly your academic background.

5 A I have a B.S. in Biology from Florida State University
6 that I got in 1974 and a Master's in Biology that I got at
7 Florida State University in 1978.

8 Q And what about your employment history subsequent to
9 your academic career?

10 A I was a research scientist at Oak Ridge National
11 Laboratory for seven years; research scientist at National
12 Institutes of Environmental Health Sciences for five years;
13 research scientist at Burroughs Wellcome Pharmaceutical for
14 seven years; been a reserve police officer since 1986. I
15 was a full time police officer for Durham for about nine or
16 ten months prior to my coming to the Branch.

17 Q And have you previously testified in DWI cases, or any
18 other types of cases for that matter, as an expert witness?

19 A Yes, I have.

20 MS. DUFFY: Your Honor, I would proffer Mr. Glover
21 be accepted as an expert witness.

22 THE COURT: Any voir dire on that? I believe he's
23 testified before, has he not?

24 MR. GIBSON: He has and I would just renew my
25 objection. I would need to review his background

1 before I could accept him but --

2 THE COURT: Well, I believe you've seen him before
3 on that issue. Objection overruled. Do you wish to
4 voir dire on that?

5 MR. GIBSON: I do not, Your Honor, because I'm not
6 prepared to because I didn't know he would testify to
7 have his background to go into it. If we'll do as we
8 did with the other witness, defer it. I don't expect
9 it will be a problem.

10 THE COURT: All right. The Court will accept him
11 as tendered, he may express an opinion in the field of
12 -- what?

13 MS. DUFFY: The Intoxilyzer 5000 or alcohol
14 testing in general.

15 THE COURT: All right. An expert in the field of
16 alcohol testing in general and in the operations of the
17 Intoxilyzer 5000. Now, that's based in part upon
18 previous testimony, as I recall he previously testified
19 before me in this very case.

20 WITNESS: Yes, sir.

21 THE COURT: Go ahead.

22 MS. DUFFY: Yes, Your Honor. May I approach?

23 THE COURT: Yes.

24 BY MS. DUFFY:

25 Q Mr. Glover, showing you what's been marked State's

1 Exhibit Six, would you describe that for the Court, please?

2 A This is a copy of a test record ticket that I generated
3 on an Intoxilyzer 5000 in my laboratory. It was set up in
4 the custom mode that is used for all testing of subjects who
5 are arrested in North Carolina.

6 Q Could you go through the information fields at the top
7 just briefly, Mr. Glover.

8 A It has the location of the instrument, the model, serial
9 number, the date, the county code, citation, subject name,
10 subject birthdate, subject gender, driver's license number,
11 name of the officer, name of the agency, type of agency, the
12 name of the analyst, the permit number.

13 It then has the series of tests, the air blank,
14 calibration verification, air blank, subject test, air
15 blank, subject test, air blank, and reported alcohol
16 concentration.

17 Q And on this particular test what was the alcohol
18 concentration?

19 A This was a .15. I did this with an alcoholic breath
20 simulator, which is a mix of alcohol and water that we use
21 for this purpose.

22 THE COURT: So in other words, Mr. Joe Q. Doaks
23 was not present?

24 WITNESS: No, sir, he was not.

25 MS. DUFFY: Nor was Mr. Glover drinking.

1 BY MS. DUFFY:

2 Q And point out the obvious, but how many digits is
3 reported there on the subject tests?

4 A All results are reported to two digits.

5 MS. DUFFY: May I approach?

6 THE COURT: Yes, ma'am.

7 BY MS. DUFFY:

8 Q Showing you what's been marked State's Exhibit Number
9 Seven, could you identify this for the Court, please?

10 A Yes. After I ran those tests and a couple of other
11 tests on the Intoxilyzer, I downloaded the data as we would
12 typically download it from an Intoxilyzer. I was able to
13 take that DBF file or data base file and print it out as a
14 text file.

15 Typically this data base file would be pulled into
16 an access program that formats the data in a way that we use
17 it for generating reports. But this is the raw data exactly
18 as it is when it comes out of the Intoxilyzer.

19 Q Mr. Glover, how does it get from, in the normal case,
20 how does it get from an Intoxilyzer, say for example in
21 Concord, to your computer system in Raleigh?

22 A We have a computer in Raleigh that will call up the
23 Intoxilyzer via modem and there's a software program called
24 COBRA that will communicate with the Intoxilyzer. It will
25 then download the data from the Intoxilyzer into the desktop

1 computer.

2 Q And how frequently is that done?

3 A High volume sites are done every two weeks, low volume
4 sites are done once a month. There's an automatic schedule.
5 Because there are so many units, we try to do it at times
6 when phones aren't being used and so it will start doing
7 them maybe at 2:00 in the morning and do them until 5:00 in
8 the morning.

9 Q When was that system put online, Mr. Glover?

10 A Some of the initial units went in in late January of
11 2000. Because there are erasable programmable chips that we
12 have to put in the instruments with a specific program in
13 it, we would need 1,000 to 1,100 chips to try to change all
14 the chips in all the instruments on the same date.

15 We don't have that many chips, we have about 120
16 chips. So we start at one end of the state, they pull the
17 old chips out, put the new chips in. We then reprogram
18 those chips, send them to the next region, they put new
19 chips in, take the old chips out. So it took about four
20 months or five months before we got the entire state
21 switched over.

22 MS. DUFFY: May I approach?

23 THE COURT: Yes, ma'am.

24 BY MS. DUFFY:

25 Q I'm showing you what's been marked as State's Exhibit

1 Number One, a subpoena. The information requested has a
2 date there, could you identify that please.

3 A It's asking for raw data from February 3rd until the
4 last scheduled download. February 3rd of 2000; and this
5 would be for Cleveland County.

6 Q So does that date of February 3rd, 2000, relate to, in
7 your mind, the changeover process of the or installing, I
8 should say, of the COBRA system?

9 A I'd have to go back and look because I don't know
10 exactly when Cleveland County was switched but it would have
11 been possibly in February or March of that year. But I
12 don't know the exact date.

13 Q But of the 560 subpoenas that have been issued to the
14 Branch personnel, yourself, Mr. Eisele or Mr. Jones, isn't
15 it consistently requested that you provide the raw data back
16 to February 3rd, 2000?

17 A Yes. There was I believe an earlier date that was used
18 on a good number of the subpoenas and then, it may have been
19 like January 1st, 2000, and then it got switched in some of
20 the subpoenas to being February 3rd of 2000. But it
21 generically shows up as that date.

22 Q Thank you. Now, on Exhibit Number Seven, I believe
23 you've highlighted, I believe the Court's copy as well as
24 the Clerk's copy has some data that's been highlighted.

25 A Yes.

1 Q Could you identify that and explain its significance?

2 A Those would be the -- there are actually two subject
3 tests that are in this data, one is when I did the
4 preventive maintenance on this instrument and the results
5 that are highlighted show the breath results to two digits
6 and the calibration verification to two digits.

7 Then when I used the alcoholic breath simulator it
8 shows the breath results there to two digits, the .15 and
9 .15, and a calibration verification of .08. Again, all of
10 those are to two digits and that's the data exactly as it
11 comes out of the instrument.

12 MS. DUFFY: May I approach?

13 THE COURT: Yes, ma'am.

14 BY MS. DUFFY:

15 Q Showing you what's been marked as State's Exhibit Number
16 Eight. Could you describe this document to the Court,
17 please.

18 A This is the instrument file or data base file that was
19 downloaded at the exact same time that the subject file was
20 downloaded. This contains the information that would have
21 been in the either error exception file, the diagnostic file
22 or the calibration file. And it just shows the data that
23 was there.

24 Q And you have some items on that exhibit highlighted as
25 well, Mr. Glover, could you explain their significance?

1 A Those values would be the values that are referred to as
2 the DVM, which is the digital voltage measurement; and it
3 shows that they come out in three digits, as they always
4 have. And it shows the diagnostic that was done.

5 When it first came out of "not ready" at 10:08 and
6 then another diagnostic when I had turned the instrument off
7 and back on, when it came out of "not ready" at 10:58, and
8 it just shows there's a difference in the DVM, which we
9 would expect. But it also shows that there is but a single
10 measurement that's recorded at the time the instrument comes
11 out of "not ready." But it doesn't monitor and record the
12 DVM the whole time the instrument is on.

13 Q Thank you, Mr. Glover.

14 MS. DUFFY: May I approach?

15 THE COURT: Yes, ma'am.

16 BY MS. DUFFY:

17 Q Showing you what's been marked State's Exhibit Number
18 Nine. Could you describe that to the Court, please.

19 A This is a sample of about 2,800 pages of data that we
20 provided to Mr. Morgan pursuant to Judge Mercer's order.
21 This is the format that the data is in once it's pulled into
22 our server into an access program.

23 Access program converts the data as you see it in
24 the raw form into this form where it's in a spreadsheet.
25 And it has columns indicating the different values and

1 again, it's broken down into four different files, subject
2 file, calibration file, error exception file and diagnostic
3 file.

4 Q How many columns of information are there altogether,
5 Mr. Glover?

6 A In the subject file I believe there are 52 columns. The
7 other files have varying numbers of columns, but subject is
8 52.

9 Q And is there anything in this access report which
10 displays data either to the second or the third digit?

11 A Yes, the subject result is displayed, well, actually on
12 the second page, the first column, it shows calibration
13 verification value.

14 THE COURT: Second page, third column. I see it.
15 Okay.

16 WITNESS: Calibration verification. It's actually
17 that was done at the time that the simulator was
18 changed for that column. If you go to almost to the
19 back you'll be looking at Page 5 of 2349, the last
20 column, that's the reported alcohol concentration that
21 would be printed at the bottom of the test record
22 ticket. It's displayed to two digits. That reported
23 value, if there was a high and low value for a subject,
24 it would report the low value in that column.

25 And if you go to Page 6 of 2349, the last column

1 shows the result of the subject's first breath and the
2 next page on the first column shows the subject's
3 result of the second sample. And, again, those are
4 reported to two digits.

5 BY MS. DUFFY:

6 Q And have you provided this data in this format to Mr.
7 Morgan in the past?

8 A Yes.

9 Q On what occasion?

10 A Pursuant to Judge Mercer's order.

11 Q And how many pages of data were provided to Mr. Morgan?

12 A Something like 2,861 altogether, I believe.

13 Q And do you recall how many subjects that represented?

14 A It represented about 12,000 subjects.

15 Q And so the data --

16 THE COURT: Wait a minute. You mean 12,000, by
17 subjects you mean --

18 WITNESS: Arrestees, yes, sir. Because it was
19 about two and a-half years of data, Charlotte does
20 about 5,000 DWI's for Mecklenburg County a year so two
21 and a-half times 5,000 is right at --

22 BY MS. DUFFY:

23 Q So the data you pulled and provided was pulled actually
24 by Intoxilyzer unit not by defendant?

25 A In this case we were to provide all the data on all the

1 units in Mecklenburg County and the data resides in the
2 computer in files by county and so that's how I pulled that
3 county.

4 MS. DUFFY: Your Honor, at this time, so we don't
5 lose track, or at least I don't lose track, I would
6 like to move Exhibits Six, Seven, Eight and Nine into
7 evidence.

8 THE COURT: All right. Subject to Mr. Gibson's
9 reservation of his right to later object, or objecting
10 now, they are admitted.

11 MS. DUFFY: Thank you, Your Honor.

12 (Whereupon, the documents referred
13 to as Test Record Ticket and marked as
14 State's Exhibit Number 6; Subject Data
15 and marked as State's Exhibit Number 7;
16 Instrument Data and marked as State's
17 Exhibit Number 8; and Spreadsheet Data
18 and marked as State's Exhibit Number 9
19 were received by the Court.)

20 MS. DUFFY: May I approach?

21 THE COURT: Yes, ma'am.

22 BY MS. DUFFY:

23 Q Showing you what's been marked State's Exhibit Number
24 Ten, Mr. Glover, could you identify that for the Court.

25 A This is a Motion to Enforce Order and for Sanctions that

1 Mr. Morgan filed in October of 2002 in Mecklenburg County.

2 Q And could you describe briefly the content of his motion
3 and what information is sought.

4 A Content, it details monies that were expended in copying
5 the data we provided him and having someone look at it
6 briefly. It also says that we didn't include the subject's
7 names and that it says that the data was truncated and that
8 they would rather have it on a floppy disk or CD; and he
9 says that it's been two and a-half months since the court
10 ordered the State to comply and the defendants have not yet
11 received all of the data.

12 Q Did it ever become apparent to you what he meant by "all
13 the data"?

14 A The only two things we could come up with was, I think,
15 based on the affidavit that his expert attached to it and
16 she was concerned about the DVM being missing from some of
17 the files.

18 When we first started capturing this data, about
19 the first five months, the software we had did not capture
20 the DVM values; and so for a given instrument, when you look
21 at the DVM column, and if you look at, if you go back to
22 Exhibit Nine, and you look at Page 2 of 436 --

23 THE COURT: Well, let me see that particular Page
24 2. I have it, go ahead.

25 WITNESS: The next to the last column on the

1 right, it says STRDVM, there are four empty spaces at
2 the top. That's when we were not collecting the DVM
3 values; and so for each of the instruments that we
4 provided the data, the data is ranked in chronological
5 order and the first five months of data collection
6 there are no DVM values and then the DVM values were
7 collected after that. But we did not delete anything
8 from those.

9 The other thing was that because the subject files
10 are not verified, in other words, there's no way we can
11 verify that the person named in the subject file was in
12 fact the person that was charged, we can't verify that
13 they were not a juvenile, we don't even know if
14 probable cause was found for the case to go forward,
15 and because the defense's expert had said at one point
16 that the names didn't matter, they didn't need the
17 names, we took the names and driver's license numbers
18 of the subjects out of the data.

19 But that was the only thing that we took out of
20 them. It still has the arresting officer information,
21 citation, so it's easy to go back in with date and time
22 and identify the area of interest without the names
23 being in there.

24 BY MS. DUFFY:

25 Q Mr. Glover, if you would look for a moment at this

1 affidavit that's attached to this particular motion. Could
2 you briefly explain to the Court who Mary Catherine McMurray
3 is?

4 A She is an individual who used to be part of the breath
5 test program in Wisconsin and she left there after a period
6 of time and started working as a defense expert. She
7 testified in the hearing in Charlotte and testified in a
8 hearing in Wake County. But that's what she does for a
9 living now.

10 Q Would it be fair to say that she's more or less, at
11 least her previous position with the State was more or less
12 comparable to yours?

13 A Yes.

14 Q Could you summarize for the Court the issues that she's
15 raising in this affidavit?

16 MR. GIBSON: I object, Your Honor. The affidavit
17 speaks for itself. I think this --

18 THE COURT: Well, objection sustained. I'll read
19 it.

20 MS. DUFFY: All right. Thank you, Your Honor.

21 THE COURT: Just a moment.

22 MS. DUFFY: May I approach?

23 THE COURT: Yes, ma'am. Let me read this before
24 you proceed.

25 MS. DUFFY: Okay.

1 THE COURT: You can go ahead and hand him that
2 thing while you're up here. (Reading.) She just
3 objects to the format in which it was provided. She
4 wanted it on a disk and other matters. All right, I'm
5 ready.

6 MS. DUFFY: Well, I think the key issue is also in
7 paragraph seven, Your Honor --

8 THE COURT: All right.

9 MS. DUFFY: ...about the three decimal and two
10 decimal.

11 THE COURT: Right. She says, "All Intoxilyzers
12 record and store test information to three decimal
13 places." All right, go ahead. I've read it.

14 BY MS. DUFFY:

15 Q Mr. Glover, is that assertion in paragraph seven true,
16 that all Intoxilyzers record and store the information to
17 three decimal places?

18 A No, it's not. They have the ability to do that but it
19 depends upon a particular states' statute and rule and
20 regulation as to whether or not that's done.

21 Q Does our software capture at three digits?

22 A Our software does not capture the third digit. It is
23 designed to go to two digits and two digits only; and that's
24 the way it's displayed.

25 When you're in North Carolina custom mode, which

1 you have to be in in order to conduct a test on an
2 individual, you have to have a Switch Eleven up into data
3 entry mode. When it's in that mode, everything goes to two
4 digits and those results are stored in the memory.

5 If you're not in that mode, the data doesn't go to
6 memory. And I ran some tests out of that mode when I
7 generated this Exhibit Six, which was the test record
8 ticket, when I was doing that I took it out of North
9 Carolina custom mode, ran some tests. It will print to
10 three digits when it's out of that mode but that never goes
11 to memory and so when I downloaded the data, there's no
12 results there for that series of tests.

13 THE COURT: I believe that's exactly what was
14 stated the last time I heard you testify.

15 WITNESS: Yes, sir.

16 MS. DUFFY: Your Honor, I'm going to take this a
17 little bit out of sequence because that seems to be
18 where we're going, but if I may approach?

19 THE COURT: Yes, ma'am.

20 BY MS. DUFFY:

21 Q We'll just set aside these motions for a moment,
22 although I've already handed one up. Showing you what's
23 been marked State's Exhibit Number Fifteen, you mentioned
24 just previously something about a test you did in your
25 laboratory, Mr. Glover?

1 A Yes. These I did on the same day when I generated the
2 other ticket and prior to downloading the data. And when
3 you look at the raw data there's nothing, none of these
4 results are in there just because it simply doesn't send it
5 to memory.

6 MS. DUFFY: May I approach?

7 THE COURT: Yes, ma'am.

8 BY MS. DUFFY:

9 Q Showing you what's been marked State's Exhibit Number
10 Thirteen and Fourteen, could you explain what those
11 illustrations are there?

12 A Exhibit Thirteen are copies of pictures of the side
13 panel on a 6400 series Intoxilyzer 5000.

14 MR. GIBSON: Excuse me, is that Thirteen?

15 MS. DUFFY: The 6400 series is --

16 WITNESS: Is Thirteen, the 6600 is Fourteen.

17 MR. GIBSON: Okay.

18 WITNESS: This shows the side panel, it shows that
19 it is a side panel that is attached and hinged to the
20 unit.

21 THE COURT: Is Exhibit Thirteen though?

22 WITNESS: Yes, sir.

23 THE COURT: Okay.

24 WITNESS: And the second page of Exhibit Thirteen
25 shows the side panel open and it's taken so that you

1 can read the information on the side panel.

2 The reason I did this series of pictures was
3 because many, many times in court Mr. Morgan has
4 provided a manual from the manufacturer that is for a
5 6400 series instrument and has subsequently stated, as
6 he did in one of these motions, that I said that it
7 doesn't have a side panel. I've always said it has a
8 side panel.

9 Ours, a 6600 doesn't have a hinged side panel and
10 I made that distinction. The other distinction is that
11 the functions of the switches are different, as
12 indicated in Exhibit Fourteen by what's printed on the
13 side panel when you take it off.

14 But in Exhibit Fourteen, there is a Switch Four
15 and the Switch Four's function, if you look at the
16 second page of Exhibit Fourteen, bottom picture, on the
17 right-hand side of that picture it shows a little box
18 that says "options," and it has, "S-Four equals third
19 digit on." That switch will make it print and display
20 a third digit but only if you're not in the North
21 Carolina custom mode.

22 So if that switch is activated in the up position
23 and you're in North Carolina custom mode, it still
24 prints, displays and stores the data to two digits.
25 Essentially it ignores the position of Switch Four when

1 you're in the custom mode.

2 THE COURT: All right, now, let me interrupt.
3 Explain to me briefly North Carolina custom mode. I
4 think I know what it means but tell me.

5 WITNESS: Well, because rules and regulations
6 dictate what we will do when a person is tested, you
7 have to enter the information pursuant to the rules and
8 regulations. That information is information that
9 would be at the top of a test record ticket.

10 It then has to go through a prescribed sequence,
11 and that is, air blank, calibration verification, air
12 blank, subject test, air blank, subject test.

13 THE COURT: Right.

14 WITNESS: And if you're not in -- the manufacturer
15 wrote the software to do it that way. Switch Eleven
16 controls data entry. If Switch Eleven is off, then
17 when you push the "start test" button, it says insert a
18 ticket and it immediately goes through its sequence.
19 It never gives you the opportunity to enter any of the
20 identifying information of the subject that's up there.
21 So you're not following North Carolina mode. You would
22 end up generating a test record ticket like Exhibit
23 Fifteen where there's no identifying information at the
24 top of it.

25 THE COURT: Okay. So now, the North Carolina test

1 mode is mandated by statute.

2 WITNESS: Well, it's by regulation and by statute
3 and it's sort of a combination of the two, if you
4 consider that the statute says alcohol concentration in
5 the definition section of, I think, 20-4.01, alcohol
6 concentrations shall be reported to the hundredth, not
7 to the thousandth. And then rules and regulations
8 specify the operational procedures. So it's actually a
9 combination of those two, statute and rule and reg.
10 that dictate what the programming has to do.

11 THE COURT: Okay. Thank you.

12 MS. DUFFY: Your Honor, may I approach?

13 THE COURT: Yes, ma'am.

14 MS. DUFFY: Your Honor, you may recall at the
15 December 16th hearing that the State had brought a
16 witness, Mr. William Schofield, from Kentucky.

17 THE COURT: I remember that.

18 MS. DUFFY: And our purpose was to have him
19 testify as to some of this technical information.

20 THE COURT: Yes, I do remember that.

21 MS. DUFFY: We were able to do that very, very
22 briefly. I have here this morning an affidavit which
23 Mr. Schofield has signed, which I would offer to the
24 Court and ask that be admitted.

25 THE COURT: All right. That's admitted. That's

1 Exhibit --

2 MS. DUFFY: Sixteen.

3 MR. GIBSON: May I note our objection.

4 THE COURT: Yes, sir.

5 MR. GIBSON: I think this was available earlier to
6 be provided.

7 THE COURT: Well, --

8 MS. DUFFY: And I also have available a copy of
9 the transcript of that hearing, which I would like to
10 enter.

11 THE COURT: Very well. That is admitted.

12 MS. DUFFY: I don't have that marked. Do I need
13 to have that marked?

14 THE COURT: I believe I would. Let's mark that
15 something.

16 MS. DUFFY: Call it Twenty-One and that way the
17 rest of the exhibits will be in order.

18 THE COURT: Okay.

19 MR. GIBSON: And the affidavit is Sixteen?

20 THE COURT: Sixteen.

21 (Whereupon, the documents referred
22 to as Affidavit and marked as State's
23 Exhibit Number 16; and Transcript and
24 marked as State's Exhibit Number 21 were
25 received by the Court.)

1 BY MS. DUFFY:

2 Q Mr. Glover, just to sort of sum up what you've testified
3 to regarding these switches, and in particular Switch Number
4 Four and the North Carolina custom mode, is there anything
5 in Mr. Schofield's affidavit that would help you elaborate
6 upon that or summarize it or otherwise fill in any blanks
7 for the Court?

8 MR. GIBSON: Objection. I just don't think he
9 should testify about Mr. Schofield's affidavit. It's
10 bad enough when it comes in evidence without discovery
11 and the ability to cross examine Mr. Schofield. Mr.
12 Glover ought not to be able to testify about it.

13 THE COURT: Objection overruled.

14 BY MS. DUFFY:

15 Q Go ahead, Mr. Glover.

16 A I guess to sum it up, essentially his affidavit says the
17 same thing that I just was going over as far as the
18 positions of the switches and the functions of the switches.

19 THE COURT: It really doesn't appear to add
20 anything, does it, to what you've said?

21 WITNESS: No, sir. It's just that this, I guess,
22 would come from the manufacturer as opposed to coming
23 from --

24 THE COURT: All right, from you.

25 WITNESS: ...the State's witness.

1 BY MS. DUFFY:

2 Q We'll move on from there. Let me go back to, I know we
3 sort of went off the trail a little bit. I believe I handed
4 up --

5 MS. DUFFY: If I may approach?

6 THE COURT: Yes, ma'am.

7 BY MS. DUFFY:

8 Q Eleven, and is that the motion for independent testing?

9 A Yes, it is. It was filed October 15th.

10 MS. DUFFY: Your Honor, we have five of these
11 motions in total and I'm just going to briefly have Mr.
12 Glover go over the contents. Again, it's fairly
13 technical information but we'd like to have it on the
14 record as to what these motions involve.

15 They've all been filed in Charlotte, they all
16 involve the seventy-some cases that are now pending in
17 Charlotte, so I just want to get kind of a global
18 overview of what my clients are being asked to do.

19 THE COURT: All right.

20 BY MS. DUFFY:

21 Q So, if you could, just summarize that briefly, Mr.
22 Glover.

23 A This was a Motion for Independent Testing filed October
24 15th, 2002. It contends that there's discrepancies, I'd
25 say, in testimony that state's witnesses have provided.

1 Specifically in number 3A, it was saying that, "Al Eisele
2 and/or Paul Glover initially testified that it would take
3 upwards of 18 hours to produce the requested data for a
4 single Intoxilyzer. Booker Jones initially, followed by Al
5 Eisele and/or Paul Glover, later revised their response to
6 '15 to 30 minutes.'"

7 The issue there is one more of semantics in that
8 the time that it takes to download all the units in the
9 state was asked of us at one time. And the total time for
10 the computer to call up 250 something units and download
11 them is about 18 hours.

12 Also the time for us to extract the data for a
13 specific unit or specific county is in the range of 15 to
14 30, it might take 45, just depends on how much, what else is
15 going on, I guess.

16 It lists as a contention the issue about the
17 switches and there's never been a time that we've said that
18 it did not have the switches, as this motion states.

19 It then says, "The greatest source of contention
20 in the case at bar is whether or not the Intoxilyzer 5000
21 stores data to 3 decimal points, and transfers that data to
22 3 decimal points."

23 Then it says the only way to ascertain the truth
24 is to have a controlled drinking session. So it appears
25 that this was a motion to force us to have a controlled

1 drinking session and test someone and show the data.

2 Q Do you know, Mr. Glover, if that controlled drinking
3 session where it was to take place or under whose
4 supervision or anything about that?

5 A No.

6 Q Very well.

7 MS. DUFFY: May I approach?

8 THE COURT: Yes, ma'am.

9 BY MS. DUFFY:

10 Q Showing you what's been marked State's Exhibit Number
11 Twelve entitled the Truncation Motion. Could you briefly
12 describe that for the Court.

13 A This was a motion filed in Mecklenburg County, February
14 12 of 2003, the truncation motion. And the gist of this
15 motion is that the statute requires that a subject submit
16 two breath samples, blow twice; and the results have to be
17 within .02 of each other.

18 And the contention is that if the third digit were
19 available that we would see in certain cases, a certain
20 percentage, and I believe the calculation is 45 percent of
21 the time, that the difference would be greater than .02. It
22 might be .021, .022. And so, it's just saying that those,
23 in almost half the time that the result would not be within
24 the required .02 standard.

25 One thing that gets ignored in this is that the

1 statute says .02 not .020. The statute stops at the second
2 digit. And so .02 is not the same thing as .020.

3 So, again, it addresses that and it has attached
4 to it a letter of a sort that a doctor from UNC-Charlotte
5 generated apparently in response to Mr. Morgan. So, that's
6 it.

7 MS. DUFFY: May I approach?

8 THE COURT: Yes, ma'am.

9 BY MS. DUFFY:

10 Q Showing you what's been marked State's Exhibit Number
11 Seventeen. Would you identify that document for the Court,
12 please.

13 A This is the Motion to Modify the Order and apparently
14 it's to modify the order that Judge Mercer issued this past
15 July. It is asking for us to give all the data on a floppy
16 disk or CD-Rom in ASCII format so that his expert can look
17 at it.

18 It cites a hearing that we had in Wake County
19 where Judge Bullock ordered us to give data to Mr. Morgan in
20 print form and on disk. It was limited to 90 days before
21 the subject's test and 90 days after the subject's test, so
22 it was very, very narrow in scope; and also to provide
23 repair records and preventive maintenance records but again,
24 for that 90 day before, 90 day after.

25 So this is a motion, I guess, generally to force

1 us to give it to him in a specific format on disk or CD-Rom.
2 Q Mr. Glover, directing your attention to paragraph number
3 nine of that motion, the motion references the defense
4 expert, who I assume is Mary McMurray; and also states that
5 it would give her the opportunity to form an opinion as to
6 the reliability of the particular machine in question and
7 the accuracy of its results.

8 Could you briefly for the Court explain the
9 current processes by which the accuracy and reliability of
10 the instrument are determined.

11 A Well, we can demonstrate accuracy on the subject's test
12 record ticket because we do a calibration verification
13 before each subject's test; and that's really the only
14 pertinent information for that particular point in time.

15 I was trying to think of an analogy that would
16 kind of compare this data analysis where Ms. McMurray would
17 determine accuracy.

18 It would be sort of like if you went to a doctor's
19 office and you got all the records of all his patients and
20 looked at the weight that was recorded for each of them and
21 said, I'm going to look at all the weights that have been
22 recorded for all these people and I'm going to determine the
23 accuracy of the scales used to weigh them. It's just
24 impossible to do.

25 THE COURT: From the data that's recorded on the

1 chart.

2 WITNESS: Correct, which is essentially the same
3 as this. The way it's done is you take a known sample
4 that's assayed or tested at the time a subject is being
5 tested, in this case the calibration verification, that
6 shows the accuracy at that time.

7 BY MS. DUFFY:

8 Q Excuse me, Mr. Glover, just to perhaps continue your
9 analogy. When you say a known sample, in your analogy it
10 would be, for example, a 100 pound piece of lead.

11 A Right; in the doctor's office, sure. And reliability is
12 an issue that gets brought up and we've never said the
13 instruments don't fail. We will say that if it fails, you
14 can't run a test on it.

15 But if you go in there and you sit down to run a
16 test and you're able to run a test, it was available and
17 functioning at that point in time. If a component in it
18 failed months before or failed months after, it has no
19 impact on the test that was run at that time.

20 Q Thank you.

21 THE COURT: Let me interrupt, and this is off the
22 subject, and don't let me bother your train of thought
23 but I've got 20-4.01 out here and it's quite lengthy.
24 I'm going to ask you to show me where that requirement
25 to two digits is so I don't have to read the numerous

1 pages of that statute.

2 WITNESS: It's 1(b) under alcohol concentration,
3 at the top of this page (indicating). It says to
4 hundredths.

5 THE COURT: Thank you, sir. Right there at the
6 start. Trying to make it more complicated. Go ahead,
7 ma'am.

8 MS. DUFFY: Thank you. May I approach?

9 THE COURT: Yes, ma'am.

10 BY MS. DUFFY:

11 Q I believe this is the last of the series of five
12 motions. Showing you what's been marked State's Exhibit
13 Number Eighteen, could you just briefly describe that
14 motion.

15 A This is a motion filed April 7th of 2003, in Mecklenburg
16 County; motion for independent testing. And it essentially
17 says the only way to ascertain the truth of the State FTA
18 personnel assertion, and verify or contest other claims made
19 by FTA employees about the accuracy of their results, is to
20 run tests in question and there's a list of tests that the
21 defendant would like to have run on the instruments in
22 Mecklenburg County.

23 He would want to have his expert test every unit
24 in Mecklenburg County and then have one of our employees do
25 a preventive maintenance and also to have a subject do a

1 controlled drinking so that they can be tested and I believe
2 there was wanting the entire process professionally
3 videotaped for use at trial of these respective cases.

4 Q And this motion was filed on what date again, Mr.
5 Glover?

6 A About two weeks ago, April 7th, 2003.

7 Q Thank you.

8 MS. DUFFY: May I approach?

9 THE COURT: Yes, ma'am.

10 BY MS. DUFFY:

11 Q Showing you what's been marked State's Exhibit Number
12 Twenty.

13 MS. DUFFY: If I may take just one minute, Your
14 Honor?

15 THE COURT: All right.

16 BY MS. DUFFY:

17 Q And also showing you what's been marked State's Exhibit
18 Number Twenty-Two.

19 MR. GIBSON: I'm confused. Mine are not marked so
20 when you --

21 MS. DUFFY: The preventive maintenance -- this
22 would be Twenty-Two and this would be Twenty
23 (indicating).

24 BY MS. DUFFY:

25 Q Could you explain to the Court what these documents

1 represent.

2 A Exhibit Number Twenty is a repair record for an
3 instrument. It's what our electronics technicians complete
4 when an instrument comes into the shop to be repaired; and
5 it is a record that we maintain in Raleigh.

6 THE COURT: Was this generated in Raleigh?

7 WITNESS: Yes, sir. All the repairs are done in
8 Raleigh so they do a repair and put it in the file. We
9 keep those for three years.

10 THE COURT: Okay.

11 WITNESS: Number Twenty-Two is a copy of the
12 preventive maintenance record. Regulation requires
13 that preventive maintenance be done at least every four
14 months. Depending on the volume at the test site, the
15 number of units, the field tech may go in and do it
16 sooner than that. It doesn't violate anything for them
17 to go in and do it.

18 If they have to go in and take care of one
19 instrument for some reason, they may go ahead and do
20 preventive maintenance on everything so they don't have
21 to come back the next week.

22 But this is required by regulation. These
23 originals are maintained at the local test site. A
24 carbon copy of it is generated when the field tech
25 completes it, that's sent to Raleigh.

1 These have always been available at the local test
2 site. They are available to the chemical analyst who
3 ran the test on a particular person. So that if Mr.
4 Morgan wanted the preventive maintenance record, he
5 would simply look at the test record ticket, see who
6 the chemical analyst was and request that local officer
7 to make a copy of the preventive maintenance record at
8 the local site and bring it when he's going to be going
9 to court anyway.

10 There's no requirement that the person who did the
11 preventive maintenance show up, no regulatory or
12 statutory requirement; and as it says at the bottom of
13 the preventive maintenance record, the signed original,
14 the record can be introduced in any proceeding without
15 further authentication under G.S. 20-139.1(b4).

16 So this is a record that's available, it always
17 has been, it always will be unless they change the
18 statute and regulations; and it can be obtained by
19 going through the analyst and there's nothing that
20 would require us to come to a particular county to go
21 to a test site to make a copy and then produce it in
22 court.

23 BY MS. DUFFY:

24 Q And if Mr. Morgan wished to obtain the repair records,
25 are those available?

1 A Those would be available and could be sent to the Clerk
2 so that they could be made part of the shuck and would be
3 available at the time that the case was tried.

4 Q So as far as the preventive maintenance record and the
5 repair records, you don't have any problem or they're not in
6 any way restricted access?

7 A No.

8 Q Thank you.

9 MS. DUFFY: Just one more exhibit, Your Honor.

10 THE COURT: All right.

11 MS. DUFFY: May I approach?

12 THE COURT: Yes, ma'am.

13 BY MS. DUFFY:

14 Q Showing you State's Exhibit Number Nineteen, could you
15 describe this document and how it came to be compiled.

16 A I compiled it. This is a compilation of the orders that
17 have come out in other counties when we've had motions to
18 quash on Mr. Morgan's subpoenas; and the front page of this
19 is a list of the dates, the counties, the Court, and
20 essentially the outcome of those cases, outcome of the
21 State's motion to quash.

22 Q And just in the interest of completeness, it does
23 include an order issued by Judge Spainhour; correct?

24 A Yes, it does.

25 Q And that was in the State versus Lyle case.

1 A Correct; and another point of clarification, number
2 eleven, the one that was in Buncombe County, while the judge
3 verbally ordered that the data be produced, they then
4 immediately tried the case. He then dismissed it,
5 essentially immediately, and then rescinded the order.

6 So the order was never written, the order never
7 went anywhere because they tried the case that very -- I
8 mean, they heard the State's motion to quash, the judge
9 denied it, said you needed to produce thirty days worth of
10 data. Then they tried the case right then.

11 THE COURT: Was this before a federal magistrate?

12 WITNESS: Yes, sir, it was.

13 THE COURT: Was it on a national park?

14 WITNESS: Yes, sir, it was. And the defendant had
15 wanted to use his cell phone in the patrol car while he
16 was being transported, the officer said the phone won't
17 work here, you can use it at the test site; and the
18 judge ended up dismissing it because he wasn't allowed
19 to use his cell phone in the car. And so then he said
20 that's dismissed, rescind the order even though the
21 order was never actually executed or drawn up.

22 THE COURT: I understand.

23 BY MS. DUFFY:

24 Q So then just to, again, summarize, we've been over this
25 before, but in all these different encounters where the

1 State has brought a motion to quash presented by the ADA,
2 not by the Attorney General's Office, and Mr. Morgan has
3 brought a motion to compel, his motion to compel has been
4 granted twice; is that correct?

5 A Correct.

6 Q And that was, again, in what counties?

7 A In Mecklenburg County in District Court pursuant to
8 Judge Mercer's order, and then in Wake County, Judge
9 Bullock, and in that one it was modified to be ninety days
10 before the test and ninety days after the test.

11 Q But in no case has any pending DWI case been dismissed
12 on account of your failure or refusal to provide data?

13 A Correct.

14 Q Thank you. I want to return just to a brief discussion
15 of the impact on the offices. Mr. Eisele testified you are
16 second in command and obviously you are what I guess they
17 call on television the chief scientific officer of the
18 starship. From your prospective, Mr. Glover, as these
19 subpoenas arrive at the office, could you describe the
20 impact on your position and time and so on and kind of step
21 us through that.

22 A Well, I'll get a copy of the subpoena and I've got a
23 spreadsheet that I have all of them entered in. I enter the
24 new one in there. I sort it by court date in a descending
25 order so the top of my list shows the furthest out court

1 date.

2 I will have to look and see if that hits, and
3 that's actually how we started seeing that we were getting
4 all these conflicting ones back in the fall where we would
5 need to be in three counties, you know. I would sort it and
6 all of a sudden I would go we've got to be in three counties
7 at the same time, we can't do that.

8 So I enter it, if it's a new case then I'll
9 contact or attempt to contact the prosecutor's office.
10 Usually that's kind of a hit or miss proposition because
11 they're in court doing something so I catch them late in the
12 day or first thing in the morning to say, there are going to
13 be some issues with this, we're going to need to get up with
14 you, who's going to be doing district court. Well, what
15 week; well, it's going to be someone else. So there's a
16 fair amount of telephone leg-work that I end up having to do
17 to communicate with the prosecutor that's going to be there.

18 And then the other aspect of it is if I call and
19 say, Well, this is coming up; well, that's been continued
20 because we got a call from Mr. Morgan and that's been
21 continued, so don't bother coming out here.

22 So that it's just a big administrative issue to
23 track all of these. Sometimes we get a subpoena where one
24 would be served on Al but one would not be served on Booker.
25 Though both of their subpoenas have both of their names on

1 it, it technically was not served on one or the other.
2 There's just a lot of logistics involved in keeping track of
3 all of this.

4 Q Just if I could, if I could refer you to State's Exhibit
5 Number Four.

6 MS. DUFFY: If I may approach?

7 THE COURT: Yes, ma'am.

8 BY MS. DUFFY:

9 Q It was the list of the case status list.

10 A Correct.

11 Q Mr. Glover, I believe there is one case on there where,
12 if you'll look on the second page, a county where after a
13 trial in Superior Court a notice of appeal was filed.

14 A Yes, that would be line 60, Richard V. Worley in Macon
15 County.

16 Q Line sixty.

17 A Sixty.

18 Q Were you present in court when the notice of appeal was
19 given?

20 A I was not, no.

21 Q Have you followed up on whether or not that appeal has
22 been perfected or gone forward in any way?

23 A I contacted the district attorney or the assistant
24 district attorney in that county and to his knowledge
25 nothing has been done on that at this point; and so no

1 transcript order had been done, nothing has been done on it
 2 to his knowledge.

3 Q And when was that trial, approximately, if you can
 4 recall?

5 A That was November 18.

6 Q November 18.

7 A Of 2002.

8 Q So today is April 25th; and when was the last time you
 9 checked with the office to see if anything had been done on
 10 this appeal?

11 A This morning.

12 Q This morning?

13 A Uh-huh (yes).

14 Q And what were you told?

15 A That to their knowledge nothing had been done on it.

16 Q No motion for an extension of time filed?

17 A They said they had not seen any.

18 Q All right, thank you. I guess I'll just ask, if you'll
 19 permit me, Your Honor, is there anything I have neglected to
 20 inquire of, of a technical or scientific nature, that you
 21 feel would be important for Judge Spainhour to be aware of?

22 A No, not a technical aspect. One thing though, on
 23 Exhibit Four, I generated this and the status of these cases
 24 I determined either by calling the Clerk of Court in that
 25 county or by going online and checking to see if the CR was

1 still an active CR.

2 So like all the Mecklenburg ones, I did not call
3 and ask all of those, I simply went online and if the same
4 CR was still active and pending then I indicated it was an
5 active case.

6 THE COURT: All right.

7 BY MS. DUFFY:

8 Q Just one more thing briefly, Mr. Glover, of the data
9 that you've provided in Mecklenburg County has Mr. Morgan
10 made any use of that data whatsoever to your knowledge?

11 A Not to my knowledge.

12 MR. GIBSON: Objection -- well --

13 THE COURT: Objection overruled.

14 MS. DUFFY: That's all I have.

15 THE COURT: Let me ask you a question. Have you
16 ever been subpoenaed and had the occasion where you
17 were not told to appear even when the case had been
18 continued without your knowledge or anything of that
19 nature?

20 WITNESS: Could you ask that again.

21 THE COURT: Well, let me rephrase that. It's
22 alleged that Mr. Morgan never tells the Branch
23 personnel not to appear even when he knows the case is
24 not going to be called. Do you know anything about
25 that?

1 WITNESS: Yes, sir. We have, I believe, been
2 contacted on four different occasions to tell us to not
3 go to court. And --

4 THE COURT: You mean by Mr. Morgan or his office?

5 WITNESS: By Mr. Morgan or his office. And it may
6 be six but it's not more than that. And so we have
7 taken it upon ourselves to check with the prosecutor to
8 see, one, if it's already been continued; if it's going
9 to be heard, anything that they may be able to tell us
10 because of the volume of cases. I mean, that's the
11 easiest way.

12 THE COURT: All right, sir. Thank you.

13 BY MS. DUFFY:

14 Q Mr. Glover, have there been occasions when you and/or
15 Mr. Eisele or other personnel from the Branch have appeared
16 as subpoenaed at a time and place certain and found that Mr.
17 Morgan wasn't present or ready to proceed?

18 A We were to be in the motion, let me see if I can find
19 it, the motion to enforce --

20 THE COURT: What's the exhibit number?

21 WITNESS: Exhibit Number Ten, to enforce order and
22 for sanctions, was to be heard in front of Judge
23 Mercer. I don't remember the exact date.

24 We went down there for the hearing to Charlotte,
25 Judge Mercer had been injured and was not going to be

1 able to be there. But in fact the motion hadn't been
2 filed even at that point because the prosecutor -- we
3 asked the prosecutor for a copy of it and he said the
4 motion had not been filed. So --

5 THE COURT: And you had been served with a copy of
6 the motion or subpoenaed to be there on account of
7 that?

8 WITNESS: I don't think we had gotten a subpoena
9 for it, we just -- the prosecutor said we're going to
10 hear this motion in front of Judge Mercer at 2:00
11 o'clock on whatever afternoon it was and so we went
12 down for that, but in fact it --

13 THE COURT: But the sheriff didn't tell you to
14 come?

15 WITNESS: No, sir, not on that one.

16 MR. GIBSON: Am I clear there was no subpoena --

17 THE COURT: No service.

18 WITNESS: Correct. I guess there's one instance
19 that we've become aware of where we've been subpoenaed
20 for a civil case, a revocation hearing, and there was a
21 motion to compel entered in that case and in fact the
22 motion to compel was filed before the subpoena was ever
23 issued to us.

24 So it said that we had failed to produce this
25 requested data and it was filed, I think, on March 31st

1 and the subpoena actually asking for anything from us
 2 was issued on April the 3rd. So after the motion was
 3 filed.

4 MS. DUFFY: Your Honor, I would like to, since Mr.
 5 Glover, brought that issue up, I would like to have
 6 some documentation in that regard.

7 THE COURT: All right.

8 MS. DUFFY: May I approach?

9 THE COURT: Yes, ma'am.

10 BY MS. DUFFY:

11 Q Showing you Exhibit Number Twenty-Three, is that the
 12 subpoena and the motion to compel you were referring to a
 13 moment ago?

14 A Yes, it is.

15 Q Would you point out the dates?

16 A The subpoena was issued April 3rd, 2003, and the file --

17 MR. GIBSON: Objection, Your Honor. I believe
 18 this comes even after the motion or the order to show
 19 cause so it wouldn't be a part of this current
 20 proceeding because it has come afterward. It's in an
 21 ongoing proceeding that has a hearing date in May, May
 22 14th.

23 THE COURT: Well, the hearing date is afterward
 24 but it was issued before this date, I take it.

25 MR. GIBSON: Before their filing, so it's not --

1 THE COURT: This document was issued April 3?

2 WITNESS: The subpoena was.

3 THE COURT: Yes. Today is April the 25th.

4 MR. GIBSON: Well, I'm going back to the date the
5 attorney general filed the motion, Your Honor.

6 THE COURT: I think it's admissible to show a
7 continuing course of conduct.

8 MR. GIBSON: Okay.

9 THE COURT: Overruled.

10 MS. DUFFY: Thank you, Your Honor.

11 WITNESS: And the filed date on it is March 31st
12 with I believe a signature date of March 28th. File
13 date of March 31st but the subpoena was issued on April
14 3rd.

15 BY MS. DUFFY:

16 Q And, I'm sorry, I was a bit distracted when you were
17 testifying earlier. Did you point out to Judge Spainhour
18 that that is a refusal case?

19 A Yes, it is a refusal case where the subject, like I say,
20 it's the Superior Court civil refusal hearing.

21 THE COURT: So it appears from these documents
22 that the motion to compel stated that --

23 WITNESS: On the second page, number six, the
24 defendant has previously issued one or more subpoenas
25 to us.

1 THE COURT: Duces Tecum; um-hum (yes).

2 WITNESS: And as of this date have not complied
3 with such subpoena.

4 THE COURT: And the subpoena is issued after the
5 date of the motion.

6 WITNESS: Yes, sir.

7 THE COURT: All right.

8 MS. DUFFY: That's all I have, Your Honor.

9 THE COURT: Let's take about a ten minute break.

10 (Whereupon, court was adjourned for
11 a brief recess; after which, the
12 following proceedings were held:)

13 THE COURT: We're back in session. Mr. Gibson.

14 MS. DUFFY: Your Honor, I would like to just move
15 all my exhibits into evidence, One through Twenty-
16 Three, I believe that's the total number that I had.

17 THE COURT: They are admitted. The photographs,
18 you want to admit as illustrative or substantive
19 evidence?

20 MS. DUFFY: I would like to admit them as
21 substantive, if that's all right.

22 THE COURT: That's fine with me. Do you have any
23 objection?

24 MR. GIBSON: Well, I object because I think
25 photographs are always admitted for illustrative

1 evidence.

2 THE COURT: Oh, no, they can be admitted for
3 substantive evidence to show the truth of the matter
4 asserted. Sir, did you take those pictures?

5 WITNESS: Yes, sir, I did.

6 THE COURT: Did you alter the camera in any way or
7 change those images in any way?

8 WITNESS: No, sir, I did not.

9 THE COURT: Do they correctly reflect exactly what
10 is shown therein?

11 WITNESS: Yes, sir.

12 THE COURT: Very well, they are admitted as
13 substantive evidence.

14 (Whereupon, the documents referred
15 to as Motions and marked as State's
16 Exhibit Numbers 10 through 12,
17 inclusive; Photographs and marked as
18 State's Exhibit Numbers 13 and 14; Test
19 Ticket and marked as State's Exhibit
20 Number 15; Motions and marked as State's
21 Exhibit Numbers 17 and 18; Compilation
22 and marked as State's Exhibit Number 19;
23 Repair Record and marked as State's
24 Exhibit Number 20; Preventive
25 Maintenance Record and marked as State's

1 Exhibit Number 22; and Motion and marked
2 as State's Exhibit Number 23 were
3 received by the Court.)

4 MS. DUFFY: Thank you, Your Honor.

5 THE COURT: Cross examine.

6 CROSS EXAMINATION

7 BY MR. GIBSON:

8 Q Is it Doctor Glover or Mr. Glover?

9 A Mister.

10 Q Mr. Glover, when Ms. Duffy was asking you questions
11 about the maintenance documents she used the phrase, are
12 there any other documents with restricted access or
13 something. Are there documents in your department that have
14 restricted access?

15 A Not to my knowledge.

16 Q I'm not trying to be flippant by this question but is it
17 fair to say that your testimony is that the Intoxilyzer is a
18 flawless piece of machinery?

19 A No, sir. I've never said that.

20 Q I'm asking you, is that -- part of the appearance of it
21 might be flippant but are you trying to contend that it's a
22 flawless piece of machinery?

23 A No, I've never made that contention. It's made up of
24 various components. It's got light bulbs, it's got motors,
25 it's got resistors, it's got capacitors. Components fail.

1 When a component fails though in our experience you cannot
2 run a test. And that doesn't mean it never breaks down.

3 The analogy I've used before is if you have four
4 flat tires on your car, most people would not drive it but
5 in fact you could crank it up, drive it to the store and
6 drive it home on four flat tires.

7 The Intoxilyzer, if the light bulb burns out, you
8 can't force it to run a test because it can't run a test.
9 If the motor burns out, you can't run a test because it
10 won't run a test then. So the difference is when it fails,
11 you cannot use it.

12 Q Let's talk about something less than failure. Is it
13 your contention that it's flawless to the extent that unless
14 it is working absolutely perfectly it won't work at all?

15 A (No response.)

16 Q You said it shuts itself down if a component fails.

17 A That's correct.

18 Q And I'm saying what if a component isn't working
19 properly, are you saying the machine is so flawless that it
20 doesn't work at that point?

21 A Well, that's possibly a little too general. There are
22 certain components that either work or they don't work.
23 Like a light bulb, it doesn't have a time when it kind of
24 halfway works. A light bulb either comes on when you turn
25 it on or it does not. And so a number of these components

1 fall into that category. If they fail, they have failed.

2 It's not like they kind of work some.

3 Q Well, let's talk about those components either working
4 singularly or in conjunction to create an end result. Are
5 there components that don't just work on and off?

6 A I don't -- well, the printer could have some parts of it
7 that weren't working that would prevent you from getting a
8 completed test record ticket.

9 There are some but I don't think I'm in a position
10 to be able to categorize all the parts in it as to which
11 ones are on/off and which ones are marginal. I can't think
12 of some that will function marginally.

13 Q You're familiar with the Intoxilyzer being used in other
14 states, aren't you?

15 A Yes, I am.

16 Q And other states have different -- the machines are
17 programmed differently in other states, aren't they?

18 A That's correct.

19 Q And at your, I assume, industry meetings or contacts
20 with peers in the industry, you're aware that data
21 collection, maintenance processes are subject of court
22 proceedings in various other states; isn't that correct?

23 A Correct.

24 Q Now, if for whatever reason someone higher up in the
25 department were to tell you to reformat the Intoxilyzer,

1 either totally within the state or using the experts who
2 manufacture the machine, it could be done, couldn't it?

3 THE COURT: Wait just a minute. Reformatted in
4 the context of what?

5 MR. GIBSON: I'm sorry, I should have -- I'm
6 referring to the two digit issue versus three digit.

7 THE COURT: Wait just a minute. Why is that at
8 all relevant or even admissible in view of the statute?

9 MR. GIBSON: Because, Your Honor, if you pardon me
10 for a second, what's underlying this is Mr. Morgan's
11 belief that there is a good faith argument to be made
12 that North Carolina statutory framework is
13 intentionally set at two digits and three digits would
14 create a sphere of data which would challenge the
15 efficiency and the operation of the Intoxilyzer; and
16 because that is being done in other states, that's why
17 I asked the question, it wasn't just to hear myself
18 talk, of Mr. Eisele, that data to three digits and
19 other data is being collected in other states and that
20 data is subject to examination in court proceedings
21 around the country. North Carolina --

22 THE COURT: Well, regardless of -- wait just a
23 minute -- regardless of what other states say, our
24 statute says reported in hundredths and it's determine
25 guilt or innocence on that basis, not on the basis as

1 was previously testified by this witness, I believe.

2 MR. GIBSON: Well, if a lawyer is going to try to
3 challenge that statute, he's going to have to build an
4 evidentiary basis. A very difficult one, I will point
5 out. But in North Carolina the data is not being
6 collected.

7 THE COURT: Well, why couldn't the data from other
8 states be used?

9 MR. GIBSON: I think that is possible.

10 THE COURT: Well, then why bother these people?
11 Why does he have to disrupt this office?

12 MR. GIBSON: Well, candidly, Your Honor, I think
13 at some point earlier Mr. Morgan should have moved on
14 to another approach. I think that's a strategy
15 question.

16 But the underlying issue here and the question of
17 whether he's violating the Rules of Professional
18 Conduct goes back to is there a reasonable basis for
19 him to try to do what he's doing in court proceedings?

20 THE COURT: All right.

21 MR. GIBSON: Now, whether we think it's
22 reasonable, whether we think he'll prevail, you know,
23 there are lots of folks who have chased windmills and
24 it's taken them a longer time than any of us might have
25 thought was reasonable to catch them but that's where

1 we're coming from.

2 THE COURT: I understand your point. Go ahead. I
3 don't know how much you need to develop with this
4 witness. I understand what you're saying.

5 MR. GIBSON: Again, all I wanted to do is make
6 clear that it's being done in other states. It could
7 be done here if ordered. There's no scientific,
8 mechanical reason it couldn't be, it's just that you're
9 complying with the state statute.

10 THE COURT: That's what these people are doing,
11 they are complying with the state statute and he can't
12 force them not to. That seems to me -- how can he
13 force these people not to comply with the statute?
14 Isn't that what we're talking about.

15 MR. GIBSON: I think at an earlier time it became
16 clear that the data is not available in North Carolina.

17 THE COURT: Right, that's correct.

18 MR. GIBSON: And so at that point alternative
19 approaches would be appropriate. But the question
20 becomes is that a violation of the Rules of
21 Professional Conduct.

22 THE COURT: Okay. I understand.

23 MR. GIBSON: May I have a second? (Discussion
24 with Mr. Morgan.) No further questions.

25 THE COURT: All right. Anything further?

1 MS. DUFFY: No, Your Honor.

2 THE COURT: You may step down.

3 (Whereupon, the witness left the stand.)

4 THE COURT: Yes, ma'am.

5 MS. DUFFY: Your Honor, that's the evidence for
6 the State.

7 THE COURT: All right. Does the defendant wish to
8 present evidence at this time?

9 MR. GIBSON: Yes. We'll present Mr. Morgan.

10

11 CHARLES L. MORGAN, JR., the Respondent, having
12 been first duly sworn to tell the truth, was examined
13 and testified as follows:

14

15 DIRECT EXAMINATION

16 BY MR. GIBSON:

17 Q Mr. Morgan, would you state your name and address for
18 the record.

19 A Certainly. I'm Charles Linwood Morgan, Jr., and I
20 reside in Mecklenburg County.

21 Q Mr. Morgan, would you explain to the judge why you issue
22 subpoenas and handle DWI cases in the manner that's the
23 subject of this proceeding.

24 A Yes, sir. On a good faith basis I issued these
25 subpoenas to protect my client's Sixth Amendment rights as