

## VOLUME II

(Thursday, August 10, 2001, at 10:40 a.m., in open court.)

1 (RESUME PROCEEDINGS)

2 THE COURT: Anything else before we get  
started this morning?

3 MR. HEAD: Not from us, Your Honor.

4 MR. FERN: Briefly, Your Honor, Motion for  
Discharge and Acquittal, we would still cite Code  
5 Sections, and I'm not going to go into those again;  
17-7-17, and 15-6-3. We further cite to The Court  
6 the State -- the case of Head versus State, 189  
Georgia Appeals, 111, 1988. And it's compliance --  
dictates Georgia's strict compliance due to the  
7 harsh sanctions involved with this particular  
Discharge and Motion for Acquittal.

8 THE COURT: Well, it appears that we  
have a timing situation with regard to that,  
9 and so until I hear something further I will  
deny that motion. Anything else?

10 MR. HEAD: No. I think we're ready.

11 THE COURT: Okay.

Is the jury here?

12 THE BAILIFF: Yes, sir.

13 THE COURT: Okay. Will you bring them  
14

in, please.

(Whereupon, the Bailiff exits the courtroom.)

1 THE COURT: Ms. McMurray, you may come  
on back up to the stand if you would like.

2 (Whereupon, Ms. McMurray retakes the  
witness stand.)

3 THE COURT: Thank you, ma'am.

4 THE WITNESS: Uh-huh (affirmative).

(Whereupon, the jurors enter the  
courtroom and are seated in the jury box.)

5  
6 THE COURT: Good morning, ladies and  
gentlemen. I hope you're doing well. I wanted  
7 to apologize to you this morning. I was the  
reason for the late start this morning, and  
8 unfortunately the obligation that I had run a  
little long and I sincerely apologize to you  
9 for that. I don't like it when people waste my  
time, and I apologize personally to each of you  
10 that my obligation ran a little bit longer this  
morning than I had anticipated.

11 As you will recall, ladies and  
gentlemen, as we closed out the day yesterday  
12 Mr. Head was examining Ms. McMurray.

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And at this time, Mr. Head you are invited to continue your examination.

MR. HEAD: Thank you, Your Honor.

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CONTINUED DIRECT EXAMINATION

BY MR. HEAD: (Resuming)

2

Q. Okay. Ms. McMurray, I think we covered your qualifications yesterday, okay?

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A. Okay.

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Q. I'm going to be asking you about various aspects of this case, and I want to start with the question of standardized field sobriety testing. Do you remember us talking about that yesterday?

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A. Yes, sir.

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Q. And are you familiar, again, with the NHTSA, National Highway Traffic Safety Administration guidelines?

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A. Yes, sir.

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Q. Have you taught that?

A. Yes, sir.

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Q. Now, I want to ask you first about what the NHTSA training indicates insofar as checking the subject for horizontal gaze nystagmus, the eye test, what does it -- what does it require of the officer?

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A. Well, first to -- first to inquire of the person you're going to administer the test to whether or

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1 not they are wearing contact lenses. There was some  
2 debate whether or not to differentiate between soft  
3 lenses versus hard lenses. But in many cases, even the  
4 current training, they still say check for contact  
5 lenses, ask the person specifically, and notate it.  
6 Also, if they're wearing eyeglasses you would notate  
7 that. Part of the training that we would give would be  
8 to stress to people if they're wearing eye glasses still  
9 ask about contacts because some people wear both contacts  
10 and eye glasses. They need -- their vision is so bad  
11 that they do both.

12 Q. Uh-huh (affirmative).

13 A. As -- did you want conditions under the  
14 testing or just the questions.

15 Q. Well, if you see that they're wearing  
16 glasses, what do you do if they're wearing glasses?

17 A. Have them remove the glasses.

18 Q. Okay. Now, does the NHTSA training require  
19 the officer to do that or is that just an optional thing?

20 A. It's required.

21 Q. Okay. As far as the location of giving the  
22 HGN evaluation, is there -- are there any guidelines  
23 relating to a proper environment or location for giving  
24 the HGN evaluation?

25 A. Yes, sir. Ideally, you want a very well lit

1 environment. It helps seeing the person's eyes to watch  
2 what they're doing, but you do want some light because  
3 you have to be able to see their eyes, you have to be  
4 able to see if there's a little white left at the edge  
5 when you're taking up to maximum deviation. You also  
6 want the person positioned so that they're facing away  
7 from distractions. You don't want them facing, say, the  
8 roadway where the traffic would be going by because  
9 objects that move in and out of your field of vision can,  
10 in and of themselves, trigger some of the jerking that  
11 you would be looking for. You definitely do not want  
12 them facing any kind of flashing or rotating lights. The  
13 same thing, the light would be moving in and out of your  
14 field of vision. That can cause the nystagmus, also.

Q. Okay. As far as people who have an existing  
nystagmus problem that's noticeable, just a congenital  
nystagmus problem, can those people get licensed?

A. Yes, sir.

Q. And are there other causes of nystagmus  
other than alcohol?

A. Yes, sir. There are numerous causes. Being  
tired can cause nystagmus, a blow to the head,  
concussions especially are things to watch out for.  
That's kind of where a lot of the nystagmus testing  
started was hospital emergency rooms looking to determine

if a person had a concussion.

Q. Okay.

1 A. Certain drugs can also cause nystagmuses,  
certain illnesses can also cause nystagmus.

2 Q. Like Dilantin, and anti-seizure medicines,  
and things like that?

3 A. Yes, sir. Or accessible amounts of caffeine  
or nicotine could also trigger a nystagmus.

4 Q. Okay. Now, in the event these NHTSA  
guidelines are not followed, what does the NHTSA training  
5 say about the reliability of the HGN evaluation if these  
rules are not followed.

6 A. Basically, you've compromised it. You  
cannot rely on their statistics for the testing.

7 Q. The word they use is compromised?

A. Yes, sir, compromised.

8 Q. Okay. And the one-legged stand and walk-  
and-turn evaluations, let me start by asking you if -- is  
9 there a difference between the two of them versus the  
HGN?

10 A. Yes, sir. The one-legged stand, walk-and-  
turn are basically considered divided attention tasks  
11 that also involve balance. That's also part of the  
divided attention.

12 Q. Okay. And how -- and what is the HGN, what

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is it called?

1           A.           It's basically a physical test. It's an  
involuntary jerking. There's nothing a person can do to  
prevent it, control, stop it.

2           Q.           Okay. And would a person who has nystagmus  
or that their eyes would be jerking due to rotating  
lights or oncoming traffic, would they even know their  
3 eyes are making this -- this very small movement?

4           A.           No, sir.

5           Q.           Now, on the one-legged stand evaluation and  
the walk-and- turn, are there any environmental  
guidelines that NHTSA requires to get a valid reading on  
those?

6           A.           Yes, sir. For -- most critical would be a  
smooth, level, flat surface, preferably well lit, but in  
7 any case there needs to be some lighting because part of  
balance is visual clues. You want a surface that's free  
8 of any debris, and when I say level I mean not just  
smooth, but leveled, not sloped in any way, shape, or  
9 form.

10          Q.           Okay.

11          A.           And, again, away from any distractions.  
Like you wouldn't want to do it right on the edge of the  
12 roadway. You would want to move the person off to the  
side.

1 Q. Okay. And if you have a -- a location off  
of the highway itself, what does NHTSA say about moving a  
person to a different location?

2 A. Totally acceptable to move them to a new  
location to do testing in a more safe, better  
environment.

3 Q. Okay. Now, as far as the location of these  
field tests, have you been out to that location?

4 A. Yes, sir.

5 Q. And did you walk around out there?

6 A. Yes, sir.

7 Q. Okay. Could you tell the jury what your  
first impression upon seeing it was and then what you  
determined after walking around out there?

8 MR. FERN: Your Honor, I'm going to  
object as to foundation here because I don't  
know if it's necessarily been laid that she  
knows the precise spot in which the stop  
occurred. And I would like that clarified  
prior to her testifying to this.

9 THE COURT: I concur.

10 BY MR. HEAD: (Resuming)

11 Q. Okay. Ms. McMurray, let me go back to this.  
Did -- when you came into -- when did you get into town?

12 A. Tuesday evening.

Q. Okay. Tuesday evening, who were you with?

A. Tuesday evening I had dinner with yourself and the Defendant.

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Q. Okay. And after you -- after that who were you with?

2

A. You.

3

Q. Okay. And did I drive you out to a location on Holcomb Bridge Road?

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A. Well, you drove me to a location. Thinking of signs that I've seen, yes, I saw a sign for Holcomb Bridge. There was a side thing that looked like it was a gated area, and I was told that was a golf course area or something like that back there.

5

Q. Okay. Did -- did you -- do you remember the location that we went to in relation to a bridge?

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A. We had gone past a -- under a bridge. There's so many bridges here that it's hard for me to tell you. I mean, it's -- Atlanta traffic, you've got such wide roads, lots of overpasses. I couldn't tell you exactly where it was other than it fit the description. It looked like the sketches that I had seen in terms of where you said that the tests had been occurred.

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Q. Okay. And do you remember after that leaving and going to the intersection of Spalding and Holcomb Bridge?

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A. Yes, sir.

Q. Okay. Are you familiar with that intersection?

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A. Yes, sir.

2

Q. Okay. Now, as far as Holcomb Bridge Road, would you know where the county line is just from your own knowledge?

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A. No, sir.

4

Q. Okay. And from -- from where you were looking at this location, were you on the Spalding Drive side, or on the -- across the river from the Spalding Drive side?

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A. I'm not sure I know where the river is. I've been up that road so many times with you I don't know if I've seen a river.

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Q. Well, you didn't go through the river, you went over it on the bridge.

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A. Well, like I said, there's so many bridges that we go over, but I do know where the Spalding is and the Holcomb Bridge sign. I remember seeing that numerous times.

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Q. Okay. Do you remember the gated -- you said you remember the gated area, do you remember what it said there or what it was leading in to?

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A. It said something about golf. I mean, I had

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the impression that there was a golf course beyond the tree line there.

1 Q. Okay.

A. Beyond the gates, then the tree line.

2 Q. Okay. Now, as far as it being on Holcomb Bridge, do you remember seeing the words, Holcomb Bridge, there?

3 A. I remember seeing the woods, Holcomb Bridge.

4 Q. Okay.

A. Partly because there's several signs for Holcomb Bridge along that roadway.

5 Q. Okay. All right.

6 MR. HEAD: Your Honor, I don't know if I can lay any more foundation since she doesn't live in the area. But, I mean, we -- we

7 -- basically, she was with me when we went out there. I don't know if I can lay anymore

8 foundation than that. And I was basing that on the previous hearings with the police officer

9 and his drawing -- I mean his police report.

10 MR. FERN: Your Honor, I again renew my objection because it doesn't state the specific

11 area. And if we're going to identify the terrain and the location, specifically, we need

12 some specific testimony of exactly where it

1 was, where the stop was located, and exactly  
2 where it was that these tests proven upon to be  
3 provided or were provided so that this expert  
4 can give her testimony in that regard.

5 MR. HEAD: Your Honor, I plan to ask  
6 her some relationship to that gate -- I plan to  
7 ask her questions about that. I think that  
8 will establish it.

9 THE COURT: I'm going to overrule the  
10 objection. I do note that some foundation as  
11 been laid. If he gets too specific, Mr. Fern,  
12 I would urge you to re-urge your objection. Go  
13 ahead.

14 MR. FERN: Thank you.

BY MR. HEAD: (Resuming)

1 Q. Ms. McMurray, when -- when out at the  
2 location that you went to two nights ago, and in  
3 reference to that gated area, and I want you specifically  
4 think of the gated area as being where those doors are  
5 (indicating), and looking in an uphill direction --

6 A. Okay.

7 Q. And take note of which direction traffic was  
8 going there. I'm not going to try to make you guess east  
9 or west at night, okay?

10 A. Okay.

Q. Okay. Is that a reference point for you?

A. Okay. If that was the gate, itself --

Q. Right.

1 A. -- the traffic would be to my back,  
essentially, heading that way.

2 Q. Okay. So if you were standing here and the  
3 gate was on your right, is the traffic going this way or  
the opposite way in the lanes that you are in?

4 A. If that's the gate, and I'm facing the gate,  
the traffic would be going behind --

5 Q. Let me make sure -- where the -- where the  
6 jury is sitting is the road and this is the curve in the  
grass --

A. Okay.

7 Q. This is the curve in the grass, but the  
8 gate's over here to this side -- I'm trying to get you to  
-- to where you were -- the side of the road where you  
9 were -- where you were on, was traffic going uphill or  
downhill?

10 A. Well, if we're coming from my right to my  
left, then I believe there is -- that would be what you  
would be calling uphill.

11 Q. Okay. Now, approximately from the door  
12 there to where you are sitting, did you get a look at the  
road conditions and slope in that area?

A. Yes, sir.

Q. Did you walk around on the road there?

A. Yes, sir.

1 Q. And could you tell the jury what you noted  
2 about the road and it's -- and it's condition in -- as it  
3 relates to the NHTSA field sobriety tests?

4 A. Well, it was a black top surface and I'm  
5 driving up towards it, my first reaction was it looked  
6 like a nice, safe place because there was plenty of room  
7 there. But when I got out of the car and started  
8 walking, my first reaction is it's almost like a double  
9 slope, it's sloping down towards the road, but it's also  
10 sloping the other direction. And it's -- there's the  
11 water, if you were to put something up at the upper right  
12 hand corner by the gate it's not going to slide just down  
13 to the road. It's going to go at an angle diagonal  
14 towards the road because you've got the slope going down  
as well as the slope coming this way. It doesn't look  
like that bad of a slope until you start walking on it.  
I was actually surprised in walking on it because I had  
nice walking shoes on, and yet my first reaction as I  
started to walk down I could feel myself taking faster  
steps. The slope was much more pronounced than it  
visually looked like. It was very deceptive in terms of  
the slope. I actually walked around your entire car to

determine how much the slope was, and, again, it was sloped down, as well as towards the gully.

1 Q. Okay. And is part of that slope for water run-off?

2 A. That would be what I would assume it was for, is you wouldn't want the water rushing out into the roadway. You want it directed towards the gully, and yet 3 they had to come down because the gate was up higher than the roadway.

4 Q. All right. And as far as ambient lighting in the area, what is -- what did you find?

5 A. There were lights right by the gate, but there weren't real bright lights. And as for the other, 6 in terms of the road lights, just your normal highway far apart spaced lighting. It wasn't very bright.

7 Q. Okay. And as far as when you were in front of the car, with the headlights, where -- did you have 8 ample light to see there?

9 A. When I was in front of your car, yes, sir, there was ample light. When I would be on the side 10 between your vehicle and the gate, itself, it's relatively dark. When I was behind your car it was 11 definitely dark, and between your car and the highway it was definitely dark.

12 Q. Okay. Now, based upon the NHTSA training

1 that is in the manual, and based upon actually visiting  
2 out at this location, did you come to any conclusions  
3 about the propriety of that location for doing walk-and-  
4 turn and one-legged stand?

5 MR. FERN: Again, I'm going to renew my  
6 objection, Your Honor, because there hasn't  
7 been any testimony as to whether this vehicle  
8 was located on the side of the road, the curve  
9 that was involved, the shoulder of the road,  
10 the drop-off, it's not clear that this is the  
11 place where the field sobriety test was  
12 actually administered.

13 THE COURT: Mr. Head, I'm going to have  
14 to sustain that objection. I -- I think that  
15 conditions change over the course of roadways  
16 so much that you've got to be able to have  
17 this, or some foundation laid before this  
18 witness can testify as to the exact location  
19 that this -- this took place, and I don't know  
20 that that's been brought out before this court.

21 MR. HEAD: Well, Your Honor, the only  
22 thing I would point out is that I asked Officer  
23 Adams did he remember the gate, and was it  
24 -- what's -- was it the distance of the  
25 courtroom from here to there from where he was

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1 doing it, and that's the area that she's  
2 discussing. But can she go back and testify  
3 about whether it's been resurfaced, we're not  
4 really talking about the surface, we're talking  
5 about a slope and I don't think the geographic  
6 changes -- there have been any geographic  
7 changes there. I can put Officer Adams back up  
8 to ask him if he's noticed any geographic  
9 changes, but we're not -- again, we're not  
10 saying there's pebbles on the ground. We're  
11 saying what is the slope and the water -- and  
12 the road configuration as far as water run-off.  
13 That's all we're trying to show. This is the  
14 end of what I'm trying to show.

THE COURT: For that limited purpose  
I'll let you go on.

MR. HEAD: Okay.

BY MR. HEAD: (Resuming)

Q. Do -- do you understand the question or do I  
need to repeat it?

A. I think you should repeat it.

Q. Based upon the location, with the gate being  
approximately the length of the courtroom off to the  
right side, and that stretch of road right there, and  
based upon what NHTSA guidelines say about a proper

environmental surface for one-legged stand and walk-and-turn, did you come to any conclusion about the propriety of that location?

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A. Yes, sir.

Q. And what did -- what did you conclude?

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A. Too much slope for a one-legged stand, walk-and-turn would be very difficult because of the slope down, as well as the slope towards the gully. There wasn't any real flat, level area in there unless you got all the way down to the road, and that puts you too close to traffic, there would be too much distraction. Where as it looked on first approach as a good spot, walking it made me realize it was not a good sight.

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Q. Okay. Now, as far as -- as slope and the grade here, does it make the test impossible or simply difficult?

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A. It makes it more difficult, especially since you're walking in a manner that is not natural, meaning, you know, foot directly in front of the other foot, heel touching the toe. That's a -- more difficult than it really sounds because they're little tiny baby steps.

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Keeping your arms strictly at your side is why it becomes much more difficult. When you're walking a balance beam, the first people -- thing people want to do is arms out for balance. In this case you have to keep your arms at

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1 your side. I used my arms for balance when I started  
walking this, and I wasn't trying to walk heel to toe, I  
was just walking and that's the first reaction when I  
realized how steep it was. Because it is much more slope  
than it looks.

2 Q. All right. Well, as far as NHTSA training,  
3 does NHTSA say -- do they give any percentages of  
acceptable slope or do they -- how do they characterize a  
proper surface.

4 A. I don't think they give a percentage on  
5 acceptable slope. They just say a smooth, flat level  
6 surface clear of debris, preferably well lit, but in any  
case you have to have enough lighting that a person can  
see where they're going.

7 Q. Okay. All right. That's all I want to ask  
you about that part of that, but I want to ask you this.

8 As far as the -- as far as the walk-and-turn and one-  
legged stand, and according to NHTSA training, do those  
9 two evaluations have a percentage of reliability?

10 A. Well, yes, NHTSA's done testing and assigned  
a percentage of reliability if they're performed  
properly.

11 Q. Okay. And could you tell the jury, first on  
the walk-and-turn, what that percentage of reliability  
12 would be?

A. Walk-and-turn is 68 percent reliability factor.

Q. How about the one-legged stand?

1 A. Sixty -- I said 68 for walk-and-turn, 65 for one-legged stand.

2 Q. Okay. And out of a hundred people, using  
3 the two tests, respectively, 32 percent and 35 percent of  
4 the people, what does it mean for those people out of  
5 every hundred who are tested for those even on a level,  
6 flat, level surface with no impediments and good  
7 lighting?

8 A. In terms of it saying it's got a 65 percent  
9 or a 68 percent reliability would mean either 32 or a 35,  
10 depending on which of the numbers you're using, of people  
11 that are sober are not going to be able to perform this  
12 test adequately. They would be considered as failures.

13 Q. And is that on the surface that NHTSA  
14 describes as flat, level surface?

A. Flat, level surface, well lit, smooth, no  
debris.

Q. All right. Let me turn now to the question  
of the breath-testing device, the Intoxilyzer 5000, okay?

A. Okay.

Q. And how many years have you been working  
with that device?

A. Since 1986, so 14 years.

1 Q. All right. I would like, if you could, to  
first explain to the jurors the basic operating  
principles behind that device. Could you tell them,  
2 basically, how it works on a level that I can understand  
and they can understand?

3 A. Okay. The Intoxilyzer 5000 is what's known  
as an infrared breath alcohol analyzer. It's  
4 computerized so the test sequence is all taken care of.  
The officer can't manipulate when the person blows, it's  
5 all pre-programmed. But how it analyzes a sample, you  
blow through a breath tube, your breath sample is carried  
6 back to the sample chamber. There's a light source on  
one end of the sample chamber, a detector on the other  
7 end of the sample chamber. If there's nothing but room  
air in the chamber, the one passing through the chamber  
8 reaching the detector gives you the maximum amount of  
light possible. That's using a base line. When the  
9 breath sample is in the sample chamber, if there's  
anything in there that absorbs infrared light at certain  
10 wavelengths, less light will reach the detector. So it  
looks for a reduction in light being equal to an alcohol  
11 concentration. The Intoxilyzer is relatively dumb as far  
as infrared analyzers goes because it's only got a total  
12 of five to go through, one of them being a baseline

1 background check. The other four would be for looking  
2 for the alcohol and possibly determining chemical  
3 interference. But it's only got four and there's  
4 literally hundreds of thousands of different chemicals  
5 looking at just the wavelengths that the infrared is  
6 looking for. In an intoxilyzer there's literally  
7 thousands of compounds that would contain the methyl  
8 group, the structure that it's looking for. So there's a  
9 lot of things that could appear on a person's breath that  
10 can show up as being alcohol, even though they're not  
11 necessarily drinking alcohol.

12 Q. Okay. So going back to the principle of  
13 light shining through a chamber, you're saying the light  
14 starts at an intensity here (indicating), correct?

A. Correct.

7 Q. And then it's red over here on the other  
8 side of the chamber, correct?

8 A. Correct.

9 Q. And any diminution causes what as relates to  
10 a number?

10 A. Diminution, meaning less light, means  
11 increased alcohol, or it's assumed to be alcohol.

11 Q. Okay. And then you have some molecules up  
12 here. Could you, using these, explain to the jury how  
13 some of these other chemicals -- you said there were  
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thousands, how could some of these other chemicals be read and give a number if they're not actually drinking alcohol?

1           A.           Okay. I'll try to position these so it  
2           makes the most sense. All right. What this one here  
3           (indicating), would be representative of ethyl alcohol,  
4           drinking alcohol. There's two carbons, five hydrogens  
5           attached to the carbons, and then an oxygen with a  
6           hydrogen attached to it. The blue red combination is  
7           what makes this categorized as an alcohol, so I guess I  
8           don't have -- here we go. The blue red here on this  
9           molecule would also be alcohol, so this represents one  
10          type of alcohol, the one in my other hand represents  
11          drinking alcohol, ethyl alcohol. What the intoxilyzer is  
12          looking for, though, isn't this blue red combination.  
13          It's looking for the black ball with the three balls  
14          attached. This is called a methyl group. You've got a  
15          methyl group on this molecule (indicating), you've got a  
16          methyl group on this molecule (indicating), a methyl  
17          group on this molecule (indicating). It wouldn't be able  
18          to tell the difference between the three different methyl  
19          groups unless it's well calibrated for detecting  
20          interference.

11          Q.           Okay. Now, I want to go back to that  
12          concept, and let's assume for a moment that a person

1 who's blowing into this -- let's say a person has more  
2 than one type of chemical, not just the -- not this  
3 drinking alcohol. Let's say they have something else on  
4 their breath. How is the breath machine going to be able  
5 to separate out and tell you what the different chemicals  
6 are, or can it do that?

7 A. Can it separate what the differences are?  
8 To some extent it can but not efficiently. Things that  
9 are alcohols it's not necessarily going to be able to  
10 distinguish this -- let's move some of the balls around  
11 here so this one now looks like isopropyl alcohol.  
12 There's two methyl groups, the hydroxyl, my ethyl alcohol  
13 is one methyl group, the hydroxyl. The intoxilyzer  
14 cannot tell the difference between these two. Even with  
15 the five filters it does a terrible job differentiating.  
16 They look too much alike. I mean, if you just block off  
17 one end, these two essentially are the same. If I cover  
18 one of the red balls then the rest of what's sticking  
19 above my hand in both hands is essentially the same  
20 molecule. That's why it can't tell the difference  
21 between the two of them.

22 Q. You mentioned a wavelength and that the  
23 wavelength varies, could you -- could you explain to the  
24 jury what an infrared wavelength -- what that -- could  
25 you give a better analogy of something that would make

them understand what a wavelength was like, when an infrared light shines through it.

1           A.       Well, an analogy that might help, let's  
2 picture the sample chambers being a train tunnel, the sun  
3 at one end would be the infrared source, my eyes would be  
4 the detector. The way it's looking for different  
5 wavelengths, and those are just certain frequencies of  
6 infrared -- it's real hard to describe what they are, but  
7 to make it simple, the way it differentiates these is  
8 it's got filters. So if I put sunglasses where one lens  
9 was blue blocker and the other one was one of those gray  
10 tone lenses, it would be the same as having two filters,  
11 and I would be seeing slightly different things through  
12 each filter. The equivalent of the intoxilyzer, each of  
13 the filters is only allowing certain energy levels of the  
14 infrared to pass through.

8           Q.       Okay. All right. And -- and based upon  
9 what you're saying, you said there were -- on a spectrum,  
10 you said earlier, I think yesterday, you had worked on a  
11 full spectrum graph all the way across. How many  
12 different wavelengths can chemicals produce -- can these  
13 chemicals produce?

11          A.       Well, the chemicals aren't producing the  
12 wavelengths. It's light energy and it basically is in  
13 infinitesimal amounts of energy levels. The filters

1 don't really sort out just one wavelength, but rather  
2 they try to narrow it down so the center of the filter  
3 would be the wavelength you're looking for, the energy  
4 level that you're looking for.

5 Q. Okay. And assume, for the moment, a person  
6 on a high protein diet, had been on the diet for some  
7 time, can you tell the jury how that might relate to the  
8 examples you're doing, how does that correlate to what  
9 you're showing them with these different molecules?

10 A. Well, a person who's on a high protein diet,  
11 meaning very limited carbohydrates, the purpose of doing  
12 that is it switches your body over. So instead of using  
13 glycogen as an energy source it starts using ketones as  
14 an energy source. The primary ketone -- well, actually  
15 it's using fat as an energy source, the bi-product being  
16 the ketones. The primary ketone that you're going to  
17 have produced would be acetone, which again has got the  
18 methyl group on it. In burning fat you build up very  
19 large concentrations of ketones in your system. Your  
20 body after a period of time, give yourself about a week  
21 on such a diet, becomes rather efficient at burning the  
22 ketones, and doesn't necessarily cause any serious side  
23 effects, unless something's introduced like some  
24 carbohydrates. Your body no longer knows how to handle  
25 the carbohydrates. Typically it will cause your body to

1 become rather acidic, and if you become acidic, this  
2 molecule will then rapidly transform into the isopropyl  
3 alcohol. It simply -- this one's not quite put together  
4 -- when it becomes isopropyl alcohol, you've now added  
5 alcohol to two methyl groups, the intoxilyzer can no  
6 longer tell the difference. The intoxilyzers are  
7 supposed to be able to recognize acetones, but that  
8 requires very good calibration, careful calibration.  
9 Most intoxilyzers are not checked adequately where you  
10 could say it's 100 percent efficient at flagging acetone.

11 Additionally, if you have high concentrations of acetone  
12 it becomes less able to flag it. It looks for  
13 concentrations that would be normal for your average  
14 diabetic, a person on a starvation fast, or a protein  
sparing fast is going to have much more acetone than what  
you would expect in that type of situation, making the  
device blind.

8 Q. Okay. Now, you said that, earlier, you  
9 introduce this carbohydrate, would beer be a  
10 carbohydrate?

11 A. Yes, sir. Beer is a carbohydrate.

12 Q. Okay. You said if you introduce that into  
13 your system after being on a high protein diet the  
14 ketones are produced which are then converted to  
isopropyl alcohol?

A. Correct.

1 Q. Okay. Would the breath machine -- forget  
about acetones and ketones, but would the breath machine  
be able to distinguish between isopropyl alcohol and the  
drinking alcohol we call ethyl alcohol?

2 A. No. Not the intoxilyzer.

3 Q. Okay. Now, the -- the source of the  
isopropyl alcohol, is that coming from consuming alcohol,  
or is it coming from being generated inside your body and  
4 actually producing in your body?

5 A. The isopropyl would be generated by your  
body. Your body is burning fat making acetone. It  
6 becomes acidic, the acetone will turn into the isopropyl,  
so this is not alcohol that you drank, this is something  
your body made kind of as a result of having burnt the  
7 fat and then received some carbohydrates.

8 Q. Okay. Now, if your body didn't convert the  
acetone into isopropyl, what would happen to you?

9 A. If it didn't convert the acetone into  
isopropyl you would get very very sick very very fast.

10 Q. Could it kill you?

11 A. In theory it could, but I don't think your  
body would be able to build up that high of a  
12 concentration. Woodmark, Eric Woodmark, a Swedish  
scientist did a lot of research on acetone, and he

1 actually would consume as much as a liter of acetone,  
2 which makes me shiver because acetone, if you haven't  
3 figured out yet, it's like nail polish remover. He would  
4 drink as much as a liter of that and that didn't kill  
5 him. He's dead now, but he lived a long time ago.

6 Q. So this phenomenon of going on the high  
7 protein diet, and then the person introducing  
8 carbohydrates that hasn't been seen in large quantities,  
9 is that something that is part of physiological science,  
10 biology, is that a commonly known factor, or has studies  
11 been done on this?

12 A. Converting acetone to -- for, yeah, acetone  
13 to isopropyl alcohol?

14 Q. Right.

15 A. Uh-huh (affirmative). Yes, sir. There  
16 -- first of all, when I finally saw something in the  
17 literature dealing with this biotransformation in the  
18 human body, it was enlightening to me because as soon as  
19 I looked at the chemical reaction I wound up hitting  
20 myself in the head and saying, dah, it's a basic chemist  
21 reaction that you learn in organic chemistry lab, taking  
22 a ketone, put it in the presence of an acid, and it  
23 becomes an alcohol. There was an article that came out  
24 just a couple years ago by A.W. Jones, who was probably  
25 one of the most well known names in the field of breath

1 alcohol testing, describing -- well, the article was  
entitled Biotransformation of Acetone to Isopropyl  
2 Alcohol. And it was reporting a case study where a  
person in Sweden had been arrested, and then they had  
3 done both a breath test and a blood test, and because of  
4 the discrepancy between the two tests, they looked closer  
and discovered in the blood sample that they had two  
5 different kinds of alcohol, which explained why the  
breath tests were so high. It couldn't tell that these  
6 were two different kinds. Instead it read it as being  
all the same type of alcohol.

7 Q. It just combined them and gave a higher  
number?

8 A. Yes, sir.

9 Q. But the blood test, when it was run, broke  
10 them out into their proper components?

11 A. Yes, sir. Actually, the blood test broke it  
12 out into isopropyl alcohol, ethanol, and acetone. It  
showed high concentrations of all, but it was the first  
13 case study that had ever been reported. It had been  
-- in looking at all the literature that I had been  
14 reading over the years about breath testing and  
concentrations of acetone and started realizing that when  
they talked about fasting people, because we talk about  
acetone levels in fasting subjects, historically they've

1 always looked at 36 hours, 24 to 36 hours. That's not  
2 realistic. I mean, today with people going on diets that  
3 last weeks, months, or longer, people that do voluntary  
4 fast -- I mean, if I'm -- if somebody asked me what a  
5 fast was I would say a minimum of a week, because when I  
6 do fasting it's usually a week to ten days.

7 Q. Okay. Now, is there a description of what  
8 goes on in your body once you go into this high protein  
9 state, is there -- is there any type of commonly known  
10 scientific term, is it called something like --

11 A. Ketosis.

12 Q. Excuse me?

13 A. Ketosis.

14 Q. A state of what?

15 A. A state of ketosis. When you're burning fat  
16 as opposed to burning sugars for energy you would be in  
17 ketosis. When you become acidic it's called keto  
18 acidosis, meaning the ketones are being exposed to acids.

19 Q. Okay. Now, you mentioned Dr. A.W. Jones, is  
20 he an American scientist or what?

21 A. Well, he lives in Sweden and so a lot of  
22 people say that he's a Swedish scientist. In reality he  
23 comes from Wales. He married a woman in Sweden, and  
24 that's where he resides.

25 Q. Now, you were saying that he did, on a

1 subject that had a high reading, he did blood and breath  
2 simultaneously, are you saying that the isopropyl, in  
3 addition to being on the person's breath actually was in  
4 the person's blood?

5 A. Yes, sir.

6 Q. And as far as Dr. Jones' research showed,  
7 did it show that that person also generated isopropyl  
8 from their internal system versus consuming it through  
9 their mouth?

10 A. That was the whole purpose of this article  
11 was to alert people that elevated concentrations of  
12 ketones in your body, if you become acidic, would then  
13 turn the ketones into isopropyl alcohol. That's the  
14 biotransformation of acetone to alcohol, that's the name.

15 And he actually was explaining how this happens and gave  
16 quite a wonderful description. And like I said, when I  
17 first read it, as soon as I saw acetone plus acid I knew  
18 what the end answer was going to be in the equation  
19 because that's basic organic chemistry.

20 Q. Okay. Now, is Dr. Jones in private practice  
21 or does he work for the Swedish government?

22 A. He works for the university in Linkoping, if  
23 I say that right, I'm probably mutilating it. He's a  
24 university employee. He does do private consulting. He  
25 comes to this country, I would say, oh a minimum of twice

a year, sometimes four times a year.

Q. Okay. All right. And do they use the Intoxilyzer 5000 in Sweden, Intoxilyzer 5000?

1 A. Yes, sir. But they call it an Intoxilyzer  
2 5000s, meaning when it scrolls, it scrolls in Swedish,  
not English.

3 Q. Okay. So they've had a program written for  
Swedish over there?

4 A. Yes, sir. And it -- the reporting units are  
slightly different. They don't report grams for 210  
5 liters, they report milligrams per liter.

6 Q. Okay. Now, this phenomenon of the high  
protein dieter and the effect on breath machines, is the  
7 literature coming out fairly recent, and if so, when did  
you first read an article that related to this?

8 A. The article on the Bio-Transformation was  
something that I came across as a result of being asked  
9 to investigate this issue for a different person within  
the last year. That triggered me to do a lot of research  
10 on the whole idea of ketosis, hypoglycemia, and alcohol-  
induced hypoglycemia.

11 Q. Okay. And do you remember when the Jones  
articles was -- article was published?

12 A. Well, I want to say that it was published in  
19--, let's see, we're in the year, 2000, so I want to

say 1996 in the Journal of Analytical Toxicology. I've got the article in my brief case. I could look -- look it up for you if you want that.

1 Q. Well, I just want to know if it's in recent  
2 times, and -- and the other question I had is, prior to  
3 that had you seen a specific article that talked about  
4 this prior to Dr. Jones doing this study?

5 A. Well, there were articles by various state  
6 agencies, like the National Highway Traffic Safety  
7 Administration, back in the early '80s, that put out an  
8 article regarding acetone interference on breath alcohol  
9 tests. There were numerous articles by Curt Debowski  
10 over the years about acetone interference. The Jones  
11 article is the first one that really hit home with me  
12 because, you know, if you just assume people are not  
13 going to have high concentrations of ketones then fine.  
14 The NHTSA articles, the Debowski articles sound very  
15 good. But when you read them carefully, the first thing  
16 the NHTSA article said is, we're not going to look at the  
17 unusual case. We're going to assume that your average  
18 driver is not going to have that high of a concentration.

19 They looked at what the norm is for acetone. They also  
20 -- both the NHTSA studies and the Debowski studies,  
21 fasting subjects is 24 to 36 hours. They didn't go  
22 beyond that. That was a serious oversight. Research

1 that I've done on this -- look up anorexics. You find  
2 out all kinds of interesting things about what happens  
3 when your body starts, essentially, eating itself. I  
4 found out that after 24 hours of fasting your ketone  
5 levels are elevated five times. If you go seven days  
6 fasting your ketone levels are elevated a hundred times.

7 They stopped the studies there because people get  
8 nervous when they withhold food from somebody for seven  
9 days. They felt that was still in a safe range.

10 Q. And so when you go on this type of fasting  
11 is the same general process of burning body fat to  
12 survive, is that going on?

13 A. That's going on, and the longer you do it,  
14 the higher the ketone levels will become.

15 Q. Okay. And it's not -- it's not just a level  
16 curve, it's like a geometric increase as the days  
17 increase?

18 A. Correct.

19 Q. So the longer you go you would expect to  
20 have higher levels of these chemicals in your body?

21 A. Yes, sir.

22 Q. And when a person has these chemicals, if  
23 they're in a state of ketosis or if it's gone so far to  
24 introduce a -- a carbohydrate and cause isopropyl to be

1 generated, what would you anticipate a person's breath  
2 would smell like, leaving out any ethanol, if there's no  
3 ethanol and they're just going into this state of  
4 ketosis, as you've described it, what would you expect  
5 their breath to smell like?

6 A. Nasty.

7 Q. Nasty in terms of what nasty?

8 A. Both the -- you would have some of the odor  
9 from the ketones, some of the odor from the isopropyl.  
10 Concentration wise, though, most people wouldn't be able  
11 to tell you what it was. I mean, if I mixed some  
12 -- isopropanol would be rubbing alcohol. If I mixed some  
13 rubbing alcohol with some acetone and asked you to smell  
14 it and tell me what it was, most people would say, well,  
15 it smells stringent, or it smells intoxicating. On a  
16 persons' breath, the concentration that you would be  
17 having there, to describe it as an intoxicating odor  
18 would probably be about what I would have called it.

19 Q. Without -- without some kind of equipment to  
20 distinguish which was which would you really know the  
21 difference between the smell of an alcohol coming off a  
22 person's breath like you -- you consumed alcohol?

23 A. No, sir. If I have a bottle of pure  
24 isopropyl and pure ethanol I could tell you the  
25 difference. Most people wouldn't. They would say they

smell essentially the same because it's a very strong stringent type of odor. I've worked around both of them enough that I know the difference in the smell. But if you were talking, you know, one-tenth of one percent concentration, would I be able to distinguish the difference between the two just by smelling it, no way.

1  
2  
3 Q. Okay. Now, going back to our -- our train tunnel, and using your analogy again, if that train tunnel has something in it that's going to absorb the light, like you said the sunglasses, if what's in there is not one type of carbon, but multiple like acetone and isopropyl, as well as ethanol, will the -- will the reading be able to break out what's just alcohol you've consumed versus the rest of it?

4  
5  
6  
7 A. No, sir. The more things you mix in the sample the harder it becomes for the device to sort out just the ethanol.

8  
9 Q. Okay. Does a breath machine actually analyze a person's blood?

10 A. No, sir.

11 Q. All right. Could you tell the jury how that relationship works, in terms of how a breath -- breath machine works, versus, say, a blood test with a gas chromatograph?

12 A. Well, with the -- are you trying to -- let

13

14

1 me make sure I'm understanding your question. You want  
2 to know how a GC works versus an infrared analyzer, or  
3 you want to know the difference between a breath alcohol  
4 and a blood alcohol?

5 Q. Well, I'd like -- I'd like to -- you might  
6 start off, if you would, by explaining how the blood test  
7 works and then show how a breath -- how it works in  
8 relation to a blood test. Do you have -- does that  
9 -- does that make it clear, somewhat?

10 A. I'll try. I'll try. With a blood test  
11 they're actually looking for the molecule itself.  
12 They're using a GC, which is a gas chromatograph -- I'm  
13 trying to think of the easiest way of explaining it.  
14 There's -- there's a hollow tube, if you were actually to  
15 look at the capillary that it's being passed through,  
16 you wouldn't be able to see that there's really a orifice.  
17 That's how skinny that the hole is through this tube.  
18 It's actually wrapped around in a coil so the things  
19 could be several meters long, actually hundreds of meters  
20 long in some cases. By passing it through, the smaller  
21 the molecule is the faster it's going to move. So the  
22 ethanol is going to come through the GC column a whole  
23 lot faster than the isopropyl will. That way you can  
24 actually separate it out where you get a peak reading on  
25 your recorder. It says, okay, we just got one compound

1 out in its entirety. The path length is so long that  
2 there's plenty of time for all of the ethyl alcohol  
3 molecules to reach the same general area if they're  
4 detected simultaneously, or essentially simultaneous.  
5 Then along would come the next larger molecule, and the  
6 next, and the next. To some extent the size of the  
7 molecules will also be affected by what kind of things  
8 are attached to it. If we have a double bonded oxygen  
9 versus a hydrogen oxygen bond attached to a device, the  
10 molecule -- I mean, that will determine how fast or how  
11 slow it goes through. So with blood analogies they can  
12 actually tell you just the ethyl alcohol. Whereas, with  
13 breath analysis, it's simply looking to see how many of  
14 these little black balls, with the three balls attached,  
how many of these can it count in that sample all at the  
same time. Now, it's going to count all of these,  
essentially, the same. The extra filters are supposed to  
help separate out some of the other compounds, but unless  
you're calibrating it and checking the calibration quite  
closely, you're not going to be able to. Additionally,  
with the intoxilyzer, originally it had three filters.  
It thought there were only two chemicals in the entire  
world. The version that Georgia has now has five  
filters, but it's still looking for the methyl groups,  
and they only calibrate using acetone and ethanol, which

1 means the only things that you can reliably count on it  
2 flagging would be acetone and ethanol. They don't check  
3 it well enough or frequently enough that you could rely  
4 that it's even going to be able to do that.

5 Q. Well, are -- are there any breath machines  
6 that can distinguish between ethyl alcohol, which we  
7 drink, and isopropanol -- or isopropanol?

8 A. Are there any machines that can distinguish?  
9 Yes, sir. The Draeger 7110 does infrared at nine-and-a-  
10 half microns, it does field cell, but they've got a very  
11 well designed field cell that, due to computer  
12 indigration, they can tell the difference between  
13 ethanol, isopropanol, methanol, just about any of the  
14 alcohols. And they've got it configured such so that the  
15 first thing it's going to read would be the ethanol.  
16 That way it can tell you specifically what it's looking  
17 at. Other things by doing the nine-and-a-half microns  
18 it's looking for what makes it an alcohol as opposed to a  
19 ketone body.

20 Q. Okay. Georgia doesn't use that machine,  
21 though, correct?

22 A. No, sir. Correct. Currently there's only  
23 one state using that.

24 Q. What state is that?

25 A. Alabama.

Q. All right. And what machine did they have before they went to that?

A. Intoxilyzer 5000.

1 Q. Okay. And when did they change to the Draeger machine?

2 A. They're still in the process of changing it. Switching equipment is a very time consuming process.  
3 They've been changing over for about a year-and-a-half now. They're rapidly approaching the end at this point.  
4 I believe there's only like three counties left that they have to do.

5 Q. Okay. And at that stage they'll have the entire state with Draeger not Intoxilyzer?

6 A. Yes, sir.

7 Q. Now, as far as a person on a high protein diet, who there's evidence that that person then consumed carbohydrates in the form of drinking -- having alcohol  
8 drinks, that is ingesting alcohol, do you have an opinion, based upon what you've told this jury, whether  
9 or not an intoxilyzer reading taken from that subject at a point in time after consuming the ethanol, whether that  
10 reading would be reliable to indicate alcohol consumed versus other chemicals within that person's body?

11 A. A person who's been on just a protein diet, no, sir. There's too much probability that they're going  
12

1 to be producing the acetone, or isopropyl alcohol at that  
2 point, in which case the intoxilyzer is not capable of  
3 telling you just consumed alcohol. It's going to give  
4 you consumed alcohol plus alcohol your body made.

5 Q. Okay. Would those same principles that  
6 you've been talking about be equally applicable to  
7 someone who is an anorexic who's not eating at all?

8 A. An anorexic who's not eating at all and then  
9 has, say, a glass of wine is going to also produce large  
10 concentrations of the isopropyl alcohol. It would show  
11 up on their breath in a breath test.

12 Q. And is the same general principle applicable  
13 to diabetics?

14 A. Diabetics, also, they produce large amounts  
of ketones. They're actually -- the other end, anorexic  
could be low blood sugar, hypoglycemic. Diabetics are  
high blood sugar or hyperglycemic. The bottom line is,  
though, both conditions the people burn body fat as  
opposed to using sugars for energy. With diabetics they  
can't utilize the sugars. They can't break them down.  
Their insulin doesn't work right. And, yes, they will  
produce the acetone. It then would be converted into  
isopropyl alcohol if they consumed a small amount of  
carbohydrates, or any amount of carbohydrates at that  
point.

1 Q. Okay. Would you consider that whole group  
of people, anorexics, people on high protein diets,  
diabetics, would you consider them to be normal subjects  
for purposes of breath testing?

2 A. No, sir.

3 Q. And what's the solution to doing breath  
tests for those people, is there a solution?

4 A. Yes, sir.

5 Q. What is it?

6 A. Don't do the breath test, or if you do a  
breath test, back it up with a blood test.

7 MR. HEAD: That's all I have, thank  
you.

8 THE COURT: Mr. Fern?

9 MR. FERN: Please, Your Honor. Thank  
you.

10 CROSS-EXAMINATION

11 BY MR. FERN:

12 Q. Mrs. McMurray, were you there on May 23rd,  
1998?

13 A. No, sir.

14 Q. Okay. Was the first time that you visited  
that site, or the apparent site, where the pullover was  
effectuated, was that two days ago?

A. It was Tuesday evening, so, yes, two days

ago.

Q. And that is two years and some-odd months since the date of this offense, is that correct?

1

A. Yes, sir. I think that's correct.

2

Q. Okay. Had the vehicle, the police patrol car, been parked immediately under one of those lights that you had testified to earlier?

3

A. There wasn't any light immediately above me there. There was the lights on the gates.

4

Q. You mentioned that there were lights on the gates and then that there were some lights that they had along the roadway at various locations throughout.

5

A. Along the roadway, but I don't remember one being directly across, and I know that there wasn't one on each side of the drive -- the driveway going up to the gate.

7

Q. So it's your understanding that that driveway was where it occurred, close to -- a close proximity?

8

9

A. There was a driveway going up to the gate, but it had a wide apron, you know, from the -- if you're coming down the roadway there was actually a wide apron for you to turn. You could actually fit several vehicles in that apron area, and, no, there weren't -- there wasn't a light directly above that.

10

11

12

13

14

Q. Okay. Was that before or after you got to the bridge, do you recall?

1 A. It was light at night, it was dark. Atlanta  
traffic scares me, I try not to watch out the windows too  
2 much so I, you know, I remember there being a bridge  
there. I think it was right we had gone past a bridge,  
3 but again, I don't watch out the window a whole lot in  
Atlanta traffic.

4 Q. Okay. Do you have independent knowledge if  
the Defendant performed the test, the field sobriety test  
5 again, on concrete, asphalt, or whether he performed it  
on the ground or surface?

6 A. I didn't see anything in the police report  
describing what the surface was. I do know when I was  
7 walking on it my first reaction was, at least it's not  
gravel. I mean, it was a blacktopped surface. It looked  
8 new, and it was nice and dark black as opposed to being  
sort of that gray shading that you get -- you get on old  
9 black top.

10 Q. So it could have definitely changed within a  
two-year period of time, you have no knowledge to that  
effect, is that correct?

11 A. I have no knowledge if the surface has  
changed.

12 Q. And you don't know where the cars were

position exactly that night, correct?

1           A.           Other than from the sketches that I've seen  
drawn, no, I don't know. Sketches, I know, were both  
2           stated not to scale.

3           Q.           Okay. What documents have you reviewed in  
order to prepare for your testimony today?

4           A.           The Jones article on Bio-Transformation of  
Acetone to Isopropyl. There is several articles that  
I've got relevant to alcohol induced hypoglycemia, as  
5           well as a lot of information that I've cleaned off of the  
internet looking at anorexics, as well as diabetics, and  
6           the incident of acetone on their -- in their blood. I  
also reviewed the paperwork -- Mr. Head has a history  
7           questionnaire that when he has clients come in and they  
fill that out, I've reviewed that paperwork, and then  
8           several items of the police report, the tickets, the  
citation, the test card itself.

9           Q.           Okay. Have you ever done any independent  
research yourself regarding high protein diet and that  
10          individual's -- or that subject's sample that would be  
obtained in a breath test?

11          A.           No. No direct research myself, but because  
of the other case that I've done on this, and then this  
12          one, I'm seriously looking at trying to figure out a way  
that we could get a lot of people that are on this type

1 of diet that are strict adherers to the diet, because you  
2 have to be really sticking to the diet -- if you're one  
3 of these people that cheats on a daily basis the argument  
4 wouldn't work. But I would like to get a lot of people  
5 that have been on it for extended periods of time,  
6 meaning minimum of a month, preferably two to three  
7 months.

8 Q. Okay. What would happen if you cheat on  
9 this diet according to your understanding?

10 A. Cheating on a diet can -- you're not going  
11 to be -- your body's going to be burning the fat,  
12 producing the ketones, but if you're cheating fairly  
13 regularly you're -- it's not like your body forgets how  
14 to handle carbohydrates. If you're adhering to it  
15 strictly your body says, okay, this is the only food type  
16 that I have to deal with. It becomes very efficient. If  
17 you're sliding other things in there it can convert back  
18 and forth much faster. You're not going to become acidic  
19 as easily as you would if you adhere to the diet.

20 Q. Does it increase over time, in terms of the  
21 total amount of ketones that your body is producing?

22 A. Yes, sir.

23 Q. The longer you're on a diet?

24 A. The five -- five day -- if you go 24 hours,  
25 you know, in a fasting type of state where you're not

introducing any carbohydrates, your acetone levels, ketone levels, will increase about five times. If you go seven days you're going to jack them up a hundred times.

1 I cannot find any literature that takes me beyond seven  
2 days so I couldn't tell you how much more it goes up. If  
3 you're looking at the difference between those two it  
becomes apparent that you could be going up thousand-fold  
in a matter of a month.

4 Q. Okay. Can you tell by looking at a person  
whether or not they're producing ketones?

5 A. No.

6 Q. You can't tell by just the naked eye?

7 A. No.

8 Q. You had mentioned a 65 percent degree of  
9 reliability, bringing up the one-legged stand and walk-  
10 and-turn, and a 65 percent and 68 percent reliability?

11 A. Sixty-five on one -- sixty-five on the one-  
12 legged stand, sixty-eight on the walk-and-turn.

13 Q. How -- what's your understanding as to how  
14 those numbers were achieved?

A. The testing had -- they look at -- they  
15 didn't have anybody that was alcohol free in doing the  
16 testing, rather low doses.

17 Q. When you say alcohol free, do you mean a  
18 sober individual?

A. Having alcohol in your system does not necessarily mean that you're not sober.

Q. Okay.

1 A. I'm saying alcohol free, meaning there's no  
2 alcohol been ingested. You -- you have not had any  
3 alcohol consumed, and I believe they would have people go  
4 24 hours minimum before showing up.

Q. And that's a controlled atmosphere?

A. That's a controlled atmosphere.

4 Q. And the 65 percent of those individuals that  
5 had consumed the varying amounts?

6 A. They had consumed varying amounts where you  
7 would have some people that would be a 1.0 or less, and  
8 other people that were above the 1.0. I guess I should  
9 put that better. Some people are less than 1.0, other  
10 people that are 1.0 or greater. And in terms -- and you  
11 couldn't really do it with anybody that was absolutely  
12 alcohol free, because one of the first things an officer  
13 is going to rely on would be their sense of smell, were  
14 they smelling anything.

Q. Okay.

10 A. Because you have to have people that at  
11 least have some odor about them. As for the percentages  
12 they would look to see how often were the officers  
13 correct in identifying using each of the individual

tests, whether a person was at or above 1.0 or below a 1.0.

1 Q. And then they accumulated the total number  
because different officers have varying degrees of  
2 success, is that not true?

3 A. Different officers have varying degrees of  
success, but in terms of standardizing it, it means that  
4 they looked at how did all of the officers do, how -- how  
reliable were all the officers as a group, not each one  
5 individually. Because, yes, you could have one officer  
that's very very good at it, and essentially you have  
6 like a 90 percent reliability, or a 95 percent  
reliability, and another officer who's terrible.

7 Q. Based on your training and situations that  
you've been in, what determines the ability of an  
8 officer, what are some of the criteria that goes into an  
officer who tends to do better than others?

9 A. Officers that adhere to the NHTSA training  
guidelines tend to do better. Officers that improvise, I  
10 mean, if you have somebody that was trained, say, eight  
years ago, and hasn't received any updated training  
11 versus an officer who uses it on a regular basis, and as  
an instructor, I would expect that person to do way  
better than the person who has not had updated training.

12 Officers that modify the techniques have poor

1 reliability. Officers who, I'm trying to think of terms  
2 that are better -- officers that have recent training  
3 tend to do better than officers who have not had any  
4 update or training in a long period of time. When NHTSA  
5 does their testing, the first thing they do -- every time  
6 they do their retesting is they retrain all the officers  
7 before they do it, which helps them on their statistics.

8 Q. With regards to the one-legged stand, how  
9 many clues are present there, or indicators, is that what  
10 they're called?

11 A. It depends on when you were trained. They  
12 were originally called clues, then they became  
13 indicators.

14 Q. Okay.

15 A. With the one-legged stand, I'm never sure if  
16 I should say it's four clues or five, because the fifth  
17 clue is actually if you put your foot down three times or  
18 more they count that as a clue, or they discontinue the  
19 testing, I should say. So, technically, I -- in terms of  
20 how I was trained, I have always looked at the last one  
21 as discontinuing the testing, therefore they've got all  
22 the clues.

23 Q. If you raise your arms is that a clue?

24 A. Raising the arms more than six inches from  
25 what a person's normal posture, with their arms down at

their side --

Q. Okay.

1 A. That has to be stressed because if a person  
my size, my arms go right down to my side, but if a  
2 person is a little bit more round in the middle, their  
arms aren't going to go down to the sides of their legs.

3 They're going to stick up. You've got to take six  
inches from that position.

4 Q. How about the walk-and-turn evaluation, how  
many clues or indicators are present in that evaluation?

5 A. Walk-and-turn, NHTSA's way of identifying  
it, there would be eight clues. The way that it's  
6 frequently trained they'll tell you that there's actually  
a ninth clue, mainly if the person steps off three or  
7 more times, discontinue the test for their safety. But,  
technically, it's eight clues. Some people would call it  
8 nine.

9 Q. If you hold your arms up on this and if you  
raise your arms, is that one clue?

A. Yes, sir.

10 Q. Okay. If you lose your balance on the turn,  
is that one clue?

11 A. If you lose your balance on the turn, yes,  
sir.

12 Q. Do you agree that alcohol affects a person's

ability to process information?

A. It can.

1 Q. Do you agree that it affects the brain  
first?

2 A. I guess you would say I would agree with  
that. It's hard to differentiate between -- anything  
3 that's being affected the brain is what's processing it,  
so I guess I would have to say yes.

4 Q. Would you agree that it affects the brain  
after the first drink that you have?

A. It can.

5 Q. Would you agree that that would increase  
6 with every drink consumed provided it's consumed within a  
reasonable amount of time thereafter?

7 A. Thank you for putting that in. Yes, sir.  
If you're consuming successive drinks, yes. Each  
8 successive drink will add to the impairment.

9 Q. Okay. Would you agree that alcohol affects  
reaction time?

A. It can.

10 Q. Can it affect coordination?

A. Yes, sir.

11 Q. Can it affect judgment?

A. Yes, sir.

12 Q. Speech?

A. Yes, sir.

Q. Motor skills?

A. Yes, sir.

1 Q. Okay. Is it possible for a person to be  
impaired after just two drinks?

2 A. It's possible for some people to be impaired  
after two drinks.

3 Q. When you say some people, does this mean  
that alcohol affects different people in different ways?

4 A. Yes, sir.

5 Q. Okay. What are some of the factors that go  
into that?

6 A. A very big factor would be a person's  
physical size. In terms of physical size, at my size, I  
7 know what one drink will do to me. If I was to gain 200  
pounds all the sudden and drink one drink it's still  
going to have the same effect because fat doesn't count.

8 So you would be looking at lean mass, size would make a  
9 difference. So a hundred pound male versus a two hundred  
pound male, assuming that they're both lean, mean,  
10 fighting machines, the two hundred pound male is going to  
have less effect than the hundred pound male. Gender  
11 makes a difference. Women have less water in their body  
than men do, pound for pound. That would make some  
12 difference in a person as thin as I am, it could make

1 quite a difference, because I don't fit the norm for the  
2 female body type. I don't have the normal distributions  
3 of fatty deposits. Other things that can affect would  
4 be, one, your drinking situation. I mean, if you're in a  
5 social situation you tend to think you feel the effects  
6 more than you would if you were in -- sitting in a room  
7 alone, watching t.v., working on the internet and sipping  
8 a drink, you're not going to feel it as much because  
9 you're not in a party mode. Food that you have eaten can  
10 affect how -- how you're go on a given drink, medications  
11 you're on can affect it.

12 Q. You've testified, as I recall your  
13 testimony, that you had testified for CMI, is that  
14 correct?

15 A. Yes, sir.

16 Q. And CMI is the manufacturer of the  
17 Intoxilyzer 5000?

18 A. Yes, sir.

19 Q. How much does one of -- one of those  
20 machines cost?

21 A. An Intoxilyzer 5000?

22 Q. Yes, ma'am.

23 A. It depends. States are able to buy the  
24 equipment much cheaper than, say, I could if I was to go  
25 to them to buy, say, their newest version of the

1 Intoxilyzer 5000. If I could walk away with a machine  
2 for \$10,000 I would be doing very well, whereas looking  
3 at what different state bids have come in the past year,  
4 some states have gotten them for as less -- for as little  
5 as about \$5,300.

6 Q. Have you been trained or certified through  
7 CMI to work on their machines?

8 A. I was trained on maintenance for the  
9 Intoxilyzer 5000, the original version, which would be  
10 the 6400, received updated training from them on  
11 maintenance --

12 Q. When you say them, are you referring to CMI?

13 A. Them meaning CMI.

14 Q. Did you do it on-site at Ellensburg?

15 A. I did my initial training on-site in  
16 Mentern, Colorado.

17 Q. In what?

18 A. Mentern, Colorado, because that's where they  
19 were way back when.

20 Q. You don't have to say your age here, I'm not  
21 going there.

22 A. Okay. I was going to say I received updated  
23 training in Wisconsin. They came to us when I was  
24 working for the state and that would be the cool detector  
25 varieties, which is what you have here in this state. I

also received training on the 1400.

Q. Okay. Are there diagnostic checks that are involved with the Intoxilyzer 5000?

1

A. Yes, sir.

Q. What do those comprise of?

2

A. It -- some depends on which version of the Intoxilyzer you have. Looking at the 68s, they do a PRM check, a ram check, a temperature check.

3

Q. Would you describe those to the jury?

4

A. PRM check, Programmable Readout Memory; ram check would be the random access memory, it's looking to see that certain information shouldn't be changing, so it pulls out numbers to see are they the same way that there always supposed to be. Other things, it feeds information in and sees whether or not it comes back out in the same fashion that it went in. There's a temperature check, that's a real simple check. It just looks to see if the sample cell itself is at a temperature that it should -- it's looking for 47 degrees plus or minus 5 degrees celsius on the sample chamber. It doesn't look at any of the rest of the breath path, just the chamber. It does a print check, which you guys have the internal printer, so what it's doing, it's checking to see does the print head move. You know, the old diamatrix printers that had the roller bar that the

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1 head slides back and forth on as it does the printing  
2 out. It looks to see does that head move. It doesn't  
3 look to see if it goes all the way to the end and back.  
4 It just looks to see -- move enough that it can detect  
5 that it moved. It doesn't look to see if it prints, it  
6 just looks to see does the print head move. There's a  
7 real-time clock check, depending on how you have your  
8 state software configured, it might do an internal  
9 standard check with each diagnostic. From what I've seen  
10 on the test cards, there's no way you can tell in this  
11 state if it's doing the internal standards with each  
12 diagnostic. The maintenance certificates would have had  
13 the test cards attached. If they had them attached I can  
14 tell if there printing out the internal standards then,  
but they don't show them on the test cards, the subjects'  
tests, which is why I can't tell if they're actually  
doing it. Some states do, some states don't. Usually if  
they're doing them they print them on a test card because  
it's useful information. There's some other checks in  
there -- it is one of those things that if I actually sit  
in front of one and watch then I could tell you what each  
of the steps are, but those are the significant ones.

11 Q. What happens if one of these diagnostic  
12 checks doesn't run properly?

12 A. If it doesn't run properly it's going to

13

14

1 fail the diagnostic. If you have computer download  
capabilities, or if you've utilized the computer download  
capabilities, you can actually tell where in the process  
of the diagnostic it failed. Without the computer  
2 printout you may or may not be able to, depending on what  
the failure was. Some states have it where if it does a  
3 failed diagnostic it will print out a test card right  
then and there, identifying what all the different  
4 diagnostic tests are, and it will say, pass, pass, pass,  
up until it gets to the one step that failed, and then  
5 from that point on it will say failed.

6 Q. What happens if it runs through the course  
of diagnostic checks properly?

7 A. If it runs through the course of diagnostic  
checks properly, depending on was this a coming up to  
8 temperature diagnostic or a pre-test diagnostic. When it  
first comes up to temperature it does the diagnostic, and  
if it made it through everything, at that point, it would  
9 start scrolling this message about press button to start  
task, then it gives you some advertising type of  
10 information. If you're running a subject's test and it  
does the diagnostic and passes, the next step it's going  
11 to do, depending on how your software is programmed, I'm  
going to assume that you do the subject entry after that.

12 Some states do the subject entry before the diagnostics.

Some states do it after. It makes more sense to me to do it after because if you typed all that information then it fails the diagnostic, then it's very frustrating.

1

Q. Okay. If I can, I apologize for looking for it in the course of your testimony, but if I could show you State's Exhibit No. 5, do you recognize that particular exhibit?

2

3

A. Yes, sir. I've seen copy of this test card before.

4

Q. Okay. And did you see it in your preparation of your materials in this case?

5

A. Yes, sir.

6

Q. Okay. And that's the state's diagnostics across the line there?

7

A. Yes, sir. There's actually two diagnostics in the way that they do the testing here.

8

Q. Okay. How many states use the Intoxilyzer 5000, to your knowledge?

9

A. There's intoxilyzers in more than 38 states. Right now it's hard to say how many states are using it because there's a number of states, like Wisconsin has recently gotten rid of their 5000s, Alabama is in the process of getting rid of them. I'd say about 38 would be a fair number.

10

11

12

Q. Let me ask you how much the Draeger 7110

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14

cost that you talked about that's used in Alabama, or that's beginning to be used?

1           A.           The Draeger 7110 is real expensive. If I  
could buy one and I was to get all of the features on it  
2           that I want I would probably be looking at about  
\$12,000.00. I could tell you what states could get it  
3           for. I've seen some bids recently. States can get it  
for about six grand.

4           Q.           Okay. At .06 to .08 grams of blood alcohol  
there could be greater effects on reaction time, would  
5           you agree with that statement?

6           A.           There can in some people.

7           Q.           How about coordination and motor skills?

8           A.           Again, in some people, yes.

9           Q.           Judgment and speech?

10          A.           Yes, sir.

11          Q.           Okay. These effects could bring a person to  
12          be a less safe driver than somebody who had consumed any  
alcohol at all, would you agree with that statement?

13          A.           It could, yes, sir.

14          Q.           Do you agree that a person who has consumed  
just once drink can be a less safe driver than a -- than  
a driver who has not consumed any alcohol whatsoever?

          A.           I'd have to clarify that in a person that I  
would say could be a less safe driver after one drink,

1 I'd be talking of a person who does not drink, you know,  
2 like a juvenile, a teenager who's having his very first  
3 beer is probably going to show more impairment than, say,  
4 a person who's tasted beer, drank beer in the past.

5 Q. Would you agree that it would be important  
6 to observe a person's objective signs of intoxication at  
7 the scene?

8 A. That is important, yes, sir.

9 Q. Okay. And you mentioned that a lot of  
10 these, in your earlier testimony, the field sobriety  
11 tests are objective in nature, that is it removes it from  
12 personal subject's view, correct?

13 A. Correct.

14 Q. So it's not as much a decision, but rather  
15 if you follow the criteria properly it would seemingly  
16 take it out of an individual's hands based on their  
17 influences and go by the dictates of the grid, if you  
18 will, for want of a better word?

19 A. Yes, sir. If they're properly performed it  
20 removes that personal thing. You've got very specific  
21 clues that they're looking for.

22 Q. Now, the police officer that -- who is  
23 trained in DUI detection is trained to observe these  
24 objective signs of intoxication, is that correct, to your  
25 knowledge?

A. They should be, but I wouldn't say all are.

1 Q. Now, a police officer who's been trained to  
observe these objective signs of intoxication is also  
qualified to determine if a person is under the influence  
of alcohol, would that be correct?

2 A. I wouldn't necessarily say that they're  
3 qualified. Again, it depends on experience. When a  
4 person who's received training on detection of symptoms  
of alcohol impairment, who then works in an office all  
5 the time, I'm not going to trust their opinion as much  
as, say, an officer who works with drinking drivers on a  
regular basis.

6 Q. Such as an individual assigned to a DUI Task  
Force, a detail specializing in it?

7 A. I have some problems with DUI Task Forces.  
8 Good idea, there's a nice concept, unfortunately you  
9 frequently wind up with gung ho officers who want to find  
drunks, and therefore everybody appears to be impaired  
when it comes to evaluating sobriety tests.

10 Q. Would you agree that one of the duties of a  
police officer is to keep less safe drivers off the road?

A. Yes, sir.

11 Q. Let me ask you something with regards to the  
12 field sobriety tests that you have discussed earlier in  
your testimony. You mentioned that you need to go to an

area, or at least move to an area that's well-lit and more suitable conditions according to NHTSA standards, is that correct?

1           A.           NHTSA recommends that if you do not have  
2 ideal conditions and you know where there is a better  
location, yes, you should move that location.

3           Q.           Does NHTSA provide what you should do with  
the vehicle of the Defendant while you make this move?

4           A.           No. And I always thought that was  
interesting because -- especially looking at your  
5 roadways here, I could see an officer having to go a long  
way around to get to a safe location and then back to a  
vehicle.

6           Q.           Would you not agree that there are a number  
7 of conditions that an officer out in the field is going  
to encounter while on routine patrol, in terms of snow,  
8 rain, ice, storms, whatever the case may be, is that not  
-- is that a fair statement?

9           A.           Yes, sir.

10          Q.           Okay. And you were not at the scene when  
the Defendant was stopped, correct?

11          A.           That's correct.

12          Q.           And you did not personally view the  
13 Defendant's outward manifestations that night, correct?

14          A.           That's correct.

Q. And you were not there to smell the presence of alcohol on the Defendant's breath, is that correct?

A. That's correct.

Q. And you were not there to hear the Defendant's speech, is that correct?

A. That's correct.

Q. And you were not there during the performance of the field sobriety evaluations?

A. That's correct.

Q. You didn't see the Defendant walk that night, correct?

A. I did not see him that night, correct.

Q. Have you performed any tests upon the Defendant?

A. No, sir.

Q. Okay. You haven't subjected him to see if he has these ketones that are being -- that you testified to?

A. This test was like more than two years ago. It would make no sense to do testing today for anything. He's also not strictly on the diet I -- I don't believe. I mean, he follows the diet plan, but not the strict adherence that you would when you're trying to actively lose a large amount of weight.

Q. Okay. And you also don't know if he was

actively on that diet on May 23rd, 1998, do you?

1 A. Based on conversation with him, I believe he  
was, but personal knowledge, no, I wasn't living with  
him. I couldn't tell you.

2 Q. Okay. And you were not there to see the  
Defendant perform the HGN, correct?

3 A. That's correct.

4 Q. And you were not there the Defendant's eyes  
tracking properly while performing the HGN, correct?

5 A. That's correct.

6 Q. Okay. So you were not there to see the  
Defendant's eyes jerk while performing the HGN?

7 A. Again, that's correct.

8 Q. Let me ask you this with regards to the HGN,  
what does maximum distinct nystagmus at maximum deviation  
tell us of a person's who's performing an HGN?

9 A. That's just one of the clues that they're  
looking for. Are you asking what -- what is -- what are  
they looking for?

10 Q. Right. What are they looking for, as well  
as what does that particular clue indicate?

11 A. No one individual clue tells you anything in  
terms of making a conclusion. But in terms of what  
they're looking for is you want to take the eye out as  
far as it can go. You still want a little bit of white  
12

left on the sides that you can see is the eye twitching.

When you take them out -- everybody is going to have a little bit of twitching when you've got your eye diverted as far as it can to the side. But you want a very distinct jerking, not just a little quiver, which is part of why the little bit of white helps is you can distinguish between the jerk versus the quiver.

1  
2  
3 Q. How much are you being paid to testify here today?

4 A. Actually, the payment is not just for testimony, it includes consulting time, etc. I've been here for two days, almost three days, and I had flat feed this one 1500 plus travel expenses, so \$1,500 plus travel expenses. I, as far as travel expenses, am keeping those to a minimum. Basically, it's going to amount to just airfare.

5  
6  
7  
8 Q. Okay. You've never done any independent research regarding ketones or acetones, is that correct?

9 A. Well, I've done testing using acetone and ketone solutions on intoxilyzers, but, no, not starting people and getting the elevated levels on people.

10 Q. Have you ever been trained in DUI detection by the Georgia Crime Lab, ma'am?

11 A. Not by the Georgia Crime Lab.

12 Q. Okay. Have you ever been employed by the

Georgia Crime Lab.

A. No, sir.

1 Q. Have you ever testified on behalf of the  
prosecution?

2 A. Have I ever testified on behalf of the  
prosecution, yes, sir.

3 Q. I'm sorry?

4 A. Yes, sir. I've testified for the  
prosecution many times.

5 Q. When was that and what occasions?

6 A. I worked for the State of Wisconsin for  
eight years and part of my job responsibility was  
testifying. I must have testified for The State easily  
350 times while I was working there.

7 Q. How many blood tests have you performed?

8 A. I don't do bloods.

9 Q. You do not do blood?

10 A. I do not do blood tests. I came into a  
breath alcohol program. I've learned a lot about blood  
11 testing. I -- I've just never gone through the process  
of becoming certified as a blood alcohol analyst. I know  
12 how to run the equipment because we went through my  
chemistry training, all of my courses, I made a point of  
13 taking the instrumental labs as opposed to the general  
labs. So I've run GCs, I know how to do the analysis,

I've just never gone through the process of becoming a blood analyst.

Q. Okay.

THE COURT: He's not quite finished.

MR. HEAD: Oh, I'm sorry.

MR. FERN: I'm sorry.

THE COURT: He may be finished.

MR. HEAD: When I'm not facing you I can't hear you with this bad ear, so --

MR. FERN: It's my fault.

BY MR. FERN: (Resuming)

Q. On the HGN, if they are wearing contacts, what are the instructions then?

A. It depends on when they were trained. The original instructions were do not do the testing. Then the second version of the training manual that came out said that differentiate between soft lenses, hard lenses. If they're hard lenses, don't do the testing. There was the suggestion in there at one point having the people remove the contact if, in fact, they were hard lenses. They no longer tell you to remove them.

Q. What is meant by an invalid sample of Intoxilyzer 5000?

A. An invalid sample?

Q. Yes, ma'am.

A. Means residual mouth alcohol.

Q. Okay. What about an insufficient sample?

1 A. It means -- it depends on the state's  
2 definition. Typically, it means the person did not  
3 provide enough breath volume or blow long for it to take  
4 a sample, the minimum volume being 1.1 liters or a  
5 leveling off in alcohol concentrations. So insufficient  
6 would mean you either didn't give the minimal volume or  
7 you stopped before you reached the plateau.

8 Q. With residual mouth alcohol, if enough is  
9 detected, what does the Intoxilyzer 5000 do at that  
10 point?

11 A. If it detects it as being residual mouth  
12 alcohol it will alert the officer. The intoxilyzer makes  
13 this high low beeping noise, k-bleep, k-bleep. It also  
14 will flash a message on the screen saying, invalid  
sample, prints on the test card, again, depending on the  
state's software, where it should say subject's sample it  
will say invalid sample, and then on the bottom some kind  
of message like residual mouth alcohol detected or -- I'm  
trying to think of what other language I've seen, invalid  
sample, mouth alcohol detected, versions of that.

MR. FERN: No further questions. Thank  
you, ma'am.

MR. HEAD: Just a few follow-ups, Ms.

McMurray. I'll try to be brief. As brief as I'm able.

REDIRECT EXAMINATION

1 BY MR. HEAD:

2 Q. As far as the -- let's go back to the road  
3 location that you saw. Even if the surface had been  
4 changed and re-asphalted, did you notice anything about  
5 that location that looked like the terrain had been  
6 changed, like earth moving or anything that changed that  
7 roadway?

8 A. No, sir. That was -- the trees that were  
9 along the fence are quite tall so I know that they  
10 haven't been changed in the last two years. There was no  
11 indication that there has been any construction or  
12 excavation along that side of the roadway.

13 Q. You were asked by Mr. Fern, can -- can you  
14 tell by looking someone -- looking at someone if they are  
15 on a high protein diet?

16 A. I think his question was could I tell by  
17 looking at them are they producing ketones.

18 Q. Right.

19 A. And my answer is, no.

20 Q. Okay. Is there a solution for an officer  
21 who's trying to do the job to the best of his ability,  
22 what's the solution for that officer before giving a  
23  
24

breath test?

1           A.           Ask questions. Ask the person, are you  
2           diabetic, are you on any type of starvation fast, or any  
3           type of diet. Another question I would throw in there is  
4           do you work around chemicals, because that could also  
5           have an affect.

6           Q.           Are these -- are these checklists common in  
7           other states?

8           A.           Yes, sir.

9           Q.           Okay. Now, if you get a positive answer to  
10          any of those questions, what's the normal procedure?

11          A.           My advice would be get a different type of  
12          test. Some people will say, well, we'll take this test,  
13          but we'll make sure that we get a different type of test  
14          in addition to this. Personally, I think the best  
15          solution is just go for blood.

16          Q.           Okay. And is that actually the procedure in  
17          some of these states with checklists?

18          A.           Yes, sir. For example -- oh, I'm drawing a  
19          blank on which state I'm thinking. I believe it's  
20          Kentucky, if they answer yes to the diabetes question  
21          it's an automatic, you go for a blood.

22          Q.           Okay. Now, you were asked questions by Mr.  
23          Fern about Mr. Redstrom and whether or not he was on this  
24          protein diet, and I think you said, that's what he

advised me when I got involved in the case, is that correct?

1 A. Yes, sir.

2 Q. Did you also review the initial paperwork about his health that he filled out before he ever even met with a lawyer?

3 A. Yes, sir. The first thing that you have people do when they come to your office is fill out a questionnaire, and, yes, you had provided me a copy of that questionnaire, and in there it talks about the diet he was on.

4 Q. Okay. Would -- would the normal person walking around the street, or even the normal person or police officer, know about this phenomenon?

5 A. No, sir.

6 Q. This ketones and that isopropyl?

7 A. No, sir. In fact, I think this is a field that I think is going to become discussed more. Starvation diets, or these protein sparing diets have become very popular in the last, I'd say, five years. I think we're going to begin to see things on task, where people are going to start challenging the breath test more. If all you've had is a couple of drinks and you test outrageously high most people are going to start realizing, I've got to get another test, and most states

will advise you that you have the right to that.

1 Q. Okay. Now, returning for just a moment to  
2 Mr. Fern's questions about the performance of the  
3 standardized field sobriety evaluations, okay? The first  
4 thing I want to ask you is: Did your earlier opinion  
5 about the propriety of this location change when he asked  
6 you questions about the person moving their arms more  
7 than six inches? In other words, I asked you earlier was  
8 this a proper location, does that -- has your opinion  
9 about that changed?

10 A. No, sir. In fact, the arms is part of what  
11 I had given as my answer why it was inappropriate because  
12 I found myself using my arms when I started walking on  
13 that surface. The angle was enough that it was like,  
14 whoa.

15 Q. All right. Let's assume for the moment that  
16 in Officer Adams giving the one-legged stand that he did  
17 it perfectly according to NHTSA guidelines. I know you  
18 weren't there, but it was perfectly done at this  
19 location on this roadway, and the person passes it. In  
20 your opinion, what does that show about the person?

21 A. They've got very good balance.

22 Q. Okay. What does that show about the  
23 person's likely impairment?

24 A. I would be less inclined to feel that they

1 were impaired because standing on one leg with your other  
2 foot six inches -- a minimum of six inches from the  
3 ground, keeping your leg straight and your arms at your  
4 side for 30 seconds, your normal person, sober person,  
5 can manage that for a good 26 seconds without beginning  
6 to show balance problems. If you have somebody that does  
7 it perfectly I'm going to be less inclined to think that  
8 they had any serious impairment and that's not an easy  
9 test.

10 Q. Okay. And turning to the walk-and-turn,  
11 assuming, again, that Officer Adams did absolutely  
12 perfectly, except at this location and along side of his  
13 vehicle, as opposed to -- with lighting on the subject  
14 and the person had two clues, what would be your opinion  
15 of that person's performance in that situation?

16 A. Two clues is what NHTSA calls, you know,  
17 quote, unquote, fail, but given the slope there and given  
18 how dark it was there I'd say they were doing quite well.  
19 You've got the slope going in two different directions  
20 angling down towards -- for the water to run off. I  
21 wasn't comfortable walking on there, and I wasn't walking  
22 the heel to toe with my arms at my side.

23 Q. Okay. Now, assuming that the person -- that  
24 Officer Adams and his maneuvering of the horizontal gaze  
25 nystagmus moved his stimulus perfectly at the right

distance, at the right eye height, but that he had the person facing blue lights and oncoming traffic lights, do you have an opinion about the reliability of that test?

1           A.       Yes, sir. The reliability's been  
2           compromised because the blue lights -- when you say blue  
3           lights, I'm assuming you mean the flashing blues. That's  
4           a striping effect, you've got something that's appearing  
5           in and out of your vision. If there's any traffic going  
6           by during the performance of the test, even though the  
7           person's focusing on the finger, you've got things moving  
8           in and out of your field of vision. That can cause a  
9           jerking, that can trigger a nystagmus.

10          Q.       Okay. And -- and if an officer says, I saw  
11          jerking under those conditions, can any person, you or  
12          anyone, say that the jerking was caused by something  
13          going on internally versus these -- these distractions?

14          A.       Can anybody say that, no, sir.

15          Q.       Okay. Now, Mr. Fern asked you about the  
16          diagnostic check part of this machine, the Intoxilyzer  
17          5000.

18          A.       Yes, sir.

19          Q.       Let's assume that the machine that Officer  
20          Adams had at his disposal was absolutely calibrated  
21          perfectly to perfect diagnostic checks, everything was  
22          perfect, does that change your earlier opinion that the

reading obtained cannot break out what was assumed alcohol versus generated alcohol?

1           A.        No.  It doesn't change my opinion.  I mean,  
I'm not saying the intoxilyzer was working incorrectly  
2 here.  I'm saying that we've got things other than ethyl  
alcohol on the graph and that's what it's misreading.  It  
3 doesn't mean it's a poorly maintained device or poorly  
operated.

4           Q.        So -- so what you're saying, then, is you  
can accept the machine as being absolutely perfect in  
5 what it's capable of doing, and your opinion has not  
changed about this sample being a mixed -- mixed  
6 hydrocarbon sample?

7           A.        Yes, sir.  Because it's not capable of  
sorting out these mixed samples.

8           Q.        You mentioned something like if the machine  
was not functioning you could determine this by looking  
9 at the computer download.  Does Georgia ever download its  
computer on this machine?

10          A.        No, sir.  Georgia has the ability to, seeing  
how they've got the keyboard for -- it means they've  
11 automatically got the communications capability.  They  
don't store the computer data.  Instead, when it hits the  
12 bottom, where it would normally tell you the memory's  
full, it simply starts over at the top and starts writing

over all the tests. They don't store any of it.

1 Q. Okay. And Mr. Fern asked you about the  
relative cost that states could purchase the Intoxilyzer  
2 5000 versus Draeger, and if I heard you correctly, an  
Intoxilyzer 5000 costs about \$5300, and a Draeger, at the  
3 best price you've seen, is about \$6000, is that right?

4 A. Yes, sir.

5 Q. And is the Draeger machine the one that can  
distinguish between some of these other chemicals by  
6 checking different wavelengths?

7 A. Yes, sir -- well, they don't check different  
wavelengths. They use -- they use a different wavelength  
8 from what the other infrared devices do. They look for  
what makes the molecule an alcohol, plus they've got a  
9 fuel cell as a secondary analysis, and the fuel cell can  
10 tell you the different types of alcohol. It can actually  
separate out the ethyl alcohol, the drinking alcohol.

11 Q. Okay. Mr. Fern also asked you about could a  
person who had this mixture in their system and be less  
12 than a .10, he used another 6 of some number, but just  
using this as an example, as a hypothetical, he asked you  
13 would that person conceivably -- could that person  
conceivably be a less safe driver, do you remember those  
14 questions?

A. Yes, sir.

Q. Could you tell me whether or not NHTSA's guidelines and studies indicate that the act of speeding indicates impairment from alcohol?

1 MR. FERN: Objection, Your Honor. Re-  
2 direct according to the cross-examination, and  
3 I didn't get into anything along the lines of  
4 speeding or anything to go on that line of  
5 question.

6 THE COURT: I sustain the objection.

7 MR. FERN: Thank you, Your Honor.

8 BY MR. HEAD: (Resuming)

9 Q. Now, you were asked questions about what if  
10 a person had two drinks, what if a person had one drink,  
11 do you remember those questions?

12 A. Yes, sir.

13 Q. Can you tell the jury whether or not waiting  
14 after the last drink can be an important factor in  
15 determining alcohol level?

16 A. Yes, sir.

17 Q. Why?

18 A. Well, waiting -- the longer you wait after  
19 you finish your drink, the more alcohol you're going to  
20 be getting rid of. You're also going to finish absorbing  
21 what's in your stomach. If you have, say, a couple  
22 hours, you've already gone up past your peak and you're

1 on your way back down. A person's more impaired on the  
2 way up than they are on the way down, so it's to your  
3 advantage to wait. It also means as time progresses  
4 you're going to keep becoming lower and lower.

5 Q. Okay. Mr. Fern also asked you about giving  
6 a field test in snow, or rain, or ice. Did you  
7 understand that this was done in snow, rain, or ice in  
8 this case?

9 A. That's the reason I had smiled at is because  
10 I had to recheck the test card because I -- first of all,  
11 it doesn't snow or ice in Georgia that often. It does  
12 happen on occasion, but not that often. Second, I don't  
13 think it happens in May, much less the end of May.

14 Q. Does -- do the NHTSA guidelines give any  
15 sort of suggestions if it is raining or under adverse  
16 conditions, what do they say about that?

17 A. Actually, I could tell you what they do in  
18 the northern states is frequently they'll have areas at  
19 the police department that are set up for doing field  
20 sobriety tests. Typically, they're gray painted walls,  
21 gray painted floor with a white stripe down the middle of  
22 the floor. It's to your advantage to take them to a  
23 facility like that and do the testing there, don't do  
24 them on the road.

25 Q. Okay. And -- and does -- does the NHTSA

guidelines require the surface you're on to be not only level, and does it require it to be dry?

1 A. It's supposed to be a dry surface.

2 Q. Okay. Now, you were asked several questions about the possible readout of a breath machine called, invalid sample, do you remember those questions?

3 A. Yes, sir.

4 Q. Tell the jury, if you would, what would be the typical fact pattern that would cause a machine to read invalid sample, first of all.

5 A. Well, invalid sample meaning residual mouth alcohol. Breath alcohol is alcohol that's actually coming from your blood onto your breath, as you exhale they can measure it. Mouth alcohol would be you've got raw alcohol in your mouth breathing passages, either from 6 say, mouthwash, you swished and spit some mouthwash, or you could have it come from your stomach if you had drunk 7 recently and regurgitated or vomited. In any case, you have to have some introduction of this raw alcohol to get 8 a residual mouth alcohol flag. That's why they do the 20 9 minute observation is to try --

10 MR. FERN: Objection, Your Honor. That wasn't covered at all, in any form, in any 11 testimony at this point.

12 THE COURT: Sustain the objection.

13

14

MR. FERN: I'd ask that that be  
stricken from that record, Your Honor.

THE COURT: You should disregard that  
last response.

BY MR. HEAD: (Resuming)

1  
2 Q. Okay. Without getting into the 20 minute  
3 period, what I would like to ask you about is: Based  
4 upon what you know of this case, what you -- what you  
5 have -- have taken into account in coming in here and  
6 giving an opinion, for a person on a high protein diet  
7 who has then introduced a carbohydrate to his or her  
8 system, and all -- not going back over what you said,  
9 just generally, would you expect that person's breath  
10 test to suddenly flag invalid sample?

A. No.

7 Q. And could you tell the jury would that would  
8 not generate an invalid sample reading?

8 A. The way I understood the drinking, there was  
9 about two-and-a-half hours or more between the finish of  
10 the last drink and when the arrest occurred, which means  
11 then we're looking at about three hours before the breath  
12 test. I'm not expecting any large amounts of alcohol in  
13 the stomach, plus I've never been told that there were  
14 any mouth alcohols flagged. The test card doesn't show  
it. I don't expect a mouth alcohol at that point.

1 Q. Okay. So from a person on a high protein  
2 diet and introduces carbohydrates to his system, would  
3 you expect a number to be generated, whether that was  
4 from alcohol consumed versus partial consumption and  
5 partial generation from the body?

6 A. Given the high protein diet and some alcohol  
7 consumption I expect the numbers to be a result of the  
8 alcohol that was consumed and the alcohol that was  
9 generated.

10 Q. So it would be a combined number?

11 A. Combined number.

12 Q. Is there any way with an Intoxilyzer 5000 to  
13 break out and tell this jury what part was alcohol  
14 consumed versus what part was alcohol generated from  
15 within Mr. Redstrom's body?

16 A. No, sir. At least not with a breath test,  
17 not with Intoxilyzer 5000.

18 Q. And could a blood test do that?

19 A. A blood test could.

20 MR. HEAD: Okay. Thank you.

21 THE COURT: Anything else?

22 MR. FERN: Nothing, Your Honor. Thank  
23 you.

24 THE COURT: Thank you, and you may step  
25 down.

(Whereupon, the witness exits the witness stand.)

1 MR. HEAD: Your Honor, the Defense  
rests. We think we're going to -- we have  
2 introduced two exhibits, and with those two  
exhibits and that testimony, we rest.

3 THE COURT: Yes, you have introduced  
two exhibits.

4 MR. HEAD: Yes, sir. Thank you.

THE COURT: Mr. Fern, the Defense has  
rested.

5 MR. FERN: Your Honor, I have one,  
possibly two, rebuttal witnesses. May we  
6 approach?

7 THE COURT: Surely.

MR. FERN: Thank you.

8 (Whereupon, an unreported bench  
conference occurred.)

9 THE COURT: Ladies and gentlemen, the  
Defense has rested in this case. The State  
10 indicates they are going to have some rebuttal  
testimony, and so therefore given the length  
11 that will apparently take, I think it  
appropriate at this time to go ahead and take  
12 our lunch break. We're going to break for an

1 hour for lunch, and then I ask that you please  
2 be back at 1:20, at which time we will continue  
3 on with the testimony in our trial. So please  
4 be back at 1:20 where Mr. Holmes and Mr. Morrow  
5 tell you to be. Again, don't discuss this test  
6 with anyone or allow anyone to discuss this  
7 case with you or in your presence. If you have  
8 any such instances please report them  
9 immediately to your Bailiffs. With those  
10 instructions, I'm going to dismiss you until  
11 1:20. Thank you.

12 (Whereupon, the jurors exit the jury  
13 box.)

14 THE COURT: Okay. We'll see everyone  
back at 1:20.

MR. HEAD: Yes, sir.

MR. FERN: Thank you, Your Honor.

(Whereupon, a luncheon recess was  
taken.)

THE COURT: Okay. Anything we need to  
take up before we bring our jury back in?

MR. FERN: None for The State, Your  
Honor.

MR. HEAD: No, sir.

THE COURT: All right. Bring them in,

please.

(Whereupon, the Bailiff exits to bring  
in the jurors.)

(Whereupon, the jurors enter the  
courtroom and are seated in the jury box.)

THE COURT: Okay. Ladies and  
gentlemen, before we broke for lunch the  
Defense had completed their evidence, and it is  
not time to hear any rebuttal testimony from  
The State. Mr. Fern, you indicated that you  
had some rebuttal testimony?

MR. FERN: Yes, Your Honor.

THE COURT: Call your first rebuttal  
witness, please.

MR. FERN: We call Officer Adams to the  
stand.

(Whereupon, Officer Adams takes the  
witness stand.)

DIRECT EXAMINATION

BY MR. FERN:

Q. Officer Adams, I simply remind you that you  
remain under oath to tell the truth in this matter, do  
you understand?

A. Yes, sir.

Q. Officer Adams, we've got testimony at this

point, and I wanted to bring you back before the jury, if I could, and have you diagram, if you will -- there's a board right there. And just draw a brief diagram of the position of the Defendant in the field sobriety test, as well as yourself and your vehicles.

A. (Witness complies with request of counsel.)

Okay. This is the bridge (indicating), and this would be Holcomb Bridge (indicating), about like that. This is the bridge where the Chattahoochee runs here (indicating), and this is Fulton County and this is Gwinnett County (indicating). Okay. And as we get across the bridge, just as we crossed the bridge here (indicating), Mr. Redstrom pulled over on the side of the road here so part of his car was in this grass area that actually goes like this (indicating), and this is grass and dirt and stuff. Then there's a thing off the -- that's the gate that we were talking about with the golf range out here (indicating), okay? And then this would be like the farther out -- this isn't to scale. It looks like it's farther out than it is, because the scale would be farther out at the edge of the road. You have a white line on this side and the markers on this side (indicating). And we're trained to stop a vehicle opposite our police car, if not directly behind it. This is for safety purposes because when I get out of my car

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1 to come up here and talk to the driver, this gives me a  
2 little safe area in here (indicating) to talk to him. So  
3 if somebody was, you know, a car was to come up this way  
4 they would have to go around my police car and that would  
5 kind of give me a safe area. And then when we do field  
6 sobriety, we bring them back to this area here  
7 (indicating), and this is like a little safe void so if  
8 somebody was to come up and run into my police car, my  
9 police car would actually move forward here and strike  
10 this car (indicating) and it would -- so it's kind of  
11 like a safe area, because we don't want somebody to come  
12 up and run into the back of my police car and squash me  
13 and whoever I'm doing between the two cars, so this is  
14 what is this area (indicating). Now, what I do  
-- where I do the sobriety evaluations is in this area  
right here on the side of the road (indicating). All  
right. The first thing we do is interview them, I talk  
to them, where are you coming from, having conversation,  
and start the actual sobriety evaluations. I have the  
subject stand right here (indicating) facing this way,  
and I stand directly in front of him facing that way  
(indicating). The blue lights of my car are going out  
like this (indicating). And I put this back towards just  
the headlights, and like I testified before, he looks  
like that halo effect, because it's right behind him

1 facing this way. Where I'm looking what I see is the  
2 subject, then I see my patrol car behind him so the blue  
3 lights don't flash in his eyes, they're flashing in my  
4 eyes. What he's seeing is any oncoming traffic coming  
5 this way (indicating) and just dark back here, and that's  
6 to alleviate the effects of the strobes flashing in your  
7 eyes because it's really, if you're concentrating on a  
8 finger or something like that, and you're just focusing,  
9 if he was to stand right there and have the strobe lights  
10 flashing in his eyes, it gives you a headache and this  
11 -- it would mess up your vision, so that's why we -- we  
12 do that.

13 Q. Now, in your line of traffic you were going  
14 westbound, is that correct?

15 A. Yeah, the west --

16 Q. And the oncoming traffic would be where?

17 A. West is this way (indicating).

18 Q. Is it a two-lane road here?

19 A. Yeah, this is. You've got a double yellow  
20 and then the other, like that (indicating). This is kind  
21 of a rough drawing.

22 Q. Okay. And there was a stop at that -- where  
23 that bridge was located?

24 A. Yeah, just after the bridge. Right where  
25 the bridge ends is where he pulled his vehicle over.

1 Q. Okay. Now, with regards to the walk-and-  
turn and one-legged stand, what -- what area did you  
administer those field sobriety evaluations, to the best  
of your ability that you can remember, realizing it's  
over two years ago?

2 A. In this area right here (indicating). So  
when I say he walked between my car, alongside my car, he  
3 walks nine steps this way and turns around and walks nine  
steps that way (indicating).

4 MR. FERN: No further questions of this  
witness, Your Honor. Thank you, Officer Adams.

5 I appreciate that.

6 THE COURT: Anything -- you might want  
to have a seat -- Mr. Head.

7 MR. HEAD: Just a couple of questions.  
You can leave that open, that's fine. If you  
want to sit down, though, once you've opened it  
8 that would be fine.

9 THE WITNESS: I didn't know if you  
wanted me to stand over there or not.

10 MR. HEAD: No, that's fine.

CROSS-EXAMINATION

11 BY MR. HEAD:

12 Q. Now, do you -- do you recall my earlier  
questions about HGN when I questioned you earlier?

A. Yes, sir.

Q. And do you remember at the point I asked you -- do you remember me asking you was he standing behind his car and between your car?

A. Uh-huh (affirmative).

Q. And I asked you which way he was turned, do you remember that?

A. Uh-huh (affirmative). Yes, sir.

Q. And do you remember me asking you that he was -- you said he was turned toward traffic and would have been going eastbound was one thing, correct -- or I guess it would be, I'm sorry, westbound? Let me give an orientation.

A. Okay.

Q. If you had been turned toward traffic coming from Gwinnett County toward Marietta, is that correct?

A. No. No. Unh-unh (negative.) If -- I may not have understood. He would be facing traffic coming from -- he's -- he's not -- my patrol car is back. I'm facing -- I'm looking into Gwinnett County and my patrol car is behind him. And he's facing --

Q. Okay. So --

A. If I said that, that was incorrect.

Q. And when I asked you the question yesterday was he facing the blue light, were your blue lights on --

A. The blue lights were on.

Q. Okay. No doubt about that, was there?

A. No, sir.

Q. Okay.

A. No, sir.

Q. All right. And so you're saying now that he was turned the opposite way?

A. Yes, sir. When you asked me if he had a halo effect around him, meaning my headlights and the lights were at his back coming around him, and I said, yes, that's what I meant. That was what I was trying to convey to you when you asked if there was a halo effect behind him.

Q. Okay. Now -- so if he wasn't facing traffic going toward Marietta he was facing traffic going toward Gwinnett County?

A. He's facing traffic coming from Fulton County into Gwinnett County.

Q. Okay. And the -- the -- the testimony that you gave yesterday, you're saying that you were just confused about the orientation I was requesting?

A. That's correct.

Q. Okay. Now, there's changed about the testimony that you didn't ask him anything about contacts, is that right?

A. No, sir.

1 Q. Okay. And as far as how you gave it, you  
still gave it the same way where you raise it slightly  
above eye level to see the whites underneath his eyes?

A. That's correct.

2 MR. HEAD: All right. That's all I  
have.

3 THE WITNESS: Yes, sir.

4 THE COURT: Anything else, Mr. Fern?

MR. FERN: No, Your Honor. Thank you.

5 THE COURT: Thank you, Officer.

THE WITNESS: Yes, sir.

6 (Whereupon, the witness exits the  
witness stand.)

7 MR. FERN: We call James Panter, Your  
Honor.

8 (Whereupon, the witness takes the  
witness stand.)

(Witness sworn.)

9 Whereupon,

JAMES PANNER

10 was called as a witness herein, and having been first  
duly sworn, was examined and testified as follows:

11 MR. FERN: Please be seated, sir.

12 DIRECT EXAMINATION

13

14

BY MR. FERN:

Q. Please state your name for the record.

A. James W. Panter.

Q. How are you employed, Mr. Panter?

A. I'm a forensic chemist with the Georgia Bureau of Investigation, Division of Forensic Science, which is a Georgia state crime laboratory.

Q. Okay. What is your educational background, sir?

A. I have a Bachelor of Science degree in Chemistry from Georgia State University. I received my degree in 1973, and I was employed at the crime laboratory in September of '73. I've been employed by the laboratory for 27 years now. I was originally employed in what's called the Drug Identification Division, and what you do in that section is you analyze material to determine its drug content. At that time this section was also responsible for what's called blood alcohol analysis, which is a determination of alcohol content in biological specimens, primarily in DUI cases.

I was in that section for nine years. And then in March of 1983 I was promoted to the Implied Consent supervisor position, which is in charge of alcohol testing. And by this time, the alcohol section, which was both blood and breath, was a separate entity within the crime

laboratory. And so I was supervisor of that from 1983, and I am still called the Implied Consent supervisor, or manager, but that section was subdivided further in 1999, and now Implied Consent encompasses only breath alcohol testing. So my office is responsible for the training the operator conducts, or is -- has to complete to be certified to do breath alcohol tests, and also the quality assurance and quality control program that the instrument has to be maintained to make sure the instruments are operating properly throughout the state.

Q. What is your current job duty?

A. Implied Consent Manager, which is in charge of breath alcohol testing, both training and the quality control program. In connection with this I am a regular instructor at the Georgia Public Safety Training Center where I teach the theory of breath alcohol testing and is also the pharmacology of alcohol, which is the way alcohol affects your system and the way your body deals with alcohol once it's been ingested.

Q. How long have you been teaching these classes, Mr. Panter?

A. I was originally, I guess you would say, associated with the training program in 1976 when I started teaching in the physical principles part of the class. And then when I became the manager of the section

I began teaching all of the different parts of the class.

Q. Do you attend any seminars, sir?

1 A. Yes, sir. I've attended a number of top  
seminars, both done with my type of work and, also, other  
types of -- of forensic applications.

2 Q. Yes, sir. How many blood alcohol tests have  
you performed, Mr. Panter?

3 A. From 1983 to 1999 I was running them full-  
time, so I did over a hundred thousand samples to  
4 determine their alcohol content. And this included both  
traffic cases and coroner cases.

5 Q. How many breath alcohol tests have you  
performed, sir?

6 A. Several thousand, but I have never performed  
a breath alcohol case that was going to be used as  
7 evidence in court. Mine has always been in research  
capacity.

8 Q. Have you ever testified as an expert witness  
before, sir?

9 A. Yes, sir.

Q. Okay. How often?

10 A. Somewhere between 2000 to 2,500 times.

11 Q. In what areas have you been qualified as an  
expert, sir?

12 A. Well, when I was first employed laboratory I

was in drug identification, and subsequent to that blood alcohol analysis, pharmacology of alcohol, and most recently in breath alcohol testing.

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Q. Are you familiar with the Intoxilyzer 5000, sir?

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A. Yes, sir.

3

Q. How are you familiar with the Intoxilyzer 5000?

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A. The first -- first became acquainted with the Intoxilyzer 5000 we were evaluating for Georgia in 1993, and then our instrument that we selected to use became approved in 1994, and we began installing it. I attended several classes between 1994 and the end of '95 with the manufacturer of the Intoxilyzer.

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Q. Is that CMI, sir?

7

A. Yes, sir.

8

Q. Where did you attend those classes?

8

A. They were held at the training center in Forsyth.

9

Q. Okay. What did they teach y'all in those classes?

10

A. Well, the classes were designed to teach the theory of operation of the intoxilyzer and also do basic maintenance and preventive maintenance primarily.

11

12

Q. Are you familiar with the quarterly

13

14

inspections take place on the Intoxilyzer 5000 in the state of Georgia?

1 A. Yes, sir.

Q. And you are familiar with human physiology and the effects of alcohol upon a person, correct?

2 A. Yes, sir.

3 MR. FERN: Your Honor, at this time I  
tender as an expert Mr. Panter on the  
4 Intoxilyzer 5000, the Pharmacology of Alcohol  
-- Pharmacology of Alcohol, Blood Alcohol  
5 Analysis, as well as Breath Alcohol Analysis,  
subject to any voir dire that Mr. Head wishes  
6 to conduct, Your Honor.

THE COURT: Mr. Head?

7 MR. HEAD: I would like to voir dire  
him on a couple of areas.

8 THE COURT: Okay.

VOIR DIRE EXAMINATION

9 BY MR. HEAD:

10 Q. Mr. Panter, your degree is -- is in  
chemistry from Georgia State, right?

A. Yes, sir.

11 Q. Did you take any pharmacy courses?

A. No, sir.

12 Q. All right. Have you attended any  
13  
14

specialized training to teach you about pharmacokinetics of alcohol?

1 A. I've done on-the-job studies, but I've not conducted any formal classes.

2 Q. You haven't been to any special medical schools, or, say, University of Tennessee Medical School, where Dr. Stafford is, no place like that?

3 A. No, sir.

4 Q. Okay. But you -- you teach the principles of how the -- the body assimilates alcohol is what you're saying, right?

5 A. I teach the theory of how alcohol gets into your system, and also the process by which your body eliminates alcohol.

7 Q. But you -- but you --

8 A. And also I'm familiar with the effects of alcohol at different concentrations.

9 Q. Okay. Is this from reading and study or --

10 A. Yes, sir.

11 Q. -- taking courses?

12 A. Both reading and studying and practical experience.

13 Q. Okay. But as far as actually taking pharmacy courses, and taking them along side a pharmacist

or doctor, you've not done that?

A. I've not done that formally, no, sir.

1 Q. Okay. And as far as human physiology, what  
type of human physiology have you had other than on the  
job?

2 A. It's been primarily on the job other than  
high school biology.

3 Q. Okay.

A. I mean, college biology.

4 Q. And this wasn't something covered by your  
Degree of Chemistry at Georgia State, was it?

5 A. No, sir.

6 Q. Was your degree in Organic Chemistry or  
Analytical?

A. It was actually Bio-Physical.

7 Q. Bio-Physical?

A. Yes, sir.

8 Q. Okay. Did you take any courses in Organic  
Chemistry?

9 A. Yes, sir. You're required a year of  
Organic.

10 Q. Okay. And you indicated that you've run a  
lot of blood samples and it's been with the GBI, correct?

11 A. Yes, sir.

12 Q. You've never worked anywhere but there since

college, have you?

A. That's correct.

1 Q. Okay. And you said you've testified between  
2000 and 2,500 times in 27 years?

A. That's just a rough guess, yes, sir.

2 Q. So you're in court every day testifying?

3 A. I go to court a lot, usually about two-and-  
a-half times a week.

4 Q. Okay. And is it your contingent that you  
should be qualified as an expert in Pharmacology for  
purposes of this trial?

5 A. Yes, sir. My training in Pharmacology has  
6 been, as you said, literature research, both published  
reference material, and also practical experiments  
7 getting individuals intoxicated and observing the effects  
of alcohol, and also measuring alcohol concentrations of  
these people first-hand.

8 Q. And also in Human Physiology, you're asking  
9 the court to qualify you as an expert in Human Physiology  
as opposed to the principle, general principles of  
10 chemistry, is that correct?

11 A. Human Physiology as it relates to alcohol  
testing, which would include the respiratory physiology  
necessary to do the breath alcohol test.

12 Q. Okay. Have you had any -- have you had any

13

14

training by a pulmonary doctor or pulmonary specialist course that deal with the lungs, have you dealt with any course work there?

1

A. No formal course work, no sir.

2

Q. Okay. So all of what your training has been has been through observations on the job working for the same employee 27 years, correct?

3

A. Yes, sir.

4

Q. Okay. And you say you've taken one or two courses from CMI to teach you how to do preventive maintenance on the breath machine, correct?

5

A. Let's see, they started coming down here in, I think the first class was in July of 1994, and between then and the end of '95 they probably came four times to teach us different things in a different length of time.

7

Q. Okay. And you attended all those?

8

A. Yes, sir.

9

Q. Now, are -- are you authorized to make repairs or to calibrate that device, the internal of the Intoxilyzer 5000?

10

A. No, sir.

11

Q. Okay. Has CMI ever asked you, or paid you, or requested you to go to other states to testify as an expert on the 5000?

12

A. No, sir.

13

14

Q. Is it fair to say that the only place you've been qualified to do that is in the state of Georgia?

A. Correct.

Q. How many total hours of training from CMI have you received?

A. I'd say between 40 and 60 total hours.

Q. All right. And did you receive any type of certificate from them saying that you were authorized to stand as -- or certified as any type of expert on this device?

A. Not as an expert, but it gave you a certificate of competency and completion in the course that you had taken.

Q. Okay. And if you could tell the jury how many, before the machine was put in, people in Georgia -- drivers in Georgia were tested on the 5000, how many simultaneous blood draws and breath tests did you take in an experimental fashion to see if the machine could give accurate and reliable results.

A. Simultaneous blood tests and breath tests, none.

Q. Zero?

A. Zero.

1 MR. HEAD: All right. Your Honor, I  
2 won't -- based on that, I won't challenge his  
3 credentials to at least testify about the 5000,  
4 but when it comes to Human Physiology and  
5 Pharmacology I do have a problem lacking any  
6 formal training in this area, so we object to  
7 that being a qualification. But as far as the  
8 5000 and the principles of infrared breath  
9 testing, I won't object to his qualifications.

10 THE COURT: What about blood alcohol  
11 analysis?

12 MR. HEAD: I think that he's had  
13 sufficient training to do that. That's  
14 basically chemistry and using the devices that  
15 Ms. McMurray testified to, GC mass spec and  
16 gastromotography, those devices, I think, are  
17 part of chemistry, but in talking about  
18 Pharmacology and Human Physiology I don't agree  
19 with it.

20 THE COURT: I do think you're going to  
21 need to ask some more questions, Mr. Fern,  
22 about Pharmacology of alcohol and the Human  
23 Physiology aspects if you're going to need to  
24 -- if you're going to want to ask him some  
25 questions about that area.

MR. FERN: Yes, Your Honor.

BY MR. FERN: (Resuming)

1 Q. Mr. Panter, with regards to human  
2 physiology, a lot of it is on the job training on  
3 checking it, something that you've learned over time, is  
4 that correct?

5 A. Yes, sir. Through independent study.

6 Q. Okay. You've also read a number of  
7 articles, is that correct?

8 A. That's what independent study means, yes,  
9 sir.

10 Q. And when you've gotten your chance and your  
11 opportunity you've been able to keep up on this because  
12 of the fact that I would assume as something to do with  
13 being up to speed in your particular area of work, is  
14 that correct?

A. It's essential.

8 Q. Okay. What steps do you take, I mean, are  
9 there specific requirements for you and your employee?

10 A. Well, there are specific requirements, but  
11 you shouldn't limit yourself to the requirements. We're  
12 required to receive 16 hours of continuing education  
13 every year, but I do routine readings of articles in the  
14 field daily.

Q. Okay.

1 A. And also included, although I don't qualify  
2 that, we have legal updates on what's happening in the  
3 field of DUI.

4 Q. Have you ever read an article on a 1996  
5 study by Jones of Sweden?

6 A. Jones is one of the biggest publishers in  
7 the field. He has published literally hundreds of  
8 articles. I wouldn't know whether I read specific one,  
9 no, sir.

10 Q. Okay.

11 MR. HEAD: Mr. Fern, here's the article  
12 if you would like it.

13 MR. FERN: If I could approach the  
14 witness, Your Honor?

THE COURT: Certainly.

BY MR. FERN: (Resuming)

Q. Mr. Head has produced the article. If you  
could review that article and indicate whether or not  
you've actually had the opportunity to read that before.

A. I don't remember exactly seeing this in the  
beginning, but I'm familiar with the concept of it.

Q. How are you familiar with the concept of it,  
sir?

A. Well, it deals with alcohol -- isopropyl  
alcohol and acetone being present in this person's system

at the time.

Q. And how are you familiar with that particular area, is that through --

1 A. Well, when you ingest isopropyl alcohol your  
2 system will metabolize isopropyl alcohol into acetone.  
3 I've seen that in a number of cases, both traffic cases  
4 and also coroner cases.

Q. That's cases that you've seen in the course of your duties?

4 A. In my experience, yes, sir.

5 MR. FERN: Your Honor, I, again, renew  
6 my request to tender him as an expert in those  
7 listed fields.

8 THE COURT: I'll accept Mr. Panter as  
9 an expert in the areas proposed by The State,  
10 as to the Intoxilyzer 5000, the Pharmacology of  
11 Alcohol, Blood Alcohol Analysis, and Breath  
12 Alcohol Analysis. Please proceed.

MR. FERN: Thank you, Your Honor.

9 BY MR. FERN: (Resuming)

10 Q. Mr. Panter, would you please give a brief  
11 description to the jury of how the Intoxilyzer 5000 works  
12 in order to catch a breath sample. I know it really  
13 can't be done brief.

12 A. With breath alcohol testing you're

1 interested in two processes. One is collection of a  
2 sample from an individual, which represents their alcohol  
3 concentration. You do this with the 5000 by having the  
4 person exhale a breath sample that is deep enough that  
5 the blood -- the breath sample that's collected is from a  
6 part of the lung that's in balance, or in equilibrated,  
7 with the blood. To do this you're required to thin off  
8 or purge away all the first part of the breath sample,  
9 only collect the in-air. And once you've collected that  
10 in sample you're assuming that sample is what's at  
11 equilibrium with the blood level. The Intoxilyzer 5000  
12 actually has the ability, since it's a computerized  
13 device, to actually run an analysis on the content of  
14 alcohol in that breath specimen constantly. So what it's  
15 looking to happen is, as the breath alcohol is coming out  
16 of the individual, as you're getting mixed air it will  
17 rise, and then once you're getting the equilivated area  
18 it will plateau. Once it plateaus it knows this is the  
19 alcohol concentration that's in balance with this person.

20 I'm now going to sample this breath sample or analyze  
21 it. After you've collected it you have to have a process  
22 where you can identify that the material you are  
23 analyzing is in fact ethyl alcohol, and only ethyl  
24 alcohol. To do that the Intoxilyzer 5000 that we use in  
25 Georgia uses a process called multiple wavelength

analysis, which means it -- it looks at the alcohol using multiple wavelengths of infrared light. And what it's looking for is a specific pattern to be produced -- absorption to each one of these wavelengths. All types of molecules will absorb some type of light energy depending on their structure, but alcohol will, like all compounds, will absorb a unique pattern. Once you've identified that pattern you know what you're looking at is ethyl alcohol. Once it identifies a material as ethyl alcohol, which is drinking alcohol, it analyzes the concentration, which you have to set up prior to doing the test to that it knows for any given quantity of light being absorbed by the instrument, this represents this quantity of alcohol. So once you've figured how much alcohol you're ready to put the result. Our instrument in Georgia is designed to only gives these results when it's done both of these things, identified the materials that it's testing as ethyl alcohol and also make sure the breath sample is at equilibrium, that is we're getting good, consistent results, and then it will give you a numerical result. Anything that happens along the way that is not standard procedure it will give the operator of the instrument an error message and tell him, in the instruments' programming what has been triggered that does not fit the picture of the pattern it's looking for.

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Q. What is methyl alcohol?

1 A. Methyl alcohol is wood alcohol. It's a slightly smaller structure than ethyl alcohol. It's usually found in things like paint solvents and paint thinners. It's a highly poisonous material.

2 Q. How about isopropyl alcohol?

3 A. Isopropyl alcohol is rubbing alcohol. It's one methyl group bigger than ethyl alcohol. It's not quite as toxic as methyl alcohol, but it is more toxic than ethyl alcohol. The difference in toxicity, primarily, is in the metabolic process. Ethyl alcohol in your body when you ingest it is changed by an enzyme into acid aldehyde and then subsequently to, basically, acidic acid, so that your body burns it out as CO<sub>2</sub> and water so you don't have any harmful components building up in your system. With methyl alcohol your body is channeling into a process similar to metabolically, but the in-products are formaldehyde, which you know is embalming fluid, and then formic acid. And the formic acid changes the PH of your blood, which when you consume methyl alcohol, you usually die from acidosis. The isopropyl alcohol goes through the same metabolic process. The output, though, is instead of acid aldehyde, which is basically harmless to your system, as acetone. And the bad problem there is, now -- now acetone is an in-product. Your body

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1 doesn't have an enzyme capable to transforming this any  
2 further, so your body has to excrete this either through  
3 your breath in small quantities or primarily your urine,  
4 your kidneys would put out most of it.

5 Q. What is acetone, Mr. Panter?

6 A. Acetone is fingernail polish remover.

7 Fingernail polish remover is 70 percent acetone. It's a  
8 real good organic solvent.

9 Q. How about ketone?

10 A. Ketone is a generic term. Ketone refers to  
11 any -- I don't know if this is going to make no sense to  
12 you -- any nonprimary carbo bond, which means oxygen  
13 that's double bonded to a carbon that's not on the end of  
14 a molecule. Now, there are certain exceptions. You  
-- you've got to have carbons on both sides of your carbo  
group.

Q. Does alcohol contain carbohydrates, sir?

A. Ethanol is, ethyl alcohol, is, itself, to be  
considered a carbohydrate. It consists of carbon  
hydrogen, which makes anything a carbohydrate. But a  
carbohydrate, usually, first is something like a sugar or  
a starch, classically, and usually the way you make  
ethanol is you use some sort of fermentation process to  
change sugar into ethanol.

Q. Can the ethanol content within the human

body be detected by a urine specimen?

A. Say that one more time.

1 Q. Can the alcohol within a human body be  
detected by a urine sample?

A. Yes, sir.

2 Q. How about by a blood sample?

A. Yes, sir.

3 Q. How about a breath sample?

A. Yes, sir.

4 Q. How long does it take to receive breath  
samples results?

5 A. How long does it take to receive them?

6 Q. Right.

A. A few minutes.

7 Q. Okay. How about blood samples results,  
optimum conditions?

A. Anywhere from --

8 MR. HEAD: Your Honor, I have to ask  
9 the question be framed better, is it in this  
10 state or is it everywhere in the world, because  
11 that question is nebulous. If we're talking  
12 about this state that has to do with management  
of the blood. If you're talking about how  
quickly you can take a sample and get a reading  
that's a different number, so I'd like the

question clarified, if we could.

THE COURT: I agree.

BY MR. FERN: (Resuming)

1 Q. To get a blood alcohol content number, if  
2 you will, how long would that take under optimum  
3 conditions for the blood sample term?

THE COURT: You've still got to ask  
-- you're talking about --

BY MR. FERN: (Resuming)

4 Q. In the state of Georgia?

5 A. It depends on who's doing the test. You can  
6 have a blood sample run off for diagnostic purposes at a  
7 hospital and have the results within an hour. To have a  
8 forensically appable or admissible blood test result can  
9 take anywhere from three weeks to two months.

10 Q. What is meant by invalid sample, Mr. Panter,  
11 on the Intoxilyzer 5000?

12 A. Invalid sample is programmed within the  
13 instrument, and I told you that the instrument is looking  
14 for something to happen with the alcohol concentration in  
the breath, it's to rise and then flatten out. Well, if  
it ever starts somewhere other than down and then go up,  
if it starts somewhere high and then goes down it's going  
to give an invalid sample. What the instrument's trying  
to do is detect alcohol from some other source other than

1 the lungs. If it's in the mouth or throat area it's  
2 immediately going to hit the instrument and it's going to  
3 have an initially high reading, and as a person's alcohol  
4 content comes through it can go downward. So if it ever  
5 senses that it's going to invalidate the test and print  
6 invalid sample on the printout. It won't give you a  
7 result.

8 Q. What is meant by ambient fail?

9 A. Ambient fail means the instrument detected  
10 something in the air around its instrument, around  
11 itself, while it was setting it's clear state. In other  
12 words, it's got to pump clean air through the instrument  
13 to set its reference point, its zero point. And once  
14 it's set that it's going to measure against this point.  
15 If there's anything in the air, and it doesn't  
16 necessarily have to be ethanol, but usually ethanol is  
17 what it sees, it won't be able to set a zero and it will  
18 tell the operator it's had an ambient fail, which means  
19 the air around it can't zero it.

20 Q. Ms. McMurray, in her testimony, referred to  
21 a sample solution, a .10 solution, are you familiar with  
22 that term?

23 A. A sample solution, .10, yes, sir.

24 Q. What would that entail?

25 A. That's a simulator solution. It's something

1 to artificially produce an alcohol vapor of a known  
2 concentration. You have water in solution at a heated  
3 temperature and you blow air through it to produce  
4 alcohol vapor. And the alcohol vapor would be in  
5 equilibrium with the alcohol solution so that you produce  
6 the known concentrations of alcohol in a gas state.

7 Q. How is that related to the use of  
8 Intoxilyzer 5000 in the state of Georgia?

9 A. Well, that's the way you initially calibrate  
10 the instrument. You produce non-alcohol concentrations,  
11 you tell the instrument this is how much alcohol vapor is  
12 being introduced, and this is the concentration you see.

13 What we do in Georgia, after we receive the instrument,  
14 we check it to make sure the calibration is constant.  
15 And we use a .10 alcohol standard. We introduce it to  
16 the instrument by way of a gas specimen, and the  
17 instrument must be within five percent of that target for  
18 the instrument to continue to work. That's part of our  
19 quality control program.

20 Q. What is an interferant organic?

21 A. An interferant is anything other than ethyl  
22 alcohol. Anything that produces absorption that is not  
23 characteristic of the pattern you're looking for, and  
24 this can be any type of organic compound, other than  
25 ethyl alcohol. Once it's matched up with alcohol it's

going to give you a numeric result. Anything that doesn't match it's going to throw it out and call it interferant.

1

Q. Are you familiar with high protein diets and their influence on the Intoxilyzer 5000 or breath samples?

2

A. I'm familiar with the theory behind it.

3

Q. Okay.

A. What a high protein diet should do to your system and how it could theoretically affect breath samples, yes, sir.

4

5

Q. Okay. What is your understanding of what a high protein diet would do to your system?

6

A. Well, since you're not introducing carbohydrates to your normal metabolism, what your body tends to do is find other sources of energy. And when it does this it starts burning your proteins, which produces acetone as a bi-product. The acetone could theoretically get in your breath, it could theoretically give you an acetone concentration in your breath, which could you give you an interferant detected.

7

8

9

10

Q. Okay. So if a person was on this diet and did in fact have this acetone level, it's your testimony, then, that an interferant detected would be the product that would result --

11

12

13

14

A. Yes, sir.

Q. -- in the Intoxilyzer 5000?

A. Yes, sir.

1 Q. Okay. So if a person was on this test -- I  
2 mean, rather, on this diet and was submitted a sample to  
3 the Intoxilyzer 5000, and had been on this diet for a  
4 period of months, what would that result be?

5 A. Well, provided they had acetone in their  
6 system, you'd get the interferant detected. Now, the  
7 -- the situation you're describing requires the person's  
8 system be in what's called ketosis, the body is producing  
9 these ketones in the blood stream.

10 Q. What is ketosis?

11 A. That's a biological condition where your  
12 body is burning proteins.

13 Q. What effect does it have upon human beings?

14 A. Well, it really depends on your physical  
condition. It can be a very life-threatening -- or a  
serious condition is what it can be. It really depends  
on what kind of fat reserves your body has because they  
will kick in first. Your body prefers to burn things  
that are that type of material.

Q. If a person who was on this high protein  
type diet had been drinking alcohol earlier that evening,  
at some point would that impact upon the Intoxilyzer

5000, depending on what their body was consuming at that time?

1           A.       Well, once you've consumed any  
2 carbohydrates, or anything like alcohol, that will  
3 disrupt the whole cycle. So you won't be in the ketosis  
4 system anymore.

5           Q.       In what way would it disrupt the cycle?

6           A.       The type of compounds necessary to feed in  
7 your metabolic process would now be present, and so your  
8 system would stop burning the less preferential  
9 materials. The body will always burn what's easiest. So  
10 if you feed it glucose it will burn that first. If you  
11 don't have enough glucose it will pick something harder  
12 to burn, like fats. It will always burn whatever's  
13 easiest, or -- when I say burn, I mean metabolize.

14          Q.       If you could look at State's Exhibit 5,  
15 which is in front of you, do you recognize that document,  
16 have you seen similar documents?

17          A.       This is a copy of the printout from the  
18 Intoxilyzer 5000. This is serial number 1050.

19          Q.       And what does that particular result  
20 indicate to you?

21          A.       The alcohol concentration?

22          Q.       Yes, sir.

23          A.       Is .107 in both samples.

Q. Are there any interferences detected?

A. No, sir.

1 Q. Anything along those lines, any ambient  
fail, anything else?

2 A. No, sir. Again, if you had an ambient fail  
you wouldn't have a test result.

3 Q. Okay.

4 A. If you had any sort of warning message you  
wouldn't have got a printout.

5 Q. What do the filters inside the Intoxilyzer  
5000 do?

6 A. The filters are actually wavelength filters  
and they're actually like windows. And they permit  
7 certain types of energy through. And so you're screening  
out everything you're not interested in, and that's how  
8 you produce what you're looking for, the windows or the  
different wavelengths.

9 Q. And you mentioned that it's looking for  
certain patterns, including for ethyl alcohol, the  
10 Intoxilyzer 5000, what type of patterns is it looking  
for?

11 A. Well, the pattern will always be the same,  
but the concentration will increase the amount of  
12 absorption at each wavelength. But all the pattern  
-- all the wavelengths should increase together at the

same weight. You're looking for ethyl alcohol, and you know what it looks like, so you're looking to match that pattern, any concentration.

1 MR. FERN: No further questions, Your  
Honor. Thank you, Mr. Panter.

2 CROSS-EXAMINATION

3 BY MR. HEAD:

4 Q. I'm going to start off with a simple  
chemistry question, okay?

5 A. Sure.

6 Q. What happens when you put a ketone in the  
presence of an acid?

7 A. It depends on the type of acid, whether it's  
8 an organic acid or you're talking about an inorganic  
acid.

9 Q. Let's just say that you say ethanol.

10 A. Ethanol's not an acid.

11 Q. What if the -- what if the person is in the  
process of ketosis and you introduce to that person  
ethanol. You're saying that the byproduct that that  
creates is what?

12 A. Well, I say when you introduce, not  
necessarily ethanol, any carbohydrates, what you're doing  
13 is you're feeding in at the top of the system something  
14 that can be more easily metabolized than the proteins.

Q. All right.

1 A. Which is what ketosis is. So you're giving  
a system that's basically shut down while your body's  
burning the proteins something to work with. And so they  
2 go back to working where they're supposed to. And so  
this -- this part of the metabolism now is now basically  
abandoned.

3 Q. Okay. Have you looked at any of the  
research of people on high protein diets to determine how  
4 much higher the person's ketone level goes from norm  
after one day, one week, etc., have you looked at any of  
5 those numbers?

6 A. I've seen some number, and actually, the  
numbers I remember most were published by Jones. I don't  
remember how long ago, but I think it was in the '80s.

7 Q. Okay.

8 A. And his were very small, less than usually  
two-hundredths of a gram.

9 Q. So -- so you're saying --

A. For people on a protein diet.

10 Q. So people on a protein diet, you're saying,  
let's say after a couple of days they wouldn't have five  
times the amount of ketones, or after a week, a hundred  
11 times.

12 A. Of a normal person, yes, sir.

13

14

Q. They would?

A. A normal person has practically zero. So five times or ten times is not a huge quantity.

1

Q. Okay. What about a hundred times?

A. By a hundred times you would be in a serious medical problem.

2

Q. Okay. And so you would recognize, then, that people who stay in a state of ketosis on a protein diet can suffer or get into a serious medical situation?

3

4

A. Yes, sir.

Q. Now, the article that I handed you is written by A. W. Jones, isn't it?

5

A. Yes, sir.

6

Q. You said that you're not sure you'd ever seen that before.

7

A. I'm not sure I've ever read this particular article, no, sir.

8

Q. Okay. Now, first of all, let me ask you about A.W. Jones. Tell the jury who he is.

9

A. He is a person who works in alcohol testing, primarily breath alcohol testing, in Sweden.

10

Q. Okay.

A. He's probably one of the most recognized people in the field.

11

Q. And you certainly would recognize him as one

12

13

14

of the greatest authorities living, I'm sure, wouldn't you, him and Dubowski, right?

1 A. Yes, sir. I would put those two in roughly the same class, along with like Moskowitz.

2 Q. Okay.

3 A. And probably not the same as Borkenstein, but pretty close.

4 Q. Well, Borkenstein's retired, almost dead, but he's retired.

5 A. He's 90-something years old, but he's the father, basically.

6 Q. All right. I understand. As far as published articles, and studies, and research, he's the one --

7 A. Well, as far as published articles, Jones has no comparison.

8 Q. Okay. Thank you. And if Jones sends something to the Journal of Amicable Chemistry or any other scientific publication, would you say, based on his reputation, that he's researched it pretty well.

9 A. If it's a peer reviewed article, yes, sir.

10 Q. Okay. What's the title of the article you're reading?

11 A. It's a case report. It's Bio-Transformation of Acetone to Isopropanol observed in a motorist in a

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sobriety check.

1 Q. Okay. Now, have you actually done studies  
on persons on high protein diets, have you done any  
2 experiments to done simultaneously blood and breath  
tests?

3 A. No, sir.

4 Q. All right. Have you -- you are aware,  
5 though, that people on high protein diets do produce  
6 acetone, correct?

7 A. Yes. Yes, sir.

8 Q. And once they reach a state of ketone  
9 -- ketosis, their bodies are not what you consider  
10 normal, are they?

11 A. They're not usually normal metabolic  
12 pathways, no, sir.

13 Q. Okay. Now, you said this machine Georgia  
14 uses has filters that are supposed to isolate and say  
this is only ethyl alcohol on a person's breath, that's  
what they're designed to do, correct?

A. That's what they're designed -- that's the  
purpose of the multi-wavelength approach.

Q. All right. Tell the jury what range of  
wavelengths the 5000 is -- is looking at, what are the  
filters -- what are they targeting?

A. They are in the range from about 3.4 or

3.8 --

Q. Okay.

A. -- microns.

1 Q. Well, 3.8 is what, the 3.8 on the filter is what?

2 A. It's for reference.

3 Q. It's for reference. It's not ethanol or isopropyl, or anything like that, is it?

4 A. No, sir. You need a -- what you want is a filter that should be in an area where nothing's going to be absorbing and so you have something to compare to.

5 Q. Well, you will agree with me, Mr. Panter, that there are numerous other chemicals, not just  
6 isopropyl, not just acetone, there's numerous other chemicals that we come in contact with in our  
7 environmental circumstances, or we may even produce internally like we've been talking about, that will show  
8 up in that same wavelength, is that correct?

9 A. That's correct.

10 Q. Okay. Now, this device, the 5000 machine, has five filters, but there's only three of those that are targeted in that range that you're expecting to see alcohol, isn't that true?

11 A. Four of them are in the range that you're expecting to see some absorption, but from ethanol in  
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most of the places, it's going to be less than the one that you're going to be measuring for the quantitation purpose.

1

Q. All right. Now, is it your testimony that this device, the Intox 5000, if a person does have methyl alcohol or isopropyl alcohol in his system, is it your testimony that this machine, with it's existing configuration will flag that as an interfering substance?

2

3

A. Yes, sir. I've done those experiments with controlled solution in the laboratory.

4

Q. Now, I'm talking about in a human being. Have you ever done it in a human being?

5

A. I've only seen two samples where the subject had a interferant detected, and we were able to get a blood sample and identify isopropyl and acid in that person's system.

6

7

Q. And you assumed they drank that, right?

8

A. Well, whenever you see the combination of isopropyl and acetone you know the person's drinking.

9

Q. Okay. And that's based upon what?

A. Based on a normal metabolism of isopropyl acetone in your system.

10

Q. Okay. So you're saying if you get a blood sample that says it's got both acetone and isopropyl in it, you know the person had to drink it?

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1 A. That's true, yes, sir. And if the person's  
deceased you know that's what killed them.

2 Q. Okay. And was the person deceased that  
you --

3 A. Not in these two instances, though, that's  
4 why they were interesting. Instances like this are kind  
of rare.

5 Q. And did you ask the person had they drunk  
the alcohol versus it being generated from within their  
body?

6 A. The isopropyl?

7 Q. Did you ask them or are you just saying it  
had to be?

8 A. In one case we had a report from the officer  
9 that the person had isopropyl in their possession, along  
with normal ethanol, and the other one we didn't find  
out.

10 Q. Okay. But -- but still nobody, either  
second-hand or hearsay even asked him had he consumed  
acetone or isopropyl alcohol?

11 A. No, sir.

12 Q. Okay. And so your assumption was that the  
only way they could be in the system would be if the  
person drank it, consumed it?

13 A. Yes, sir.

14

1 Q. Okay. Now, if Dr. Jones' article came to a  
different conclusion, would that change your opinion  
about this, that is that the -- that the isopropyl  
alcohol was actually produced within the body due to the  
abnormal physiology of the human being?

2 A. I've never heard of that process.

3 Q. Okay.

4 A. Your system just can't backtrack and go from  
isopropyl to acetone.

5 Q. Okay.

6 A. There is no enzyme that does that.

7 Q. And -- and if Dr. Jones' actual blood sample  
and breath sample simultaneous showed a great variance  
between the breath and the blood, and that is when he  
broke the blood down he found isopropyl and these other  
compounds on a mass spec, you're saying that his -- his  
machine wasn't working correctly, his breath machine  
wasn't working correctly?

8 A. Well, all I've had a chance to read is the  
9 abstract. The --

10 Q. Well, take the time to read it.

11 A. The Intoxilyzer 5000 identified the presence  
of an interference, which is what you would expect, and  
he had an alco-meter, which is another type of electro-  
chemical device, and he got a positive reading on that,

but I don't see a numerical result. He does give numerical results for the blood levels, though.

Q. Okay. And what was that?

1 A. Which is what you'd expect. A .45 milligrams per milliliter of acetone, and .17 milligrams  
2 per milliliter, and -- these are classic levels of a person who's ingested isopropyl.

3 Q. What -- .17 level of what, isopropyl?

4 A. Isopropyl.

5 Q. And didn't it say that the breath machine and it's software, because they use software and they  
6 download, showed a .06 ethanol?

7 A. I say I don't see a numerical result anywhere here for that.

8 Q. Read it a little more closely. I think you'll see .06 is what the machine showed, when the blood  
9 actually showed they had a .17 isopropyl in their system.

10 A. (Witness reviews report of Mr. Jones.)

11 I see the .06 that you're referring to, but this was never printed out, and this was extracted from  
12 the instrument's memory as an apparent ethyl alcohol, which is a terminology used when the instrument is  
13 programmed -- you've got to subtract when you have an interference. Some states build their intoxilyzers to  
14 subtract the apparent interferant and give you what's

1 called an apparent ethanol reading. And that didn't work  
2 in this instrument because it gave only an interferant  
3 warning, and to actually get the apparent reading, they  
4 had to go in and pull it out of the memory.

5 Q. Okay. But they went ahead and drew blood  
6 from what he says there, correct?

7 A. Yes, sir, they did.

8 Q. And the person had a .17 isopropyl alcohol,  
9 is that correct?

10 A. That's correct.

11 Q. And the person had, at least from the  
12 software downloading, it showed that it had an apparent  
13 ethanol reading, too, correct?

14 A. That's true.

15 Q. Now, based upon what Jones writes in there,  
16 does it not appear that -- that from his research it  
17 appears that acetone is converted to isopropyl alcohol  
18 within -- within a human subject?

19 A. That's what he is reporting, yes, sir.

20 Q. Okay. But you hadn't seen that until now, I  
21 take it?

22 A. I've never seen this, and this is contrary  
23 to everything else that I've ever read, and this is not a  
24 peer-reviewed article.

25 Q. Okay. All right. You're not challenging

Dr. Jones' credentials, though, are you?

A. No, sir.

1 Q. And if -- if he took the time to write this  
up and publish it I would assume we would all guess that  
he thought it was important, wouldn't you?

2 A. Yes, sir. But he never mentions whether or  
3 not this person did or did not consume isopropyl alcohol,  
which is the more likely scenario.

4 Q. All right. But -- but from the history the  
person never did that as far as you --

5 A. From the history of the person the person is  
a borderline diabetic who does drink vodka, which --

6 Q. And -- and -- and was in a state of  
hypoglycemia, it mentions that --

7 A. Not proved. If you read the article there  
was never a sugar level taken, so you can't prove  
8 hypoglycemia, it was inferred.

9 Q. All right. Borderline diabetic, then?

A. That's what he says, yes, sir.

10 Q. Okay.

A. But, again, it was never proved.

11 Q. Okay. And as far as your laboratory, I've  
12 touched on this when we were doing your qualifications,  
before this machine on line to use in Georgia you did no  
simultaneous testing on any subjects taking both blood

and breath, is that right?

A. That's correct.

1 Q. And as far as -- you said something about in  
breath testing you're -- you're overseeing the quality  
control of the machines used in Georgia, right?

2 A. Yes, sir.

3 Q. And so may I take it from that that you're  
the person who has authored or designed how breath  
machines will be used and operated within this state  
4 pretty much?

5 A. Yes, sir.

6 Q. And one of the things that you've opted to  
not do is to not use software and download how the  
machine's operating, is that right?

7 A. Yes, sir. We don't have that software  
package with our instrument.

8 Q. But all you have to do is purchase it and  
download it and it will do it, won't it?

9 A. You could do that, yes, sir.

10 Q. Okay. And other states do it, don't they?

A. Some do, yes, sir.

11 Q. Okay. But Georgia's never done it, right?

A. No, sir.

12 Q. And isn't it true that in -- in separating  
up the protocol for people like Officer Adams to run the

machine that you have not created any checklists to ask questions of any subjects before they give a breath test?

1 A. That's correct.

2 Q. And so an officer who's trained in Georgia  
basically goes out and gives one to everybody, correct?  
3 If they submit to a test, and they're stopped for a  
suspected DUI, every single person gets the test without  
screening questions, right?

4 A. They don't get any screening questions, no,  
sir. The only requirement before doing a breath test is  
5 the operator has to wait 20 minutes, and that's to allow  
any mouth alcohol to dissipate, and that's to reduce the  
likelihood of getting an invalid test.

6 Q. Okay. Now, Mr. Panter, you mentioned  
7 acetone, we talked about ketosis, and we talked about  
isopropyl, would you agree with me that a subject who had  
8 any of those chemicals in his or her breath is going to  
give a fruity smell similar to ethanol, the king of  
alcohol we normally drink?

9 A. Say that one more time.

10 Q. A person who has high levels of acetone or  
is in a high level -- has high ketone levels, or maybe  
11 has consumed isopropyl alcohol, any of those situations  
that person's breath is going to smell fruity, very  
12 similar to an -- an ethanol breath, are they not?

1 A. No, sir. I've smelled a diabetic's  
breath, and it -- to me it doesn't smell fruity. It's --  
it's an unpleasant smell is what it is to me. And it's  
different than ethanol.

2 Q. Well, what about somebody on -- who's got a  
high state of ketosis, what does it smell like?

3 A. Ketosis would be more like acetone. If  
you've ever smelled fingernail polish remover that's the  
4 smell that you're going to smell, but it's much fainter,  
it's not nearly as strong. And, again, to me, it's not a  
5 fruity smell, but smells are totally personalized. I  
mean, it's difficult to tell a person what something  
6 smells like.

7 Q. Okay. And you said that -- and I asked you  
this question earlier. You said that based upon your  
training from CMI that you were not taught, in your  
8 class, you were not taught that if a person has methyl or  
isopropyl alcohol coming out of their breath that it  
would read cumulatively with the ethanol in their breath?

9 A. That's not true.

10 Q. You weren't taught that?

A. No, sir. I was not taught that.

11 Q. Okay. And you said that you've run some  
experiments using both methyl and isopropyl alcohol, did  
12 you run those experiments utilizing quantities that were

proven from prior studies to be tolerable amounts of those chemicals in the human body?

1           A.        I did with isopropyl alcohol, but methanol  
is extremely toxic, so what I was using was a level that  
was a low level for me but is still a toxic level.

2           Q.        Okay. Now, you indicated that this -- this  
machine has various filters, correct?

3           A.        Yes, sir.

4           Q.        And as far as the filters are set, they're  
set between about a 3.34 and a 3.52, that's the range  
they're set in, right, microns?

5           A.        Somewhere in that neighborhood, yes, sir.

6           Q.        Okay. And ethanol --

7           A.        Excluding the 3.8.

8           Q.        And ethanol falls right at about a 3.4,  
right?

9           A.        The quantitation is right around a 3.4.

10          Q.        And what's the quantitation filter for  
acetone?

11          A.        There isn't one for acetone in a Georgia  
instrument because we're not quantitating acetone. We're  
simply flagging anything that doesn't match exactly what  
we're looking for.

12          Q.        Okay. I'm talking about where does the  
-- where does the peak of the wavelength for acetone

fall, what's the -- what's the mid point?

A. It would be very close to that.

Q. Right next to 3.4, isn't it?

A. Pretty close, yes, sir.

Q. How about toluene?

A. Toluene would be further away.

Q. At 3.5, isn't it?

A. Yes, sir.

Q. And what about acetone -- I've already asked you acetone. What about acid aldehyde, a 3.47, isn't it?

A. Let's see. There all group right between, like I said, 3.4 and 3.8, with 3.8 meaning further away than anyone else.

Q. And what we're talking about when we're discussing this, if I could for a moment.

(Whereupon, Mr. Head goes to the board to draw diagram.)

Q. Is that the light spectrum runs from one end all the way across, and you're talking about a little segment right in here in that light spectrum (indicating), are you not, a very very small hole of infrared light, right?

A. Right. Infrared or the entire electro magnetic spectrum.

Q. The entire electro-magnetic spectrum, yes.

A very small part of it, correct?

A. A very small part of it.

1 Q. And then if you look -- if you look at it  
like a fingerprint of it you may have a dip in it,  
2 something like that (indicating), correct? And this  
would be a midpoint, would be ethanol at, say, 3.39,  
3 correct?

A. Similar to that, yes, sir.

4 Q. And then if you were getting a -- an acetone  
reading, it would come over and do that, wouldn't it,  
5 somewhere close to it?

A. You would have different wavelength's  
6 absorption at different places.

Q. Okay. And then --

7 A. It's not one band. It's a whole series of  
events.

Q. Okay.

8 A. So what you're looking for is -- even  
9 ethanol will absorb in all those different places, except  
for the one that's way outside.

10 Q. Tell -- tell the jury where isopropyl  
alcohol -- where is that -- what is that wavelength?

11 A. It's only slightly shifted from ethanol  
because they're very structural similar, and that's one  
12 of the reasons I checked this out specifically because in

my own mind I wanted to make sure that was true.

Q. So methyl -- methyl is where, where is methanol, where does it fall in this spectrum?

1 A. Again, it's a very similar compound so they would have roughly overlaying patterns.

2 Q. Okay. And -- and in no place in your  
3 training from CMI have you ever heard that the machine  
4 can't distinguish between isopropyl alcohol and ethyl  
5 alcohol?

4 A. That's true.

Q. You've never heard that?

5 A. Never heard that.

6 Q. And, just to make sure I'm clear, I've asked  
7 you so many different questions, but have you or your lab  
8 ever undertaken to analyze subjects who are on high  
9 protein diets, either with giving them alcohol or not, to  
10 check how they performed on breath devices?

8 A. No, sir.

9 Q. Okay. Now, you were asked some questions by  
10 Mr. Fern about different display messages on the 5000,  
11 correct?

10 A. Correct.

11 Q. And there's many more places that may give  
12 you a display of something wrong with the machine,  
13 correct?

1 A. Something wrong with the test that's being  
performed and the instrument's telling the operator  
what's going on that I'm not going to give you a test  
result.

2 Q. For example, it can have radio frequency  
interference, it will tell you that if it picks it up,  
right?

3 A. If anybody uses a radio transmitter in its  
immediate vicinity, it will stop the test at that point,  
4 it will print (inaudible) detected.

5 Q. And you might even have, instead of an  
invalid sample, an invalid test if somebody's put the  
wrong sequence in, right?

6 A. If you do something wrong procedurally while  
you're running a test it will give you an invalid test.

7 Q. Okay. Now, you mentioned a simulator a  
while ago in Mr. Fern's questioning, do you remember  
8 that?

9 A. Yes, sir.

10 Q. And a simulator, you said, is like a sealed  
jar that tries to as best it can imitate a human being's  
internal system by having a known alcohol solution,  
right?

11 A. Well, you're trying to simulate an alcohol  
vapor coming out of a person with a nonconcentration.  
12

1 Q. Okay. Now, the first questions I want to  
ask you there are this: The Georgia machines when  
they're running on a subject, if I pulled anybody out of  
a back room and tested them, there is no simulator  
running when you test them, is there?

2 A. That's correct.

3 Q. The only time a simulator is ever hooked up  
is when a person from the State Patrol, from Implied  
Consent section, comes around every three to four, five  
4 months, whatever a quarter turns out to be, and hooks it  
up and makes a couple of checks, correct?

5 A. Yes, sir.

6 Q. And the machine is capable of running that  
simulator all the time, isn't it?

7 A. The instrument can be set up to be  
permanently attached to a simulator and provide it with  
air and recirculate it, yes, sir, it can be done.

8 Q. And that's done in many states, isn't it?

9 A. Some states do provide simulated solution  
with every breath sample, yes, sir.

10 Q. Okay. And many of those states also keep a  
computer database using computer software, don't they?

11 A. Yes, sir.

12 Q. And many of those states also use a  
checklist for subjects and send some people for blood,

1 don't they?

2 A. I don't know how many states run checklists  
3 or how many states require blood samples. Checklists are  
4 something that used to be prevalently used and has sort  
5 of gone by the roadway.

6 Q. There used to be a checklist when Phil  
7 Hancock was in the position you're now in, or you were in  
8 starting in '83, correct?

9 A. With a photo electric intoximeter there was  
10 a checklist. But the photo electric intoximeter was a  
11 -- I wouldn't say more archaic, it was a more complicated  
12 type of test to run. It was based on a different theory  
13 of alcohol detection.

14 Q. Okay. Now, you're aware, are you not, Mr.  
15 Panter, that the-- there are -- there are breath testing  
16 devices that have a more sophisticated method of assuring  
17 that ethanol is what's being looked at, are you not?

18 A. There's different types of technologies, but  
19 the 5000 with the five-filter system is the most  
20 sophisticated infrared detection device to look for  
21 interference.

22 Q. Okay. And you're familiar with the  
23 technology that the Draeger 7110 has, is that correct?

24 A. It's a 7110, and I think it is. It's the  
25 dual method of detection instrument they use as a

combination --

Q. A 9.5, they check it at 9.5 -- they check it up at the 9 region, not just down to the 3.39 range.

1 A. Okay. I'm -- I'm not familiar with that, then.

2 Q. Are you familiar with the fact that Alabama has done away with the breath machine, the 5000, and has gone to the Draeger?

3 A. I knew that they were going to the Draeger, but the Draeger that they're using is a dual detection mechanism. They're using both a fuel cell detector and an infrared.

4 Q. Okay. And have you also learned that other states, including Wisconsin, New York, New Jersey, have abandoned their machines in favor of the Draeger?

5 THE COURT: What's the relevance of that in Georgia, Mr. Head?

6 MR. HEAD: Well, I'm just talking about technology, Your Honor.

7 BY MR. HEAD: (Resuming)

8 Q. Let me -- let me ask you -- I'm almost through here, Mr. Panter. And your area supervisors of these breath machines all over the state, isn't it true that the only regular testing they get for any interferant is to put two drops of acetone in a

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simulator, and stir it up, and check for acetone detection?

1           A.       Yes, sir. They provide it with an  
interferant that they know will give the instrument  
something different to look at other than ethyl alcohol.

2           And they use a solution that already has ethyl alcohol  
3           in it, so the instrument has to have the ability to see  
something that has ethanol with something else and be  
4           able to kick that out and say this is not what I'm  
supposed to look for. This has something else in it. So  
5           they have to be able to do that for the instrument to be  
certified to operate.

6           Q.       And these other razor chemicals, toluene,  
xylene, isopropyl alcohol, methylalcohol, methyl, ethyl,  
7           ketone, none of those things are ever mixed and checked  
other than just acetone, right?

8           A.       Not routinely by the area supervisors.  
Several of them have been checked by -- I've checked the  
9           different types of alcohol. Some of them are not very  
water soluble, especially things like toluene, which is a  
10          paint solvent, so it's very difficult to check those. And  
those are more easily checked, as far as interferant  
11          capability, with a standard gas solution, so the  
manufacturer handles that.

12          Q.       And if any type of repairs or recalibration

13

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has to be done on these machines there's nobody in the state of Georgia permitted or authorized to do that, is there?

1           A.           Yes, sir. That's correct. We don't  
2 authorize anybody to recalibrate our instruments other  
3 than the manufacturer. Whenever an instrument needs  
4 servicing it's sent back to the factory to be, you know,  
5 done and sent back calibrated. And then before we put  
6 it back in operation we check the calibration.

7           Q.           Now, when these area supervisors go out and  
8 they take a simulator jar, and they put two drops of  
9 acetone in there, you don't have any studies showing that  
10 that level is a humanly tolerable level of acetone per  
11 the total quantity in that jar, do you?

12           A.           That's a target level that we're aiming for  
13 is between .015 and .02 grams, which is a -- a level of  
14 which you expect a person who is in ketosis from insulin  
-- out of control to have in their system before they go  
comatose, while they're still ambulatory.

          Q.           This is -- they would be so high they're  
ready to pass out, it's a coma, right?

          A.           No, sir. It's before they reach that level.

          Q.           Right.

          A.           So we want -- we wanted a level that -- we  
wanted to make sure if a person is still capable of doing

a breath test it would detect it.

1 Q. Okay. And isn't it true that the  
Intoxilyzer 5000, regardless of what it's trying to  
analyze, that it has difficult at the low levels, that is  
2 between a 0 and a .02, it has difficulty giving reliable  
results at low levels?

3 A. Not that I'm aware of. The instrument has  
to be calibrated at .02. It's not calibrated between 0  
and .02.

4 Q. Well, but isn't it a fact the manufacturer  
itself has -- it has basically stated that as far as  
5 reliability within a plus or minus point -- plus or minus  
six percent, that reads no readings of -- of those type  
6 chemicals, like acetone and like ethanol, that the  
machine is not going to be able to come within those  
7 tolerance levels?

8 A. No, sir. It would not come within plus or  
minus five percent at those levels because you're talking  
then of less than ten-thousands.

9 Q. Okay. And isn't true that low levels of  
acetone, or possible other interferrants, if they're at  
10 low levels might be included in the sample and it not be  
flagged by the signal interferant detector?

11 A. It's possible because they're below the  
detection level, yes, sir.  
12  
13  
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1 Q. Okay. Now, other than these two samples out  
of all the ones you talked about that came into the lab,  
have you done any type of systematic study or research to  
do simultaneous blood draws against breath tests of  
subjects who had known health conditions?

2 A. No, sir.

3 Q. Okay. So all of what you've told the jury  
has been pretty much theory based upon your training, is  
that right?

4 A. Yes, sir.

5 MR. HEAD: I think that's all the  
questions I have, Your Honor. Thank you.

6 THE COURT: Anything else, Mr. Fern?

MR. FERN: No, Your Honor. Thank you.

7 THE COURT: Okay. Thank you, Mr.  
Panter. Anything else?

8 MR. FERN: May this witness be excused,  
Your Honor?

9 THE COURT: Any problem with that, Mr.  
Head?

10 MR. HEAD: I have no problem with that.

11 THE COURT: Thank you, Mr. Panter,  
you're excused. Anything else?

12 (Whereupon, the witness exits the  
witness stand.)

MR. FERN: The State would rest.

THE COURT: Okay. The State's completed their rebuttal. Any surrebuttal?

1 MR. HEAD: If I could have a five-  
2 minute recess, Your Honor, I could tell you  
3 that within five minutes. I just haven't been  
4 able to talk to possible surrebuttal witnesses.  
5 This part will be extremely brief, I assure  
6 you.

7 THE COURT: Okay. Ladies and  
8 gentlemen, we may have some surrebuttal  
9 evidence. Mr. Head's going to make decision as  
10 to that. Let me just to explain to you in case  
11 he does not have any surrebuttal evidence.  
12 After the evidence is completed, before the  
13 attorneys can have -- come to you with their  
14 closing arguments, it will be necessary for the  
attorneys and I to have what is known as a  
Charge Conference, where we discuss the law  
that is applicable to this case. And so if Mr.  
Head has the -- has sir rebuttal evidence I'll  
bring you back into the courtroom to hear that  
evidence. If he does not have that evidence,  
please be aware that we will probably need to  
take an extended break, and I'll send word back

1 to you about that while we discuss this matter,  
2 the matter of the charge. Then we'll come back  
3 before you, having closing arguments, and the  
4 charges that are all applicable to the case,  
5 and then the case will be yours to deliberate  
6 upon until you reach your verdict. But I just  
7 wanted you to know where we were going with  
8 that before we do take a short break, which  
9 could become a longer break, depending upon  
10 where we're going. So with that I'm going to  
11 release you back to the jury assembly area for  
12 around five minutes at which time I'll either  
13 bring you in the courtroom or send word back to  
14 you as to how long we will be before we come  
back to you.

(Whereupon, the jurors exit the  
courtroom.)

THE COURT: We'll be in recess.

(Whereupon, a brief recess was taken.)

(RESUME PROCEEDINGS)

THE COURT: Okay. What's our  
situation?

MR. HEAD: Yes, sir. I have a brief  
surrebuttal.

THE COURT: And who's that going to be?

MR. HEAD: Excuse me, Your Honor?

THE COURT: Who will that be?

MR. HEAD: Dr. Citron and Ms. McMurray.

1 THE COURT: Well, I have a problem with  
2 that in that both of those folks have been  
3 sitting in this courtroom, and the Rule of  
4 Sequestration has been invoked.

5 MR. HEAD: Well, as far as rebuttal and  
6 surrebutter, as far as I'm aware of the rules,  
7 those don't apply to those people. And there  
8 was no objection to them sitting here in plain  
9 view, but all it has to do with is Doctor -- I  
10 mean, Mr. Pannier's testimony and nothing else.

11 MR. FERN: Your Honor, I have made an  
12 objection to Mr. Citron earlier in the  
13 proceedings. I didn't realize he was going to  
14 call these particular individuals, and of  
15 course, he can call anybody in the room in  
16 terms of surrebutter. I understand that, but  
17 I had invoked the Rule of Sequestration, and I  
18 have not withdrawn that. I had approached the  
19 bench on an earlier instance when I saw

20 Mr. Citron walk in the first instance and  
21 opportunity. He has had the opportunity to  
22 listen to Mr. Panter's testimony, and he has

been in the courtroom the entire time.

1           MR. HEAD: Well, the only thing he's  
2 going to do surrebuttal on is Mr. Panter's  
3 testimony, and the rule under the Greenway Case  
4 and others says that the Sequestration Rule  
5 apply to witnesses only on the same side of the  
6 case versus witnesses on the opposite side.  
7 But as far as surrebuttal, it is my  
8 understanding that anyone -- and I've had this  
9 come up several times because I've had parents  
10 sitting in listening to the trial of children  
11 and things like that, and in each case -- I  
12 mean, if The Court wants to instruct the jury  
13 that they've been in here, of course, the jury  
14 knows he's been here, but there's no objection  
to it, and clearly with Mr. Panter testifying  
they should have been aware that that may be  
the case. It would be very difficult to find a  
way to do surrebuttal without extensive  
hypotheticals without pointing out the  
-- pointing out with a transcript what  
Mr. Panter said. There would be no way  
they would be able to give a brief testimony  
versus the extended testimony. But I could  
pull up Daniels and give The Court a citing of

the case, but I don't think it's improper, and if the matter had come up I would have still asked for them to stay in because there's no --

1           THE COURT: That's the point. That's  
2 exactly the point is that we all know that  
3 there are certain situations under which  
4 witnesses, expert and otherwise, may be  
5 excepted from the Rule of Sequestration. But  
6 Mr. Fern is correct. Very early in this trial,  
7 when Mr. Citron came in the courtroom, he came  
8 up and had a bench conference when Mr. Citron  
9 was discussed and it was represented to this  
10 Court that he was not going to be a witness in  
11 this case. And so, yes, he sat here during the  
12 entire trial, and now he's apparently going to  
13 be used in surrebuttal. In addition to that,  
14 there are certain circumstances when -- where  
an expert witness is excepted from the Rule of  
Sequestration in order to hear testimony so  
that the witness will be ready to render an  
expert's opinion on that as pertinent to the  
case. But there again the matter is brought to  
The Court and it's rule upon in the usual  
course so that there's no surprise or anything  
else. I've just got a problem that we've let

1 these folks in here despite the Rule of  
2 Sequestration, and now, all of a sudden,  
3 basically, to heck with the Rule, and I don't  
4 like it.

5 MR. HEAD: Well, Your Honor, I would  
6 have -- I would have expected if Mr. Fern was  
7 concerned about surrebuttal -- because  
8 Mr. Panter's not on my witness list and he's  
9 here for rebuttal --

10 THE COURT: Now, Mr. Head, you know  
11 that the witness list does not have to have on  
12 it folks that are going to be in rebuttal and  
13 surrebuttal, so we're talking apples and  
14 oranges.

15 MR. HEAD: But my understanding of the  
16 Rule, and if I'm wrong, I apologize, but my  
17 understanding of the Rule is for rebuttal and  
18 surrebuttal the presence of those witnesses in  
19 the courtroom is irrelevant because it is only  
20 for a limited purpose of dealing with what's  
21 brought up in rebuttal, and if necessary,  
22 surrebuttal.

23 (Whereupon, The Court reviews law.)

24 MR. HEAD: Could I ask for  
clarification, Your Honor. Is it Dr. Citron

that The Court doesn't want in, or

Ms. McMurray, or both? Because I think the  
rules says here, I'm reading it in Judge  
1 Daniels' book, that it applies to witnesses who  
have not testified. She's already testified.  
2 Because I may be able to have a brief meeting  
with them and she may be able to cover  
3 everything.

MR. FERN: Your Honor, my understand of  
4 the Rule of Sequestration is that it applies to  
all witnesses unless it's brought to the  
5 attention of The Court for the same reason, or  
at least in the section that I'm reading, 19-2,  
6 applies to all witnesses and that the  
discretion of the Judge must be exercised at  
7 the time the Rule is invoked. If either party  
wishes to keep witness in the courtroom it  
8 should be called to the attention of The Court  
and an explanation given at that time, as a  
9 burden of accepting a witness from the  
Sequestration Order as part of the\_\_\_\_\_.

10 In the case of Gray v. State, it' within the  
discretion of The Court to grant a denial of  
11 such an attempt. Gray v. State site, Your  
Honor, it says Footnote 14, which is 222  
12

Georgia Appeals 696 (1996) case.

1 MR. HEAD: Your Honor, I'm reading in  
the same section that says the purpose of the  
2 Sequestration Order is to prevent a witness who  
has not testified from completing his testimony  
3 from overhearing another witness's testimony,  
thus having his testimony affected by that of  
another witness. If it matters that

4 Dr. Panter, I mean, Mr. Panter went into  
formal rebuttal, I think either one of them  
5 should be permitted, since this is a criminal  
case, but I have to abide by whatever The  
6 Court's ruling is.

7 MR. FERN: That sentence, as read, Your  
Honor, the purpose of the Sequest Rule --

8 Sequestration Rule is to prevent a witness  
who has not testified, which would be Mr.  
9 Citron, or completed his testimony, which in my  
understanding would be Ms. McMurray, from  
10 overhearing another witness's testimony, and  
therefore they both would be under it.

11 MR. HEAD: Could I give The Court a  
citing from the Greenway Case?

12 THE COURT: Certainly.

13 MR. HEAD: It is -- I'm sorry.  
14

THE COURT: Yes, sir.

MR. HEAD: 207 Georgia Appeals, 511.

1 That has the best description that I'm aware  
2 about that the sequestration was to keep  
3 witnesses on the same side of the case, same  
4 side, from hearing the testimony, informative  
5 testimony.

6 (Whereupon, The Court reviews court  
7 rules and case law.)

8 THE COURT: Well, I'm going to let them  
9 testify, but I'm going to say this that I -- I  
10 think it was -- there is no -- there is no  
11 exception to the Rule of Sequestration. It has  
12 to do with rebuttal or surrebuttal witnesses,  
13 that's just not the law. My analysis comes  
14 down to the fact that I don't think it is  
unusual. These -- these are opinion witnesses  
rather than fact witnesses, and it is typical  
to allow experts to stay in the courtroom, be  
excepted from the Rule of Sequestration to hear  
matters that would assist them with providing  
their opinion evidence to the jury. I just  
think it's -- the Rule of Sequestration is  
there for a reason, and there is, as Mr. Fern  
points out, there is a procedure, and it's so

1 that we're all playing on the same level  
2 playing field. However, in this instance I'm  
3 going to allow them to testify. Anything else  
4 before we bring our jury back in?

5 MR. HEAD: Thank you, Your Honor. I do  
6 apologize. I assure you it won't occur again.

7 THE COURT: Anything else?

8 MR. HEAD: I should have made Mr.  
9 Citron sit out from start to finish in case I  
10 ever needed him.

11 THE COURT: Okay. Bring them in.

12 (Whereupon, the Bailiff exits to get  
13 the jury.)

14 (Whereupon, the jurors enter the  
15 courtroom and are seated in the jury box.)

16 THE COURT: Okay, ladies and gentlemen.  
17 That took a little bit longer than we had  
18 anticipated. There is going to be some  
19 surrebuttal evidence, and Mr. Head, you may  
20 call your surrebuttal witnesses at this time.

21 MR. HEAD: Thank you. Dr. Citron and  
22 Ms. McMurray, if you can wait outside, please.

23 (Whereupon, the witness takes the  
24 witness stand.)

25 (Witness sworn.)

Whereupon,

JOSEPH CITRON

1 was called as a witness herein, and having been first  
duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

2 BY MR. HEAD:

3 Q. Please be seated and state your full name  
for the jury.

4 A. My name is Joseph Citron.

Q. And what do you do for a living?

5 A. I'm a medical doctor in the city of Atlanta.

6 Q. All right. Do you have any other training  
other than a medical doctor?

7 A. Yes. I have a law degree from Georgia State  
University and I did do some part-time legal work.

8 Q. Okay. How long have you been a physician?

9 A. I graduated from medical school in 1971 and  
moved to Georgia in 1975. I went into private practice  
at that time, so it's been licensed practicing physician  
in Georgia since 1975.

10 Q. And are you board certified?

A. Yes, I am.

11 Q. In what field?

A. The field of Ophthalmology.

12 Q. And have you worked in emergency medicine?

13

14

A. Yes, I have.

Q. And have you also worked in other medical  
-- fields of medicine as you progressed through your  
1 career?

A. Yes, I have.

Q. And where did you do your residency?

A. I did my internship and residency at the  
3 Mayo Clinic in Rochester, Minnesota.

Q. And you still have an active practice?

A. Yes, I do.

Q. Have you in addition to this training  
5 -- well, first of all, you're licensed as a physician by  
the state of Georgia?

A. Yes, I am.

Q. Are you licensed as a physician in any other  
7 states?

A. In the state of Alabama, and I have been  
8 licensed in California and Minnesota.

Q. Okay. Have you also, since the time you  
9 became a physician and since the time you went to law  
school, have you taken the opportunity to go through  
10 training with a company known as CMI?

A. Yes, I have.

Q. And who is CMI?

A. CMI is the manufacturing company that  
12

manufactures the Intoxilyzer 5000 breath-testing machine.

1 Q. And did you obtain any type of training  
certificate or certification after going through that  
training?

2 A. Yes. I took an instructor's case in the  
spring of 1999, which was a three-day course to become an  
3 instructor to be able to teach people how to operate the  
machine, and I received a certificate from them.

4 Q. Okay. And do you have the certificate with  
you?

5 A. Yes, I do.

6 Q. All right. Do you have it so I could show  
it to Mr. Fern?

7 MR. FERN: Mr. Head, if he's simply  
tendering, I'm familiar with Mr. Citron.

8 MR. HEAD: Okay. That's not necessary  
Dr. Citron.

9 BY MR. HEAD: (Resuming)

10 Q. I just have a very few questions for you,  
okay? Number one, can you tell the jury what your  
11 training from the factory, the CMI factory, indicated  
relating to the Intoxilyzer 5000 machine's ability to  
distinguish between and flag isopropanol or isopropyl  
alcohol versus ethanol?

12 A. Yes. The machine cannot distinguish between

13

14

1 isopropyl alcohol and ethanol because of their similarity  
2 in structure, and as the infrared bands of absorption are  
3 identical, it's not overlapping, so the machine is not  
4 designed to distinguish between them.

5 Q. And is that something specifically taught in  
6 the course?

7 A. Yes. The course material included review of  
8 common alcohols and the way the body processes them. One  
9 of the common alcohols is isopropyl alcohol, which  
10 everybody knows is rubbing alcohol. And the difference  
11 between that and ethanol was part of the material. And  
12 it's -- the understanding is that you don't ingest  
13 isopropyl alcohol, you don't ingest methyl alcohol  
14 because it's toxic, but you do drink ethyl alcohol, so  
the machine is not designed to distinguish between the  
two things that you would not be normally drinking.

Q. Okay. And when -- sorry. When you were  
-- when you were given this instruction was that a point  
specifically brought up in the course that you took for  
which you've been certified?

A. Yes. The material -- the -- the course I  
took involved medical people, and it was just something  
that we were all familiar with, the different forms of  
alcohol, from our backgrounds.

Q. Okay. And the next area I want to quickly

very briefly ask you about has to do with human physiology as it relates to blood sugar levels. Are you familiar with those areas?

1

A. Yes, I am.

2

Q. And have you actually done some research in those areas?

3

A. Yes, I have.

4

Q. Have you written a book concerning those areas?

5

A. Yes.

Q. It's not been -- yet been published, though, has it?

6

A. No, not yet.

7

Q. Okay. I'd like to ask you have you also read Dr. A. W. Jones' article that I showed Mr. Panter a while ago?

8

A. Yes, I have.

9

Q. And I'd like to ask you, if you will, to explain to the jury your position as a physician in studying this area -- what your position is regarding whether or not the body will -- on a high protein diet situation, whether or not the body will convert ketones into isopropyl alcohol within the body, coming out of the body?

10

11

12

MR. FERN: Objection, Your Honor,

13

14

because he's been a doctor of Ophthalmology, a medical doctor of Ophthalmology, and he's testifying as to Physiology.

1 THE COURT: It appears that Mr. Fern's  
2 not ready to accept him for an opinion to that,  
3 so you're going to need to lay some foundation.

MR. HEAD: I'll be glad to, Your Honor.

3 VOIR DIRE EXAMINATION

4 BY MR. HEAD:

Q. Dr. Citron, when you were in medical school  
5 did you study courses on Human Physiology?

A. Yes, I did.

Q. Did you study courses on Pharmacology?

6 A. Yes.

Q. Did you study courses that dealt with how  
7 toxic substances, including alcohol, are dealt with by  
8 the human body?

A. Yes. I'm familiar with the alcohol  
9 physiology -- the physiology of alcohol by the human  
10 body.

Q. How many years were you in medical school?

10 A. Four years.

Q. How many years in -- in your intern  
11 residency?

12 A. Four years.

Q. Okay. So eight total years of training, is that correct?

A. Yes.

Q. And after -- is this after undergrad school?

A. That's correct.

Q. And four years of medical school?

A. My major was Biology, and my minor was Chemistry in undergraduate.

Q. In undergrad school?

A. Yes.

Q. Where was that?

A. At Boston University.

Q. Okay. Now, as part of this training, is it necessary for you to become a physician to pass your courses as a doctor?

A. Yes.

Q. Would you have been able to pass medical board states in four states without knowing human physiology and the pharmacology of the human body?

A. I wouldn't have gotten my M.D. degree, I wouldn't have been able to graduate, even take the licensing exams.

Q. And the book that you've written, what -- what does it specifically deal with? What -- what does it specifically deal with, tell the jury what it

specifically deals with.

1 A. It deals with high protein diets, because at  
2 one time I was more than I am now, and I lost a  
3 significant amount of weight by going back and reviewing  
4 some of the physiology of how the body processes food.  
5 And I decided to create a program that I felt would be  
6 healthy, and discussed it with several endocrinologists  
7 and colleagues of mine, and put together something that's  
8 called Meal To Meal, and it's basically a high protein  
9 diet, which you've probably read about. It's very common  
10 now.

11 Q. Okay. And I know you've been in here for  
12 part of what's going on, were you here called as an  
13 expert for this case?

14 A. No, I was not.

15 Q. What were you here for in this case.

16 A. My curiosity because I usually don't get to  
17 listen to testimony. As an attorney I like to be able to  
18 hear other experts. When I was in my training as a  
19 resident, when I had the opportunity to watch other  
20 surgeons, I would take the opportunity to go to the  
21 operating room and watch what they did. I was just using  
22 -- that's an analogy. That's why I came to watch. I  
23 came to watch some very good attorneys and listen to the  
24 experts and see what they had to testify.

Q. All right. Let me turn --

MR. HEAD: Your Honor, I would like to offer him now as an expert in Human Physiology.

If Mr. Fern wants to Voir Dire him I have no problem with that.

THE COURT: Mr. Fern?

MR. FERN: That's fine, Your Honor. No objection from The State.

THE COURT: So accepted.

RE-DIRECT EXAMINATION

BY MR. HEAD:

Q. Let me go back to the question I was focusing on, Dr. Citron. As far as the -- the person on a high protein diet, and it's been an extended period of time, do you have an opinion about whether or not that person's ketone bodies, or acetone levels, once broken down and are starting to be metabolized, whether that will turn into isopropyl alcohol within the human body? In other words, generated by the human body?

A. Yes. That's exactly what takes place. There's a pathway in the body that's mediated by alcohol dehydrogenase, which is the enzyme that converts acetone into isopropyl alcohol. That's -- that's exactly what that article was talking about.

Q. Whose article?

A. Wayne Jones' article.

Q. And have you ever met Wayne Jones?

1 A. Yes, I spent some time with him last year in  
Lumshurpin, Sweden, which is where I --

Q. Which is where you met with him?

2 A. Yes, I did.

3 Q. And is it fair to say due to this book  
you're writing, and your medical background, plus legal  
4 background, that this is a topic of great interest to  
you?

5 A. For a lot of reasons, one of which I felt I  
was -- I needed to do something about my health, and,  
6 yes, that's why I did it. But I felt that I was able to  
create this, with my background and sources that I had to  
7 turn to, to make sure that I was doing something long  
term that was healthy.

8 Q. Okay. Based upon your training of the  
Intoxilyzer 5000 machine, your knowledge of medicine, and  
9 this -- specifically focusing on the article by Jones, do  
you have an opinion of whether or not a person on a high  
10 protein diet who then ingests ethanol drinks, do you have  
an opinion about what would occur in that person's body?

11 A. Yes.

Q. Could you tell the jury what that is?

12 A. Well, the -- the body that had the presence

1 of ketones, specifically acetone, the -- if there is  
sufficient amounts of acetone, the body doesn't shift to  
manufacturing isopropyl alcohol, and they would also have  
ethanol, which is part of what's going on in their body.

2 But because of the ketosis that they're in because of  
the high protein diet, the metabolism carbohydrate would  
3 be retarded because it's dependent upon insulin  
secretion. And in the presence of high protein your body  
4 secretes glucagon, and that inhibits insulin, so the  
carbohydrate's not used as a fuel. The glucagon  
5 basically takes your fat, melts it, and forms an inherent  
form of glucose. It's called -- it's a process where  
6 glucagon changes fat into glucose, and it's -- it's  
exactly what happens with high protein diets. I know  
7 that's exactly what I was aiming for, and was successful  
in losing approximately 40 pounds last year.

8 Q. In one year?

9 A. Well, it was about in a six-month period,  
yes, sir.

10 Q. Okay. And insofar as the training that  
you've received on the Intox 5000, and based on your  
11 medical background, what -- do you have an opinion about  
whether or not a person who is on a high protein diet,  
has been on it for an extended period of time, and that  
12 has ethanol, do you have an opinion about whether or not

a reliable test of the ethanol they consumed could be obtained from an Intoxilyzer 5000 machine?

1 A. No. The only way that you could reliably do  
that would be blood test because that would distinguish  
2 between the three different chemicals that are being  
interpreted by the Intoxilyzer -- could be interpreted by  
3 the Intoxilyzer is ethanol.

4 Q. Would any person, regardless of their  
educational background, experience, be able to look at a  
5 number like a .107 in this case, and tell what part of  
that was from alcohol consumed versus alcohol generated  
in the body or other chemicals generated in the body?

6 A. No.

MR. HEAD: Thank you.

CROSS-EXAMINATION

7 BY MR. FERN:

8 Q. Mr. Citron, have you ever examined the  
Defendant, Mr. Redstrom, in this case?

9 A. No, I have not.

Q. As a medical doctor or otherwise?

10 A. No, sir.

11 Q. Did you put models together correctly  
earlier today for Mrs. McMurray --

12 A. I put --

13 Q. -- prior to her testimony?

1 A. I'm sorry. I put some of them together  
correctly. I mislocated the oxygen on one of them.

2 MR. FERN: No further questions, thank  
you.

3 MR. HEAD: I don't have any questions  
for him.

4 THE COURT: Thank you, sir.  
(Whereupon, the witness exits the  
witness stand.)

5 MR. HEAD: (Tells the Bailiff) If you  
could have Ms. McMurray, I just need to ask her  
about three questions.

6 (Whereupon, the Bailiff exits.)

7 (Whereupon, Ms. McMurray enters the  
courtroom and takes the witness stand.)

8 DIRECT EXAMINATION

9 BY MR. HEAD:

10 Q. All right, Ms. McMurray, you're still under  
oath, okay?

11 A. Okay.

12 Q. I'd like to first focus your attention on  
the issue of acetone levels that the human body is able  
to maintain before going into a coma.

13 A. Okay.

14 Q. Could you tell the jury what your study of

the research has indicated would be the levels of acetone the human body could have in it without going into a coma?

1           A.           The literature where I've been able to find  
2 the highest levels I've seen reported would be 19,000  
3 milligrams per liter, acetone on the breath, which would  
4 convert, in terms of grams, to 210 liters to a .09. I  
5 also mentioned earlier today about Woodmark's drinking  
6 like a liter of acetone at a time. It didn't kill him.  
7 And so it's not a lethal dose.

8           Q.           Okay. Now, were you in the courtroom when  
9 Mr. Panter testified that he created a sample to create a  
10 .015 to a .02 level of acetone?

11          A.           Yes, sir. I heard that.

12          Q.           And with his analysis that he was trying to  
13 get someone up to a level just before going into a  
14 comatose state, do you agree with these numbers?

15          A.           No, sir. I do not agree with that.

16          Q.           Okay. Now, insofar as this -- the issue of  
17 whether or not the human body will produce isopropyl  
18 alcohol from the conversion of ketone bodies, or acetone,  
19 can you tell this jury if your opinion coincides with  
20 Mr. Panter or with Dr. A.W. Jones and the research that  
21 you've done?

22          A.           I would agree with Dr. Jones' research

1 because the enzyme alcohol, dehydrogenase, will convert  
2 acetone to isopropyl or isopropyl to acetone. It's the  
3 same enzyme that breaks down ethyl alcohol. It's there  
4 naturally, it depends on how acidic you are, whether  
5 you're going to go to the alcohol side or the ketone  
6 side. Dr. Jones, I believe, is correct.

7 Q. Okay. Now, have you trained with CMI, the  
8 manufacturer? I think you said earlier you did, is that  
9 right?

10 A. Yes, sir. I've been trained by the  
11 manufacturer on two different occasions, with the  
12 earliest versions of the Intoxilyzers plus the newer  
13 versions, called the Tuct versions.

14 Q. And that's the ones with five filters, the  
15 one that Georgia uses?

16 A. Yes, sir.

17 Q. Can you tell the jury whether or not a  
18 discussion took place in this training regarding the  
19 ability of the Intox 5000 to take a sample and  
20 distinguish between, or flag, isopropyl alcohol?

21 A. No, sir. It does not reliably flag other  
22 alcohols. It locks all alcohols together.

23 Q. Okay. And is isopropanol, or isopropyl  
24 alcohol, is that the same thing?

25 A. That's -- isopropanol, isopropyl alcohol,

are the same term.

Q. Isopropyl alcohol and ethanol are the same thing?

1

A. Yes, sir.

2

Q. And based upon your training from CMI, the manufacturer of the machine, they've indicated that all alcohols would be lumped into one number?

3

A. Yes, sir. It's not reliable in separating out alcohols, it tends to lump them all, which is why a lot of states write their labs saying alcohol, and not defining what kind of alcohol. It's with infrared devices around the three-and-a-half micron range, it's too difficult to separate them out because it's looking for carbon -- well, actually, it's looking for a methyl group, but a chemical that has the carbon hydrogen bond on it.

4

5

6

7

8

Q. Okay. So you're saying that based upon your understanding, some states say they don't care whether you drink isopropyl or ethyl alcohol, it's still alcohol, right?

9

10

A. Yes, sir. Wisconsin's an example of that. And they wrote that in when they went to Intoxilyzer recognizing that it cannot reliably separate the two. It tends to lump them together.

11

12

Q. Okay. Now, as far as that law is concerned,

13

14

did it -- there's nothing in the law that says,  
unintentionally created in your body is a crime, did it?

1 MR. FERN: Objection, Your Honor. She  
hasn't qualified. It calls for a legal  
conclusion for the state of Wisconsin.

2 MR. HEAD: I'll withdraw the question.

3 THE COURT: Anything else?

4 MR. FERN: No questions, Your Honor,  
thank you.

5 THE COURT: Thank you. Anything else?

6 MR. HEAD: No further witnesses. Thank  
you, Your Honor.

7 (Whereupon, the witness exits the  
witness stand.)

8 THE COURT: Ladies and gentlemen, we  
are going to need some time. At this time the  
evidence in our case is now closed, and we're  
going to need some time to address some matters  
outside of your presence. So I'm going to  
release you at this time until four o'clock, at  
which time it is my fervent hope that we will  
be ready to have closing arguments, and then  
the Charge of the Law, and then I'll give you  
this case to deliberate upon and to reach your  
verdict. So with that I'm going to release you

1 until four o'clock. Please don't discuss this  
2 case with anyone nor allow anyone to discuss  
3 this case with you or in your presence. So  
4 with that I'll excuse you until four o'clock.

(Whereupon, the jurors exit the  
courtroom.)

THE COURT: Okay. Before we break I'm  
going to put some things on the record. After  
hearing Dr. Citron's testimony I am as  
concerned as ever about this sequestration  
matter. And in addition in looking at McNeil  
v. State, 229 Georgia Appeals, 149, a 1997  
case, it specifically addresses the Greenway  
case, sequestration of witnesses and expert  
witnesses, and who may be excused, and it  
specifically addresses the situation, except  
for the rebuttal situation that we're in. But  
I just -- I was -- could not believe that  
Greenway would be considered the law in  
Georgia, and this McNeil case specifically sets  
out that -- the Court of Appeals in this case  
says specifically: We have previously approved  
the long-standing practice of the trial courts  
of this state, which have required all  
witnesses to leave the courtroom and remain

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1 outside until they are required to testify.  
2 And thus even when an expert witness would be  
3 assisted by hearing of testimony of preceding  
4 witnesses instead of answering a hypothetical  
5 question and assist counsel in conducting a  
6 cross-examination, the grant or denial of  
7 subject exemption -- exemption lies within the  
8 sound discretion of The Trial Court and will  
9 not be disturbed absent a manifest abuse of  
10 that discretion. I'm seriously considering  
11 granting a su as ponte, calling a mistrial in  
12 this case. It was specifically set out at the  
13 beginning of this case that Dr. Citron would  
14 not testify in this case. And for some reason  
-- I mean, I hear this man's testimony up  
here, and he's basically your case. Now, he --  
he knows about these kinds of diets, he knows  
about the Intox, he's a medical doctor, he's a  
lawyer. He's your case and you call him in  
surrebuttal, and he was specifically addressed  
by Mr. Fern's bench conference at this time.  
I'm -- I am taken aback, I will say that. I'm  
going to go finish up this Charge, but we may  
not need to go that far. I'll be back. Y'all  
stay with me, I'm going to get you this Charge,

and I'll be thinking about this next one.

(Whereupon, a recess was taken.)

CHARGE CONFERENCE

1

THE COURT: Okay. Mr. Fern, have you had the opportunity to review the Charge?

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MR. FERN: Yes, I have, Your Honor.

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THE COURT: Mr. Head?

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MR. HEAD: I have, Your Honor.

4

THE COURT: Okay. Mr. Fern, did you have any comments with regard to the Charge?

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MR. FERN: With regard to the Charge of Clarification, Your Honor, on page 19 and 20, the pages circled.

6

THE COURT: Right.

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MR. FERN: Georgia law provides for the setting of maximum speed limits and requires the drivers obey posted speed limits, it's my understanding that's going to be the substance of the Charge, the unwritten version?

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THE COURT: Yes, correct.

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MR. FERN: Not the following version on page 20, is that correct?

11

THE COURT: Oh, I'm sorry. Yes, that should have been x'd out, so nothing on page 20 will be given.

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MR. FERN: That's the only question I had with the Charge -- with regards to the Charge. Thank you, Your Honor.

1

THE COURT: Okay. Mr. Head?

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MR. HEAD: If I could just have one moment, Your Honor. Your Honor, it appears that The Court may infuse the actual pattern book or rewritten, but it does appear that the Charges we requested have all be included in this so I don't have any objection to this.

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THE COURT: Okay. Let me put on the record the fact that I -- just so that the record is clear. At the beginning of this trial the Rule of Sequestration was invoked by both sides in this case. Further, Mr. Fern, I cannot recall exactly at what point in time it was, but my present recollection was that it was either -- I think it was at the very beginning of testimony in this case, Dr. Citron came into the courtroom, and Mr. Fern, and I should have thanked him for the way that he undertook calling this to our attention, asked for a bench conference, at which time he brought to The Court's attention that

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Dr. Citron had entered the courtroom,

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1 reminded The Court that the rule had been  
invoked, and said that he recognized Dr. Citron  
and asked whether he was going to be a witness  
in this case, whereupon Mr. Head conferred with

2 Dr. Citron, came back to the bench,  
and represented to The Court that Dr. Citron  
was not going to be a witness in this case.  
3 And thereafter Dr. Citron remained in the  
courtroom virtually through the entirety of  
4 this trial, with rare exception. In addition  
to that, after Ms. McMurray's testimony, she  
5 stayed in the courtroom, and I have no -- the  
record will reflect what happened at the  
6 conclusion of her testimony, but I have no  
recollection that she was excused at that time,  
7 and thereafter, Ms. McMurray stayed in  
the courtroom, also. Thereafter, after The  
8 State's rebuttal testimony, during which both  
Dr. Citron and Ms. McMurray were in the  
9 courtroom, it was -- The Court was  
informed that these two witnesses were going to  
10 be called on for surrebuttal testimony. Upon  
consideration of this matter -- I'm not going  
11 to refer to myself in the third person, but I'm  
going to say that I am extremely concerned

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1 about this matter. I don't think it was all --  
2 at all appropriate, and I think that The State  
3 has been put in an extreme disadvantage as a  
4 result of that. Again, I think that Dr.  
5 Citron's apparent qualifications as an M.D.,  
6 J.V., a person who's been on this diet, a  
7 person's who's written about this diet, has  
8 visited with Dr. Jones in Sweden, that's the  
9 entirety of the Defendant's case in this  
10 matter, and I just am flabbergasted that --  
11 that he was called in surrebuttal. After the -  
12 - I tell you that upon consideration I'm not  
13 going to declare a mistrial in this case,  
14 although, Mr. Fern I want the record complete,  
and if you have anything else you want to put  
on the record I would invite you to do so that  
The State will have as complete a record as it  
needs in this matter.

9 I am going to charge this jury. And I  
10 want to say I don't lightly say these things.  
11 My point -- I say this in civil cases, I  
12 typically don't say them in criminal cases, but  
13 I want this jury to have as much information as  
14 possible. I have no stake in the outcome of  
this case whatsoever, but both sides should

1 have a level playing field, and this -- this  
2 field has become so out of level it's not even  
3 funny. But I'm going to, upon -- and so I  
4 don't come about this frustration lightly, and  
5 I don't need to unduly chastise anyone, but I  
6 think that everyone in this room has been  
7 involved in this business for extended periods  
8 of time, and we just, quite frankly, ought to  
9 know better.

10 I'm going to, after the expert witness  
11 charge, just so everybody knows what the  
12 situation is, I'm going to charge this jury as  
13 follows: I advise you that both sides invoked  
14 the Rule of Sequestration at the beginning of  
15 this trial. That rule provides that witnesses  
16 are required to remain outside of the courtroom  
17 during trial and are not to discuss testimony.

18 You will have noted the Defendant's two  
19 surrebuttal witnesses were present in the  
20 courtroom during The State's rebuttal  
21 testimony. You may take note of that as you  
22 analyze the weight that you give the testimony  
23 of those two surrebuttal witnesses.

24 MR. HEAD: Your Honor, I'm not  
25 challenging giving that Charge, but I was not

1 the one requesting it, and I don't think I  
2 joined in, and I'll be asking the Court  
3 Reporter to look back and see, but I did not  
4 request it because The State had only reported  
5 one witness, but I don't think I joined in it,  
6 but I'll be glad to have the Court Reporter  
7 look back and see what happened.

8 THE COURT: Well, we may be -- you may  
9 be correct, then.

10 MR. HEAD: I didn't say anything about  
11 it because I only had one name. And I  
12 understand The Court's frustration, and I know  
13 that no apology is going to correct it with The  
14 Court, but in 25 years I've never had the issue  
15 raised, and I don't know how many times I've  
16 had surrebuttal witnesses sitting for all or  
17 part of the trials. The first time I've had  
18 anybody raise -- I was not aware that the  
19 McNeil opinion surplanted Greenway. I knew  
20 about the Gray case, but that's on a whole  
21 different angle into it because the Gray case  
22 was my case, as a matter of fact. But  
23 Greenway has been the rule up until then, and  
24 it was not intentional, and I've -- I've  
25 discussed this off record with Mr. Fern. I

think he knows I wasn't planning to use

Dr. Citron at all. But I had no idea that

1 Mr. Panter was coming until I rested and we  
2 were going to lunch. I had no idea in the  
3 world he was coming -- that Mr. Panter was  
4 coming until we -- until we rested. So I do  
5 apologize again, and I have discussed it with  
6 Mr. Fern, and I hope he knows that I planned  
7 for Dr. Citron to sit in and enjoy the trial  
8 instead of having to be involved in all of them  
9 all the time. But for what that's worth I  
10 hope, also, that the matters he testified to  
11 seem to be duplicative of what Ms. McMurray  
12 testified to and the article by Dr. Jones,  
13 which all experts seem to recognize him as an  
14 authority.

8 THE COURT: Okay. Anything you need to  
9 put on the record, Mr. Fern?

9 MR. FERN: Your Honor, the only thing  
10 that I would put on the record is that I  
11 appreciate the information from The Court. The  
12 objections have been launched throughout the  
13 course of this trial. I made my independent  
14 decision of this fact, and I take everything as  
it's stated in the record at this time.

THE COURT: Okay. Thank you. Mr. Fern, will you open and close closing arguments?

1 MR. FERN: Your Honor, we're going to waive those, and we reserve the right to close.

2 THE COURT: Okay. Mr. Head, how long will you need to get ready for your closing argument?

3 MR. HEAD: Long enough to go the restroom and return.

4 THE COURT: All right. In five minutes -- will you need any longer?

5 MR. HEAD: No.

6 THE COURT: Okay. In five minutes I will bring this jury back in and get going. I will tell you that I don't -- at this time, I would ask everyone about obligations. I've got a dinner that I have to attend. I have to leave here at 6:30 this evening, and I'm not going to tell this jury that because I don't want to chill their deliberation, but I will tell y'all that at 6:30 -- I will tell this jury that they will be in charge of their deliberation because I know that childcare and other considerations will -- can weigh upon

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1           them, and I will tell them that it will be up  
2           to them to determine how long they want to  
3           deliberate. But at 6:30, if they are still  
4           deliberating, then they're going to have to  
5           come back in the morning, okay?

6           MR. HEAD: Yes, sir.

7           THE COURT: Anything else?

8           MR. FERN: Okay. In five minutes I'm  
9           going to bring the jury in so if you'll get  
10          them ready, and in five minutes we're going to  
11          bring them in.

12          (Whereupon, a recess was taken.)

13          THE COURT: Okay. Anything else before  
14          we bring this jury in?

15          MR. FERN: Nothing for The State, Your  
16          Honor.

17          MR. HEAD: No, Your Honor.

18          THE COURT: Okay. Bring them in,  
19          please.

20          (Whereupon, the Bailiff exits to get  
21          the jurors.)

22          THE COURT: Mr. Head, you'll be first  
23          up.

24          (Whereupon, the jurors enter the  
25          courtroom and are seated in the jury box.)

1 THE COURT: Ladies and gentlemen, I do,  
again, want to thank you for your patience  
during all these delays. I take full  
responsibility for them. There's sometimes  
some things that take us some time to discuss.

2 I assure you that we have been transacting  
3 business during all of these breaks, with the  
exception of 15 minute morning or afternoon  
4 breaks, and sometimes these things take longer  
than I anticipate that they will take, and we  
5 were diligently undertaking some business while  
y'all were patiently waiting outside of the  
6 courtroom.

7 Ladies and gentlemen, our evidence in  
our case is now closed, and we are now to that  
8 point in the proceeding where the attorneys who  
have been representing the parties in this case  
will come before you and give their closing  
9 argument. At the conclusion of that closing  
argument I will charge you the law that's  
10 applicable to this case, and the case will then  
be yours to deliberate upon and reach your  
11 verdict.

12 At this time, Mr. Head, you're invited  
to come to this jury and give your closing

argument.

MR. HEAD: Thank you, Your Honor.

1 Ladies and gentlemen, thank you for  
2 your patience of two very long days, and I want  
3 to thank you, all the six of you, for having  
4 such an attention span. It's been -- it's been  
5 marvelous watching you work because it's been a  
6 long trial and it's very difficult to follow me  
7 at times, but I want to thank you in advance.  
8 The Judge and Mr. Fern will also thank you.

9 It's been my honor for Mark Redstrom to  
10 have chosen me to represent him in this case  
11 because there's 30,000 lawyers in this state,  
12 and anytime somebody selects me that's got to  
13 be an honor. And I hope my coaching decisions  
14 on behalf of our team won't be second-guessed  
by the jury. I did the best I can, and I hope  
now that you can see why my coaching decisions  
were made.

I told you at the offset there would be  
no need for us to attack Officer Adams. I  
think you understand why now that you've seen  
him testify and have had a chance to get a  
little perspective about him. At the same  
time, I did have to cross-examine him on

certain issues and we'll cover those later.  
There's nothing in this case, nothing about the  
Defendant, nothing about myself that says that  
Officer Adams is a bad guy. That's not the  
case. That's not what we're here about.  
You're here in a jury trial, which is probably  
a citizen's highest calling. You may be  
surprised to know that there are no jury  
trials, zero, anywhere in the world for a DUI  
case, except the United States of America, not  
even Canada, not England, not France, zero.  
That's how important this is. It's the very  
crux of our -- of our criminal system. So I've  
had to serve, I'm sure the Judge has had to  
serve at sometime. We don't get exempted  
because we're judges or lawyers. Nobody gets  
exempted, and that's the way it should be.  
Everybody should serve when they're called. I  
also want to say that from the outside of this  
case I -- I asked you to please hold on and  
wait for the rest of the story, not just for  
the first witness, but to wait for the rest of  
the story, and I think you now understand that  
better. This is my last chance to say anything  
to you, and after this Mr. Fern gets the final

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1 word. He could have gone first, and me in the  
2 middle, and me last, but he decided to do all  
3 of his last so he'll get the final word. So I  
4 won't be able to get up and respond. In this  
5 closing that I'm doing I am not going to cover  
6 every little point, much like the preview thing  
7 I told you in the opening, I can't cover all  
8 these points. I'm just going to cover the  
9 highlights. I noticed how many notes were  
10 taken in this case and I think you've got some  
11 good notes from what I could tell.

12 My objective here is to not only cover  
13 some evidentiary points, but to also try to  
14 highlight some of the legal rules you're going  
to hear from Judge Hamil because, as he told  
you at the outset, you take the facts from the  
witness stand, you take his legal instructions  
and blend them together, like taking water, and  
flour, and milk and making a cake. You're the  
one that's got to make the decision. Nobody  
else can except you six people. And you six  
jurors have to be unanimous, not five to one,  
not four to two, unanimous. We're going to  
talk about that at the end, too. I want to  
break the case down this way. You're going to

1 deal with four charges. The first two are the  
2 alternate DUI counts, the last two are  
3 speeding. And I'm not going to say much about  
4 speeding, but I'm going to talk to you about  
5 the DUI charges specifically.

6 The only two things I'm going to say  
7 about the speeding charges that both Officer  
8 Adams and Mary McMurray have told you that  
9 speeding was dealt with, I think Officer Adams  
10 really dealt with it more than Ms. McMurray,  
11 speeding is not one of the predicted types of  
12 behavior that the federal government's  
13 identified as a likely person being intoxicated  
14 as opposed to some other driving conduct. The  
15 other thing I want to point out to you is that  
16 Officer Adams he saw no erratic driving, no  
17 kind of lane violation, nothing, except the  
18 speed itself. And remember the time and  
19 situation. It's three-something in the  
20 morning, it's on Holcomb Bridge Road, there's  
21 no other traffic. In fact, Officer Adams  
22 wasn't even going in that direction, the same  
23 as Mr. Redstrom, until he made a u-turn and got  
24 behind him, so remember that.

But let's talk now about the DUI

1 charges. There's two charges, as I told you at  
2 the outset, and the Judge is going to give you  
3 the law on this, but basically one count has  
4 accused him of being a less safe driver from  
5 having consumed too much alcohol. That's  
6 basically the general jest of it. And the  
7 other one is that they charged him in the  
8 alternatives with having an alcohol level from  
9 a .10 or more from alcohol he consumed from a  
10 test taken within three hours of consumption

-- I mean, of driving, I'm sorry. But as the  
11 Judge is giving you're going to hear the word  
12 consumed, alcohol consumed. Now, I want to  
13 talk to you first about the second one. That  
14 is, we call it per say alcohol, or per day DUI,  
or it's sometimes called, driving with an  
unlawful blood alcohol level. That's what it's  
called by lawyers, per say, we talk per say  
sometimes. Much of the testimony from

Ms. McMurray, you heard testimony from

15 Mr. Panter, and you heard some surrebuttal,  
16 through all these steps in the process from  
17 both Ms. McMurray and Dr. Citron, who was just  
18 sitting here watching for most of the trial.  
19 The situation here is -- is this. And the

Judge is going to give you these basic instructions. Any person charged with a crime comes into a criminal case presumed innocent. That presumption of innocence is the very crux, also, of our legal system. The Judge is going to tell you that that presumption of innocence surrounds the Defendant and never leaves the Defendant until, and unless, The State proves beyond a reasonable doubt his guilt of the offense charge. Now, I'm going to focus just on the two DUIs for the moment. One the one dealing with unlawful blood alcohol level, The State has to prove -- it doesn't have anything to do with driving, or manifestations, or anything. They have to prove, though, that that reading, the .107 that's in evidence, is from alcohol consumed prior to driving and at that level you believe that's an accurate and reliable level of alcohol consumed by him. That's what they have to prove, beyond a reasonable doubt. I'll talk -- talk to you about that standard later. Beyond a reasonable doubt, you don't usually discuss -- you don't go in to see your family and say, beyond a reasonable doubt, I'm going to Kroger in a

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1 little while. If you said that they would  
2 think you need a net around you, so it's legal  
3 terminology, and the Judge is going to talk to  
4 you about reasonable doubt in a few minutes.  
5 The testimony you heard was not only lengthy,  
6 but I would submit to you, based on the fact  
7 that Mr. Panter had never read this Jones  
8 article, it is fairly new and it is fairly  
9 rare. I don't think that this has been  
10 something that's come up in very many cases.  
11 But the bottom line to it is that the -- the  
12 physiology of this problem, that is a high  
13 protein diet, what goes on in your body, was  
14 confirmed not only by the witnesses you heard,  
15 but the -- the -- relying on probably the  
16 foremost authority in the world, Dr. A.W. Jones  
17 from Sweden. Now, I was a History major, and I  
18 trust -- trust me, there's no History major  
19 courses that talk about all this, so this has  
20 been as tough for me as it has been for you.  
21 It's been a learning curve, learning process  
22 for me. Maybe I should have studied Science,  
23 as a matter of fact, my teachers told me to.  
24 But I don't know that I would have ever learned  
25 it to this degree, to go into this type of

level. The thing I want to point out that confirms what -- what our position is in the case is that that number is not reliable. It's not only all the testimony, but I want to point out to you a polite, cooperative, Mark Redstrom, a person who passed the one-legged stand, never putting the foot down, having the only clue that he moved his hands more than six inches from his side. The person who, in the terrain you heard described, at the road situation you had described, had minimum number of clues under NHTSA guidelines, that his arms were the side more than six inches, and making the turn -- not making the turn correctly, those were the only two clues and you saw where it was done alongside of the car here. And you heard about the lighting, particularly yesterday, from Officer Adams. Those facts point to the fact that a person was not above the legal limit. Now, granted, we're not dealing with impairment here, but how does a person -- how does a person maintain this type of composure and cooperative level, how does a person -- you don't hear any testimony in here about flushed face or the normal condition that

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1 you might see in somebody's face, not a word of  
2 that was ever said. I believe the officer said  
3 that he didn't know any way anybody could be  
4 more cooperative than Mark Redstrom was. Now,  
5 the presumption of innocence surrounds the  
6 Defendant, and the entire time the jury is  
7 sitting here the jury is trying to consider has  
8 The State proven beyond a reasonable doubt that  
9 that presumption of innocence should fall and  
10 this person be convicted. Have they proved  
11 that beyond a reasonable doubt? And I would  
12 submit to you, based on the evidence you heard,  
13 that that test result is not only suspect, but  
14 cannot be relied upon as being alcohol  
consumed. I'm not going to go over all the  
evidence because I know you're tired of hearing  
scientific evidence. But the reason I'm  
focusing on that in the first part is because  
in the other type of DUI, that is the less safe  
DUI, that's a -- a type of DUI that does not  
even have to have a test. The State can try to  
come forward and accuse somebody without a  
test. But if there is a test, the test becomes  
one component of the proof if you believe the  
test. And if you'll bear with me I'm going to

do a very crude drawing up here, and I hope this will help you understand the less safe test.

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(Whereupon, Mr. Head draws diagram.)

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And I'm -- I'm hoping that the bottom line of this will -- on the one side you've got the unlawful blood alcohol level. I'm going to put BAC for blood alcohol content. This is what The State is got on Count 2, I believe it is. I don't remember my Counts. Count 1 is the less safe DUI. And typically -- I said it was going to be a crude drawing, so I'll do the best I can. It's like a four-legged table, The State's case is typically like this. One leg, a less safe DUI -- I'll use a different color.

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I think I'm running out -- is the alleged BAC level. Another leg, this is typically called manifestations, you heard that word, probably, in the testimony. Now, in other observations

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-- I have to step up here, excuse me. I'm not going to take the stand. Another one is driving conduct, and the other one is field sobriety tests or evaluations. And here you have the standardized -- NHTSA standardized field sobriety evaluations. Now, those are the

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1 legs that The State usually tries to build  
2 their table on. The problem here is that the  
3 first leg, because of Mr. Redstrom's very  
4 unusual high protein diet situation, you've  
5 heard from Mary McMurray, you've heard from

6 Dr. Menaldino, you've heard from Dr. Citron,  
7 and you even heard parts of this from

8 Mr. Panter, himself, what goes on in the body  
9 in these high protein diets is something that  
10 can actually be toxic, it can be lethal if the  
11 body doesn't process these things out. You  
12 know about acetone, that you can die from that,  
13 you can pass out from it and have a coma. The  
14 problem with this is the body reacts and it  
converts it into isopropyl alcohol, which your  
body can get rid of. It doesn't just keep  
building up till you just die. That's the very  
basis of the A.W. Jones article, that was the  
under pending of the scientific evidence here.

So the first thing of a less safe case is the  
position that the defense is. You can't rely  
on that leg of the table because we don't know  
what part his body created and give a combined  
reading versus what part was ingested. We do  
know that Officer Adams said, he had not had

anything for a while, he didn't remember how long he said exactly, he doesn't remember him saying it's been a while since I had anything.

1 He does know that he was coming from dropping  
2 off somebody else, taking them home. He does  
3 remember those facts. The second leg, the  
4 smell and other manifestations. Now, remember  
5 that the testimony you heard, depending on how  
6 it's characterized is that some of these same  
7 chemicals as you breathe them out have a  
8 fruity, smelly odor. Dr. Menaldino said that,  
9 and I think a couple of the other witnesses  
10 talked about that. They have a fruity, smelly  
11 odor that may be mistaken for alcohol. Now,  
12 Ms. McMurray talked about that. Bloodshot,  
13 watery eyes, no questions were asked about have  
14 you been in a smokey environment, have you been  
up for 24 hours, do you have contacts in, he  
just wasn't asked those questions, an alternate  
explanation because nothing was asked why are  
your eyes red, why do they look that way. Now,  
I don't wear contacts anymore, and maybe some  
of you wear contacts. Different people react  
to contacts differently, especially in harsh  
environments like smoking environments. He

indicated, the officer indicated, that he  
-- and I never did understand this, exactly  
what he said, if he seemed a little unsteady on  
his feet. Well, ladies and gentlemen, I don't  
know about this location except what you've  
heard, the darkness, the location, getting out  
of the car there. But I do know that the young  
man stood on one leg, without putting a foot  
down, without swaying, to the count of 30, and  
that he walked nine up, nine back, touching  
heel to toe each time, never stepping off the  
line, never stopping, never coming out of the  
starting position. And I don't think that's  
consistent with unsteady on your feet. It's up  
to you to evaluate, the difficulty factor  
there, especially at this roadside location.  
Now, the officer said, and Mr. Fern asked him  
these questions, I though his speech might have  
been slightly slurred, I've never heard him  
talk before. And he said that I had no  
difficulty understanding anything the young man  
said. I don't know his manner of speech. I  
have no background on that. He said, I asked  
him for his license and insurance, (snaps  
fingers) he gave them to me, no delay. He was

1 very honest and straightforward with him and  
2 never evasive. Every question Officer Adams  
3 asked him he answered. He didn't try to hide  
4 anything from him. In fact, Mark, when he  
5 asked him -- when the officer asked him where  
6 he was coming from, or whatever the  
7 conversation was then, he said, he had been at  
8 a bachelor's party, and he had come from the  
9 Gold Club, and the other thing was that it had  
10 been a while since he had had something to  
11 drink. He did not try to hide anything. He  
12 did not try to hide a thing. Now, the  
13 manifestations, and some of the ones that are  
14 missing, in other words, the officer said when  
15 he turned the blue lights on and he got across  
16 the bridge he started moving over to pull over.

17 A quick pullover, quick license, quick  
18 insurance, got everything together, totally  
19 cooperative. That leg of the table is weak in  
20 this case, and you're not seeing the type of  
21 manifestations that you would see from somebody  
22 who had reached an impairment level that  
23 they're not able to understand questions, and  
24 function, and have cognitive reasonable thought  
25 going on. You get over to the driving conduct,

1 and, again, Officer Adams recognized that  
2 speeding is not the type of contact that the  
3 federal government has identified as a  
4 suspicious conduct from an impaired driver.  
5 It's not a wide turn, it's not driving without  
6 lights on, or any of the common conduct. It's  
7 just not there. So that leg of the table  
8 really is not supportive like it would be in a  
9 weaving, or an accident case, or running a red  
10 light, so other type of behavior that might fit  
11 into that, or make an extremely wide turn  
12 across lanes. You come down to this next leg,  
13 the standardized field sobriety. And I want to  
14 talk about that in a little more length because  
it appears that those standardized field  
sobriety evaluations is what put the handcuffs  
on Mark Redstrom that night. And I'm going to  
have to leave it to you for what you've heard  
in the evidence, both yesterday and today, from  
Officer Adams, and I will rely on your notes  
because I saw you taking notes, and I know you  
know what was said. But on this HGN  
evaluation, he indicated, Officer Adams,  
indicated that he got the very minimum number  
of clues he could get in saying that the person

1 didn't do well. He asked no questions about  
2 contacts in spite of the fact that that's what  
3 his training is. He's supposed to ask that.  
4 And that's logical, that's not something that's  
5 any -- you don't need a scientist to tell you  
6 that. But he didn't ask the questions that his  
7 training taught him. We had the question of  
8 which direction Mr. Redstrom was pointing, and  
9 I'm going to have to leave that to your own  
10 memory, because I can't -- I don't have a  
11 record here to go back and show you. Now, the  
12 officer said we all have nystagmus to a certain  
13 extent, and that it's just -- it's a matter of  
14 whether you have more noticeable nystagmus than  
some people, and there never was any  
explanation about contacts, and whether or not  
that person should even be given some of these.  
The other question is, I asked him if people  
that you've stopped who have had absolutely no  
alcohol, have a nystagmus, do they have  
driver's licenses? He said, of course they do.  
You get a driver's license. So a nystagmus is  
not something that disqualifies you from  
driving. You are going to have to consider the  
testimony of distractions, location, and

performance. I can't really do much with it.  
I just have to leave it to testimony for that.

1 But I do want you to note that the next  
evaluation, one-legged stand, Mark Redstrom  
2 passed. The only error was that his hands were  
more than six inches from his sides, and that's  
3 a pass by NHTSA's guidelines. The next one,  
again, was NHTSA's absolute minimum threshold,  
4 too, for the officer to be able to say he  
didn't do well. And that included, again, the  
5 arms from the sides, and when he made the turn  
-- at that location alongside the car that was  
6 up there a minute ago, that turn was not  
proper. One the one-legged stand and walk-and-  
7 turn you have these 32 and 35 percent alcohol  
free subjects that are going to have the same  
8 problem, or subjects that who don't know they  
have a problem. And that, in many people,  
9 nearly one-third, on average, of the people who  
try to do this with no impairment can't do it.

10 And Mark's performance on those two, if you  
put them together, one's bad, one's failed,  
11 according to NHTSA's two clues, but on both of  
them, under these circumstances on this  
12 roadway, and many of you may know that roadway

1 even though it's right over in Fulton County,  
2 this is not a level location, and the officer  
3 said it's supposed to be a level, lighted  
4 location. You'll have to look at those things.

5 The point of it is that each of these things,  
6 every one of them, who has the burden of  
7 proving it, The State, the tests -- that the  
8 smell or the other observations that were  
9 there, the manifestations clearly would be  
10 -- would mean impairment, driving conduct,  
11 you've already heard that from the officer  
12 saying it was not in the field test. You'll  
13 have to evaluate all of what you've heard from  
14 all of the witnesses about that. Any time a  
trial like this occurs, and you have these  
types of issues, and you have a straight  
forward officer, like Officer Adams, who's out  
there doing the job as best he's able to, the  
one thing that I -- I hope has been conveyed by  
what we've done is that in this case we're  
simply saying that due to the unusual health  
circumstances of Mark Redstrom, combined with  
the fact that Georgia has opted not to use a  
checklist to ask any questions about special  
health matters, simply led to a mistake.

1 That's all it was. And I'm not faulting  
2 Officer Adams for not moving him on up to that  
3 area where the gate is, he thought it was level  
4 enough to give it a shot. But, again, we're  
5 talking about guilt and innocence in a criminal  
6 case here. This isn't -- this isn't a shopping  
7 decision. This is an important decision that's  
8 proven by the fact that you six good people  
9 have sat here for two days listening to the  
10 evidence of another citizen's case. But I  
11 think you know enough about it and have seen  
12 enough about the demeanor of Mark Redstrom, and  
13 his friend John Parrish -- I think you have a  
14 good impression that he's not here saying that  
the law is bad. We're not here saying that the  
law doesn't have good purpose because it does.

8 But let me give you an example of another type  
9 of business, another type of situation, where  
10 there's a good purpose but a mistake is made  
11 and a bad result can happen. Let's take the  
12 example of a commercial fisherman. The  
13 fisherman goes out every morning on the boat,  
14 goes out in the ocean where he or she believes  
there's going to be fish, let's just say  
they're going be catching tuna. They take

1 their boat out, they go out where they think  
2 they're going to be and drop the nets, and they  
3 pull those nets through the water. When  
4 they're pulling nets through the water their  
5 objective is good, that is to catch fish to  
6 sell for commercial purposes, for our food.  
7 That's an important target, just like sending  
8 officers out to make DUI arrests on people who  
9 are a danger. There's nothing wrong with that  
10 purpose. But if that fisherman, and his or her  
11 nets, catches a dolphin, not a tuna, the  
12 dolphin is an air-breathing animal. The  
13 dolphin is not what he's after. The dolphin  
14 will not survive being down under the water for  
long periods of time while the nets are being  
dragged. The dolphin, if it doesn't have an  
excluder mechanism when this drag net is taking  
and pulling all these fish in, the dolphin's  
going to be sacrificed in an effort to catch a  
tuna. And that's what we have here. There's  
nothing wrong with Officer Adams. I would  
never try to say that. It was simply a mistake  
he could not have anticipated. If he was  
working in Virginia and he had a checklist he  
might have caught this. But he would have gone

1 for a blood test, and the blood test would have  
2 broken things down, and you would have seen  
3 what ethyl alcohol was consumed, plus isopropyl  
4 alcohol, what's ketones, whatever's in the  
5 breath would be in the blood, also. It would  
6 break it out. But ladies and gentlemen, you  
7 six people are the excluding mechanism for this  
8 trial because if Mark Redstrom -- if we have  
9 not proven that Mark Redstrom is that dolphin  
10 then the excluding mechanism's not going to  
11 work, and the effort to catch those tuna, he's  
12 going to be sacrificed. That's what this case  
13 is about, plain and simple. Now, every one of  
14 you is going to be asked when you leave here  
what in the world have you been doing for two  
days, we've been missing you, had to cover for  
you, your wife might -- somebody's had to deal  
with some kids somewhere along the way. I hope  
what you'll tell them is this. I've been  
serving on a jury in a case that, while long,  
was very interesting, and I've learned a lot  
from it. And I hope you're going to tell them  
that we listened to all the evidence, we  
listened to the rules the Judge gave us, and we  
were compelled to say, not guilty, because it

simply wasn't proven beyond a reasonable doubt.

It simply wasn't proven.

1 I promised you I would talk about  
2 beyond a reasonable doubt. Let me go ahead and  
3 do it because there's various levels of proof  
4 in our legal system. And beyond a reasonable  
5 doubt -- we'll put this where you can see, Mr.  
6 Fern, is up here. To enter a guilty verdict  
7 you have to have proof beyond a reasonable  
8 doubt. And somewhere down the stairs down here  
9 (indicating) because lawyers are always dealing  
10 with these terms, but articulable suspicion,  
11 although you don't use that in \_\_\_\_\_, that's  
12 a level of proof we talk about, for an officer  
13 to be able to pull a car over, like the  
14 articulable suspicion he was speeding, you  
can't even pull a car over in this country  
unless you have articulable suspicion,  
something you can articulate that brought your  
attention to the car, if it was either a tag  
violation, or speeding, or something. That's  
the level to pull over. If you're going to  
make an arrest you have to go up to a higher  
level to prove, to show that probable cause  
-- probable cause exists to arrest a person.

1 You've probably heard that term a lot more  
often than articulable suspicion. The next  
2 step up is preponderance of the evidence, which  
is the civil standard some of you may have  
3 heard in your civil cases, whichever side has  
the greater weight of evidence, just simply  
weighing it out. That's that standard. If  
4 somebody gets 50.0001 versus 49.9999, the one  
with 50.0001, that's preponderance of evidence.

5 This is my favorite one to describe this,  
clear and convincing evidence. You'll never  
6 guess what that standard's used in most often  
around the state of Georgia and most states.  
That's the standard of proof that a judge has  
7 to have to take your children away from you.  
That's standard of proof that the judge has to  
8 have in a case where you're being asked to lose  
your children. And higher than that is the  
9 standard of proof beyond a reasonable doubt.  
And the Judge is going to tell you that that's  
10 not an exclusion of all to amount to  
mathematical certainty because you don't get  
11 mathematical certainty in a case like this.  
But remember assumption of innocence stays  
12 wrapped around Mark Edstrom, and until that

1 doubt -- until The State has proved their  
2 claims, and you don't find a doubt upon which  
3 you can base a reason, if you unanimously say  
4 there is no doubt from the evidence we've heard  
5 from that stand that this man's guilty, and  
6 it's beyond all doubt, all reasonable doubt,  
7 then that's when you can convict. A higher  
8 standard even than the one that takes your  
9 children away from you.

10 The last thing I want to show you and  
11 I'm going to shut-up. These words are going to  
12 be in the Judge's Charge, and there's going to  
13 be 30 minutes of his Charge so you're going to  
14 have to listen carefully, if your minds are  
wavering, unsettled, unsatisfied, that is a  
doubt of the law and you should acquit the  
Defendant, something along that same word. And  
very, very important, along with the fact that  
it requires unanimous decision -- unanimous  
decision, those two things, that standard and  
the fact that it has to be unanimous is the  
greatest single protection in the criminal  
justice system that we have. The greatest  
single protection. That way compromises aren't  
made, and I encourage all of you, if you have

1 seen a doubt point it out to your fellow  
jurors. This is a joint decision. The Judge  
is going to tell you that you can confer with  
each other and listen to each other's opinion.

2 If you've seen a doubt don't compromise on  
that. Don't compromise. That's what our  
3 system's about. That's why our protections are  
here. And I ask you to do simply what the law  
4 says, if it's not proven beyond a reasonable  
doubt, to acquit. Thank you.

5 THE COURT: Thank you, Mr. Head. Mr.  
Fern, you're invited to come to the jury and  
give your closing arguments.

6 MR. FERN: Thank you, Your Honor.

7 I just have one minute. I know y'all  
are bored through this -- with this process.  
8 I'm not going to be able to draw y'all a lot of  
pretty pictures. One of the reasons I went to  
9 law school is I'm not much in the way of  
artistry, but I'm just going to write up some  
10 various points that I want to point out during  
this. The first thing that I do want to tell  
11 you is I want to thank you for your service. I  
want to thank you for the time and attention.  
12 I want to apologize for the newfound expertise

1 that y'all all possess now. I know it's been a  
2 long arduous process, but it does take some  
3 time and there are very important matters at  
4 stake. And out of all fairness from all sides  
5 I want to thank you for your time and attention  
6 in this matter.

7 I do want to cover beyond a reasonable  
8 doubt. It's not a mathematical certainty.  
9 That's in the charges and the instructions that  
10 the judge is going to give you. And it's not a  
11 mathematical formula I can give to you,  
12 something that you can just all of the sudden  
13 be able to just do. You fit it in, plug it in,  
14 and make it happen. The Judge is going to  
charge you more in depth, but he's going to  
tell you that it's a fair and impartial juror  
honestly seeking the truth, and that's really  
what it boils down to. And that's why at the  
beginning of this matter I told you, listen to  
all of the evidence that comes from up here.  
This is where all of the evidence comes from.  
Whatever the lawyers say is not evidence,  
everything is from this stand. Your beyond  
reasonable doubt is not beyond a shadow of a  
doubt. It often comes down to that, and it's

1 not. It's not beyond a shadow of a doubt, it's  
2 beyond a reasonable doubt. And when you apply  
3 that is when you use the right circumstances  
4 that you bring in your deliberations to this  
5 matter as a fair and impartial juror honestly  
6 seeking the truth.

7 I'm going to talk about basically what  
8 constitutes a less safe driver, and the Judge  
9 is going to charge you in depth with that. But  
10 basically it's whether the Defendant, Mark  
11 Redstrom, was less efficient, less skillful,  
12 less confident, less able, less qualified, and  
13 less proficient. Think about those terms, and  
14 I just wanted to mention them at this stage of  
the argument because this was the chance for me  
to place that seed in your mind. And I'm  
hoping that throughout the trial that seed was  
able to grow so that you could take the  
information that you've received and apply and  
make a determination of whether he was under  
the influence of alcohol to the extent that he  
was a less safe driver. Much has been made  
about pleading an alternative and making double  
accusations, whatever the case may be. One is  
under one code section, DUI, 4639181, and one

1 is under another subsection, A-5. So there's  
2 two different crimes and it's going to be your  
3 determination as to those, as well as the  
4 speeding citation. He's been charged on  
5 separate instances because of the fact, even  
6 though it arises out of the same occasion, two  
7 different violations occurred. One is a less  
8 safe driver, two is he operated a motor vehicle  
9 within three hours of consuming -- he had a  
10 blood alcohol level, blood alcohol content  
11 level of .100 or greater. Let me talk about  
12 the facts, not hypothesis, not what could  
13 happen, not should happen. Let's talk about  
14 what happened according to the information you  
received in this stand. Number one, you heard  
it was 3:23 in the morning, that's something  
you have to consider, that time frame. And,  
again, you get to bring your life experiences.

I always tell the juries that I talk to and  
have the opportunity and privilege of being in  
front of, don't check your common sense at the  
door when you go into your deliberations. Use  
your every day life experiences that you have.

Use what you have accumulated throughout your  
life, and I don't care if you learned that in

1 the school of hard knocks, or Harvard Business  
2 School, or wherever you've learned this bring  
3 those real life experiences. Mr. Head made it  
4 out to be a four-legged table. I don't think  
5 that it's that easy. I wish that it was, but  
6 it's not. What I like to do is I've referred  
7 to it as a totality of circumstance. And  
8 that's when you have to look at everything  
9 involved. Everything that's in the  
10 investigation. So you're looking at the time  
11 frame, I mean, you've got Officer Adams coming  
12 down Holcomb Bridge Road and he observes a  
13 vehicle that's speeding, that's Counts 3 and 4  
14 of this particular case that's going to be  
submitted to you for your deliberation. I'm  
not going to belabor those points because it's  
essentially been admitted as much. The officer  
testified to it, it hasn't been rebutted or  
refuted, therefore, that's the only information  
that you have in order to make your decision.  
So he's speeding, but what is he speeding past?  
A marked patrol car. Officer Adams, assigned  
to the DUI Task Force for the Gwinnett County  
Police Department is going in this direction  
(indicating), while the Defendant is driving in

this direction (indicating) and he is speeding,  
58 in a 45 according to the information

provided by Officer Adams. Now, Officer Adams  
saw him, but apparently the Defendant must not  
have seen him because what did the officer do?

A u-turn, catches up with him, and this is in  
the middle of the night, mind you, and the  
information that you have before you is that  
there wasn't that much traffic on the road.

The officer was doing routine patrol in this  
area. This is the time frame of the tornadoes  
that occurred and storms that happened in

Gwinnett County. He turns around, gets behind  
the vehicle, proceeding towards -- I'll put  
Fulton County up here, he paces the vehicle.

Let's face it, there's no other vehicle in  
between my vehicle and his, and he's still  
speeding. So then they're driving toward

Fulton County, and after Officer Adams had been  
pacing the Defendant, Mr. Redstrom in this  
case, about a quarter of a mile according to

the testimony received from the stand, he was  
getting close to the Fulton County line, he  
activated his blue lights. And Mr. Head has

made much of the information that you received

1 that he didn't see any weaving, he didn't see  
2 any erratic driving, he didn't see him pull off  
3 onto the shoulder, or see him pull over, rather  
4 he just saw him speeding. And that's not a  
5 clue that's recognized as something that's  
6 indicative of a driver under the influence of  
7 alcohol. One thing you get to consider is how  
8 long did he have to make that determination.  
9 He turned around on Holcomb Bridge and began to  
10 follow him, executing a u-turn, paced his  
11 vehicle for that period of time, no vehicles in  
12 between the two, and they're driving forward to  
13 Fulton County. Just prior to Fulton the blue  
14 lights are activated and the Defendant pulls  
over. So you get to listen to the information  
that you've received, and you get to bring your  
real life experiences and realize, well, the  
officer was brought to the attention of the  
Defendant because of the speeding, turned  
around and followed him, and there really  
wasn't that much of an opportunity to ensure  
that -- you can check for these various other  
factors, these 20 that Mr. Head has referred to  
through the course of this trial. Excuse me.  
He only gets this brief opportunity before he

1 makes it over to the Fulton County area. He  
2 pulls him over. He approaches him, smells a,  
3 what he called a strong odor of alcohol. And,  
4 again, I want to remind you, totality of  
5 circumstances, look at everything. That's what  
6 Officer Adams did that night. When he gets to  
7 this point, approaches, smells a strong odor of  
8 alcohol, asks for license and insurance, those  
9 documents are for that (indicating), asked the  
10 Defendant if he had been drinking, what does he  
11 say? Bachelor party at the Gold Club. Yes, I  
12 had been drinking, it's been some time, but you  
13 have to take that information for what it's  
14 worth and assign your own credibility to that  
particular information. Was it self-serving  
declaration? I submit to you it is. So the  
officer also notes that his walk is unsteady as  
he exits the vehicle, his eyes are bloodshot  
and watery. He walks back to the vehicle and  
at that time he administers the Horizontal Gaze  
Nystagmus test, the first of the field sobriety  
evaluations he administered to the Defendant.  
Now, on the HGN test, I'm not going to belabor  
the point. You've heard what was made of the  
HGN test, you've heard what it looks for,

1 you've heard the amount of clues he saw, four  
2 of six, which is an indicator of alcohol as was  
3 covered by Mrs. McMurray and Officer Adams on  
4 the stand. He then administers the one-legged  
5 stand, and I want to impress upon you in these  
6 evaluations they're divided attention tests,  
7 which is you have to concentrate on more than  
8 one thing. Which, as many of you probably  
9 realize, is similar to driving. There are a  
10 number of things that you need to do when  
11 you're engaged in driving a vehicle. So when  
12 he does the one-legged stand, and a lot of  
13 these are balanced, as referred to by the  
14 Defendant's expert,  
Mrs. McMurray. When you look at balance the  
one thing he did do was raise his arms. So  
that's going to give you the balance that you  
need. That was also noted by the officer, he  
indicated he raised his arms on 1 through 10,  
along with 11 through 20. So he's raising his  
arms, there's the clues that he has. And this,  
you've got to realize, is that Officer Adams,  
who has effectuated a number of DUI arrests and  
has been a member of the DUI Task Force for  
some period of time and only recently was

assigned to a day watch and a routine rotation.

1           So you've got this information, you've got all  
2           of this information, the physical  
3           manifestations that were noted, the field  
4           sobriety tests performed at this time, and most  
5           importantly all of this information provided by  
6           none other than the Defendant to the officer.  
7           He continues on, does the walk-and-turn -- I'll  
8           put that over here. When he does the walk-and-  
9           turn, again, he's raising his arms on the front  
10          nine and the back nine. So on a balance test  
11          he's doing that one clue that's going to  
12          maintain his ability to perform these tests,  
13          raise his arms. And he lost his balance on the  
14          turn. Did Officer Adams stop that? No, he  
15          didn't.

16                 The Judge will charge you as to the  
17                 alco-sensor. On the alco-sensor he received a  
18                 positive reading of alcohol. You didn't hear  
19                 any testimony from the expert regarding that,  
20                 none whatsoever. So he's putting all of these  
21                 together and determines that he was going to  
22                 take him for a breath test at that point, read  
23                 him the Implied Consent Card, to which the  
24                 Defendant responded, yes. That particular

document has been admitted into evidence and  
you'll have it with you. Read that document,  
please. Take a look at it, it's very plain and  
simple. It allows for a test of your own  
choosing, an independent test of your own  
choosing. And when I asked Officer Adams  
whether or not the Defendant had requested that  
-- and you've got to remember this Defendant  
was cooperative, he hasn't been characterized  
as anything but that, he did not make that  
election, to have another test performed. The  
other information is they can have a blood  
test, you can have a urine test, and a breath  
test, and the information they tell them  
further is that all of these are going to show  
the level of alcohol that's in your system. So  
he takes him over for the blood test -- I mean,  
the breath test. When he gets to the Westside  
Precinct he sets him up on the machine and runs  
him through it. So the machine gives him a  
reading, and this will be out with you as well,  
of .107. Four minutes later another reading of  
.107. You'll also have the Certificates of  
Inspection to go out with you when you  
deliberate and make your decision. They're

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performed quarterly. I want you to look at those. The time frame here is 5/23/98.

There's one prior and there's one after. And the one prior, three days prior to the date of this offense. And then you hear all this information about Zone Diet, the high protein diet -- let's put that up here, too. He's got a high protein diet, we find out about it now, we find out about what it can do, apparently. If this person who is on a high protein diet is so concerned about his weight, as you can see from Defendant's Exhibits 1 and 2, is out at a bachelor party drinking at a nude club, does it make sense, is it reasonable, is it plausible, is it something that makes sense? And I submit to you that it does not. Are we here to condemn Mr. Redstrom? No. It's all about a choice. He cooperated with the officer, he performed the evaluations, the officer was open and honest with y'all. He told you what he saw. He related to you accurately, he gave you the information that he had regarding it, and it's going to be your decision to attach what weight to this evidence. But I want you to think about when you go in a time sequence of

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1 how this occurred, think about the first  
2 information. The first things that Officer  
3 Adams knew was that he was driving down the  
4 road, then he encountered the Defendant. He  
5 was speeding. He turns around in his marked  
6 patrol car, follows it, and he's still  
7 maintaining that speed. He catches up to him  
8 shortly down the road, paces him for a quarter  
9 of a mile, and then at that point he gets him  
10 to a position where he can pull him over,  
11 activates his blue lights, effectuates the  
12 stop. Now, these are the first things that are  
13 going to be in his mind. He approaches the  
14 vehicle and smells that strong odor of alcohol  
and he asks the Defendant where he had been.  
He was at a strip bar and he had been drinking.

8 He was returning from bringing other friends  
9 home. I also ask people -- you've seen a  
10 demonstration of field sobriety tests. This  
11 isn't advanced trigonometry. It's not that  
12 hard. They're not that difficult of tasks to  
13 perform. And you've seen the officer -- and I  
14 understand the points Mr. Head's trying to  
make, that it's his first time and the officer  
may have done it a number of times, but I would

1 indicate to you this is not advanced  
2 trigonometry or calculus. It is a very simple  
3 task. You raise your leg, you point your toe  
4 and you look down at it, and you count to 30 by  
5 1000s. It's not that difficult. It's not  
6 rocket scientist. Nine step walk-and-turn is  
7 not that difficult. You saw it demonstrated.  
8 These are not hard tasks. They're divided  
9 attention tasks, and you've heard the numbers,  
10 65 percent, 68 percent. When you listen to  
11 these numbers you want to remember it's a  
12 totality of a circumstance. It's not any one  
13 specific test. Officer Adams puts every one of  
14 these together and arrives at his final  
ultimate decision. And I want to talk about  
that for a minute, too. Mrs. McMurray  
indicated that you wanted to do it in a  
suitable and ideal condition and environment.  
A lot of DUI arrests are not made in suitable  
conditions and environments. It's the middle  
of the night, your lighting is not optimum,  
most people have been out for the majority of  
the evening, you're pulling them over on the  
side of the road. And there are rights that we  
all have as citizens. You're not going to be

1           able to pull some around without having an  
2           articulable suspicion and probable cause.  
3           You're not going to be able to pull a United  
4           States citizen out of their vehicle and make  
5           them go over to some other area -- because I  
6           asked Ms. McMurray, well, where would you have  
7           them go, what would you have them do with the  
8           Defendant's car? I thought about that, too,  
9           she said. Didn't provide an answer, but I  
10          thought about that, too. I ask you to consider  
11          that. That's just another wide circumstance.  
12          There's probably a ton of them that you have  
13          thought about that I haven't touched upon that  
14          all make perfectly good sense. And that's what  
            you get to do. You get to listen to the  
            evidence from this stand, take it, and apply it  
            to the facts that have been heard in this case.  
            You'll listen to the law as provided by Judge  
            Hamil and you'll simply provide it, attach it,  
            see what fits where, and you make a  
            determination and decision. When you look at  
            this case, and you take into consideration all  
            these factors, he's under the influence to the  
            extent that he is less safe to drive. Did the  
            officer have the greatest opportunity to

observe him? No, he didn't. But you get to factor that into your consideration as well. And I'm not going to get into the testimony of the experts, you all heard that. The Judge is going to give you a Charge with regards to that. You'll be able to independently weigh that information, and you'll assign what credibility to each one of the witnesses that you heard from. Once you do that I think that you'll be able to determine that when you apply Georgia law. And what I want you to do is listen to the Charge that the Judge gives. You won't hear anything about these qualifying instructions for the Intoxilyzer 5000 because it doesn't exist. So what we have to do here, and what you have to do, is that as jurors you apply the facts of this case to the law of this case. So you don't consider something like qualifying questions for a machine that don't exist. It's not part of our law so it's not something to consider. When you do that, when you consider the information, attach the proper weight to all of the testimony you've received, you'll be able to look at that test result and it didn't change a bit. This is a person

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1 that's apparently generating all of these  
2 things inside him, but he couldn't change the  
3 test result, not one bit, .107 both times.  
4 When you do that, and when you apply, you'll  
5 return a verdict of guilty to the DUI and less  
6 safe driver, and you'll return a verdict of  
7 guilty to the less safe driver, as well as the  
8 .10 in excess of. We've already covered the  
9 speeding, and I will submit this for your  
10 decision based on those facts. Thanks.

11 THE COURT: Thank you, Mr. Fern.

12 MR. HEAD: May we approach for just one  
13 second?

14 THE COURT: Yes, sir.

MR. HEAD: Thank you, Your Honor.

(Whereupon, counsel approaches the  
bench and an unreported bench conference  
occurs.)

THE COURT: Ladies and gentlemen, you  
are considering the case of the State of  
Georgia vs. Mark Charles Redstrom. The  
Defendant in this case has been charged with  
two counts of Driving Under The Influence, and  
two counts of Speeding. And as you recall, at  
the beginning of the case I read the various

counts to you, and I will do that again at this time.

1           Count 1 of the accusation accuses Mr.  
2           Redstrom of the offense of Driving Under The  
3           Influence alleging that on or about May 23rd,  
4           1998, he was in actual physical control of a  
5           moving vehicle while under the influence of  
6           alcohol to the extent that it was less safe for  
7           the accused to drive in violation of official  
8           Code of Georgia, inundated Section 40-6-391, A-  
9           1.

10           Count 2 of the accusation accuses Mr.  
11           Redstrom of the offense of Driving Under The  
12           Influence, alleging that on or about May 23rd,  
13           1998, he was in actual physical control of a  
14           moving vehicle while having an alcohol  
15           concentration of 0.10 grams or more at a time  
16           within three hours after such physical control  
17           from alcohol consumed reports such actual  
18           physical control ended, in violation of  
19           official Code of Georgia inundated Section 40-  
20           6-391, A-5.

21           Count 3 of the accusation accuses Mr.  
22           Redstrom of the offense of Speeding, alleging  
23           that on or about May 23rd, 1998, he did

1 unlawfully operate a motor vehicle at 58 miles  
2 per hour on a public roadway when the speed  
3 limit there was 45 miles per hour, in violation  
4 of official Code of Georgia inundated Section  
5 40-6-181.

6 And Count 4 of the accusation alleges  
7 that Mr. Redstrom committed the offense of  
8 exceeding the maximum posted speed limit,  
9 alleging that on or about May 23rd, 1998, he  
10 did unlawfully drive a motor vehicle in excess  
11 of the maximum posted speed limit of 45 miles  
12 per hour, in violation of official Code of  
13 Georgia inundated Section 40-6-181.

14 The accusation was filed in the court  
on September 9th, 1998. And to this accusation  
the Defendant has entered a plea of Not Guilty.

And this makes this issue which you as a jury  
have been selected, sworn, and impaneled to  
try. I caution you the fact that this  
Defendant has been accused by the Solicitor of  
this county is no evidence of his guilt. You  
should not consider the accusation as evidence,  
nor implication of guilt. Neither is the plea  
of Not Guilty to be considered as evidence.  
The Defendant is presumed to be innocent until

1 proven guilty. The Defendant enters upon the  
2 trial of this case with a presumption of  
3 innocence in his favor. This presumption  
4 remains with the Defendant until it is overcome  
5 by The State with evidence which is sufficient  
6 to convince you beyond a reasonable doubt that  
7 the Defendant is guilty of the offense charged.

8 No person shall be convicted of any crime  
9 unless and until each element of the crime is  
10 proven beyond a reasonable doubt. The burden  
11 of proof lies with The State to prove every  
12 material allegation of the accusation and every  
13 essential element of the crime charged beyond a  
14 reasonable doubt. There is no burden of proof  
upon the Defendant whatever, and the burden  
never shifts to the Defendant to prove  
innocence. When a defense is raised by the  
evidence the burden is on The State to negate  
or disprove it beyond a reasonable doubt.

However, The State is not required to prove the  
guilt of the Defendant beyond all doubt or to a  
mathematical certainty. A reasonable doubt  
means just what it says. It is a doubt of a  
fair minded, impartial juror honestly seeking  
the truth. It is a doubt based upon common

sense and reason. It is -- it does not mean a  
vague or arbitrary doubt, but is a doubt for  
which a reason can be given arising from a  
consideration of the evidence, a lack of  
evidence, a conflict in the evidence, or any  
combination of these. If after giving  
consideration to all of the facts and  
circumstances of this case your minds are  
wavering, unsettled, or unsatisfied, then that  
is a doubt of the law and you should acquit the  
Defendant. But if that doubt does not exist in  
your minds as to the guilt of the Defendant  
then you would be authorized to convict the  
Defendant. If The State fails to prove the  
Defendant's guilt beyond a reasonable doubt it  
would be your duty to acquit the Defendant.  
Ladies and gentlemen, you must determine the  
credibility or belief ability of the witnesses  
who appeared and testified before you. It is  
for you to determine what witness or witnesses  
you will believe and which witness or witnesses  
you will not believe, if there are some you  
will not believe. In passing upon the  
witness's credibility you may consider all of  
the facts and circumstances of this case. The

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witness's manner of testifying, their intelligence, their interest or lack of interest in the result of the case, their means and opportunity for knowing the facts to which they testify, the nature of the facts to which they testify, the probability or improbability of their testimony, and of the occurrences about which they testify. You may also consider the personal credibility as that may legitimately have appeared from the trial of this case. To impeach a witness is to prove a witness unworthy of belief. A witness may be impeached by disproving the facts to which the witness testified or by proof of contradictory statements previously made by the witness as to matters relevant to the witness's testimony and to the case. If it is sought to impeach a witness by proof of contradictory statements previously made, proof of the general good character may be shown. The effect of that evidence is to be determined by you, the jury.

If any attempt has been made to impeach a witness by proof of contradictory statements previously made, you must determine from the evidence first, whether any such statements

were made, second, whether they were  
contradictory to any statements the witness  
made on the witness stand, and third, whether  
it was material to the witness's testimony and  
to the case. If you find that a witness has  
been successfully impeached by proof of  
previous contradictory statements you may  
disregard that testimony, unless it is  
corroborated by other credible testimony. And  
the credit to be given to the balance of the  
testimony of that witness would be for you, the  
jury, to determine. It is for you to determine  
whether or not a witness has been impeached,  
and to determine the credibility of such  
witness, and the weight the witness's testimony  
shall receive in consideration of the case.  
Should you find that any witness, prior to the  
witness's testimony in the case from the  
witness stand, has made any statement  
inconsistent with that witness's testimony from  
the stand in this case, and that such prior  
inconsistent statement is material to this case  
and the witness's testimony, then you are  
authorized to consider that prior statement,  
not only for purposes of impeachment, but also

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1 as substance of evidence in this case. When  
2 you consider the evidence in this case, if you  
3 find there to be a conflict in that evidence,  
4 you should settle that conflict if you can  
5 without believing that any witness has made a  
6 false statement. If you cannot do this you  
7 should believe that witness or those witnesses  
8 you think best entitled to believe. You must  
9 determine what testimony you will believe and  
10 what testimony you will not believe.

11 Ladies and gentlemen, it is my duty to  
12 ascertain the law applicable to this case and  
13 to instruct you on that law by which you are  
14 bound. It is your duty and responsibility to  
ascertain the facts of this case from all of  
the evidence presented. It then becomes your  
duty and responsibility to apply the law as I  
give it to you in this Charge to the facts that  
you find them to be from all of the evidence in  
this case. Ladies and gentlemen, I tell you  
that this Defendant is charged with a crime  
against the laws of this state. A crime is a  
violation of a statute of this state in which  
there is a joint operation of an act or  
omission to act and intention. I tell you that

1 intent is an essential element of any crime and  
2 must be proved by The State beyond a reasonable  
3 doubt. Intent may be shown in many ways  
4 provided you, the jury, believe that it existed  
5 from the proven facts before you. It may be  
6 inferred from the proven circumstances, or by  
7 acts and conduct, or it may be in your  
8 discretion, and third, when it is the natural  
9 and necessary consequence of the act. Whether  
10 or not you draw such an inference is a solely  
11 -- a matter solely within your discretion. I  
12 tell you that criminal intent does not mean an  
13 intention to violate the law or to violate a  
14 penal statute, but means simply an intent to  
commit the act which is prohibited by a  
statute. This Defendant will not be presumed  
to have acted with criminal intent, but you may  
find such intention or the absence of it upon a  
consideration of words, conduct, demeanor,  
motive, and other circumstances connected with  
the act for which the Defendant is being  
prosecuted. Evidence is the means by which any  
fact which is put in issue is established or  
disproved. Evidence means all of the testimony  
of the witnesses and all of the exhibits

admitted during this trial. It does not include the accusation, or the opening statement, or closing arguments of the attorneys. Evidence may be circumstantial, or direct, or both. Direct evidence is evidence which points immediately to the question at issue. Evidence may also be used to prove a fact by inference. This is referred to as circumstantial evidence. Circumstantial evidence is the proof of facts or circumstances by direct evidence from which you may infer other related or connected facts which are reasonable and justified in the light of your experience. To warrant a conviction on circumstantial evidence the proven facts must not only be consistent with the theory of guilt, but must exclude every other reasonable theory other than the guilt of the accused. The comparative weight of circumstantial evidence and direct on any given issue is a question of fact for you to decide. Facts and circumstances which merely place upon the Defendant a grave suspicion of the crime charged or which merely raise a speculation or conjecture of the Defendant's guilt are not

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sufficient to authorize a conviction of the Defendant.

1 Ladies and gentlemen, testimony has  
2 been given by certain witnesses who in law are  
3 termed experts. The law permits persons expert  
4 in certain areas to give their opinions derived  
5 from their knowledge of that area. The weight  
6 which is given to the testimony of expert  
7 witnesses is a question to be determined by  
8 you, the jury. The testimony of an expert like  
9 that of other witnesses is to be received by  
10 you and given only such weight as you think it  
11 is properly entitled to receive. You are not  
12 required to accept the opinion testimony of any  
13 witness, expert or otherwise. I advise that  
14 those -- that the Rule of Sequestration was  
invoked at the beginning of this trial. That  
rule provides that witnesses are required to  
remain outside of the courtroom during trial  
and are not to discuss testimony. You will  
have noted the Defendant's two surrebuttal  
witnesses were present in the courtroom during  
The State's rebuttal testimony. You may take  
note of that as you analyze the weight of the  
Defendant's two surrebuttal witnesses.

1 Ladies and gentlemen, I tell you that  
the Defendant in a criminal case is under no  
2 duty to present any evidence tending to prove  
innocence and is not required to take the stand  
and testify in the case. If the Defendant  
3 elects not to testify no inference, hurtful,  
harmful, or adverse to the Defendant shall be  
drawn by you, the jury, nor shall such fact be  
4 held against the Defendant in any way.

Ladies and gentlemen, as I have told  
5 you, the Defendant is charged with two counts  
of Driving Under The Influence and two counts  
6 of Speeding, and in that regard I tell you that  
those charges are defined as follows: It shall  
7 be unlawful for any person while under the  
influence of alcohol to drive or be in actual  
8 physical control of any moving vehicle anywhere  
within this state. A driver or operator of a  
9 motor vehicle is under the influence of alcohol  
when the person is affected by alcohol to the  
10 extent that it is less safe for the person to  
drive than it would be if the person were not  
11 affected by alcohol. In deciding this issue  
you may consider anything in the evidence you  
12 find relevant in deciding whether the Defendant

1 was a less safe driver. Specifically as to  
2 consumption of alcohol, you may consider, among  
3 other factors, the smell or lack of smell of  
4 alcoholic beverages on the Defendant's breath  
5 and/or person, and were there any tests  
6 indicating the presence of alcohol in the  
7 Defendant's system. As to whether the  
8 Defendant was less safe to drive you may  
9 consider the fact that you deem relevant,  
10 including but not limited to the actual manner  
11 of driving the motor vehicle, the Defendant's  
12 control of his mental and/or physical  
13 abilities, the physical condition of the  
14 Defendant and any expert testimony. Merely  
showing the Defendant had been drinking or that  
there was the smell of alcohol on Defendant's  
breath or person without proof of the manner of  
driving or the ability to drive is insufficient  
to prove the Defendant was guilty of driving  
under the influence of alcohol. If you should  
find from the evidence in this case that at the  
time of the alleged offense the amount of  
alcohol in the Defendant's blood, as shown by a  
chemical analysis of the Defendant's blood or  
breath was 0.08 grams or more of alcohol you

1 may infer that the Defendant was under the  
2 influence of alcohol. However, whether or not  
3 you make such inference is a question for you  
4 to decide. If you find from the evidence that  
5 there was 0.05 grams or less of alcohol in the  
6 Defendant's blood at the time of the alleged  
7 offense, it is a presumption that the Defendant  
8 was not under the influence of alcohol, but  
9 this presumption may be rebutted. If you find  
10 that the alcohol concentration of the  
11 Defendant's blood was in excess of 0.05 grams,  
12 but less than 0.08 grams at the time of the  
13 alleged offense, such fact may be considered  
14 along with any other evidence in determining  
whether or not the Defendant was under the  
influence of alcohol to the extent it was less  
safe for the Defendant to drive at the time of  
the alleged incident. It shall be unlawful for  
any person to drive or be in actual physical  
control of any moving vehicle while there is an  
alcohol concentration of 0.10 grams or more in  
the person's blood at any time within three  
hours after driving or being in actual physical  
control of a moving vehicle from alcohol  
consumed before such driving or physical

control ended. As you make your determination as to whether the Defendant was a less safe driver, you may consider, among other things, whether the Defendant was less efficient, less skillful, less confident, less able, less qualified, and less proficient. I charge you that it is not necessary for The State to show that the Defendant was drunk. It is sufficient if The State shows beyond a reasonable doubt that the accused was under the influence of alcohol to the extent that it was less safe for him to drive a car. Under the laws of this state a witness who satisfactorily shows that he had the opportunity to observe and did observe the condition of another may testify whether that person was under the influence and the extent thereof, stating the facts upon which that opinion is based. A witness may give an opinion as to whether the Defendant was under the influence of alcohol, and whether because of any intoxication the Defendant was a less safe driver. I charge you that while a witness may give an opinion as to whether a person who is under the -- or, excuse me, let me start that one over, if I might. I charge

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1 you that while a witness may give an opinion as  
2 to whether a person was under the influence of  
3 alcohol to the extent that it was less safe for  
4 him to drive, that opinion must be supported by  
5 sufficient evidentiary foundation. The  
6 sufficiency of the fact supporting the opinion  
7 must be proven to you beyond a reasonable doubt  
8 before you may afford any weight to the  
9 opinion in your deliberations.

10 Ladies and gentlemen, I tell you that  
11 Georgia law provides for the setting of maximum  
12 speed limits and requires that drivers obey  
13 posted speed limits. It is for you, the jury  
14 to determine whether or not the Defendant as  
alleged in The State's accusation. I tell you  
that the alco-sensor is used as an initial  
screening device to aid a police officer. The  
test results are given to you, the jury, as  
positive or negative. The alco-sensor is not  
the state administered test the police officer  
asked the Defendant to take. There is no  
requirement that the administration of an  
initial alcohol-screening test be preceded by  
advising a motorist of his right to an  
independent test. I tell you that breath

1 alcohol measuring equipment approved by the  
2 Division of Forensic Sciences of the State  
3 Department of Public Safety is considered  
4 accurate if properly operated. However, the  
5 reliability and performance of any given breath  
6 analyzer or breathalyzer machine is subject to  
7 challenge. If there is evidence that any  
8 particular machine has malfunctioned or was  
9 designed or operated so as to produce  
10 unreliable results such evidence is relevant to  
11 the weight that you would accord the test  
12 results. I tell you that the HGN test is based  
13 on the well-known and medically accepted  
14 principle that nystagmus may be caused by the  
15 ingestion of alcohol. The relationship between  
16 nystagmus and alcohol has been recognized by  
17 highway safety agencies as a tool to detect  
18 those illegally driving under the influence of  
19 alcohol. The HGN test is an accepted common  
20 procedure that has reached a state of  
21 verifiable certainty in the scientific  
22 community and is admissible as a basis upon  
23 which an officer can determine that a driver  
24 was impaired by alcohol.

Ladies and gentlemen, if after

1 considering all of the testimony and evidence  
2 presented to you together with the Charge of  
3 this Court you should find and believe beyond a  
4 reasonable doubt that the Defendant in Gwinnett  
5 County, Georgia, did on or about May 23rd,  
6 1998, commit one or ore of the offenses charged  
7 you will be authorized to find -- to find the  
8 Defendant of that charge. And in that event  
9 the form of your verdict would be, we the jury  
10 find the Defendant guilty. If you do not  
11 believe that the Defendant is guilty or if you  
12 have any reasonable doubt as to the Defendant's  
13 guilt then it would be your duty to acquit the  
14 Defendant, and in that even the form of your  
15 verdict would be, we the jury find the  
16 Defendant not guilty. Ladies and gentlemen,  
17 let me tell you that, as you will recall, there  
18 are four counts in this accusation. You will  
19 take the accusation out with you. You will  
20 make a separate and independent determination  
21 as to each one of the four counts, and you will  
22 return your jury on back of the accusation.  
23 So, first of all, you need to make a separate  
24 and independent determination as to each one of  
25 the four counts, and you will make your

determination or enter your determination on  
back of the accusation where it says, verdict  
of the jury. And I've crossed out all but the  
1 first four counts, and as to each count, counts  
2 1, 2, 3, and 4 you will see a blank out to the  
3 right of that count and you will make an entry  
4 blank of guilty or not guilty, whichever your  
5 findings will be as to each of these four  
6 counts. Ladies and gentlemen, you are only  
7 concerned with the guilt or innocence of the  
8 Defendant. You are not to concern yourselves  
9 with matters of punishment. Whatever your  
10 verdict in this case it must be unanimous.  
11 That is, it must be agreed upon by all of you.

Your verdict must be signed by one of your  
7 numbers. As a foreperson it must be dated and  
8 returned to be published in open court. One of  
9 your first duties in the jury room will be to  
10 select one of your members as a foreperson who  
11 will preside over your deliberation and who  
12 will sign the verdict to which all six of you  
13 freely and voluntarily agreed. You should  
14 start your deliberation with an open mind,  
consult with one another, and consider each  
other's views. Each of you must decide this

1 case for yourself, but you should do so only  
2 after a discussion and consideration of this  
3 case with your fellow jurors. Do not hesitate  
4 to change an opinion if you are convinced that  
5 it is wrong. However, you should never  
6 surrender an honest opinion in order to be  
7 congenial or to reach a verdict solely because  
8 of the opinions of your fellow jurors. Let me  
9 tell you that by no ruling or comment which I  
10 have made during the progress of this trial  
11 have I intended to express any opinion upon the  
12 facts of this case, upon the credibility of the  
13 witnesses, upon the evidence, or upon the guilt  
14 or innocence of the Defendant. Those are  
solely matters for you to determine under the  
Charges I have given to you in this case.

8 Ladies and gentlemen, I do note that  
9 the hour is -- is late. It's approximately  
10 5:33 now. I want to tell you that this case is  
11 now yours to deliberate upon and to reach your  
12 verdict. I want to tell you that it is now up  
13 to you to determine how long you will  
14 deliberate in this case, and I will suggest to  
you that the first thing that you should do is  
to determine what family responsibilities each

of you may have and will ask that you please be sensitive to those responsibilities. If someone has a childcare or other family matter that they need to attend to, I would ask that you please consider returning to deliberate in the morning. I'm going to leave that, however, up to you. So please be sensitive to the needs of your fellow jurors. However, I'm going to let you determine how long you want to deliberate this afternoon, and whether you would like to deliberate for a period of time this afternoon and complete your deliberation today, or whether you would come back in the morning. So you will now determine your schedule. That's all I will say to you about that. In addition, you may now take those notes that you've made during the course of your -- of the trial back with you, and you may use those notes however you see fit. You may now retire to the jury room, but please do not begin your deliberation until you receive the accusation and the evidence which has been admitted in this case. At that time you may commence your deliberation. Bailiff, you may now take the jury back to the jury room. Thank

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you.

(Whereupon, the jurors exit the  
courtroom.)

1 THE COURT: Okay. Mr. Fern, any  
exception as to the Charge?

2 MR. FERN: None for The State, Your  
Honor.

3 THE COURT: Mr. Head?

4 MR. HEAD: We would reserve any until  
time of post-trial, if that is necessary.

5 THE COURT: Okay. Gentlemen, I show  
that State's Exhibits 1 through 5 and  
6 Defendant's Exhibits 1 and 2 are in evidence.  
I would ask that you put the accusation on top  
7 of that and give that to the Bailiff when he  
comes back in.

8 THE COURT: Okay. Anything else?

9 MR. HEAD: No, sir.

(Whereupon, a recess was taken.)

10 THE BAILIFF: Come to order, please.

11 THE COURT: Okay, gentlemen, I'm  
informed that the jury has their verdict. Are  
there any matters we need to take up before we  
bring the jury back in?

12 MR. HEAD: No, Your, Honor.

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14

THE COURT: Okay.

MR. FERN: No, Your Honor.

1 THE COURT: Okay. Bring them in,  
please.

2 (Whereupon, the jurors enter the  
courtroom and are seated in the jury box.)

3 THE COURT: Are you Mr. Watkins?

MR. WATKINS: Yes, sir.

4 THE COURT: Four women and two men on  
this jury and y'all chose a man to be your  
foreperson. Now, that always happens. It  
5 could be five women and one man on the jury and  
a man always gets picked as the foreperson.  
6 Just a general observation.

7 Mr. Watkins, has the jury reached a  
verdict?

8 MR. WATKINS: Yes, we have.

9 THE COURT: And is the verdict  
unanimous?

MR. WATKINS: Yes, sir.

10 THE COURT: And have you signed the  
verdict form and dated it?

11 MR. WATKINS: Yes, sir.

12 THE COURT: If you would hand your  
verdict form to Mr. Holmes, please. Thank you,

1           sir. I am going to read the verdict to the  
2           jury and it reads as follows: We the jury find  
3           the Defendant as to Count 1, Not Guilty, as to  
4           Count 2, Not Guilty, as to Count 3, Guilty, and  
5           as to Count 4, Guilty. It is signed this 10th  
6           day of August, 2000, and it is signed by Mr.  
7           Watkins. Mr. Watkins, have I correctly read  
8           your verdict?

9                   MR. WATKINS: Yes, you have.

10                   THE COURT: Mr. Holmes, would you show  
11                   this to the attorneys, please.

12                   MR. HEAD: It appears to be in good  
13                   order, Your Honor.

14                   THE COURT: Mr. Fern?

                  MR. FERN: The same, Your Honor.

                  THE COURT: Okay. Anything else to  
take up with this jury before I disburse them?

                  MR. HEAD: No, Your Honor, with our  
thanks.

                  THE COURT: Ladies and gentlemen, I do  
want to give you my thanks for your time, your  
patience, and your diligence during this task.

                  I hope that the lateness of the hour has not  
caused any of you any inconvenience. I want to  
tell you that at several points during this

1 trial I told you that you were not to talk  
2 about this trial with anyone. You are now free  
3 from that obligation, and you may now discuss  
4 this trial with whomever you see fit, including  
5 the attorneys that have been involved in this  
6 trial, if you would like. I can tell you as a  
7 former practicing attorney myself that I found  
8 it beneficial to talk over trials with jurors  
9 to assist me in finding out what went right  
10 with my trial and what didn't go so right with  
11 my trial. And I have to take care of one  
12 matter before the attorneys will be free to  
13 come out and talk to you. And if you want to  
14 stick around and talk to them I know that they  
would appreciate that. If not, you're under no  
obligation to do that and you would be free to  
go. I also want to tell you that I sincerely  
do try to make your jury services expeditious  
as possible, however, I'm not perfect and I'll  
be the first to tell you that, and I would  
appreciate any constructive criticism that you  
might have that would make the service of  
future juries better, more beneficial, and more  
expeditious. And I would welcome any  
suggestions that you might have. You can

1 either drop me a note, or even better, if you  
2 would like, I would love to talk to you by  
3 phone and would encourage you to call my  
4 office, and if I'm not here in the courtroom  
5 taking care of a matter I would be happy to  
6 talk to you, and if I am in a courtroom I'll  
7 call you back as soon as I'm able to do that.  
8 With that, again, you have my thanks for your  
9 time and your service. And these gentlemen are  
10 going to come back. I have a lot of power, but  
11 I don't have the power to tell you that you  
12 don't have to come in tomorrow. Only the jury  
13 assembly people have the power to tell you  
14 that, so you have my best wishes that your  
service is complete for the week. And with  
that, if you would go back with the Bailiffs at  
this time.

8 (Whereupon, the jurors exit the  
9 courtroom.)

9 THE COURT: Okay, Mr. Fern, the jury  
10 having found Mr. Redstrom guilty of the two  
11 counts of Speeding, did you have a  
12 recommendation as to the sentence?

11 MR. FERN: My recommendation, Your  
12 Honor, is a \$200 fine and 12 months probation.

THE COURT: Mr. Head?

1 MR. HEAD: The dollar amount of the  
2 fine is not a problem. I don't think on a  
3 speeding case, which he's admitted his  
4 responsibility, that probation would be  
5 appropriate. I think we should reserve that  
6 for something more serious than that, and I  
7 hope we do.

8 THE COURT: When would he be in a  
9 position to pay the fine?

10 MR. HEAD: He can pay it right now.

11 THE COURT: There's not going to be  
12 anybody to accept his money, so -- and I'll not  
13 execute the sentence until in the morning, but  
14 I will require that he pay a fine of \$200 plus  
any surcharges and require that he pay that by  
the end of next week.

MR. HEAD: All right.

THE COURT: Anything else?

MR. HEAD: He'll be back in the morning  
to pay it.

THE COURT: Very good. It will be  
-- the sentence will be executed first thing  
in the morning, and he can pick up a copy of  
the sentence at the second floor control

station right by the elevator, okay? Did she give you a sentence form, Mr. Fern?

MR. FERN: Yes, Your Honor.

THE COURT: Thank you, sir. Anything else we need to take up before we leave for the day.

MR. HEAD: I'm sorry if you're late. I've got a 9:20 flight if that helps.

THE COURT: Good luck to you, sir.

MR. HEAD: I'm going, ready or not.

THE COURT: Okay. See y'all later.

MR. HEAD: Thank you.

MR. FERN: Thank you, Your Honor.

(Whereupon, the above matter was concluded at 6:40 p.m.)

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