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IN THE COUNTY COURT OF THE  
ELEVENTH JUDICIAL CIRCUIT IN  
AND FOR DADE COUNTY, FLORIDA

JUDGE DAVID YOUNG  
JUDGE MAXINE COHEN LANDO  
JUDGE JERI COHEN

THE STATE OF FLORIDA, )  
 )  
 Plaintiff, )  
 )  
 VS. )  
 )  
 MICHEL MAGLOIRE, 12345 WD )  
 MARCOS HERNANDEZ, 64091WG )  
 ADELFO BAEZ, 58549 JA )  
 WILLIAM CONYERS, 45046WD )  
 CELSO MENZIES, 17478WD )  
 )  
 Defendants. )

- DJ  
4.3  
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OFFICE OF THE CLERK OF THE COURTS  
MAY 19 1994

Proceedings had and taken before The Honorable  
David Young, Maxine Cohen Lando, and Jeri Cohen, said  
Judges of said Court, Room 1-2, Metropolitan Justice  
Building, Miami, Dade County, Florida, on the 18th day of  
February, 1994, commencing at or about the hour of 1:00  
o'clock p.m., and being a HEARING.

ORIGINAL

1

1 APPEARANCES:

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3 Miami, Florida  
4 on behalf of the Plaintiff  
BY: STEPHEN TALPINS, ESQ., and MICHAEL GILFARB, ESQ.,  
5 Assistant State Attorneys.

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8 on behalf of the Defendants  
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9 Assistant Public Defender.

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19 on behalf of Defendant Michel Magloire.

20 ALSO PRESENT:

21 Leisbeth Boots, Esq., Assistant Public Defender.

22 I-N-D-E-X

23	<u>WITNESSES:</u>	<u>DIRECT</u>	<u>CROSS</u>
24	TROOPER RAY ADDISON	19	
25	By Mr. Michael Cohen		47
	By Mr. Pablo Casanovas		58
	By Mr. Carlos Canet		79
	WAYNE MORRIS	96	151
	RICK SWOPE	174	198

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By Mr. Casanovas	229
By Mr. Canet	236

1 (Thereupon, the following proceedings were had:)

2 MR. GILFARB: Judges, before we begin we would  
3 like to bring a matter to your attention. There are  
4 two matters.

5 JUDGE LANDO: Can we announce all the cases first  
6 that we are here on?

7 MR. TALPINS: Okay. In Judge Lando's court the  
8 case is Michel Magloire, case number 12345WG.

9 JUDGE LANDO: Anything else in my division? I  
10 don't think Mr. Canet has one in my division.

11 MS. BOOTS: We need to get an interpreter for Mr.  
12 Hernandez.

13 JUDGE COHEN: Which case do I have?

14 MR. CASANOVAS: I have other divisions I'm  
15 covering. William Conyers.

16 JUDGE LANDO: Which divisions?

17 MR. TALPINS: William Conyers, case number  
18 45046WD.

19 JUDGE LANDO: We are not hearing that case.

20 MR. TALPINS: William Conyers.

21 JUDGE COHEN: Conyers was a case I set while I was  
22 in your division. Now it has been transferred to Judge  
23 Gilman.

24 JUDGE LANDO: We are only hearing the cases from  
25 our own divisions. We can't hear anything that isn't

1 out of our own division.

2 MR. TALPINS: Celso Menzies, case number 17478WD  
3 which I believe is in Judge Cohen's division --

4 JUDGE COHEN: That's me.

5 MR. TALPINS: -- unless it has been transferred.  
6 And Marcos Hernandez, case number 64091WG.

7 JUDGE YOUNG: That's what I have.

8 MR. TALPINS: Michel Magloire.

9 JUDGE LANDO: That's mine.

10 MR. TALPINS: Adelfo Baez which is one of Judge  
11 Cohen's cases.

12 JUDGE COHEN: Somebody get me the files and to at  
13 least have them here. What is it again?

14 MR. TALPINS: 58549JA.

15 JUDGE COHEN: The other one, Mr. Talpins, you said  
16 it was mine.

17 MR. TALPINS: Menzies.

18 JUDGE COHEN: Yes.

19 MR. TALPINS: Case number 17478WD. I believe  
20 that's also yours. Again, Judge, I am not sure because  
21 there is a shuffling of the cases. We may need to  
22 supplement the record later with some of the cases. At  
23 one point they were all consolidated for the motion.  
24 Apparently, they got scattered through the the division  
25 and documents may not be in the file like they are

1 supposed to be. We may need to do that in terms of  
2 supplementing the record.

3 Judges, before we get into the low sample volume  
4 issue, the State has a matter it would like to address  
5 right now.

6 MR. GILFARB: Yes. Judge, overnight when we  
7 returned from a meeting we found in our mailbox  
8 downstairs a FAX transmittal of a Motion to Strike --

9 JUDGE LANDO: What night?

10 MR. GILFARB: Last night, a Motion to Strike this  
11 court's ability to take judicial notice of the  
12 Thermister Motions. I have a copy of the FAX  
13 transmission which indicates what time. It was FAX'D  
14 over February 17th at 3:58 p.m.

15 JUDGE COHEN: So you are talking about the  
16 testimony on low sample volume --

17 MR. GILFARB: That's correct, Judge.

18 JUDGE COHEN: -- that was in the Thermister  
19 Motion?

20 MR. GILFARB: All we wanted to do was to go home  
21 and we found that in our mailbox. We ask that because  
22 it is untimely filed that it be deemed waived.

23 MR. CASANOVAS: I have a stamped copy.

24 JUDGE LANDO: When was the notice you were going  
25 to use that testimony or adopt it?

1 MR. TALPINS: We filed that along time ago.

2 MR. GILFARB: Before last September, because this  
3 is Tim Kneft and Adam Cohen were dealing with this  
4 matter. That was filed by them in September.

5 JUDGE LANDO: Who's going to argue this on behalf  
6 of the defense?

7 MR. CASANOVAS: Pablo Casanovas on behalf of the  
8 Public Defender's Office, and co-counsel Carlos Canet  
9 is here.

10 MR. GILFARB: Judge, before we begin and we would  
11 like Your Honor to make a ruling on this Motion to  
12 Strike being that we received it last night. And if  
13 they were so sure we received a stamped-in copy why FAX  
14 it the night before.

15 JUDGE LANDO: We were about to do that.

16 MR. CASANOVAS: As matter of courtesy and we have  
17 been giving the State everything, notice of everything  
18 that's going on.

19 JUDGE LANDO: Wait. So long --

20 MR. CASANOVAS: This unfortunately was done by an  
21 Assistant Public Defender helping me out on this  
22 motion.

23 JUDGE LANDO: Are you adopting the motion?

24 MR. CASANOVAS: Yes, I am adopting this motion.

25 JUDGE LANDO: Why did you file it so late?

1 MR. CASANOVAS: We filed timely. And it was filed  
2 apparently Monday morning.

3 JUDGE LANDO: They are telling me and this  
4 testimony is to be adopted. Why did you wait a five  
5 months? I am asking you why you filed it at the last  
6 moment.

7 MR. CASANOVAS: Why I filed this particular motion  
8 at this particular moment, Judge, we wanted to give the  
9 State attorney an opportunity to respond in writing or  
10 otherwise. This motion they have been on constructive,  
11 not actual notice, that we are in no position to notice  
12 any documents coming in, hearsay documents that they  
13 submitted in the motions. And also, Judge, any  
14 previous testimony, any prior hearing we have the right  
15 to challenge the admissibility.

16 JUDGE LANDO: I am not questioning. I am asking  
17 why you waited five months to do it.

18 MR. CANET: Judge, if I can speak. I don't know  
19 that the rules would require that we make any sort of  
20 written response to any notice they may have filed. As  
21 a matter of fact, I think we could have probably waited  
22 until the very moment they were seeking to introduce  
23 the documents in question to raise an objection and not  
24 waive the objection.

25 JUDGE LANDO: Tell me what the rules of criminal

1 procedure say about adoption of testimony where there  
2 has been cross-examination.

3 MR. TALPINS: By these parties nonetheless.

4 JUDGE COHEN: We all sat in and heard it.

5 MR. CASANOVAS: All the rules of evidence and case  
6 law for everybody here today are very clear on the  
7 point of prior testimony coming in and essential facts  
8 of the State's burden of proof.

9 JUDGE LANDO: Is that a trial or a motion?

10 MR. CASANOVAS: This is on the motion.

11 JUDGE LANDO: Can I see the case law, please?

12 MR. TALPINS: I need to correct the record on one  
13 thing. I have a copy of a request for compulsory  
14 judicial notice the State sent to the Public Defender's  
15 Office August 9th 1993.

16 MR. GILFARB: 90.202.

17 MR. TALPINS: I have been at the State Attorney's  
18 Office handling low sample motions for several months  
19 now. I would object to the defense attorneys coming  
20 forward now and saying that they filed the response  
21 with our office when they know I am the particular ASA  
22 handling this. That does not put me on notice. He  
23 should have given me a courtesy phone call so I would  
24 have been aware of this. We haven't had time to pull  
25 case law. And I can't be expected to argue something

2 1 like this just having been handed it

2 JUDGE LANDO: I understand. On the other hand,  
3 you filed the motion last August. I figure you knew  
4 enough about the law to know whether you could or  
5 couldn't do it. Why don't we try and address the  
6 issue?

7 MR. GILFARB: After about four months and we  
8 figured it was a non-issue.

9 JUDGE COHEN: Let's get going.

10 MR. GILFARB: The second matter --

11 MR. TALPINS: We need that back.

12 Judge Cohen, Mr. Casanovas according to the Hupp  
13 case -- this is a case where a new trial was granted  
14 and so I assume there was some sort of judicial or  
15 evidentiary error in the first testimony which is why  
16 the Supreme Court wouldn't allow it the second time.

17 MR. CASANOVAS: You are right. And similarity of  
18 facts and elements of the crime, similarity analogies  
19 of listed witnesses, Judge.

20 Essentially, judicial notice is just a convenience  
21 to the court, Judge. The rule is when it has been -  
22 the established rule is the court may not take judicial  
23 notice of anything other than what it called  
24 recognizable facts which are according to the Florida  
25 Rules of Evidence

1 JUDGE LANDO: Give us a second, okay.

2 MR. CASANOVAS: Yeah, sure.

3 Basically in Hupp -- if I may, on Page 151 of Hupp  
4 and regarding Amos, and an old Supreme Court case which  
5 is an early 1917 Florida Supreme Court case, the  
6 essential teaching of Amos is first the facts to be  
7 judicially noticed must be commonly known; and second,  
8 the court should exercise great caution in using  
9 judicial notice

10 JUDGE LANDO: I understand all of that, Mr.  
11 Casanovas.

12 State, did you actually file to the defense copies  
13 of the transcripts and testimony you intended to rely  
14 on?

15 MR. TALPINS: Yes, we did. Actually, I attached  
16 it to my brief, and unsigned copy of the brief. The  
17 back of the brief, the last few pages, is actually the  
18 transcript that we are seeking to introduce at this  
19 time.

20 JUDGE COHEN: Let me look in Earhardt (phonetic).  
21 Can we get started?

22 MR. GILFARB: Actually, Judge, we anticipate a  
23 problem here.

24 JUDGE LANDO: Let us take a recess.

25 MR. GILFARB: We need to address one more thing.

2 1 As this court is aware only recently did we get notice  
2 that Mr. Wayne Morris was going to be testifying for  
3 the defense.

4 JUDGE LANDO: I thought you had a chance to  
5 question him yesterday afternoon.

6 MR. GILFARB: Your Honor was gracious and gave us  
7 a chance to speak with the expert witness over the  
8 phone. Today, Judge, through some further work on  
9 behalf of the State and we came forward with some  
10 transcripts concerning Mr. Wayne Morris. We were  
11 looking for them all morning and which would explain  
12 why we didn't have a chance to address the other  
13 motion. We would like to provide this to counsel for  
14 defense and request a one hour recess for them to  
15 review it.

16 JUDGE COHEN: What is it?

17 MR. GILFARB: Transcript of prior testimony  
18 necessary for impeachment of this last minute witness.

19 MR. CASANOVAS: We have not requested an hour to  
20 review.

21 JUDGE LANDO: You don't have to take an hour.

22 MR. TALPINS: We do. We didn't have time to read  
23 the transcript of a witness who was just added.

24 MR. GILFARB: We went through it enough to find  
25 enough to say that we are prejudiced and we need a

1 little bit of time.

2 MR. TALPINS: Judge, this is about an  
3 inch-and-a-half worth of testimony. Most respectfully,  
4 we were ready to go if this witness wouldn't have been  
5 called whatsoever.

6 JUDGE COHEN: Where did you get all that?

7 MR. CASANOVAS: If I may, Judge, this witness --

8 JUDGE YOUNG: Hold on. Judge Cohen has a  
9 question.

10 JUDGE COHEN: Where did you get all this?

11 MR. TALPINS: Assistant Don Hartery (phonetic)  
12 provided us with depositions from the Thermister  
13 hearing and we tracked them down today.

14 JUDGE LANDO: This was the Thermister hearing up  
15 in Orlando?

16 MR. TALPINS: I am not sure. And several  
17 depositions, hearings, and --

18 MR. CANET: Some of them are blood cases and where  
19 he was called upon to testify as a pharmacologist.

20 JUDGE LANDO: Tell you what, and let us take a  
21 recess and resolve this first issue. If we resolve the  
22 first issue in a certain way and it may resolve the  
23 whole thing. Let us decide that issue first and then  
24 we'll worry about the rest of it. You can take some  
25 time a while we are looking at the law.

3 1 MR. CASANOVAS: Judge, have the judges concluded  
2 listening to argument about the judicial notice issue,  
3 because I have more case law I would like to show you  
4 and more argument.

5 JUDGE LANDO: Give us all the case law you want  
6 and we'll sit and read it.

7 MR. TALPINS: We haven't had time to research this  
8 issue, okay, and I would like an opportunity to as  
9 well.

10 MR. CASANOVAS: I would like to say one thing  
11 about the witness. The state attorney has been on  
12 actual notice since last Friday.

13 JUDGE COHEN: I don't want to talk about it.

14 JUDGE LANDO: We don't want to hear about it.

15 JUDGE COHEN: Give us the case law and let us find  
16 out the answer. It will give us something to do for  
17 the next hour. God forbid we should have nothing to do  
18 for an hour.

19 MR. CASANOVAS: Daniels V. State which is a Fifth  
20 District case.

21 JUDGE COHEN: Okay. Can we go now?

22 (Thereupon, a brief recess was had, after which  
23 the following proceedings were resumed:)

24 MR. GILFARB: Your Honors, just for purposes of  
25 the record I think what we have stipulated upon is that

3 1 the testimony which we would ask that this court take  
2 judicial notice of was stipulated to and we will be  
3 able to introduce that in the matter in which the State  
4 contends, and which is certain breath cards in which  
5 the State uses for demonstrative purposes will come in  
6 as a Defendant's/State's exhibit.

7 JUDGE COHEN: The evidence you want to use for  
8 Thermister and only the page cited or photocopied or  
9 everything?

10 MR. TALPINS: We'll supplement the file with the  
11 entire document.

12 MR. GILFARB: Do you want copies?

13 JUDGE COHEN: I do.

14 MR. CANET: I hope that Your Honors may understand  
15 that there maybe some internal problem with the  
16 testimony you are reading. We have no problem them  
17 introducing the transcripts. What we would ask is that  
18 you keep in mind, for example, at least to the  
19 testimony of Dr. Rerrick (phonetic) on Page 145 wherein  
20 he makes a statement which is obviously a legal  
21 conclusion.

22 JUDGE COHEN: We know how to read it.

23 MR. CASANOVAS: Subject to all our objections and  
24 I don't know how you are going to address it if you are  
25 not going to be proffering any of this stuff or

1 anything else. We would like to state our objection to  
2 this particular one on Page 145, in the first volume of  
3 Dr. Rerrick's testimony.

4 JUDGE COHEN: Go ahead.

5 JUDGE YOUNG: Before they do that, in case this  
6 gets appealed and you have an appellate court that  
7 never did DUI's or criminal court, what is a Thermister  
8 Motion?

9 MR. GILFARB: One of the present maintenance --  
10 and perhaps Trooper Addison can explain.

11 JUDGE COHEN: A Thermister is something that  
12 regulates the heat in an Intoxilyzer -- call your first  
13 witness, State -- or the temperature.

14 JUDGE LANDO: Defense, call your first witness.

15 MR. CASANOVAS: We believe that the State has the  
16 burden.

17 JUDGE LANDO: It's your Motion to Exclude, right?

18 MR. CASANOVAS: We are moving to exclude and  
19 moving to also challenge the substantial compliance  
20 with the rules under Rizner, Johnson V. State, and a  
21 Fifth DCA 1990 and 1991 Fourth DCA case, and even under  
22 Fryes. Judge, it is the State's burden.

23 JUDGE COHEN: You know what, do me a favor. The  
24 next time you give me a case and sheppardize it. And  
25 you gave me a Fourth DCA case from McDonald and it

4  
1 is --

2 MR. CANET: The issue addressed by McDonald is not  
3 addressed.

4 JUDGE COHEN: Substantial compliance was  
5 addressed.

6 MR. CASANOVAS: Not the issue of the burden.

7 JUDGE YOUNG: State, call your first witness.

8 JUDGE COHEN: A showing of substantial compliance  
9 the burden shifts to the defense to show there is no  
10 substantial compliance.

11 What substantial compliance means for purposes of  
12 the hearing, and I think this is what is generally  
13 accepted in the State of Florida under State V. Hill,  
14 is you have to show that it would prejudice you,  
15 prejudice your client for the breath results to come  
16 in. That's what substantial compliance is. That's  
17 what we are moving under.

18 MR. CASANOVAS: I understand and have made a prima  
19 facie case on prejudice based on Fryes.

20 JUDGE COHEN: I don't want to talk about it.  
21 Come on, State.

22 MR. GILFARB: At this time, the State would call  
23 Trooper Addison to the stand.

24 JUDGE LANDO: I assume by doing this, just for the  
25 record, that we are going to give all the attorneys a

1 chance to cross-examine but that Trooper Addison's  
2 testimony is going to generally apply to each case and  
3 we are not going to ask the State to call a separate  
4 witness for each case because you all wanted this  
5 motion together. Is that agreed?

6 MR. GILFARB: That's agreed.

7 MR. CANET: That's agreed.

8 JUDGE COHEN: Raise your right-hand, Trooper  
9 Addison.

10 (Thereupon, the witness was duly sworn, after  
11 which the following proceedings were had:)

12 MR. GILFARB: If the record would also reflect  
13 that all the expert witnesses who are testifying are  
14 present in court to listen to testimony in order to aid  
15 counsel.

16 JUDGE YOUNG: Where is my defendant, Ms. Boots?

17 MS. BOOTS: I actually told him to return at a  
18 quarter to 3:00. I told him court would not --

19 JUDGE YOUNG: Do you waive his presence?

20 MS. BOOTS: I would like to waive his presence and  
21 raise the issue that it is a little technical.

22 JUDGE YOUNG: That's not a problem.

23 JUDGE LANDO: In any case the defendant is not  
24 present the presence is waived; is that correct?

25 JUDGE YOUNG: That's correct.

## DIRECT EXAMINATION

BY MR. GILFARB:

Q. Trooper, please state your full name and place of employment for the record.

A. Ray Addison. I am a State Trooper, Florida Highway Patrol, Station 2B, Miami.

Q. How long have you been so employed?

A. January 10th 1982.

Q. As part of your training -- and do you have any specialized training in DUI?

A. Yes, sir, I do.

Q. Please elaborate for the court.

A. You want from my initial training in the academy?

Q. That's correct.

JUDGE YOUNG: We stipulate to that. We all know his expertise.

JUDGE COHEN: Can we do that?

MR. CASANOVAS: Forty hours plus any refresher.

JUDGE LANDO: If I remember his testimony his expertise goes beyond that. He is also --

MR. GILFARB: Judge, I believe that all the experts have testified before you with the exception of Mr. Morris. If we can have an agreed upon stipulation to them.

4 1 MR. CASANOVAS: I need to know what areas you're  
2 offering him in.

3 JUDGE COHEN: Let him make a brief proffer. Go  
4 ahead.

5 THE WITNESS: Specific area, Intoxilyzer. I am a  
6 certified Intoxilyzer operator. I am also an  
7 Intoxilyzer technician. I was certified in a  
8 technician's course which means I am not only a  
9 preventative maintenance officer but a technician who  
10 can actually work on internal components of the  
11 Intoxilyzer. I am an Intoxilyzer instructor certified  
12 by the department as an instructor.

13 BY MR. GILFARB:

14 Q. And your training in order to become an instructor  
15 is what?

16 A. My training in order to become a instructor you  
17 must, first of all, be an operator, certified operator,  
18 meaning you have taken the basic Intoxilyzer course. Then  
19 we we are required to take 120 hours in instructor school  
20 apart from the regular instructor school which is certified  
21 by the state which includes a technician course in the  
22 Intoxilyzer 5000 at the time, also a technician course in  
23 the 3000, basic DUI training for instructor technique.  
24 Basically instruction in all areas of the DUI  
25 investigation, the technical aspects of the Intoxilyzer,

4 1 and instruction.

2 Q. Briefly, your educational background.

3 A. Well, I graduated from high school. I have a BA  
4 Degree. I have a year-and-a-half of law school. I am a  
5 certified police officer certified by the Highway Patrol.

6 Q. Have you ever testified as an expert in DUI cases?

7 A. Yes, sir, I have.

8 Q. Have you ever rendered an expert opinion as to  
9 breath samples and what those breath samples mean, what  
10 they indicate?

11 A. Yes, I have.

12 MR. GILFARB: At this time I tender him as an  
13 expert to this court.

14 JUDGE COHEN: Any objection?

15 MR. CASANOVAS: On what basis is he offering him  
16 an expert?

17 JUDGE COHEN: What area?

18 MR. GILFARB: Is that what you are asking? In the  
19 areas of breath testing, what the breath tests results  
20 are, and his expertise with the instrument.

21 JUDGE LANDO: We are willing to accept him on  
22 those.

23 BY MR. GILFARB:

24 Q. Trooper, approximately how many times have you  
25 administered a breath test in your experience as a DUI

5 1 involved trooper, if you can estimate for the court?

2 A. Thousands.

3 Q. Can you please explain in a brief fashion the  
4 requirements necessary in order obtain a breath sample?

5 A. The procedure for the Intoxilyzer --

6 Q. Not the procedure, the actual requirements with  
7 respect to the instrument itself.

8 A. The first requirement is that the subject has to  
9 be observed for twenty minutes prior to testing.

10 MR. CASANOVAS: I can't hear that.

11 MR. GILFARB: He has to observe a twenty minute  
12 wait.

13 JUDGE COHEN: Why don't we put the mike down  
14 there, Jeff.

15 THE WITNESS: The individual must first be  
16 observed for twenty minutes prior to testing. Once he  
17 has been observed for twenty minutes and he has not  
18 regurgitated any substance, the Intoxilyzer card where  
19 the button is is pushed in, the card is inserted into  
20 the Intoxilyzer. Once the Intoxilyzer goes through its  
21 own self-diagnostic it requests the individual to blow.  
22 The subject must blow into the breath tube and satisfy  
23 three components of the Intoxilyzer when he is blowing;  
24 time, pressure, and slope. He must blow a minimum of  
25 six seconds. He must apply enough pressure to push the

5 1 pressure switch. He must blow long enough for his  
2 reading to reach a slope, meaning that there is  
3 barometal variation in the Intoxilyzer reading of what  
4 that sample - the numeric value of what that sample is.  
5 At that particular point in time the Intoxilyzer  
6 blinks. There is a waiting period of approximately two  
7 minutes and then he is requested to do the same  
8 procedure a second time. He must satisfy those three  
9 components once again. If that's done and there is .02  
10 agreement between the two samples you have a valid  
11 test.

12 BY MR. GILFARB:

13 Q. Can you please explain to the court the meaning of  
14 deep lung air?

15 A. Deep lung air. Essentially, deep lung air is that  
16 approximately the last third of the air that's inside the  
17 lung. You are never going to get that last third air out  
18 of the lung simply because if you did the lung would  
19 collapse. But you want to get as much as -- not the tidal  
20 air which is air that's from the mouth, that's mixed with  
21 the air in the mouth. What you want is the deep lung air  
22 where the air is coming from the aveolae which is where the  
23 gas exchange occurs. There you are going to get the  
24 highest reading and the best sample of the subject's actual  
25 breath alcohol.

5 1 Q. Please explain to the court what your definition  
2 is of the "best sample"?

3 A. The best sample?

4 Q. Yeah.

5 A. The best sample -- well, like I said you are never  
6 going to get the best sample. That's the last third of air  
7 in the lungs. The best sample is when he blows and expends  
8 all of the air that he can blow before he can't blow hard  
9 enough to trip the pressure switch. This is the best  
10 sample.

11 Q. In your experience if a subject expends all the  
12 possible air they possibly can when registering a breath  
13 sample, is it possible that they could register a sample  
14 that's higher than their true alcohol, breath alcohol  
15 content?

16 A. It could be done but you literally have to kill a  
17 person to do it.

18 Q. How is that? Not how do you kill a person. Why  
19 is that?

20 A. Well, the only way you could do that is if he  
21 blows all of the air and just as he is about to give out  
22 you either hit him so hard so to make the lungs collapse  
23 and which gets that last bit of air out and you probably  
24 would get just a slight higher reading then -- you are not  
25 going to get any higher once he has blown everything out