

**IN THE TWELFTH JUDICIAL CIRCUIT
IN AND FOR SARASOTA COUNTY, FLORIDA**

GLENDALEE CLAY
APPELLANT

APPEAL NO.: 99-6485-CA-01

CASE NO.: 95-6506-T

vs-

STATE OF FLORIDA
APPELLEE

**VOLUME 7 OF 7
CRIMINAL APPEAL**

APPEALED FROM THE COUNTY COURT IN AND FOR SARASOTA COUNTY,
FLORIDA, THE HONORABLE **BARBARA BRIGGS**, PRESIDING JUDGE.

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INDEX
VOLUME 7 OF 7

	<u>DATE FILED</u>	<u>PAGE</u>
rules that governed how that Deputy Slapp called ly	May 26, 1999	200-303
t for the machine. ent...that scheme was not	June 11, 1999	983
re here in 1999?		
ified with regard to the		
e's directing the witness.		
tested in 1994 and 1995		
ne today with premixed		
er to getting an accurate		
ady mixed for him or her		
when they're mixing it.		
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1 A. No, there's not.

2 Q. Is there any way that theunder the rules that were in effect in 1995...could you explain to
3 the jury how the numbers could be adjusted, for lack of a better word, in doing a test?

4 A. I understand what you mean. I won't use the word "adjusted" but, actually, I guess, the
5 Officer, Officer Slapp indicated that the solution did not come out right, in other words if it
6 came out within about .005 or it came out in excess of that, the officer would dump and re-
7 mix the solution. That's what he indicated. That's the problem with the way that the
8 maintenance is conducted. Because, in other words, you're mixing the solution to match the
9 machine. Now, if you're mixing the solution and it doesn't come out right, where Deputy
10 Slapp indicated, he just dumps it and re-mixes. So, what you're doing now is you're re-
11 mixing the solution to try and match the machine. So, you're testing two unknowns against
12 each other and that's not the way that maintenance is conducted.

13 Q. Now, in the course of your being involved in breath testing in this State, and particularly in
14 comparing a machine that used to be approved in this State with the Intoxilyzer, was that kind
15 of a problem. The problem that you just discussed. Was that identified and complained about
16 or seen as a fault with the machine?

17 A. Well I think it initially was because the initial training was that's just what we were taught.
18 I mean, when you're taught something in training, that pretty much is the way it is.
19 Eventually because of cross examinations where you actually, as an officer, you learn a lot,
20 really, is that you learn how to do things a little bit better and you start making, I shouldn't
21 say demands but requests, that something be done a little bit differently and the answer then
22 starts to become pre-mix solution. So, that started coming out.

1 Q. Well now, in 1995, for the benefit of the jury, these regulatory rules that governed how
2 Intoxilyzers were maintained, what were those rules called? I think that Deputy Slapp called
3 them Chapter 11D-8?

4 A. Well, they're really just administrator rules that were put into effect for the machine.

5 Q. Now this idea that you called pre-mixed solutions, why is that different...that scheme was not
6 in effect in 1994 or 1995, was it?

7 A. No.

8 Q. And, is that the scheme that we presently have in Florida now, we're here in 1999?

9 A. Pretty much, yes. It's pretty much that way.

10 Q. Has that helped you resolve some of that problem that was identified with regard to the
11 mixing of the solutions and testing to unknowns.

12 Prosecutor. Your Honor, I'm going to object. Leading questions here...she's directing the witness.
13 Defendant's Attorney.

14 Q. What is the difference between the manner in which the machine was tested in 1994 and 1995
15 without premixed solutions as opposed to the way that it is done today with premixed
16 solutions?

17 A. Well, just that over the years, the State is becoming a little bit closer to getting an accurate
18 reading. Premix solution is a solution that the officer gets that's already mixed for him or her
19 so that they don't have to....that maybe they won't make an error when they're mixing it.
20 There's still some problems with it but at least they're starting to narrow that issue down a
21 little bit.

22 Q. Now, with regard to the testing of the machine again, Mr. Swope, what problems, if any, have

1 you identified with regard to this range of acceptability, if I can call it that, in regard to these
2 premixed solutions?

3 A. Well, again as I indicated, the solution is actually being mixed to match whatever the machine
4 reads. The machine has a very narrow margin and the State allows the machine to be plus or
5 minus .005 either high or low. Because the solution is basically only mixed to the second
6 digit, it's easy to get outside of that thousandths digit whether it be 5 above or below. So that
7 tends to lead problems to the officers having to mix a solution that matches the reading on
8 the machine. In other words, if the machine is off 3 thousandths or 4 thousandths, the
9 machine can be 1 thousandths of a percent off from going out of service. Well, by mixing a
10 solution that you don't know what the third digit is, you can actually bring the machine closer
11 to be within the parameters and either high or low. Technically, you can have a solution
12 that's high and the machine is low, you can actually bring it to parameters so you could
13 actually be outside of the .005 range but you would never know that.

14 Q. Now, the annual inspection that Mr. Justice did in 1995, is there any way for you to tell from
15 that piece of paper whether the solution that he used, let's just talk about the 5% level, any
16 way for you to tell if it was exactly 5% or whether the machine actually fell within the ranges
17 that are required at that level?

18 A. No, you can't tell.

19 Q. For the same reasons that you just stated?

20 A. Right, because the stock solution, I don't know what the stock solution... I know what the lot
21 number is but I don't know how it tested out that time so he could have mixed it high or low.
22 I mean all the readings are a little bit within 2 or 3 thousandths off but I couldn't tell you what

1 is was exactly.

2 Q. Well, that was going to be my next question. If you'll look at that document...what number
3 is that sir?

4 A. This is number 3.

5 Q. Alright, number 3. If you'll look at the tests that were run of the 5% solution, how many of
6 those...there should be how many - 5?

7 A. It's 5.

8 Q. Five tests at the 05 solution and he can get as low as .045 or as high as .055, am I correct?

9 A. Correct.

10 Q. How many of those are close?

11 A. Well, none of them are right on. They're all within, I think, you have an .047, that's the
12 farthest one that's off which is .003. But the rest of them are .002 or 001.

13 Q. So, if you look at the next category which is a 10% solution, is that right, you just increase
14 the amount. The process is the same.

15 A. Correct.

16 Q. Your just testing it at different strengths of alcohol?

17 A. Yes, Officer Slapp went through that, yes.

18 Q. Alright. Now, are the test results at the 10% level. Are they close. Are they on target?

19 A. Yes, a lot of it is on target and the rest of them are off.

20 Q. And what about the higher level, the 20% solution because they get a greater degree of
21 disparity there, don't they? They get to make more...the machine isn't quite as accurate the
22 higher you get to the .2 level, is that it?

1 A. Well, they allow a little bit more of a percentage to be off and they're close to the target but
2 they're not on.

3 Q. So, is there anyway for you to tell if, based on the document that you have in front of you,
4 if the Intoxilyzer in question was properly inspected on an annual basis by Mr. Justice in
5 1995?

6 A. No.

7 Q. You've indicated that you would have to do some additional homework, sort of, to determine
8 that, what would you look to? What would you want to have? What other documentation
9 would you want to have?

10 A. Well, I would generally request all the documents on a particular machine. In this case, I
11 think it 1712 machine number. So, I would request everything on 1712. Any repair history.
12 Anytime that it went back to the factory. I would look specifically at downtime and I would
13 look at any problems where the officer took it offline. Sometimes they go off line for
14 whatever reason. I would then do a search of the records to see if there's any possibility that
15 the officer or that the state inspector passed the machine when it was offline. That's the most
16 common thing I find.

17 Q. Now, in your experience about people and breath tests, you've done all these studies and so
18 forth, in your experience in doing those studies, if you take, you get somebody that drinks
19 alcohol, as I understand it, you would give them a controlled amount of alcohol, is that right?

20 A. Correct.

21 Q. And then you'd run some tests?

22 A. Yes.

1 Q. So, you experience, Mr. Swope, if somebody had a certain amount of alcohol, it doesn't
2 matter what the number is, and you took a breath test and they gave a sample, if you waited,
3 say, an hour later, would you expect them to have the same result...the same amount of
4 alcohol?

5 A. No. You mean two people or?

6 Q. No. Same person but an hour's worth of time difference. They have the same drinks, same
7 controlled drink at the beginning, gave them a test at hour 1, waited an hour, gave them
8 another test at hour 2. What would you expect to see?

9 A. There would be a difference in the reading.

10 Q. Why is that?

11 A. Well, because the alcohol would be absorbed and....

12 Prosecutor. You Honor, I'm going to object to this. May we approach?

13 Defendant's Attorney.

14 Q. Mr. Swope, if you saw what the test result was on Glendalee Clay at a certain specific time,
15 did you not..on the test card? The breath test result card?

16 A. Yes, I saw that.

17 Q. Are you able to tell, is anybody able to tell the jury, what Glendalee Clay's breath test result
18 was when she was driving her car?

19 A. No.

20 Q. In fact, that breath test machine can only detect that alcohol that is in somebody's body at the
21 time the test was taken. That's the goal, is that right?

22 A. That's correct, yes.

1 Q. Are there any outside factors that affect that testing mechanism? I think Mr. Slapp talked
2 about heat and stuff like that? And you talked about humidity, I think.

3 A. You mean the machine or the person?

4 Q. Well, let's talk about the machine first.

5 A. Well, there are outside factors, obviously, the accuracy of the calibration of the machine, if
6 there's any interference in a person's breath. Some people do have interference, the machine
7 should pickup most interference, some it doesn't but it should pickup certain interference,
8 depends on the amount of alcohol, regurgitation, somebody burps might have fumes in the
9 mouth for a period of time. People have false teeth. That they have something else that
10 they're holding in the mouth, people with tobacco. Things like that. So, those are the greater
11 frequency of interference, I think I mentioned that. So, there are some factors that can affect
12 the machine itself. And, of course the person has factors too.

13 Q. And as far as...what are some of the factors that a person can introduce that might affect the
14 machine as opposed to these other factors that you're talking about?

15 A. Well, a medical condition such as acetone or somebody with diabetes...

16 Prosecutor.

17 Your Honor, I'm going to object again. This is the same line of questioning (inaudible) He
18 doesn't have a medical background...

19 Judge. That question is okay.

20

21

22 End of Tape 4B

1 Tape 5A - Brendalee Clay

2 Defendant's Attorney.

3 Q. Now, Mr. Swope, Do you know, based again on your experienc with testing subjects and
4 taking breath tests with them or of them, I should say, do you know if the same person will
5 give the same result if there is a test that's taken, not at a different time, but under different
6 conditions?

7 Prosecutor. Your Honor, I'm going to object. This is leading and speculating.

8 Judge. Objection overruled.

9 Defendant's Attorney. Are we on the record or not?

10 Judge. We're on it.

11 Defendant's Attorney. It's okay?

12 A. Yes, there can vary in results.

13 Q. Now, based on what you've heard here today and the documents that you've reviewed, can
14 you tell the jury what problems you perceive, if any, with the maintenance and the inspections
15 that were done on the Intoxilyzer that was used for Glendalee Clay?

16 A. Well, the main thing, I think, I've already indicated that would be, I believe the Officer who
17 appeared before me commented on the way that the machine is tested monthly and the
18 solution....if it does not match it would be dumped out and re-done and reevaluated. That's
19 the big problem. The annual inspections, again, there are no cards on that. I think the officer
20 up here indicated that he does keep monthly cards so that's helpful if you're looking at each
21 specific month. But, the annual inspector which actually does a more detailed inspection of
22 the machine. He actually takes it apart, opens it up a little bit, checks things that the officer

1 doesn't normally check. So, therefor I don't know...there's very little chance that that could
2 be reliable based on the fact that I just don't know about these documents.

3 Q. Now, what about these stock solutions. These various numbers that are indicated on some
4 of the testing that's been admitted here. Any way, is there a list someplace of these stock
5 solutions where you can go back and check how old they are, how long they've been sitting
6 around, whether there are any problems with them?

7 A. Well, there is now.

8 Q. There is now?

9 A. There is now, yes. In other words, they're dated now and you only keep them a certain
10 amount of time. I think they can keep them up to a year. I usually keep mine about eight
11 months but I think the State keeps them to a year, which is fine in most cases. But, at that
12 time, there was no way of knowing. In other words, if the person who mixed the solution
13 knew what day he mixed it and they have it on record and he would have that date. But, as
14 far as the lot numbers at that time, there was no indication as to when they were mixed or
15 when they were sent off to the specific agencies.

16 Q. And now I asked Mr. Slapp about that testing the vapor mixture. Did you hear me ask him
17 that question about testing the vapor mixture and how do you know that you've converted
18 a 5% solution of alcohol liquid into a 5% vapor mixture? Have there been problems identified
19 in that area with regard to the results in the Intoxilyzer 5000?

20 A. Yes.

21 Q. Could you explain to the jury what problems have been identified?

22 A. Well, mainly again, the solution...I think the officer indicated...

1 Prosecutor. Your Honor, I object. This has been asked and answered before previously.

2 Defendant's Attorney....On vapor mixtures?

3 Prosecutor.... Uncontrolled testing and re-testing this thing..check each other.

4 Judge. Objection sustained.

5 Defendant's Attorney.

6 Q. Have there been any steps taken to correct the problems that have been identified with the
7 inability or failure to test the vapor mixture?

8 A. Well, some have been taken by the State and some have been taken by the manufacturers.
9 The State of Florida has not adopted the manufacturer's ... I should say recommendations but
10 they changed the way that they do simulation tests now on the Intoxilyzers..the new ones.

11 Q. What's different today than what happened in 1995?

12 Prosecutor.

13 Your Honor, this has been asked and answered as well. Object. We know the documents...

14 Judge. Counsel will approach.

15 Defendant's Attorney.

16 Q. Mr. Swope, do you recall my last question?

17 A. Yes.

18 Q. Could you please give us your answer, sir?

19 A. Well, it twofold in that they're premixing and keeping by lot number and expiration date the
20 simulator fluids or solutions and secondly, also the administration on Form 24 although they
21 have not adopted it entirely yet, would be the use of a controlled test which is the most
22 important.

1 Q. Okay. In 1995 I take it, there was no use of this controlled test?
2 A. Some places used it and most didn't but, it was on the form if I'm not mistaken. It's on Form
3 24. Yes, it's on Form 24 which is (inaudible).
4 Q. Okay. And so, did any of the people involved in the testing of the machine that Glendalee
5 Clay was tested on, did they use this controlled test?
6 A. No.
7 Q. But there was a
8 Prosecutor. Speculation, Your Honor.
9 Judge. Objection overruled. Testify as to what's on the exhibits.
10 Defendant's Attorney.
11 Q. And, if there had been a controlled test, if I'm understanding you correctly, there is a place
12 on the form that existed and was actually used to indicate that that was done. Am I getting
13 it right?
14 A. Right. They would have it on the form if they used a controlled sample for a controlled test.
15 Q. So that wasn't done either?
16 A. No.
17 Prosecutor. Your Honor, may I object and approach please?
18 Judge. Please disregard the last statement by counsel.
19 Defendant's Attorney.
20 Q. Mr. Swope, in your review of the forms, did it indicate that a controlled test was used?
21 A. It did not indicate that one was used.
22 Q. Alright. Now, with regard to the area of breath testing, excuse me, of field sobriety testing,

1 excuse me, it's the hour. I'll switch gears here, alright? Did you have an opportunity to...you
2 said you looked at the video tape, did you, as well, have an opportunity to be present during
3 the time that Officer Nick testified about the manner in which he asked Ms. Clay to do the
4 field sobriety tests?

5 A. Yes, I was there.

6 Q. Do you have an opinion about the instructions that were given by Officer Nick to Glendalee
7 Clay with regard to the field sobriety test and let me just ask that question overall?

8 A. Yes, I saw the instructions...I heard the instructions from the officer on the video tape and in
9 the courtroom what was asked, yes.

10 Q. Are you familiar with the Horizontal Gaze Nystagmas Test?

11 A. Yes.

12 Q. And, did you form an opinion about whether or not Officer Nick's giving, for lack of a better
13 word, the Horizontal Gaze Nystagmas test to Ms. Clay when he did it the first time. In other
14 words, when she was in her car. Do you have an opinion about whether that was done in
15 accordance with generally accepted methods of administering the Horizontal Gaze
16 Nystagmas?

17 A. Yes.

18 Q. What's that opinion?

19 A. She would have to have been out of the car before he gave that particular test to see what
20 basically he was able to do or see what she was able to perform.

21 Q. So, is it that he has to be able to see what she's doing? In other words, be able to visualize
22 what's going on with her eyes?

1 A. Right. Well, usually when you're sitting in the car if you're looking at the window or out the
2 window, your head is tilted somewhat or turned. I mean, normally, you're looking straight
3 ahead in the car so if she is looking at the officer, obviously she has to be turned somewhat
4 and the head must be straight on to the officer so that the officer can see the eyes.
5 Specifically, so that there's no turning of the eye or eyeball prior to giving the exam.

6 Q. And, did you see that Officer Nick gave that test to Ms. Clay again. Did you see that?

7 A. Yes, I think it was towards the end of the video.

8 Q. And, did he ... do you have an opinion about the way he did that Horizontal Gaze Nystagmas
9 .. The last time or at the end of the video?

10 A. Yes.

11 Q. And what's that opinion?

12 A. Well, I think the officer testified that his patrol car lights were on and flashing. I believe you
13 asked that question and he indicated that they were. Also, the manner in which he did the
14 exam, he admits it's very specific or the instructions are very specific and he actually did it
15 too fast then not making the right number of passes for each exam.

16 Q. And, what is the way that NHSTA.... approves the administration of a Horizontal Gaze
17 Nystagmas?

18 A. Well, the officer would hold an object, which he did in this case. A pen or a penlight.
19 Normally at night you try to use a penlight if you had one to make sure that the suspect is not
20 directly affected by the oscillating lights on the car or oncoming traffic, etc. The officer then
21 would make minimal two passes to look for what known as smooth precision. First of all, it's
22 actually called tracking...to see if they tract. Then, it's a specific procedure to check the three

1 clues in each eye which would be a right-right, left-left and then you do that right-right, left-
2 left, right-right, left-left. So you make a minimum of two passes for each clue which would
3 be six passes in each eye. So, actually it takes a few more seconds but you have to do that.

4 Q. And, how does his failure to do that affect anything that he would see as a result?

5 A. Well, it really would be unreliable. The manual itself states, in section eight. I think it's page
6 10, that if the test is not done properly or if there is any deviation that the results of any type
7 of test should be discounted, basically.

8 Q. And, did NHSTA, this National Highway Safety Organization, have they approved, for lack
9 of a better word, certain kinds of testing that can be done in the area of alcohol detection?

10 A. Yes.

11 Q. What are those tests that they've approved?

12 A. Well, there three. There's the HGN test that we just discussed. There's the walk and turn
13 test and the results of the one-leg stand test.

14 Q. Well, it appears that Officer Nick asked Ms. Clay to stand with her feet together and her eyes
15 closed and her head back and say the alphabet. Is that a test that's approved by NHSTA?

16 A. No.

17 Q. Did that test have any meaning as far as you're concerned and based on your experience for
18 alcohol detection?

19 A. No. It doesn't really have any meaning, naturally. But, I though she performed well on the
20 test anyway. You're looking for balance and those type of things and I though she looked
21 fine.

22 Q. Now, the let's talk about, I think there was another one. That finger to nose. Is that one

1 of the three that NHSTA approved?

2 A. No. It is not an approved test.

3 Q. So, does it have....what value does it have then in an officer trying to make a decision about
4 whether someone should be charged with a DUI? Based on your experience.

5 A. Well....

6 Prosecutor.

7 Your Honor, I'm going to object. This is totally based on his experience and a lot of
8 speculation of other officers.

9 Judge. Just answer as to your experience.

10 A. The value is that really as many people that I have come across or tested that are totally sober
11 failing as people that have been drinking. So, that's really the problem with the tests. Lots
12 of people who are sober fail the test.

13 Q. Alright. Now, you talked about the approval of this Walk and Turn and the Standing on One
14 leg. Let me talk about the Walk and Turn. You saw the video and you heard the testimony
15 of Officer Nick. Do you an opinion first of all as to whether he instructed Ms. Clay properly
16 in the way to instruct a subject who you suspect is driving under the influence?

17 A. Well, the instructions were actually not bad but the demonstration was the opposite of what
18 he told her.

19 Q. In what way? What did you note?

20 A. Well, he told her to stand with her left and right foot in front. In other words, the first step
21 off would have been her left foot and the reason is because when he told her to make the turn
22 and she would turn to her left. Your left foot is your ninth step so that your lead foot making

1 it easy to make that little pivot. He did it the opposite way. He took off on his right foot and,
2 if you notice, when he got to the ninth step he was out of sync and he had to take one
3 additional step to make the turn. So, actually, he showed her wrong as to (inaudible) and
4 procedure down the line so that was a little confusing or could be a little confusing.

5 Q. Now, what about the place where Ms. Clay was asked to do that Walk and Turn, putting one
6 foot in front of another?

7 A. Well, there was not a lot of traffic and there some cars that went by that I could see in the
8 video but generally there is a slight incline on the side of the road and the purpose of that is
9 to..for water drainage. You know, if you ever get a puddle in the middle of the road, you
10 know the road's not draining properly. There's always a pitch to the road and generally the
11 sides of the road will have about 1-2 degree pitch depending on the roadway. So, being right
12 on the edge is not like the greatest place and I don't know what was close. Maybe the officer
13 could have moved her somewhere else. I'm not sure. I'm not familiar with the area.

14 Q. I understand. Now, let me talk to you about standing on one leg or The One Leg Stand I
15 think you call it. Can you tell us....do you have an opinion about the instructions that Officer
16 Nick gave to Ms. Clay on that particular maneuver?

17 A. Again, the instructions were fairly close to what the officer should have requested. The only
18 thing he didn't tell her was that it was a timed test. In other words, even though he asked her
19 to count to 30 by one thousands, some people count faster than others or slower so therefore
20 he should have told her to keep her foot up or attempt to keep it up for 30 seconds because
21 that's what he's ultimately looking for is the 30 second time test and, if she puts her foot
22 down once or twice, he actually should keep tract of the clock during that period.

- 1 Q. Was there any indication, at least in the video, what she saw that he was keeping track of the
2 clock?
- 3 A. I didn't see him watch the watch and didn't see a similar kind of timing device.
- 4 Q. Alright. Now, the I lost my train of thought, I'm sorry. Just give me a second
5 here....Totally, totally lost my train of thought. What effect, if any, you hear me not only ask
6 Officer Nick, but you saw in the video, Ms. Clay made a complaint about her hair getting in
7 her way. Any kind of guidelines for what you do with it...more important that someone have
8 restrictions such as in Ms. Clay's case? Her hair falling in her face or is it more important that
9 they keep their hands at their sides or is there just an officer's call?
- 10 A. Well, pretty much, when you say its an officer's call, I think the officer let her remove her
11 shoes at one point and, she did indicate a couple of times she had a problem with her hair and
12 I think he may have said "tuck it in" or something like that but, obviously at least on video,
13 looked like she was having some problem with it at one point.
- 14 Q. Her hair?
- 15 A. Her hair at a couple of points but, and I think all in all, looking at the video, what you're
16 looking for is the balance during the entire time the officer's in contact with her and you can
17 see that here as well.
- 18 Q. And there was also, Mr. Swope, about the weather. About it being cold and, of course, now
19 we know she...because we saw it in the video and I don't think there's any dispute about she
20 took her shoes off.
- 21 A. Right. She did.
- 22 Q. Now, what, again based on your training in this NHSTA program, what do you do about..I

1 mean you can't change the weather so they say. What do you do? How do you take those
2 things into consideration if it's affecting someone or if they're complaining.

3 A. Well again there's...again, it's not something an officer runs into every day. In other words,
4 its an infrequent thing. In other words, when I was in Michigan as an officer and we had
5 snow. . Sometimes it would be snowing two or three feet at night in Michigan so, we
6 couldn't give a test in the road. We had to take them to another location inside. That's what
7 we had to do. And, in this case, he could have properly moved Ms. Clay to another location
8 whether it be inside or outside or somewhere else to get her off the road. There are different
9 things you can do if you have to. And, again, it's not something that has to be expected in
10 every situation but maybe that night the weather was a little different than normal. I'm sure
11 the officer ... it could have been raining out there and he would have had to make an
12 exception for that so those things happen frequently.

13 Q. What is the methodology? How does the officer make these evaluations about things like
14 obstructions like hair or traffic or lights or cold or whatever it happens to be. How do you
15 make those adjustments so that you treat everybody somewhat equally?

16 A. Well, it primarily experience and training. Knowing your job well. Those things all come into
17 consideration. Being with officers, backing other officers up on stops to see how they handle
18 things. So, it's all part of your training. The purpose of doing exams are so everyone gets
19 the same grade, so to speak, or the same grade procedure.

20 Q. Now, you heard Officer Nick talk about what he found on this HGN test. These six clues
21 being present.

22 A. Yes.

1 Q. Do you have an opinion about whether he was correct in that regard based on what you
2 heard?

3 Prosecutor. Your Honor, I object. I guess we should approach, I guess I'm sorry.

4 Defendant's Attorney.

5 Q. Let me put the question another way, Mr. Swope. Let me ask you this way, would you have
6 reached the same opinion that Officer Nick did based on what you saw and heard today?

7 Prosecutor. Your Honor, I object. This is speculation.

8 Judge. Approach.

9 Defendant's Attorney.

10 Q. Mr. Swope, what....let's see how we can do this were we don't run into any more problems.
11 What would have been....let me ask you this way, what is the...what would be the purpose
12 of giving the HGN test more than one time?

13 A. Probably because you weren't sure. I mean, you probably weren't sure of your interpretation
14 the first time or you're just not certain based on the performance that you saw on the person
15 so you give them another test.

16 Q. You heard Officer Nick give his opinion about the HGN being the most reliable field sobriety
17 test that there is. Do you share that opinion?

18 A. No, although it is percentage wise, if you take NHSTA's studies, percentage wise it's the
19 most accurate. Do I share that opinion? No. But, percentage wise, yes.

20 Q. And is that dependent totally on any of these tests? Is the outcome or the decision making
21 that a police officer makes on what they see in a situation similar to Officer Nick and Ms.
22 Clay? Is that totally dependent upon these field sobriety tests being administered properly?

1 A. Absolutely.

2 Q. Now, I asked Officer Nick about that walking up and down and whether that was normal and
3 he agreed that it wasn't normal. How do you take these abnormal kinds of movements and
4 make or reach an opinion about whether someone's affected by alcohol? How's that done?

5 A. Well, you watch the person the entire time. Obviously, as you saw on the video, the officer
6 doesn't have to test everything. Second, there are periods of time where he's either
7 explaining something or just talking to her briefly. What you're looking for at that time is the
8 other observations. You know, slurred speech. Somebody who's unsteady on their feet,
9 leaning on something for support. And, if you have that occurring for or between each test,
10 then certainly that shows that that person is probably impaired. But, in this case, the video
11 showed she looked pretty good....

12 Prosecutor. Your Honor, I object.

13 Judge. Objection sustained. The last sentence of the witnesses' statement is stricken.

14 Defendant's Attorney.

15 Q. Mr. Swope, are any of these tests that we have been talking about, these field sobriety tests,
16 are they designed so that people will pass them?

17 A. No, I don't think so.

18 Q. Why not?

19 A. Because...

20 Prosecutor.

21 I'll object. This is no personal knowledge of why he knows this. Does he have testimony as
22 to why he knows every (inaudible).

1 Judge. Any foundation?

2 Defendant's Attorney.

3 Q. Mr. Swope, all the times that you have administered these tests, all the times that you have
4 been involved in instructing other people on how to administer these tests, based on all of the
5 totality of the experience that you have in the area of field sobriety testing, do you have an
6 opinion about whether these tests are designed for someone to pass or fail?

7 A. Yes.

8 Q. What's that opinion?

9 A. My opinion is based on the studies that I've done (inaudible) is that many ... the average
10 person will fail the first time they perform the test.

11 Q. And, what's your recommendation? What would overcome that difficulty in this area of field
12 sobriety testing?

13 A. Well, it depends obviously on the person but at least having them perform the tests a couple
14 of times. Maybe going back and having them doing the test series a second time. Obviously,
15 the officer can perform good because we normally do it every day. When I was an officer I
16 did it every day. But, there are parts of the tests or exam that just are not normal. In other
17 words, like walking the line. Those types of things.

18 Q. Okay. I don't have anything else, Mr. Swope.

19 Judge. Mr. Flaherty?

20 Prosecutor.

21 Q. Mr. Swope, do you know whether or not the Defendant performed those tests before?

22 A. No sir, I have no knowledge.

1 Q. Okay. Mr. Swope, you've been tendered as an expert witness here today, is that correct?
2 In Intoxilyzers and your opinion on how to conduct field sobriety exercises?

3 A. Yes.

4 Q. Okay. And, as an expert witness, it's important for you in your business to maintain what's
5 called a curriculum vitae, is that correct?

6 A. Well, it's important. There are certain things that I keep in my curriculum that I feel are
7 important; many things not. I don't have everything down, obviously.

8 Q. Okay. I guess you could just say yes or no.

9 A. Well, I'm trying to explain it...

10 Q. You don't think it's important then?

11 A. No, I didn't say that.

12 Q. Okay. Well, let me ask you this. Let me ask you this.

13 A. There are certain things that are important and others that are not.

14 Q. When Ms. Mack contacted you last week about testifying, what did you send out to her as
15 part of your...to show that you were experienced in this field?

16 A. She asked me for a curriculum and I faxed her a copy of it.

17 Q. And you faxed her a copy of your curriculum vitae?

18 A. I'm pretty sure I faxed it or e-mailed it, I'm not sure. One or the other.

19 Q. That's what you sent to her last week when she...right?

20 A. Yes.

21 Q. If you can take a look in that composite exhibit under "B"
22 Judge. Which exhibit?