

## Intoxilyzer Questions

95. Were you a licensed chemical analyst on the date of this arrest?
96. Did you possess a permit issued by the Department of Health and Human Services, formerly the \_\_\_\_\_ authorizing you to conduct chemical analysis of the breath utilizing the Intox EC/IR II?  
*And done in accordance with rules set by DHHS.*
97. Did you inform the defendant of his rights specified under 20-16.2?
98. How did you do that? (Should be orally and in writing)
99. Did the defendant indicate that he understood those rights?

What time did you finish reading the defendant the breath rights form?

100. Did the defendant sign the form?
101. Did the defendant indicate that they wished to have a witness present for the breath test?
102. What time and date did you begin the observation period?
103. How long is the observation period for a defendant who either asks for a witness or chooses not to have a witness?
104. What was happening during this defendant's observation period?

105. Was the defendant ever outside of your presence during the (15 or 30) minute observation period?
106. Did you see the defendant eat, drink, etc during the observation period?
107. Did anything occur during the observation period which required a new observation period?
108. Did you ask the defendant to submit to a test of his/her breathe?
109. Did the defendant submit to the breathe test?
110. What time did you ask the defendant submit to a test of his breath?
111. Was that at least (15 or 30) minutes after he/she was advised of his rights?
112. Are the results of the test recorded?
113. When was preventative maintenance performed on this instrument?
114. Is that within 4 months of the date of this offense?
115. Does the test ticket show that two consecutive and sequential tests were given to the defendant?
116. What time were the two samples taken?
117. Were the results within .02 of one another?

- Refusal – Did the defendant provide one sample of his breath and then refuse?
118. What was the lower of the two readings?
- Refusal – What was that reading? *N.C.G.S. § 20-139.1(b3)*

### **Miranda Warning and DWIR**

119. Did you advise the defendant of his rights under Miranda?
120. Did the defendant waive those rights?
121. Waived – Did you ask the defendant to answer the questions listed on the back of the DWIR?
122. Yes – Ask any relevant questions that you feel are appropriate.
123. What was the defendant's demeanor like at the intake center?

124. How long were you with the defendant on the date in question?
125. Was the defendant ever out of your presence?
126. Did you make any observations of the defendant at CCBI that changed your earlier opinion about the defendant's appreciable impairment?

## Chemical Analysis

### Relevant Case Law

A person's alcohol concentration is expressed as grams of alcohol per 210 liters of breath reported to the hundredths. N.C.G.S. § 20-4.01(b) (2007).

There is no legal authority to support that an inference that defendant was not intoxicated based on the State's failure to administer the Intoxilyzer or to administer a blood test. *State v. Highsmith*, 173 N.C.App. 600, 607, \_\_\_ S.E.2d \_\_\_, \_\_\_ (2005).

There is no basis in statutory or case law that an alcohol concentration of less than the statutory per se level creates a presumption that a defendant is not impaired. *See State v. Sigmon*, 74 N.C.App. 479, 482, 328 S.E.2d 843, 846 (1985).

X A person's refusal to give the second or subsequent breath sample shall make the result of the first breath sample, or the result of the sample providing the lowest alcohol concentration if more than one breath sample is provided, admissible in any judicial or administrative hearing for any relevant purpose, including the establishment that a person had a particular alcohol concentration for conviction of an offense involving impaired driving. N.C.G.S. § 20-139.1(b3)(2007).

Although blood-breath ratios vary between individuals and for that reason a breath test may not accurately a particular individual's blood alcohol level, our legislature has adopted a breath alcohol per se offense as an alternative method of committing a driving while impaired offense. It is immaterial whether the defendant is in fact impaired or whether his blood alcohol content is in excess of that permitted in the statutes so long as the State has established: (1) the machine was in working order, (2) the reading was correct, and (3) the officer was certified and competent to administer the test. *State v. Cothran*, 120 N.C.App. 633, 635-36, 463 S.E.2d 423, 425 (1995).

The language of N.C. Gen. Stat. § 20-138.1(a)(2)(2007) providing that "the results of a chemical analysis shall be deemed sufficient evidence to prove a person's alcohol concentration" does not create a legal presumption but simply codifies the common-law threshold for *prima facie* evidence of the defendant's blood alcohol concentration and thus does not violate the U.S. nor the North Carolina Constitution. *See State v. Narron*, \_\_\_ N.C. App. \_\_\_, \_\_\_ S.E.2d \_\_\_ (2008).

Evidence of impairment is not probative for the purpose of challenging an alcohol concentration test unless an adequate foundation is laid to show a correlation between the alleged blood alcohol level and the likely manifestation of specific symptoms. The necessary foundation would ordinarily require expert testimony regarding the reasonably expected symptoms of intoxication of someone with the defendant's physical characteristics and a breath alcohol content as shown by the chemical test. Otherwise the offer of such testimony is not relevant and is therefore inadmissible and should be excluded by the trial court. *State v. Edmondson*, 125 Idaho 132, 135, 867 P.2d 1006, 1009 (1994).