COUNTY COURT, COUNTY OF ADAMS, STATE OF COLORADO

Traffic Action No. 2013-T-9903

TRANSCRIPT OF AN ELECTRONICALLY RECORDED HEARING

THE PEOPLE OF THE STATE OF COLORADO

Plaintiff

v.

KENNETH VAN SCHOYCK

Defendant.

The hearing in this matter commenced on the 29th day of August, 2014, before THE HONORABLE DIANNA R. ROYBAL, Judge of the County Court, Division Four.

FOR THE PEOPLE:	JILL A. HUESER Registration No. 42324
	CHRISTOPHER J. HALSOR Registration No. 32109
FOR THE DEFENDANT:	GARY F. PIROSKO Registration No. 20453

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PROCEEDINGS

(The following proceedings were had and entered of record on this the 29th day of August, 2014.)

THE COURT: All right. Kenneth VanSchoyck, 13-T-9903. Good morning.

MR. PIROSKO: Good morning, your Honor. Gary Pirosko with Mr. Van Schoyck.

THE COURT: Good morning, sir. For the People?

MS. HUESER: Jill Hueser for the People, Your Honor, and Chris Halsor, ah, will be back momentarily . We have the document, ah, coming to, to move to, ah, appoint him as Special Prosecutor.

THE COURT: Okay.

MS. HUESER: He's been sworn in by the, by Judge Murphy already.

THE COURT: And he is from which agency?

MS. HUESER: He's from the Colorado District Attorney's Counsel.

THE COURT: Okay. All right, so, do we need to wait on him to start?

MS. HUESER: Ah, we could begin with the constitutional motions, but I don't know if there are any pre-motions issues that need to be discussed first. So if, if we're going to discuss, then I—wait, I think we're going to run and get Mr. Halsor.

THE COURT; I think the only constitutional motion was a Motion to Suppress Statements, is that right?

MR. PIROSKO: And the stop.

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THE COURT: Okay. We're re-calling 13-T-9903.

MR. HALSOR: Good morning, Your Honor. Chris Halsor for the People, H-A-L-S-O-R.

THE COURT: Good morning. Okay. And were you going to submit some kind of a, ah, oath or…

MS. HUESER: Your Honor, he's been sworn in by Judge Murphy. The document is on its way back from my office where it was signed by Dave Young, ah, so it should be here momentarily.

THE COURT: Okay. Sworn as, in as a Special Prosecutor for purposes of this case only?

MS. HUESER: That's correct, Your Honor.

THE COURT: All right. And, Mr. Pirosko, any objection to all that, sir?

MR. PIROSKO: None at all, Your Honor.

THE COURT: Okay.

MR. PIROSKO: Ah, just for everyone, ah, the proper pronunciation of my client's last name is Van Skoik (spelled phonetically here).

THE COURT: Skoik (phonetic)? Okay, thank you.

MR. PIROSKO: Yeah.

THE COURT: Okay, so, ah, we have a constitutional motion, and I don't know if we have an officer present to testify, for the People?

MS. HUESER: I just sent an intern down to Victim Witness to verify. I did speak with the officer, ah, last week and he did indicate that, or earlier this week, actually, and he indicated he will be here, ah, so I'm having her check in Victim Witness and follow up on whether he's arrived or not. So…

THE COURT: Okay.

MS. HUESER: …at the moment, I don't have him in the courtroom yet.

MR. HALSOR: Your Honor, with your permission, perhaps we can lay out what we're proposing on doing today. I know Mr. Pirosko had filed a Motion to Continue, but I think we've sort of worked out an agreement as to how this should proceed.

THE COURT: Between the two of you?

MR. PIROSKO: If, if…

THE COURT: Okay, I'm listening.

MR. PIROSKO: …before we get to that point, I, I need to back up a little bit. If the officer's not here and there's no indication that he's going to be here soon, I may be in a position to withdraw all my other motions and just proceed on the constitutional motions for the stop and the statements. If he's not here to testify, I'm going to ask the Court to grant those motions and, ah, that may, ah, mean that we don't have to proceed with Mr. Halsor's presentation today.

THE COURT: Okay.

MR. PIROSKO: That's my first position.

THE COURT: All right. And I'm going to deny that request, indicating he's on his way. I actually scheduled today, the rest of today to listen to all the motions, and that was one of several filed by the Defense. So, I, at a minimum, would like to take care of the constitutional motion today.

MR. PIROSKO: Okay.

THE COURT: So, I'll deny that request.

MR. PIROSKO: Judge, I'm, I, I think that all of us involved in this, with all the different agencies, understand that this is a, ah, a, kind of a global issue around the State of Colorado with these, ah, Intoxilyzers, and we understand that this goes far beyond just my client's, ah, facts, and so, ah, I think the parties have been trying to, ah, essentially work through many of these things, ah, so the Court wouldn't have to make decisions, so we are trying to make progress here, and I think Mr. Halsor and I are certainly, ah, somewhat on the same page as, as, eventually, somebody's going to have to hear these matters and, and, because if it's not in this courtroom, it's going to be in several other courtrooms and it's just going to get dragged out. We don't necessarily anticipate that we're going to resolve this issue in this case, it's a thousand-piece jigsaw puzzle which all of us may learn another twenty-five or fifty pieces, ah, through the presentations today. Obviously, there's a lot of, ah, information that needs to go back and forth between, ah, both sides, and I think that that's trying to be done, maybe it's not being done as expeditiously as either side and the Court would like, but we are both trying here. Ah, because of, ah, of discovery, ah, that came up this week, ah, I certainly wouldn't be, ah, competent in providing my, my client with effective assistance of counsel by cross-examining stuff that I haven't even seen yet. Ah, because of that, and what Mr. Halsor and I, ah, talked about and we're just proposing to the Cou--, we understand that the Court can, can, ah, require us to do whatever the Court would like, ah, but what we would like to do is have Mr. Halsor present his, ah, Direct Examination of, ah, his witnesses today; I, I intentionally, ah, have decided probably not to ask any questions, ah, because I may be asking the wrong question based upon information that I don't have yet. I know that Mr. Halsor wanted to try to, ah, videotape this and I have

no objection to that, I think it would be helpful to, ah, the courts around the state to be able to view that, to the Defense Bar and to other prosecutors. I would state, though, that, ah, because I'm not prepared to cross-examine him, ah, I probably would be objecting to things that would show up on that video, so I think that it's, ah, you know, the content of that video is really, ah, somewhat limited for future use in other courtrooms and other cases because the Defense wouldn't be ar--, arguing, ah, for objections. But I, I think that it would be beneficial to everyone if, ah, Mr. Halsor was able to, ah, video- and audio-tape this. I, I make that statement with the request—how long would it take you to make copies?

MR. HALSOR: Well, Judge, this would be, it's a digital camera, so, I think, it could be…

MR. PIROSKO: A week?

MR. HALSOR: Ah, yeah.

MR. PIROSKO: Ah, that, that the Defense be provided with, ah, a copy or two copies, ah, by the end of business next Friday and I could pick it up. And, ah, also, just to solve part of this, ah, my understanding is there was a, ah, interviews that were recorded, ah, with two witnesses by the CDAC this week, I would like to also get copies—I, I've picked up copies of those—I asked Mr. Halsor, ah, just trying to be, we're all trying to be above board on this as far as dis--, discovery goes, in order to try and flush these things out so that the Court doesn't have to ha--, hear the same type of motions over and over again by different defense attorneys. I don't know that I have an obligation not to turn it over to other defense attorneys, but I just want to get on the record, ah, everyone's positions so I'm not putting myself in an ethical bind. I, I think we're just trying to educate as many people as possible as quickly as possible, and I

think that's the best way to do it so that we're not playing a game of Telephone between attorneys and judges and witnesses that, well, I had heard this rumor and everything, if they could all just see the doc--, the, the original I think it would be best for everybody.

THE COURT: Well, let me ask you a couple of questions about that, Counsel. So, if you are, Mr. Pirosko, if you are unable to effectively cross-examine these witnesses today, ah, you would be making objections based just to object for the record and leave it at that or you're expecting me to actually…

MR. PIROSKO: Well…

THE COURT: …rule on those objections at this point?

MR. PIROSKO: No. What we were, what we had hoped to do was just like the motion, ah, that we filed with, ah, Dr. (inaudible), ah, we don't know what testimony, ah, she might need, and so we were asking to bifurcate. What Mr. Halsor and I are suggesting to the Court is that we allow Mr. Halsor to put on his Direct today--and it's probably going to take two hours, three hours?

MR. HALSOR: It'll probably take more.

MR. PIROSKO: Okay. It may take the morning.

THE COURT: Okay.

MR. HALSOR: More.

MR. PIROSKO: And, I, I, I think that it's best that I don't interrupt so that we just allow Mr., ah, Groff to get in the flow of things and present whatever they want. I don't know where it's going, and so I don't want to keep interjecting interruptions, and then we just recess and we reset, my client's willing to waive Speedy Trial, it's not a problem, ah, to allow the Defense to get the videos, get the transcript, ah, prepare, ah, for Cross-Examination and then we come back in

whatever time--I think ta--, getting the transcript is probably going to be the one thing that takes the longest period of time and I know that that's running about four weeks now, I believe.

THE COURT: And, Mr. Halsor, this is one witness you're going to present today?

MR. HALSOR: Actually no, Judge. The People intend on introducing two witnesses, ah, one, our primary witness would be Mr. Jeff Groff with Colorado Department of Public Health and Environment. He would supply the bulk of the testimony. I would then offer to have a second witness, his name is Rick--and I think it's Brough, B-R-O-U-G-H, I believe is the spelling, don't, I'm not a hundred percent on that one—ah, who would be a brief witness, probably less than a half an hour, potentially even less than that. But, Judge, what I'd like to do is, is give a little background as to how we arrived at this situation. As the Court may be well aware, the Intoxilyzer 9000 has been in the field, being utilized by law enforcement agencies since May of 2013, and although the Court is and has been apprised of some hearings, ah, including the Eagle County case, People v Jay Johnson, the, ah, case out of Boulder County, which Mr. Pirosko was on, which is People v George, although some of the issues may be redundant and we think that, Prosecution at least believes that the Court can consider some of the, the proceedings that have gone on with that, nonetheless, what hasn't taken place in the State of Colorado is a Shreck hearing on the scientific validity of the I-9000, and I think, and I, and I don't want to put, ah, words into Mr. Pirosko's mouth, but based particularly on his own statements in the George case, I think what this hearing would be about is not the underlying scientific basis of breath testing, instead it's more specific to his motions about

the scientific validity of the I-9000, ah, that particular instrument, and so, in discussing this sort of procedurally and not casting aspersions, but primarily the way the Defense Bar has sought discovery with regards to this matter is by using Colorado Open Record Act requests, and, at this particular point, using a surrogate, a, a gentleman by the name of Vince Todd, he'd been filing these for the better part of two years, and I think there's been seventy-five or eighty of these requests that have been filed out there, and in talking to Mr. Pirosko—this is just me offering my opinion—the, there's only so much information that they can obtain through that, since they've bypassed the traditional discovery process, and so what I offered to Mr. Pirosko, I said we're not going to answer these issues with core requests, we need to put Mr. Groff on the stand, but understanding that potentially new information can come out from that, I agreed it wouldn't be fair if they were forced into having to do the cross-examination. So I have no problem if we go with the bifurcated hearing. The People will put on their evidence today, we have no objection to continuing this to a later date to allow Defense Counsel to prepare for this in light of whatever information may come from this hearing. I will offer to the Court, my original intention for videotaping this, and I would ask permission for the Court—one of the things that I am proposing for this hearing is that Mr. Groff be able to bring in, which he brought with him, an actual I-9000 instrument, and that as part of the proceeding, we, he would testify and potentially run, ah, some tests and some simulations to demonstrate to the Court the, the scientific validity, the quality control measures, how this instrument really works. That's what I was intending on videotaping. I, I didn't come in to this proceeding thinking I would videotape the whole thing. Ah, I felt that in order to make a clear and effective record for the Court, it would be

useful to, to have that video supplement, ah, in order to do so. I will defer to the judgment of the Court, my intent is to put Mr. Groff on, ah, have him testify about some of the background as to how they selected, how they vetted the I-9000, how it operates, what are the quality control measures that would suffice for the evidence for the Court to make an appropriate ruling, ah, concerning its validity. I have approximately ten, or a dozen exhibits that I would intend to proffer to the Court, including ultimately the video evidence, ah, and so that's how I intend to proceed. I do want to raise one other additional point for the Court for your consideration—ah, Mr. Pirosko has always, already indicated that Mr. Van Schoyck would be willing to waive Speedy Trial, which is fine; the only concern I have, Judge, and I'm amenable to that, is my wife is due with our third child in the middle of October. October 18th is her due date, ah, and so, if the Court's amenable to that, perhaps we could set this out into November, something like that where I can at least, ah, deal with that particular personal issue.

THE COURT: You mean set the second part of this hearing out into November?

MR. HALSOR: I'm, I'm, that's, the only thing I'm saying, Judge, and my concern is, I could say, we're told the month of October, consider the baby can come in any time in that period, so if we were able to get it done in September, but I think that's unlikely in terms of getting the tran--, ah, transcript prepared, so I would probably only be prepared to do this again in November.

THE COURT: So, Mr., ah, and, I'm sorry, your last name again?

MR. HALSOR: It's Halsor, H-A-L-S-O-R.

THE COURT: Mr. Halsor, so are you conceding that the I-9000 warrants a Shreck hearing, is that what you're telling me today?

MR. HALSOR: Judge, I don't concede that it needs one, I think that the technology, as an offer of proof, the technology used to analyze breath samples is very similar to that of the 5000 EN, and, candidly, that the new model simply has more memory, more bells and whistles, more features that the 5000 EN did not have, so, I, I'm not necessarily conceding that, but I am mindful of the fact that people out there, the courts included, have this question, and so I, I, if the Court is, wants to entertain that, I would say it's not necessary but I understand if the Court wants to hear that evidence.

THE COURT: Well, I, I think that's what I, I was hearing you say was basically you're going to present enough evidence where the Court can make a finding eventually after I listen to everything as to whether or not, ah, it in fact is, is reliable and useful to the jury and that the results are verifiable and that it's working the way it's supposed to and it provides to us a sample that can be trusted by the Court and a jury, ah, that predicts what the Defendant's alcohol content was.

MR. HALSOR: I agree.

THE COURT: Similar to what was done with the 5000 EN. So, are you just sort of telling me you would like to use this forum as the forum in which the Prosecution presents all the evidence, ah, with a thorough cross-examination by the Defense, we videotape the whole process, and this sort of puts an end to the motions that are being filed by the Defense bar that is questioning the validity of the I-9000 without each individual court having to decide whether or not they have the Shreck hearing or any parts of the Constitu--, of the, ah, statute are unconstitutional based on presumptions or judicial notice, ah, et cetera, so, is that…

MR. HALSOR: Yes, Your…

THE COURT: …what you're saying?

MR. HALSOR: That's what I'm saying, Your Honor.

THE COURT: Okay. Well, this is all new to me. But it, you know, it makes a lot of sense, and I guess if, if you're conceding that you want to put forth that information and you both agree, I would just like to check with my chief Judge to make sure if the videotaping is appropriate if you both agree that you wish to have it videotaped and you don't have an issue with it being produced to the Defense Bar for purposes of education. Ah…

MR. HALSOR: And, and the Bench, not, not just Your Honor.

THE COURT: Yeah, well, I, I looked at, ah, I've looked certainly at the Eagle County case, I was familiar with the Jefferson County case, I understand the findings , I was familiar with the meeting that was going to be held in Denver County, which I thought was going to sort of do what is being proposed to ha--, to be done today, and I think summarily, they, they didn't go that route—I don't know if they had all the motions filed that I do before me, but if you folks want to spend--and I, I, I set the entire day for this case anticipating we would go through all those motions--if you want to spend the time to do this, I'll certainly give you my courtroom as the forum. Ah, I understand, Mr. Pirosko, you cannot do an effective cross-examination so you can just make a record at the beginning and then we can set this for a hearing probably about the same time in November to deal with your issues, ah, with the waiver of Speedy and then we can have an effective cross-examination, and then the Court can make a decision. Does that work?

MR. PIROSKO: It, it, it does. I have a couple of comments, but, ah, I

think we're on board so far.

THE COURT: Okay.

MR. PIROSKO: Ah, the first, Your Honor, is, understanding that we don't know when the constitutional motions will be heard as far as the stop and statements, I would be conceding my client's identify for the purpose of…

THE COURT: Okay.

MR. PIROSKO: …of those hearings.

THE COURT: Appreciate it.

MR. PIROSKO: I don't know when we're going to get to that, but there's no, ah, I would ask the Court to allow Mr. Van Schoyck to be excused or the rest of the day. There's really no need for him to sit through all of this, ah, legal evidentiary stuff.

MS. HUESER: And, Your Honor, my officer is present. He was actually in the courthouse on another filing and got delayed…

THE COURT: Okay.

MS. HUESER: …so he's here now, and I also have the document appointment Mr. Halsor, if I may approach?

THE COURT: Okay. How is this videotaping going to be done, Counsel, or audiotaping or both?

MR. HALSOR: Judge, what I am going to propose is, I, I guess that's what I would be looking for from the Court is, does—and this might be, ah, understanding that Mr. Groff's testimony, the other witness's testimony is, is subject to being transcribed—does the Court want the whole proceeding videotaped?

MR. PIROSKO: (Inaudible)

THE COURT: Ah, you anticipate two or three hours?

MR. HALSOR: It could be longer, Judge.

THE COURT: Okay. I mean, I, I truly did, I have the day.

MR. HALSOR: You booked a whole day?

THE COURT: I booked the whole day, yes.

MR. HALSOR: I don't think we'll go 'til 5 o'clock.

THE COURT: Okay. Well, I'll give you as much time as you need. We can certainly have a lunch break, but you have the equipment to do this?

MR. HALSOR: I do, Your Honor.

THE COURT: Okay. All right. Let me just, ah, talk to my chief Judge, make sure that, ah, he's comfortable with the idea that we are going to, ah, audio- and video-tape this, and then, I, I believe, Mr. Halsor, you've already conceded that Mr. Pirosko can share this with the Defense Bar? I mean, I think that's the purpose for doing it?

MR. HALSOR: I think it's the purpose so we don't have to replicate these hearings over and over throughout the state.

THE COURT: All right. Okay. Then let's take a recess, I'll take the, ah, the testimony on the constitutional motion right after the recess, and then I'll allow your client to be, ah, dismissed.

MR. PIROSKO: I still do have some responses, but, ah, it won't affect…

THE COURT: Okay.

MR. PIROSKO: …your speaking with the Chief Judge.

THE COURT: All right. I shall be back shortly.

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THE COURT: Thanks. All right. We're back on the record in Case Number 13-T-9903. All right. And I apologize for the delay, folks, it took me a while to, ah, to get the Chief Judge's ear, but as soon as I did, he said there would be no problem with audio-and video-taping the entire presentation. So, ah, let's do the constitutional motion first. It actually was just filed, Mr. Pirosko, as a Motion to Suppress Statements. Obviously, to get there, you have to, ah, have a proper stop, so I'll allow all the information in at this point. For the People?

MS. HUESER: The people would call Nicholas Wilson, Your Honor.

THE COURT: Sir, if you'd come forward and to my right, please? Raise your right hand. Do you swear and affirm that your testimony before this Court today will be the truth, the whole truth and nothing but the truth?

THE WITNESS: I do.

THE COURT: Have a seat. Sir, your voice is going to be tape-recorded. It's important that you speak up and into the mic. Your witness, Counsel.

OFFICER NICHOLAS WILSON,

the witness herein, having been duly sworn, was examined and testified as follows:

BY MS. HUESER:

Q Officer, would you pleas estate your full name and spell your last name for the record?

A Officer Nicholas Wilson. Last name is W-I-L-S-O-N.

Q And what is your occupation?

A I am a, currently I'm a detective down at North Metro Drug Task

Force.

Q Okay. And were you in law enforcement on August 25th of 2013?

A Yes, I was.

Q And where were you working at that time?

A Ah, Patrol for the City of Northglenn.

Q And how many years' law enforcement experience do you have?

A Ah, about seven and a half.

Q And what kind of training did you go through to become a police officer?

A Ah, you go through a, a basic academy. Ah, once you get out of the academy, then you have to do the in-service or the in-house with the agency that you're hired with, and that kind of training consists of Domestic Violence, DUI's, ah, basic, ah, contact on the street, ah, case law, ah, and pretty much Fourth Amendment, ah, search and seizure issues, ah, a lot of legal, ah, and that's about it.

Q And so, do you have training specific to DUI investigations?

A I do.

Q And what kind of training is that?

A We go through, ah, annual, ah, training that's mandated by the agency, ah, and that's put on by our SFST instructors, Standardized Field Sobriety Test instructors through Northglenn.

Q Okay. And then are you certified in some way to perform Standardized Field Sobriety Tests?

A Yes.

Q Okay. Ah, and were you on duty, ah, or what were your duties

when you were a patrol officer with Northglenn?

A Respond to routine calls, ah, handling traffic accidents or, ah, pretty much go and be proactive, go out and find DUI's, find, ah, anybody committing crime, ah, but in specifically that night, we were working at a multi-jurisdictional DUI saturation in Adams County.

Q Okay. And what is a DUI saturation?

A Ah, it's, pretty much, they usually do 'em county-wide, which means all the different agencies within that county, ah, get together, ah, go to a briefing that's mandated, you have to attend the brief meeting in order to do the saturation. They hand out a briefing sheet, you go over the briefing sheet, it has all the jur--, jurisdictional boundaries that you're allowed to do the saturation in, ah, and then you go out and do, enforce DUI enforcement.

Q Okay. And you said that on August 25th, that's what you were doing?

A Correct.

Q Okay. And at about 2 a.m., where were you patrolling?

A Ah, I was riding as a passenger, ah, Officer Rob Smith was the driver, we were a two-man unit in a marked patrol car, ah, and we were driving southbound on I-25, ah, about the 103-hundred block, approaching Thornton Parkway.

Q Okay. And at that time, did you observe, ah, anything unusual?

A Ah, yeah, we observed a, ah, vehicle in the Number Two lane, which would be the center lane, ah, weaving in and out of its lane. Ah, to be a little bit more particular on that, it's, ah, the tires were outside of the white dotted line and that reoccurred several times, so he was not maintaining his lane.

Q Okay. After you observed that kind of driving behavior, what did you and Officer Smith do?

A Ah, we initiated a traffic stop on the vehicle, and the vehicle pulled over right, pretty much right at the exit to Thornton Parkway southbound on I-25.

Q Okay. Did you approach the vehicle?

A I did.

Q Okay. Ah, on what side did you approach the vehicle?

A I did a passenger-side approach.

Q And what occurred when you approached the vehicle?

A Ah, the window rolled down, I made contact with, ah, Kenneth Van Schoyck—I hope I got that right—ah, and he was the sole occupant of the vehicle.

Q So was it the passenger side window that he rolled down at that point?

A Yes.

Q Okay. And when he rolled down the window, what did you observe?

A Ah, he was driving, ah, I smelled an odor of an unknown alcoholic beverage coming from within the vehicle. I then, ah, asked Kenneth if he had anything to drink or consumed any alcohol, and he stated that he had a beer around 8 p.m. and that was it.

Q Okay. Did Officer Smith also make contact with the Defendant at that point?

A He did, he came up on the driver's side. Ah, at that point, the window was then rolled down on the driver's side, and Officer Smith took over

the contact from there.

Q Okay. During this initial part of the contact, were there any other officers other than you and Officer Smith present?

A No.

Q Okay. And you were on one side of the car, he was on the other side of the car…

A Cor--…

Q …were you both in un--, uniform?

A Both in uniform, yes.

Q During this interaction while the Defendant was in the car, did you at any time draw your weapon?

A No.

Q Did Officer Smith?

A No.

Q Ah, did you at any time give the Defendant any commands?

A No.

Q Did Officer Smith give him any commands?

A No.

Q Ah, what kind of con--, what kind of tone of voice did you and Officer Smith use?

A Ah, just a, a common, ah, voice. I don't know, just normal talk, plain talk, plain speech, whatever.

Q Did either of you physically restrain or touch the Defendant in any way during that conversation?

A No.

Q So after this initial contact where he said that he had a beer, ah, what did you or Officer Smith do?

A Ah, at that point, like I said, Officer Smith took over the conversation from there, ah, but I could still hear the conversation. Officer Smith then re-asked him, ah, what he'd had to drink, ah, and then at that point, Officer Smith then asked if he would be willing to perform some voluntarily roadside maneuvers, at which, ah, the Defendant did agree to perform.

Q And did Officer Smith use that term "voluntary roadside maneuvers"?

A Yes.

Q And so after he asked the Defendant to perform voluntary roadside maneuvers and the Defendant agreed, ah, what did they do?

A Ah, he asked the Defendant to step out of the vehicle, ah, and it's kind of tough on the highway, it's, ah, pretty dangerous, so we, we had to place, ah, Kenneth in a remotely safe area to perform the roadside maneuvers as best we could, ah, and then I, I kinda maintained, ah, what a cover officer would do at that point, and that's, like, just scene security there, if you want to call it that, where I make sure that, you know, if there's a car comin', that we get out of the way, if there's any officer safety issues, anything like that, and that's pretty much what I, what I did at that point when Officer Smith began to, ah, administer the voluntary roadside maneuvers.

Q So would it be fair to say that you observed the maneuvers but didn't really critique them?

A Correct.

Q Okay. And, was there anything out of the ordinary about the way in

which Officer Smith conducted the roadside maneuvers?

A No.

Q And after the conclusion of the roadside maneuvers, did Officer Smith, ah, make a determination as to whether the Defendant had performed them as a reasonably sober person would?

MR. PIROSKO: I'm going to object, it calls for speculation.

Q Fellow Officer Rule…

THE COURT: Counsel?

Q …Your Honor.

THE COURT: And, in, I'm sorry, there was, what was your question?

Q Whether Officer Smith made a determination as to whether the Defendant was ar--, was, performed the roadsides as a sober person would.

MR. PIROSKO: It's asking this officer to determine what was in the other officer's head.

THE COURT: Well, did he, I mean, is there a foundation as to how he would know?

Q He observed the, the roadsides being conducted and then he observed what the officer did after the conclusion of the roadsides.

THE COURT: Ah, if he can testify as to what he saw and if he, in fact, saw the officer make a determination, then I'll allow it.

Q Were you able to, to see whether Officer Smith made a determination as to whether the Defendant performed the roadsides as a sober person would?

A The decision that Officer Smith made was to make the arrest by

placing the, ah, Defendant in handcuffs.

Q Okay. And, after the Defendant was arrested, ah, did, did you or Offi--, you and Officer Smith transport him to the police department?

A No, we transported him to the, ah, Command post, ah, which was at pre-determined location and it was off of 84th and Grant Street, and that's where we transported, ah, the Defendant to.

Q Okay. Did you advise him of Expressed Consent?

A I did not, Officer Smith did, but we advised him when I was present, so I did hear the advisal.

Q Okay. And, after he was advised of Expressed Consent, what was his response?

A A breath test.

Q Okay. And, did you conduct a breath test?

A I did, yes.

Q What instrument did you use to conduct a breath s--, breath test?

A The 9000 Intoxilyzer.

Q Okay. And, on August 25th, 2013, were you certified to operate the Intoxilyzer 9000?

A I was.

Q Did you conduct the breath test in accordance with your training and the protocols established to, ah, administer a breath test with the 9000?

A I did.

Q During the administration of the breath test, did anything occur that would lead you to believe that the instrument was not functioning correctly?

A No.

Q Okay. And what was the result of that test?

MR. PIROSKO: Object to foundation and speculation, hearsay.

THE COURT: Counsel?

Q Hearsay is not a proper objection at a motions hearing. He's not speculating as to what the result was, he saw it on the printout. I guess I can ask him, "Did you see it on the printout?"

THE COURT: You can establish the foundation as to how he would know.

Q Did the Intoxilyzer come up with a result?

A Yes.

Q Did you review that result?

A Yes.

Q And what was it?

A Point…

MR. PIROSKO: Object to foundation.

THE COURT; I'm going to find that she's laid an appropriate foundation. He was an eye-witness to the result of the Intoxilyzer, so, I will allow it, overrule the objection.

A Point zero-nine-zero.

Q No further questions.

THE COURT: All right. Cross-Examination?

CROSS-EXAMINATION

BY MR. PIROSKO:

Q Officer, you said you received a briefing sheet?

A Yes, that's correct.

Q Do you still have that?

A Ah, it's usually when we do these saturations, they usually include it in the case file.

Q Okay. How many pages was that briefing sheet?

A I can't be exact but probably two or three, that's front and back.

Q I have no further questions, Your Honor. I'd move for, ah, discovery of that briefing sheet.

THE COURT: Okay. Anything on Re-Direct?

MS. HUESER: No, Your Honor.

THE COURT: All right, thank you, sir.

A Thank you.

THE COURT: Other witnesses for the People?

MS. HUESER: No, Your Honor.

THE COURT: All right. Any witnesses to be presented by the Defense?

MR. PIROSKO: No, Your Honor.

THE COURT: Summary argument for the People?

MS. HUESER: Your Honor, with regard to reasonable suspicion for the stop, the officer testified that he observed the vehicle weaving over the dotted line several times and that provides reasonable suspicion for the stop. After that, the question is whether the investigation is reasonable in scope. Ah, the officer indicated he smelled an odor of alcohol; the Defendant admitted to drinking. He was asked to consent to voluntary roadside maneuvers, he did so consent. There's no coercion involved, there's no evidence of any sort of coercion or undue influence in securing that consent. The Defendant then performed

roadsides, ah, the roadsides were performed, as far as the evidence shows, in accordance with the standards. Ah, the officer who performed the roadsides then made a determination that the Defendant had not performed them as a reasonably sober person and put the Defendant into custody, he was properly advised Expressed Consent and there's been no allegation otherwise. Ah, the test was performed in accordance with the, the training and the, ah, officer was properly certified. I would ask the Court to deny the Motion to Suppress.

THE COURT: Okay. And, Mr. Pirosko?

MR. PIROSKO: Thank you, Judge. Your Honor, first of all, I, ah, respectfully disagree with the Court's, ah, statement that this, ah, motion only had to do with statements. In the motion, we do talk about the, ah, stop and detention and the search…

THE COURT: Is there a Motion to Suppress Statements of August 29th, your motion number seven, is that what we're talking about?

MR. PIROSKO: Judge, I'm looking at, I'm looking at what I have marked as, ah, my motion Number Six.

THE COURT: Number Six? You know what, that actually was not included with what the Court received, so, ah, let me see what you have in your hand.

MR. PIROSKO: Okay. This was, ah, set at the same time, on Monday, November, or January 13th.

THE COURT: Yeah, I got everything but that.

MS. HUESER: And, Your Honor, I did receive a Motion Number Six that he's referring to.

THE COURT: The Court did not. (Pause) Okay. All right. And

we'll make a copy, I'll give this back to you, it'll be in my file as well, but, Counsel, I received every other motion but this motion from you.

MR. PIROSKO: I understand.

THE COURT: Thank you.

MR. PIROSKO: Your Honor, based on the evidence today, I'm asking the Court to, to, ah, grant that, ah, motion. Essentially, what we have here is a, ah, traffic infraction of, of weaving, at best, and an odor of alcoholic beverage. The People have decided not to put on the officer that, that provided the, ah, roadside maneuvers to find out how they were administrated, how they were interpreted. All this officer said was that what he observed was after the roadside maneuvers my client was placed under arrest. The--, there's no indication that the administration or interpretation of those maneuvers from the other officer was used in that officer's determination for probable cause to invoke Expressed Consent, and so what we have here is that my client essentially had an odor of alcoholic beverage on his breath, and that's not enough even with the weaving to invoke Expressed Consent in this case and require my client to submit to a blood test or a breath test. Because of that, the People have not met their burden to show that there was probable cause to invoke Expressed Consent or probable cause to arrest and charge him with the alcohol-related offenses, and I would as--, ask for those, ah, charges to be dismissed.

THE COURT: For the People?

MS. HUESER: Your Honor, the other officer is on vacation, and given the posture of this case and the age of this case, ah, the People do believe that there's sufficient probable cause with the erratic driving of the Defendant, the door of alcohol and his admitted drinking, ah, he did admit to both officers that he

had been drinking that evening. Ah, also, I think it's a reasonable inference that when, ah, the officer conducts roadsides and conducts them in the manner that was then prescribed--as this officer testified there was nothing unusual about the administration of the roadsides--ah, that his, it's reasonable to infer that the result of the roadsides is, ah, calcula--, is part of the calculation, ah, for probable cause.

MR. PIROSKO: Judge, the People have asked for a continuance in this case before. If they had a problem with their witness being on vacation, they certainly could have done so. They chose not to do that. That's their decision on how to prosecute. We don't prosecute people on inferences, we prosecute people on evidence. There is no evidence because the People have chosen not to put it on. The odor of an alcoholic beverage and even with his statement that he was drinking, he had one drink. If we want to take this on inferences, one drink does not make you incapable of operating a vehicle. That is not enough for invocation of the Expressed Consent law.

THE COURT: All right. So the Court has the case before it regarding Defense motions to suppress statements, as well as motions to suppress the initial stop and basically everything that happened after that. Testimony from this officer indicated that, in fact, on the date August 25th, 2013, that he was on patrol in Northglenn, ah, basically Adams County, southbound I-25 at the 103rd block near the Thornton Parkway when he noticed a vehicle in the Number Two center lane, weaving in and out of the lane, indicating that the tires were outside of the dotted white line, ah, more than once, and he, ah, based on that, initiated a traffic stop. The Court would find that that would be reasonable suspicion for a stop, and that the officer had the authority to do that. He

indicates that he went to the passenger side of the vehicle, ah, Officer Smith went to the driver's side of the vehicle. The Defendant, who Defense Counsel has stipulated ID today was in the driver's, ah, side of the vehicle and there were no other passengers in the car, and, ah, the officer testified that, in fact, he did smell an odor of alcoholic beverage coming from the vehicle. Ah, the officer also indicated that at that point he had asked the Defendant if he'd had anything to drink, the Defendant indicated he'd had a beer around 8 o'clock p.m. And the testimony was that the stop occurred about 2 o'clock a.m. Ah, there was also testimony that, in fact, ah, Officer Smith came to the driver's side of the vehicle and, ah, at some point had also asked the Defendant if he'd had anything to drink and the Defendant, ah, acknowledged that he had. At that point, Officer Smith asked the Defendant if he would perform roadsides, indicated that they were voluntary. The Defendant was removed from the car, taken to a safe place to have the roadsides conducted. Officer indicated this was on I-25 and that basically and from that point forward, he acted more as security, ah, that the Defendant was taken to a remote safe area and that this officer stood by while Officer Smith conducted the roadsides. The officer testified that after the Defendant completed the roadsides it was at that point that Officer Smith, ah, decided to arrest him and take him into custody. The Fellow Officer Rule provides that a combination of observations between two separate officers can constitute probable cause--probable cause for the arrest, probable cause, ah, to, ah, be established regarding whether or not, ah, the Defendant should be advised of Expressed Consent as well. So, basically, there was initial stop, reasonable suspicion for that based on the weaving. The Court would find that the admission to drinking, and, yes, the Defendant said one beer, but the cop,

the officer can interpret that as ingesting alcohol and use his own determination as to whether that would be an accurate or inaccurate statement, but there was an admission of drinking, there was poor driving based on the weaving, ah, there was the, ah, failure to, ah, complete the roadsides, ah, in a manner where an officer would not decide to make an arrest, ah, and, ah, and then ultimately there was the result of the breath test being a point-oh-nine-oh. So the Court would make these findings, reasonable suspicion for the stop, statements made were when the Defendant was out of custody, in fact in the front seat of his, ah, vehicle, and admissible at trial if, in fact, relevant. The Court would find they were voluntary. The officer's testimony was that there was no coercion, the guns weren't drawn, ah, the test--, ah, roadsides were voluntary, ah, and based on those, Officer Smith decided to make the arrest and, ah, Officer Wilson witnessed the entire, ah, episode from the initial stop to the arrest of the Defendant and actually conducted the breathalyzer. So, with that, I would deny the Motion to Suppress, ah, the statements, the Motion to Suppress the stop, make a finding that there was probable cause for the, ah, arrest, as well as probable cause to request the roadsides. So, Mr. Pirosko, any additional record regarding that?

MR. PIROSKO: Ah, Judge, I just want to state that I, I understand the Court's, ah, ruling. I don't believe that there was anything in the testimony today that said that the, ah, as far as the performance on the roadsides that they were not done as a sober person would, and because, ah, they essentially have no meaning in this case because we don't know what roadsides were—he could have done them perfectly and the officer decided to arrest him for some other reason, and so that evidence is incompetent as far as determining, ah, whether

or not there was, ah, probable cause to invoke Expressed Consent. Ah, as far as statements go, ah, since, ah, this was a, ah, essentially a hearing on statements and the other officer was not here, any other statements that, ah, they would intend to introduce at, ah, trial, I would ask that, ah, they not be allowed to, as well as any other indications or, ah, evidence from, ah, the officer who was not here to determine reasonable suspicion or probable cause to invoke Expressed Consent or place him under arrest because he was not subject to cross-examination at this hearing.

MS. HUESER: First of all, with regard to the statements, ah, any statements made during this initial stop, this officer observed, observed no coercion, ah, provided testimony to that effect, so I think any statements, whether they were made to this officer or to Officer Smith, ah, are obviously voluntarily and not, ah, during custody.

THE COURT: So, Ms. Hueser, I think the point he's making is there are no other statements than were admitted before the Court today, which I heard as admission to two separate officers that he had had something to drink, period. There are no other statements.

MS. HUESER: And that was, that's my understanding. I'm sure there was some interaction during the roadsides with Officer Smith giving instructions and maybe, and the acknowledgement that he understood the instructions, however, I don't think that there's been any evidence that any of that interaction was custodial…

THE COURT: Okay.

MS. HUESER: …(inaudible)

THE COURT: Well, that's what you needed to present today

because I'm going to limit you to the statements that the Court heard today, this is what this case was, this, this was set for a motions hearing, so whatever statements I hear today will be admissible, no other statements are admissible.

MS. HUESER: Okay. And, as far as, ah, the not allowing the other officer to testify as to the roadsides, ah, there's…

THE COURT: Yeah.

MS. HUESER: …an entitlement to discovery at a motions hearing…

THE COURT: Yeah, this is the motions hearing, it deals with Fourth Amendment issues, so the officer's going to be able to testify as to his observations at trial, but we've already established what statements will be brought in. Okay. Anything else?

MR. PIROSKO: No, Your Honor, thank you.

THE COURT: All right. So that takes care of the constitutional issues, and if your client wishes to be excused, that's fine with the Court.

MR. PIROSKO: Ah, just (inaudible) just so we, ah, get on the record, if the Court wants him to, ah, waive his, his right to a Speedy Trial…

THE COURT: Okay.

MR. PIROSKO: …on the record, we can do that. And also, ah, as far as, ah, Mr. Halsor's request to push this into October/November, we have no problem with that.

THE COURT: Okay. All right. So, Mr. Schoyck (sic), you understand that your attorney has, ah, is going to motion to continue the jury trial, just based on everything else that's going on here, the fact that we're going to have a long motions hearing today, we're going to set another long motions hearing into the month of November to meet everybody's schedule and your jury

trial will be held after that, and we still have to give everybody enough time to get a transcript for all those motions and review it before the trial. So when you first, ah, entered a plea of Not Guilty, the District Attorney's Office had six months from that time to have you tried. Today, because essentially your counsel's going to motion to continue the jury trial to get all this other stuff done, you're going to end up waiving your right to have a speedy trial, it's going to be reset today and it's going to be reset, ah, within six months of today's date, so do you understand all that?

MR. VAN SCHOYCK: Yes, Your Honor.

THE COURT: And do you agree for all that to happen?

MR. VAN SCHOYCK: Yes.

THE COURT: All right. So let's look at a jury trial date with you folks, ah, and a motions to continue what we don't get finished today. And we're thinking of the motions sometime in November and the jury trial after that with enough time for both counsel to get transcripts.

MR. PIROSKO: And, again, because this is a, just an evidentiary-type, or a, ah, motions, ah, I would ask that my client's presence be excused for the next motions hearing.

THE COURT: Any objection by the People?

MS. HUESER: No objection, Your Honor.

THE COURT: Okay. We'll allow your client not to be present at the next motions hearing.

CLERK: How's December 12th at 8:30 for motions?

MR. PIROSKO: I think we wanted to go into October.

MR. HALSOR: Well, if, if we can go November?

MR. PIROSKO: November's fine.

Ms. HALSOR: Is there any time in November?

THE COURT: We don't have anything on our schedule that will work in November, folks.

MR. HALSOR: Okay.

THE COURT: That December 12th date is the first date that we actually have a, a day that we can actually…

MR. HALSOR: (Inaudible)

MR. PIROSKO: We can go as late as, as close to November as possible, correct?

MR. HALSOR: Ah, this is fine, I can, I can do that date.

THE COURT: December 12th at 8:30 work for both counsel?

MR. PIROSKO: September 12th?

THE COURT: December 12th, Counsel.

MR. PIROSKO: December?

THE COURT: December 12th.

MR. PIROSKO: Oh.

MR. HALSOR: Yes, Your Honor.

THE COURT: Thank you.

MR. PIROSKO: That's fine.

THE COURT: Okay. And then we'll set the jury trial.

CLERK: For jury trial, how's February 9th and 10th, 2015?

MR. PIROSKO: Fine.

THE COURT: February 9th and 10th? And then I believe Speedy would be running at the end of February, so, not much time for resetting.

MR. PIROSKO: Ah, what, ah, what time is on both of those days?

CLERK: Eight fifteen.

MR. PIROSKO: Okay.

THE COURT: All right. And you folks anticipate the trial can be handled in two days? Yes?

MR. PIROSKO: The trial?

THE COURT: Yes. Yeah, the actual trial.

MS. HUESER: I do, Your Honor.

MR. PIROSKO: Oh, probably at that point. Well…

THE COURT: I assume we would have litigated all the pre-trial motions…

MR. PIROSKO: Yeah, I…

THE COURT: …appropriately and we're really just taking testimony at that point?

MR. PIROSKO: I, I don't, I don't know. Well, I'm, I'm sure what, ah, all of us hope happens is some of these issues get flushed out in the next four months in other cases. It's not necessary to, you know, rehash them in trial here, so, I don't know.

THE COURT: Okay. Well, it'll, it's far into the future, so we'll, we'll give the, ah, February 9th and 10th…

MR. PIROSKO: That's fine.

THE COURT: …and we'll just leave the 11th clear in case we get into a third day for whatever reasons, okay?

MR. PIROSKO: Okay.

THE COURT: All right. Okay, thank you.

MR. PIROSKO: I have some other housekeeping.

THE COURT: All right.

MR. PIROSKO: Ah, first of all, I don't know who's going to be testifying, I'd ask for a Sequestration.

THE COURT: The Court will order a Sequestration Order.

MR. PIROSKO: Ah, and also, just because we're all in the courtroom and to kind of, like, ah, get festering issues off the table, ah, if the Court is not aware, ah, Vince Todd, ah, Your Honor, Vince Todd was a licensed attorney in Colorado, he was suspended. He has chosen not to get reinstated. He acts as a paralegal for many defense attorneys, and he essentially is, ah, he doesn't work for me specifically, he does a lot of work for me, he drafts a lot of my pleadings, ah, and I don't think that anything that he's done is, is improper and, ah, as far as the, essentially the Defense, not just myself but the Defense Bar, trying to get information on this Intoxilyzer 9000, ah, I personally can say as an officer of the Court that I've been trying to get this information in many different forms, in many different ways, in many different jurisdictions including discovery requests directly from the District Attorney's Office, requests directly from, ah, the Department of Health, and I've been ordered by, I don't think they can do it, but I've been ordered by the Dis--, the Attorney General's Office no longer to contact anyone at the Department of Health directly, so I've abided by that. Since I can't do that, I have to rely on things like oral requests because they started that fight, not me. I have sent letters directly to CMI in order to try to get disco--, discovery from them; they have said, essentially, we're not giving you anything, you can sue us in Owensboro, Kentucky.

THE COURT: And, Mr. Pirosko, you're making this record for what

purpose, sir?

MR. PIROSKO: Well, just to, because I, I want to make sure that, ah, everyone understands that this is a, we've gotten to this point because of the fact that all of our other attempts to get this information have been thwarted.

THE COURT: Okay. But it sounds like the CDAC and the District Attorney's Office at this point is willing to give you the information that has been difficult for you to get in the past, and hopefully that will happen today.

MR. PIROSKO: I, I appreciate the fact that I'm going to essentially walk out of this hearing or within the next week with more than I walked in with.

THE COURT: Okay.

MR. PIROSKO: And I appreciate that sincerely. I…

THE COURT: Okay, good. Well then I'm glad we're being audio- and video-taped so that, that it can be presented and you can have a good look at it and you can prepare your cross-examination and the witnesses' testimony will be transcribed and so everything will be out there at this point, hopefully. Okay.

MR. PIROSKO: As far as issues go, I agree with the, ah, Prosecution, the Government's side, that, in fact, this is not a hearing on the scientific principles of breath testing.

THE COURT: Okay. So this is technically not a Shreck hearing, okay.

MR. PIROSKO: A--, and, and I, just because we're all probably more familiar with it, if, if this were a Radar case, I wouldn't be arguing the Doppler, Doppler shift is, is not scientifically valid, but I would be arguing that the Falcon 5000 may not do what it's supposed to do. In this case, I'm not arguing Henry's

law and Beer's law and the principles that these instruments are supposed to, ah, function with, ah, this has to do with the 9000.

THE COURT: The verification and valida--, validation process, correct?

MR. PIROSKO: Correct.

THE COURT: Okay. Okay.

MR. PIROSKO: Essen--, essentially, ah, from my standpoint and the standpoint of a lot of other defense attorneys, Your Honor, what we have now with the 9000, our position is we have a black box and we're being told, and, and the bench is being told trust us that this thing does what it's supposed to do. We have tried to get manuals; they don't have any manuals. And my understanding is there are a couple of different types of manuals--technical manuals, operators' manuals; I don't even know now many types of manuals there are just for this 9000. Colorado is supposed to have those as part of their Request For Proposal. They sent them back to, my understanding is they sent them back to CMI. I'm just surmising, and my, you know, my conspiracy theory is that the fact, the reason that they were taken out of Colorado is so we don't have access to them as Defense Bar.

THE COURT: Explain to the Court what CMI is, please?

MR. PIROSKO: They're, CMI is the manufacturer of the 9000.

THE COURT: What does the CMI stand for?

MR. PIROSKO: Ah, I think it stands for, the CMI used to be, originally started, I believe, in Durango, Colorado, and I think it was, ah, I might be wrong, Colorado Mountain Instruments or something like that.

THE COURT: Okay. Okay. So, but, we're…

MR. PIROSKO: They, they…

THE COURT: …we're at today is they're willing to present this and allow you to disburse it to the Defense Bar and give you some time to do a cross-examination of the witnesses presented today, even allow you to present your own expert and let the Court make the call, so, if we're there, let's, let's go. Ah, I'm good for gettin' on, on the road here.

MR. PIROSKO: Sure. Ah, before, ah, we start, I just want to make sure, and I'd like to put this on the video once it starts that, or the Court can, I don't care who does, just say that, you know, the Defense, my concern is that if this ever gets to some type of appellate court, the appellate court says, well, you know, the Defense had the opportunity to make objections on the record…

THE COURT: Okay.

MR. PIROSKO: …during this video and didn't, and I just want it clear at the beginning of the video so any court or, or prosecutor or defense attorney or expert who looks at this in the future knows that everyone understood that the reason the Defense essentially sat back in this case is because I was not provided enough discovery up front to be able to make appropriate, ah, objections. I would be asking the Court to incorporate by reference any of the arguments that are included in my motions that I've already filed. Ah, I would just be essentially making a global continuing objection to the testimony today about hearsay, foundation, due process confrontation, any type of notice, any type of judicial notice that the People may ask the Court to take, ah, discovery violations and speculation—ah, those are all the ones I could just think of off the top of my head.

THE COURT: And I would assume for the CDAC and District

Attorney's Office, you're not going to be having the Court make any rulings today based on Mr. Pirosko's position?

MR. HALSOR: That's correct, Your Honor.

THE COURT: Okay.

MR. HALSOR: I think after speaking with Mr. Pirosko, this is part the Prosecution putting on their evidence and there is some discovery function to all of this.

THE COURT: Okay.

MR. HALSOR: I think understanding that there's a lot of evidence, ah, Mr. Pirosko wanted to streamline it—one of the difficulties I have in understanding everything he just said is, I think what might be appropriate for judicial economy is we'll have some natural breaks in the testimony, ah, and perhaps if Mr. Pirosko wants to make some of his objections then, not necessarily disrupting flow of testimony, that might be better for a cleaner record.

THE COURT: Okay, that's fine.

MR. PIROSKO: I, I, yeah, I don't want to just be standing up and, and interrupting…

THE COURT: Okay.

MR. PIROSKO: …(inaudible)

THE COURT: I appreciate that.

MR. PIROSKO: Ah, I was, ah, handed a, ah, just a rough draft of a list of exhibits that the People may introduce, which are numbered. I don't know if the Court, does the Court have that?

THE COURT: I do.

MR. PIROSKO: Ah, in addition to asking for the, ah, audio and video

by next Friday, I would appreciate, ah, copies of anything that gets introduced today with the exceptions of I don't need copies of Number Three and Number Nine, the rules and, ah, Mr. Van Schoyck's discovery.

THE COURT: Okay.

MR. HALSOR: Judge, I'll note for the Court, and I did provide a copy to Mr. Pirosko as well as the Court, ah, I have, with all my exhibits, three copies…

THE COURT: Okay, good, thank you.

MR. HALSOR: …so, so both the Court will have one and Mr. Pirosko will have one, they're bo--, that are all labeled.

THE COURT: Did those all fit in one binder, Counsel?

MR. HALSOR: Ah, Judge, it, it was a heavy, heavy haul-in…

THE COURT: Right.

MR. HALSOR: …this morning, but….

THE COURT: Okay. Okay. That sounds fair.

MR. PIROSKO: I'll, I'll stipulate, I'll stipulate to admission of exhibits. I don't have to be shown the exhibits. Ah, also I just want to make sure that everybody, I, I make my point clear, although I don't, I don't know that I need to do this, there is a statement or, and again, I'm, ah, paraphrasing, that, in fact, ah, the results of this hearing is going to be the, the all end all and everyone's going to be bound by it, I, I think that I may be bound by it in this courtroom in the future, but certainly no other defense attorney's going to be bound by this…

THE COURT: And I think the only thing…

MR. PIROSKO: …no other courts.

THE COURT: …we're really doing is audio- and video-taping it and

making it available for other defense attorneys to review it.

MR. PIROSKO: Sure.

THE COURT: Your cross-examination will be based on your individual research and what you think is appropriate for this case and will apply to this case, but it doesn't bind anybody else…

MR. PIROSKO: Right.

THE COURT: …what you did or didn't object to or what you allowed to be admitted or whatnot. Okay.

MR. HALSOR: Judge, my next question would be, then, is, understanding I've agreed to this release, is the Court entertaining that the release to other parties, other defense counsel, is during the pendency of this hearing and prior to, ah, when we have our next hearing, or is the Court finding that this is, is basically a closed hearing until the Court rules?

THE COURT: Ah, I think Mr. Pirosko, for fairness, I'm doing this for this hearing, but with the acknowledgment by both that eventually it will be shared. Ah, I think at a minimum it won't be shared until after we complete the second part, and very likely until after this case is, is taken care of, but I could listen to further argument.

MR. PIROSKO: Well, and, and I, I appreciate that, I understand that everyone wants to control it as much as they can. I, I, ah, and maybe Mr. Halsor and I can talk after the…

THE COURT: Yeah.

MR. PIROSKO: Obviously, I think it's in everyone's best interest, ah, throughout the state to get as much accurate information as possible, to as many people as possible so we can try to, ah, clear up the courts' dockets and…

THE COURT: Well, and I think that if this is going to happen in this courtroom, then it probably should happen from beginning to end before everybody else gets pieces of what's happened. That's my initial thought, but I'll listen to more as we go along at a minimum, whatever is recorded and re--, and released today should remain with the parties until we complete the rest of this motions hearing, at a minimum, so…

MR. PIROSKO: My…

THE COURT: …on the next court day for sure.

MR. PIROSKO: …my, my request and obviously I'm not an expert in this area and I would like to be able to at least share this in order to properly prepare for Cross just like I would with anyone else with, with my paralegal, who is Vince Todd, with the understanding that he is not allowed to use this and disseminate it into any other type of case or discuss it with any other attorneys, ah, with any, ah, expert witness, ah, that I may need to talk about because of the scientific nature of all of this stuff. I…

MR. HALSOR: Ju--, I, I have no objection to that consultation with experts, I would ask the Court to issue a protective order as it relates to Mr. Todd.

MR. PIROSKO: That's fine.

THE COURT: Okay. So the understanding is that you can share this with any expert that you anticipate might, ah, testify in your case or that you need the assistance of that expert to, to completely understand the, the evidence, ah, and, specifically, because of the relationship you have with Mr. Todd and the relationship he has with the Defense Bar, there'll be a protective order that indicates while you can share it with him for purposes of this case, he

cannot share it with the rest of the Defense Bar until this Court allows that to happen.

MR. PIROSKO: If, ah, because this case may take several, ah, months to get to the point where it could be disseminated, if Mr. Halsor and I are, and, and/or the, that Mr. Halsor and the District Attorney talk more about this and in, and we come to some type of agreement that maybe it's best to, ah, disseminate some or all of this, does the Court want us to run that by the Court?

THE COURT: Yeah. As long as you folks agree, I hope you're understanding this, I'm not going to have a big objection. It's when I have to make the call, then I'm going to listen to what's going on and see what's going to be in the best interests not only of this case but generally the whole defense community and the prosecuting attorney, ah, a community as we're trying to actually get these issues taken care of on a, on a more general basis, ah, for other people to, to get some direction on it. So, so we're clear on the protection, ah, order as it relates to Mr. Todd and Mr. Pirosko's ability to share this information with an expert for his assistance, ah, or an expert that he wishes to testify at trial, ah, as long as it's within the realms of this case. Okay.

MR. HALSOR: Thank you.

THE COURT: So we'll put that in the minute order. Okay , anything else?

MR. HALSOR: Judge, I have two things.

THE COURT: Okay.

MR. HALSOR: The first one is, obviously Mr. Pirosko has filed an assortment of motions. Some of them have redundancies in them, but I think the underlying tenor of all of these associated with the I-9000 and the Department of

Health is, is this scientifically reliable. That's the evidence that the People intend to introduce and produce to satisfy my burden, and just for clarification, I, I would like some sort of statement from Mr. Pirosko that, indeed that addresses his motions issues.

MR. PIROSKO: It, it does, and I was reading, ah, through the motions again last night and, ah, I realize, too, that some of these are redundant and my, ah, thought is after we go through this and I get the, ah, information and go through it, I'll likely probably be, ah, withdrawing one or two or more of those motions.

THE COURT: Okay. And, can I, can I, just a little foresight here, the motions that you filed regarding the unconstitutionality of the DUI statute, the presumptions contained in the DUI statute, the judicial notice in the DUI statute, that's what you're telling me potentially might be withdrawn if, in fact, we can square up the issues with the Intoxilyzer 9000. And I, that's in the future?

MR. PIROSKO: I, I understand.

THE COURT: Yeah, but I mean, I don't, I don't need to…

MR. PIROSKO: This has gotten, this has gotten so complicated that I've had to graph this out…

THE COURT: Okay.

MR. PIROSKO: …with dates and statutes and rules and regs and everything. I, it's not ready for, ah, to be published today, but, I don't understand necessarily, this, it's like to tryin', getting through all these issues is like trying to read a electrical wiring diagram, you know, what happened when and somebody changed some wording here and that affected this and, and I…

THE COURT: Okay.

MR. PIROSKO: …I appreciate that.

THE COURT: Okay. But I did read through all your motions, I also read through the, ah, responses, I've looked at the Eagle County case, I'm aware of the Jefferson County case, I have a good idea of what's going on around the states. I think what we're doing today will be productive, ah, and then if you decide in the future to withdraw some of those motions, I'm sure there'll be no objection. Ah, but, if you want the Court to, ah, listen to the evidence and have them litigate it, I would do that as well.

MR. HALSOR: And I think, Judge, I'm just trying, I don't want to be in a position where I put on all my evidence on the front end and then it's said, well, you didn't address this issue…

THE COURT: Yeah, today we're…

MR. HALSOR: …I mean, I want some latitude on Re-Direct if necessary to clean up any of the legal issues that might be available.

THE COURT: I assume we're not going to take any testimony today regarding the statutes, constitutionality, or the presumptions or the judicial notice, et cetera…

MR. PIROSKO: No, that's…

THE COURT: …we're going to take testimony on the Intoxilyzer 9000 and the reliability and validation process.

MR. PIROSKO: Well, we won't be, I, I don't think that we should be addressing, ah, those…

THE COURT: Okay.

MR. PIROSKO: …matters because some of the argument in there is going to come from (inaudible)

THE COURT: Okay. All right.

MR. PIROSKO: I, I know Mr. Halsor has one other issue, I, and I have just two tiny ones—one is , I have a 2:30 sentencing in Boulder--I have emergency coverage there. If for whatever reason we're getting close to the point where we can wrap up and I can race up there, I'd appreciate it, ah, but it's not critical.

THE COURT: Okay.

MR. PIROSKO: The other thing is, I'm very hard of hearing.

THE COURT: Okay.

MR. PIROSKO: ...especially in this courtroom. While this is going on, is there any objection to me sitting in the jury box?

THE COURT: I don't have a…

MR. HALSOR: I have no objection to where Mr. Pirosko is. I, I'm, my only last issue, Judge, I'm going to turn on the camera now, and the only thing is, when we break and I turn things off, I just want reminders from everybody—make sure the camera is running.

THE COURT: Okay.

MR. PIROSKO: Just put a sticker on there.

THE COURT: Mr. Pirosko, we actually have a hearing device, do you want to use it, do you want to try to use it?

MR. PIROSKO: No, it'll mess up my hair.

THE COURT: Okay. All right. So, ah, is this everybody where we need to be to be…

MR. PIROSKO: Yes, Your Honor.

THE COURT: Okay. Witnesses out of the courtroom that, ah, that

aren't necessarily need to be here based on the Sequestration Order?

MR. HALSOR: I have no witnesses in the courtroom subject to the Sequestration Order.

THE COURT: Okay. All right. All right. Then, ah, for the People, call your first witness?

MR. HALSOR: Your Honor, the People call Jeff Groff.

THE COURT: (Pause) All right. Good morning, sir. If you would come forward to my right, have a seat there in that box. Raise your right hand. Do you swear and affirm that the testimony you're about to give to this Court will be the truth, the whole truth, nothing but the truth?

THE WITNESS: I do.

THE COURT: Have a seat. Your voice is going to be tape-recorded. It's important that you speak up and directly into that mic.

THE WITNESS: Okay.

THE COURT: All right. Your witness, Counsel.

MR. HALSOR: Thank you, Your Honor.

JEFFREY GROFF,

the witness herein, having been duly sworn, was examined and testified as follows:

BY MR. HALSOR:

Q Good morning.

A Good morning.

Q Mr. Groff, would you go ahead and spell your, ah, your full name, please?

A Ah, my name is Jeff Groff, my last name is spelled G-R-O-F-F.

Q And just for the record, would you spell your first name, please?

A Ah, J-E-F-F-R-E-Y.

Q And, Mr. Groff, how are you employed?

A I'm employed by the Colorado Department of Public Health and Environment.

Q And what are your responsibilities or positions within the Colorado Department…

A Currently, I am the…

Q Hold on, Mr. Goff. Can I finish question?

A Of course.

Q All right. What is your, your position or your responsibilities within the Colorado Department of Public Health and Environment?

A I'm currently the Evidential Breath Alcohol Testing Program Manager, and I am also the Laboratory Certification Program Manager.

Q Can you briefly describe what your role and responsibility is with regards to the Laboratory Certification, ah, Department?

A Ah, the Laboratory Certification Program is responsible for the regulatory oversight of various types of laboratories located within and outside of Colorado. These include, ah, diagnostic laboratories under the Clinical Laboratory Improvement Amendments, CLIA, ah, this includes the environmental laboratories under the, ah, Environmental Protection Agency's Safe Drinking Water Act; this includes milk and dairy laboratories under the FDA Graded Pasteurized Milk Ordinance; ah, we have state requirements for forensic toxicology laboratories and we, ah, oversee, ah, that perform testing for DUI and DUID purposes, and just recently we have added a ano--, another group of

laboratories that, ah, retail marijuana testing facilities that are testing, ah, retail marijuana products.

Q Can you explain for me what your duties are as the manager of that program?

A Ah, I oversee three, ah, fulltime, ah, inspectors, ah, I administer the program, ah, I help to facilitate, ah, and co--, ah, the, the inspections that occur, ah, I perform reviews of inspections, ah, write policies, just manage the programs in general.

Q Do you have, have you had previous experience in that department?

A I have.

Q Can you describe that please?

A Ah, I have, ah, started with the Department of Health in 2005. Ah, as a medical technologist. Ah, I started working in laboratories in 1989, and I've been with the, ah, State of Colorado for twenty-two years, and in that period of time, I've worked in numerous types and different types of laboratories--ah, Level One trauma centers, I've worked in reference laboratories, I've worked in the Student Health Laboratory, ah, on, on the CU Boulder campus. Also on the CU Boulder campus, I, ah, started and, ah, operated a, ah, clinical research, adult clinical research, ah, laboratory, ah, an NIH, under the National Institute of Health. Ah, after, ah, those periods of time, I took a job with the Department of Health as a Laboratory Regulator, ah, as an inspector, and then started with the Department in 2005 in that capacity.

Q And what exactly did you do as an inspector?

A Ah, well, I went out and inspected these various types of labs that

I've mentioned to the either federal or state requirements, ah, that, ah, laboratories are, are held to.

Q And, were you responsible in any of those capacities for overseeing quality control measures?

A I was responsible for evaluating the quality control measures that were in place by these various laboratories, to make sure that they were compliant with the regulatory requirements that they were, ah, under.

Q And as such, did you have to utilize or reference particular quality assurance references or rules from the Colorado Department of Public Health and Environment?

A I did. Ah, one of the, ah, laboratories operate under, ah, su--, one of the groups of laboratories operate under State rule that is promulgated by the Department of Health.

Q And can you describe for me what would be your experience with what would be developing policy or implementing policy concerning quality assurance or what could be, you know, validation of scientific procedures? A

So, part of the inspection process and my experience is, ah, laboratories have to have, ah, quality control and quality assurance programs as a part of, ah, how they operate, and, and in order to remain compliant with any requirement, ah, what, regardless of the type of laboratory. Ah, when evaluating laboratories to those standards, ah, very often you have to evaluate, ah, the validations that are performed on various types of instruments, show they're compliant with existing standards, ah, you have to review quality control, ah, and corrective actions, ah, any quality assurance measures that they have in place to monitor the performance and the, ah, quality of the results that are being, ah, reported by

that particular laboratory.

Q Judge, may I approach the witness?

THE COURT: You may.

Q Mr. Groff, I'm showing you what is, ah, marked as People's Exhibit Number One. If I may tender a copy to the court?

THE COURT: Thank you.

Q Mr. Groff, do you recognize that?

A I do.

MR. PIROSKO: I'm stipulating to (inaudible).

Q All right. Just for record purposes, Mr. Groff, what is People's Exhibit Number One?

A Ah, it's a, ah, CV for myself.

Q Do you recognize that CV?

A I do.

Q Did you create it?

A I did.

Q Ah, do you recognize, ah, approximately how old that is?

A I believe this was, maybe, from around 2010, perhaps. I don't have a, a date as to when I created this one, unfortunately.

Q Does that detail some of the experiences for which you just described?

A It does.

Q And, does that serve as sort of a memorialization of what some of your experiences are and what your training, background, education are?

A It does.

Q Judge, I would move to admit.

THE COURT: And, Mr. Pirosko, you agreed that you wouldn't be objecting to any of the Plaintiff's exhibits, correct?

MR. PIROSKO: All of his exhibits can be admitted.

THE COURT: Okay. All right. So, People's, ah, Number One would be admitted for purposes of this hearing.

Q Thank you, Your Honor. Mr. Groff, what sort of educational experience do you have, ah, that provides this background for what you've done in your career?

A I, ah, am a medical technologist, ah, went to school at the University of Colorado, ah, have a degree in Molecular Cellular and Developmental Biology, ah, I have, ah, and I am a registered medical technologist, and which basically means that, ah, my whole career has been revolved around laboratory sciences. Ah, twenty-two years with the State, I think about twenty-seven years, twenty-five, twenty-five to twenty-seven years in total in this field.

Q And, can you describe, you said you also manage the Evidential Bre--, Breath Alcohol Testing Unit, correct?

A I do.

Q And can you explain what that unit is, what its role and responsibilities are?

A The Evidential Breath Alcohol Testing Program, or which we refer to as the EBAT Program is responsible for the maintenance, repair, calibration, verification and certification of the Evidential Breath Alcohol Testing instruments that are used statewide. Ah, we're responsible for performing, ah, facility

inspections, we have about a hundred and sixty-five, ah, roughly, ah, agencies around the state where these instruments reside, ah, we're responsible for the training and certification--ah, currently we have about five thousand or just a little over five thousand officers statewide that have been trained and certified by the Department We're responsible for maintenance of records, we're responsible for providing testimony and support. The primary role and mission of the EBAT Program is to ensure that the instrumentation, the breath alcohol instrumentation that is being used is capable of providing a, a scientifically accurate, precise, and, most importantly, a fair result to the individual that's been tested on it.

Q And what sort of training and background do you have in breath alcohol testing?

A In 2008, I was, ah, made Program Manager for the EBAT Program. Ah, the, the laboratory principles that are in place in the EBAT Program are consistent with the same types of laboratory practices that you would find in diagnostic lab, environmental lab, so and so forth, the fundamentals are the same. Once I was, ah, became the Program Manager, I attended training, ah, at the Borkenstein Course, ah, which…

Q Can you describe what that is?

A Borkenstein is, basically, the preeminent course for, ah, this field of science, of, ah, forensic, ah, testing for DUI and DUID applications, it's held at the University of Indiana Blooming--, ah, Bloomington. Ah, it's a week--, a week-long course for breath alcohol testing, week-long course for, ah, forensic toxicology testing. Ah, I also attended training, ah, by the manufacturer on the instrumentation that was in place or in use statewide at that time, which was the Intoxilyzer 5000 EN. The manufacturer of that Intoxilyzer is the, ah, a company

called CMI, and they're based out of Owensboro, Kentucky. In addition, ah, annual conferences are attended, they're referred to as the users groups, whereby this is the closest to a professional organization for breath alcohol testing, ah, where breath alcohol testing personnel from around the United States, or the provinces in other countries attend and we discuss, ah, matters related to the technology to, ah, programs, policies, accreditations, ah, all aspects related to this field, ah, and I do attend the, ah, International Association of Chemical Testing conferences, ah, when I can.

Q And, within those conferences, do they address issues concerning breath testing?

A They do. The…

Q Do they address quality control issues?

A They do.

Q Validation methodologies?

A They do.

Q And, you said that you were trained by CMI, the manufacturer of what was then the 5000 EN, correct?

A Correct.

Q And, can you describe what sort of training that you received?

A The training that's received, ah, oh, it's a week-long course, forty-hour course, and it entails, ah, the calibration, the maintenance, the repair, ah, troubleshooting of these instruments, ah, it's a level of training that's consistent with the, the level of training that's provided to their service technicians that work at the factory itself, and provides us the, the, ah, hands-on training and, and, ah, knowledge base that's needed in order for us to be able to work on these

instruments and fo--, perform the functions that I've described.

Q And what are sor--, what are the functions with regards to these instruments that your program provides?

A We're responsible for the repair, the maintenance, calibration, ah, verification of that calibration and the certification of these instruments, ah, before they're placed in the field for subject testing.

Q And do you have personal training that allows you to complete these functions?

A I do.

Q Can you describe that?

A The training includes, ah, the training includes, ah, technical training on the instrument, we have to, we tear the instruments apart down to the component level, ah, we perform repairs, they, they even teach us how to solder, if you're not very good at soldering you get solder components, ah, they go through the, the schematics of these instruments, ah, the analytical bench of these instruments, which is the components used to actually measure alcohol, ah…

Q Say that again, what was that expression?

A It's called an analytical bench, these are the, the components within the instrument themselves that are used to actually measure alcohol in a breath sample. Now, it's just the internal, some of the internal components of the instruments themselves.

Q How the instrument achieves analyzing breath samples?

A Correct.

Q And just for clarification of the record, that was "bench", B-E-N-C-

H?

A B-E-N-C-H, it's referred to as the analytical bench, that's, it's the components of the instrument that perform the actual measurements themselves.

Q And, have you ever testified as an expert witness with regards to breath testing?

A I have.

Q Do you know ho--, approximately how many times?

A Approximately, I don't have a, ah, a strong tally—I'm going to say approximately fifty to sixty times, roughly, statewide. Ah, primarily up and down the Front Range, but, ah, about fifty to sixty times since 2008.

Q In Colorado?

A In Colorado.

Q In county courts?

A County courts.

Q In any district court cases, to your knowledge?

A I have testified in District Court cases.

Q And, as such, do you have any knowledge or recollection as to what you were endorsed as an expert in or what you were recognized as an expert in?

A Ah, typically I am recognized as an expert in, ah, theory, the operation, psychological factors, ah, that can impact a breath alcohol test, ah, the operation, maintenance, calibration repair, processes and procedures employed, ah, within breath alcohol testing program, ah, programs, and, ah, typically, that's the nature of it.

Q Your Honor, at this time, I would like to have Mr. Groff recognized as an expert, really acknowledged as an expert in all facets of the breath testing process to include its development, maintenance, ah, programmatic, ah, development including the validation process, ah, to ensure the integrity of the results. I know that was a little wordy.

THE COURT: An expert regarding the development, maintenance and validation process for the Intoxilyzer, would that be appropriate?

Q I think so, Your Honor.

THE COURT: Mr. Pirosko, any objection?

MR. PIROSKO: For the record, I would object. I think it's over-broad. Ah, I don't have enough information to properly voir dire him.

THE COURT: Okay.

MR. PIROSKO: I, I appreciate the fact that he may be an expert in certain specific areas, but, ah, I'm not giving him full range.

THE COURT: Okay. And based on my review of his CV and his testimony before me under 702, I'll go ahead and designate Mr., ah, Groff as an expert in the, ah, areas of development, maintenance, and validation process for the Intoxilyzer.

Q Thank you, Your Honor. All right, Mr. Groff, let's see here, you testified that you oversaw the 5000 EN when it was in service in Colorado; can you describe for me, to your knowledge, how long was the 5000 EN in service?

A The five thou--, ah, Intoxilyzer 5000 EN went into service in Colorado in 1998, and it remained in service until May 1st of 2013. Prior to the 5000 EN was the Intoxilyzer 5000, it's just a previous generation, and that instrument was in service in Colorado from 1985 until 1998.

Q And, I believe you testified you came on to the EBAT Program 2005?

A Ah, I came, I started working with the Department of Health, for the Department of Health as a Laboratory Inspector in July of twen--, 2005. Ah, I was, ah, made Program Manager for the Evidential Breath Alcohol Testing Program in January of 2008.

Q And you said that it wasn't, it was May of 2013 that the I-9000 went into service, correct?

A Correct, May 1st.

Q So, in that period of time, you were responsible for overseeing the 5000 EN as part of, as the Manager of the EBAT Program, correct?

A Correct.

Q Now, can you provide for the Court a little bit of background of the decision-making as to why the Department was seeking out a new instrument?

A The Intoxilyzer 5000, the technology that, ah, was in these instruments was developed in the late 70's, early 80's, and so it was, it has been compared to as Atari technology, it was, it was pretty old technology, and so it had limitations to that technology. As time went on, it became more and more difficult to, ah, acquire parts, replacement parts. As an example, one of the parts that was used in these instruments was referred to as a chopper motor and it was a little motor that spun a wheel. That little motor was a tape recorder motor, and it has become, as you can imagine, quite difficult to find tape recorder motor making companies throughout the world, so as the, as the, ah, manufacturer started to struggle with finding replacement parts, it was having a downstream impact on us being able to find replacement parts. In addition, the instruments

had, ah, a service life of about seven years, is what, ah, the manufacturer will, will say, give a service life of seven years. The Department engaged in pretty robust, ah, maintenance and calibration and repair protocol, so we were, in essence, almost able to double that service life as a result. The instruments that are, ah, would still be in service today, but it got to the point where it was just becoming more problematic and difficult to find, ah, the replacement parts that were needed, so it was time to engage in, in replacing these with, ah, new equipment and, in addition to the benefits that new equipment offers.

Q Now, just to clarify, Mr. Groff, with regards to the 5000 EN, you said that the technology was limited, and understanding that the scope of this hearing isn't about the science of breath-testing, it's more about the validation and reliability of the I 9000, but can you briefly describe for the Court what the technological basis for the 5000 EN was in terms of detecting breath alcohol?

A So, the Intoxilyzer's, the technology that it's based upon is called infrared spectroscopy. Ah…

Q All right. I'm going to interrupt you, because I want you to spell what you just said for the record.

A Okay. Infrared, I-N-F-R-A-R-E-D, spectroscopy, S--, spec--, S-P-E-C-T-R-O-S--- thanks, Mr. Halsor. Can I have pen? Is that possible? (Pause) Thank you. S-P-E-C-T-R-O-S-C-O-P-Y, spectroscopy.

Q Thank you. Can you describe briefly how infrared spectroscopy works?

A Infrared spectroscopy is based off the principle that, ah, molecules, ah, whether it's a molecule or whether it's an element absorb infrared, or they absorb electromagnet energy at, at a specific frequency. What that means is,

electromag--, electromagnet spectrum is energies of light, energy, ah, cosmic rays, gamma rays, these are high-energy, ah, frequency bits of light, and as, as it slows down, it gets to an area where it will be become familiar with, which is the visible spectrum, ah, that what we can see in light because it's running at a certain frequency. As it continues and those, the waves get longer and longer, you start looking into the infrared, you start moving into radio waves and things of that nature. An example is, a couple of examples, actually is, ah, an astronomer can look at a distant star and they can tell us what that star is comprised of, and it's not by going to the star itself and scooping a sample of that star material, but it's by looking at the light that's being, ah, received, ah, electromag--, --magnetic energy has been received, and breaking it down into the various absorption patterns. So when they look in the visible spectrum as an example, when they are looking at hydrogen, they're going to see, you know, the reds and the oranges and the yellows and (inaudible) the blues and violets, but the, as you're looking through that whole rainbow, there might be a, a line where there's no color, you know, there's, like a dark line, where that light energy is being absorbed, it's not able to be seen because that molecule or that, that element is absorbing it there so you might see a dark line down the red, you might see another dark line in, in the green, you might see another one in the yellow, and that, where you see those, that pattern is a unique fingerprint for that particular element, so when they see that they know that that's hydrogen, and how much is being absorbed is proportional to how much is actually present, so the more of that light, the darker that is, ah, that's been absorbed and the, the more con--, higher concentration there is. So every element, ah, every molecule, to include ethanol, ah, which is what we're here to talk about, has a unique absorption

fingerprint. For ethanol, it's (inaudible) infrared and so the instruments are designed to measure the amount of absorption of light as it's moving through the instrument itself and through the analytical bench that I'm referring to, and when there's no sample within the instrument itself, it's able to see all the light. But when a sample is introduced and ethanol is, ah, present, not as much light is able to be received at the detector at those particular frequencies, ah, that it is specifically looking for. It's looking at, at those frequencies for absorption. So, no light, or at no alcohol, it's going to be able to see all the light. If alcohol is present, it's not going to be able to see as much light as when it's being absorbed by that particular molecule. The more alcohol that's present, the more light that's being absorbed, and so that absorption is proportional to the concentration of alcohol. That, in a nutshell, is the basic theory of infrared spectroscopy.

Q Mr. Groff, can you explain the difference, if any, between blood and breath testing?

A Blood testing is a natural measure of the alcohol that's circulating through the bloodstream, ah, whereas breath testing is an indirect measure of the alcohol concentration found in the blood through a breath sample.

Q Okay. And, when the Colorado Department of Public Health and Environment began looking for a new instrument—first of all, can you tell me approximately when that took place?

A The Department initiated, ah, the Intoxilyzer 5000 EN replacement project in the spring of 2010. Ah, the project, ah, the instruments were put into service on May 1st, 2013.

Q It was 2010?

A It was 2010.

Q And, can you explain, sort of, how that process went?

A Ah, the, it was broken into phases and in the first phase of the project, ah, we needed to identify an adequate source of funding to be able to cover the expense for replacing these instruments. Ah, after the source of funding was adequately, ah, identified and obtained and secured, ah, then, in December of 2011, we initiated the bid process, and whereby in, ah, January of 2012, a formal Request For Proposal or RFP was then, ah, released.

Q Your Honor, may I approach the witness?

THE COURT: You can. Thank you.

Q Mr. Groff, do you recognize People's Exhibit Number Two?

A I do.

Q What is it?

A This is the Request For Proposal that was submitted by the Colorado Department of Public Health and Environment.

Q And what was it for?

A It was for the, ah, Breath Alcohol Testing, ah, Unit, EBAT Request For Proposal for the replacement of, ah, to find a replacement instrument for the 5000 EN.

Q And can you tell me approximately when that was issued?

A January of 2012 is when this RFP was released.

Q And, did the request detail some requirements as to what you were looking for in terms of an instrument that would replace the 5000 EN?

A It does.

Q And, can you reference the document, is there a description of

some of the content for which you were, your department was looking for, for a new instrument?

A So, in this Request For Proposal, the following criteria that was submitted was reviewed and evaluated to, it was the minimum qualifications, the minimum qualifications for the instruments that we needed, the technology, functionality, expandability, how easy is it to use, the cost, the cost to maintain it, ah, the ease of repair, the maintenance, the calibration of the instrument, the service, warranty, ah, legal support if needed, manufacturer training, technical support.

Q So let me ask you this, Mr. Groff—based on your experience as the EBAT Manager, were you familiar with, sort of, the new generation of instruments in and around 2012?

A I was. There are only about, about five manufacturers that make these things worldwide as it is, ah, so, I was familiar with the, the existing technology that's out there for evidential breath testing devices.

Q And my question to you is, you described in your testimony that the 5000 EN had limited technol--, or was limited technology; was the new generation of instruments that you were looking for also based on infrared spectroscopy?

A It was. When I refer to limited technology, I'm referring to the age of the technology and the limitations in replacing the technology within the 5000 EN. The fundamental basis of how, ah, the instrument actually measures alcohol between the 5000 EN and the Intoxilyzer 9000, the I-9000, remains the same. It's still infrared spectroscopy, so infrared technology.

Q And we're getting ahead of ourselves in terms of, of that selection

process, but just to clarify this point, the I-9000, which is now the instrument in operation in Colorado, does it still analyze breath alcohol on the fundamental same concept as the 5000 EN did?

A It does.

Q All right. So, with regards to, ah, the RFP—and, Judge, if I haven't, I would move to admit People's Two?

THE COURT: And for the Defense?

MR. PIROSKO: I have no objection.

THE COURT: Okay. So People's Two will be admitted.

Q And, Mr. Groff, with regards to that, you described some of the criteria, ah, for all of that, so can you explain for the Court what the process was thereafter for soliciting potential vendors' bids.

A Once RFP was submitted, ah, the vendors, ah, who met the minimum qualifications submitted their instruments for evaluation. There were three vendors that actually submitted instrumentation for evaluation--CMI, Inc., ah, Draeger, and…

Q All right, hold on.

A …National (inaudible).

Q You just, and I apologize for interrupting you—for record purposes, you mentioned CMI, which is just CMI, correct?

A CMI Incorporated, yes.

Q And then you said Draeger; could you spell that for the Court?

A D-R-A-E-G-E-R.

THE COURT: And again tell me, CMI stands for?

A That's, ah, that's always the question—ah, it's just CMI, Your

Honor. Ah, it, it doesn't have, there's, it's urban legend.

THE COURT: Okay.

A I don't know. They were a company that started originally in Colorado, I believe up in Milliken, and I think the initials, ah, the three stood for the initials of the three founders maybe. Nobody really knows, they just, they just refer to themselves as CMI.

THE COURT: All right, thank you.

Q Now, Mr. Groff—give me just a moment, please. (Pause) Mr. Groff, I'm showing you two exhibits—People's Exhibit Number Three and Four; do you recognize those?

A I do.

Q And what is People's Exhibit Number Three?

A This is the Colorado Department of Public Health and Environment, it's the Colorado Board of Health Rule, ah, Rules pertaining to the testing for alcohol and other drugs, 5CCR1005-2.

Q And, with regards to that, ah, when were these rules enacted?

A These rules went into effect on February 1st, 2013.

Q And understanding that this RFP process, ah, began in 2012, nonetheless, did you utilize these rules in the ultimate selection process of the I-9000?

A These, the rules that were in place when we started the selection process, ah, was a previous version to this, so I guess I, I'm sorry, I don't understand where you're going with your question.

Q Well, I, I guess my question to you is, did you rely upon certain rules, ah, or did the rules govern what some of the selection criteria would be for

the new instrument?

A Okay. Ah, yes, the answer to that is yes. They, ah, there are, there are specifications within the rules, the previous version and this version, that, ah, go to the testing sequence itself on, ah, the calibration checks, the tolerances within the calibration checks, ah, actions to take if certain types of exception messages, ah, occur, so those were all factors that were taken into consideration during the evaluation, knowing that those requirements would remain intact.

Q (Pause) Mr. Groff, I am going to show you what I have now listed as Exhibit Three-A; do you recognize that?

A I do.

Q And I apologize, Judge, I have one copy, I can submit copies later for the Court. Do you recog--, ah…

THE COURT: And, Counsel…

Q …what exactly is Three-A?

THE COURT: Do you mind, Counsel, just for my benefit, let my clerk copy this now?

Q Please.

THE COURT: And we can distribute it now? That'll just take us a minute.

Q And, Judge, based on, on Mr. Pirosko's agreements, I'm just going to move to admit People's Three, Three-A, and Four.

THE COURT: Okay. And I didn't see a copy of Three.

Q My apologies, Your Honor.

THE COURT: Thank you. (Pause) And, Mr. Pirosko, you have no

objection to Three, Three-A and Four coming in, sir?

MR. PIROSKO: I'm not going to have an objection to those three, ah, exhibits being admitted. I would like some clarification, I'm not su--, ah, I'm not sure what this, ah, word is "uncontrolled" with the "e" on it. I'm, I'm not trying to make fun, I don't know if it's anything different. I need to know what that means, and this is where I'm going—as we go through these exhibits, I don't want to get in trouble should someone else have one of these exhibits and they got it from someplace other than me, so when we're talking to Mr. Groff, if at some point we can go through this list and say are any of these exhibits not public knowledge, ah, it's, it's for my own protection.

THE COURT: Okay. That's fine.

Q I have no problem with that, and I will ask the question to Mr. Groff to clarify what this means.

THE COURT: Okay, thank you.

Q And I'll do that right now. Ah, Mr. Groff, with regards to the exhibits that wou--, have been tendered…

MR. PIROSKO: All of 'em.

Q …all, all of them, ah, are there any of, well, I have to clarify, one of the exhibits the People intend to tender is the results from Mr. Van Schoyck's test, but with regards to the documents that have been admitted before you, ah, are there any, to your knowledge, that are not publicly available or have not otherwise been made available through public avenues?

A Ah, not to my knowledge. These are publicly available.

Q Can you…

THE COURT: And, Counsel, are you talking about all the exhibits

here or just the ones that he's been able to testify so, to so far?

Q Well, I haven't showed him all of them, Judge, so if we need to…

THE COURT: Okay.

Q …revisit this, ah, particular question, ah, later on, I can certainly do that.

THE COURT: Okay. All right. So, with that, I will go ahead—well, let's, I want to hear the, ah, explanation for why it does say, ah, "uncontrolled copy", and if there's any significance to the additional "e" at the end, and then I'll, I'll address your admission request.

Q Thank you. Mr. Groff, are you familiar with why some of these documents have a watermark on them…

A I…

Q …as referred to as "uncontrolled copy"?

A I am.

Q Could you please explain that?

A Ah, this is a standard practice, ah, and consistent with, ah, 17-02-5 compliance. Its, its mechanisms were document control. Ah, in a laboratory especially, ah, when a, ah, a technician is working at the bench and they're working from an SOP, it's very important that they are working from a copy of an original, and so once that copy has been made, whether it's being used within that, that organization or it is provided externally to the organization, then it's designated as a copy that's no longer in control of the, the Department or the division or that group. It's to ensure that, ah, that it's recognized that this is not the original, this is a copy of that original and so that's, that's the basic, ah, reason why, ah, they are marked as "uncontrolled copies". Why there's an "e" at

the end of this watermark, I can't explain, it's a misspelling.

Q Ju--, ah, Mr. Groff, with regards to the documents that I tendered before you, that have that watermark on there, and I, I'll start with, ah, the, I think it's the Quality Assurance Manual, which is People's Exhibit Number Four…

A It is. Correct.

Q ....you're saying that that watermark is simply meant to represent it's not the absolute original document?

A Correct.

Q Now, have you had the chance to review People's Exhibit Number Four?

A I've seen, yes, I've seen People's (inaudible)

Q All right. Can you testify that that, in fact, is the Quality Assurance Manual?

A It is.

Q And that's a complete and accurate copy?

A It's a complete (inaudible). Do a page count, it looks like it's the correct one and it's Revision Twelve. Ah, it was last revised 12-20 of 2012. (Pause) It looks like it's, it's complete in its entirety. So I would say this is a fair and accurate dis--, ah, copy of the Lab Services Division Quality Assurance Manual…

Q Thank you.

A …for this version.

Q Would you please look at both People's Three and Three-A, which reference the CDPHE Rules.

THE COURT: And I think my clerk has Three-A, she's copying it.

Q That's fine. For now, Mr. Groff, People's Three? Are you familiar with the rules?

A I am.

Q Can you say by reviewing that document whether, to the best of your knowledge, that's a complete and accurate copy?

A It's complete and it contains, ah, all of the appendices, so, yes.

Q While we're waiting for the clerk to return with copies of the 2009 version of the rules, I would like to ask you, with regards to both, well, let's turn to People's Four, the Quality Assurance Manual.

MR. PIROSKO: (Pause) Judge, while we're waiting on that, could I make a record?

THE COURT: Give us just a minute, Mr. Pirosko.

MR. PIROSKO: It's just a housekeeping matter.

THE COURT: Okay.

MR. PIROSKO: In the past, on certain documents, mostly they were just things that were provided by CMI or should have been provided, they were things like CMI manuals, the State, through the Attorney General's Office, has objected to those being, ah, turned over to the Defense because of copyright protection. There's a, an exception on, in copyright if it's claimed for educational purposes. While we're going through this, I would also like for the record, ah, if the, ah, Government is claiming that any of these documents cannot be essentially published or dis--, disseminated because of copyright protection. A lot of these documents also are published by the State of Colorado, and so things like the Rules and Regulations, there's no objection there because the original can be found online through, through the official public--, publication. I

don't know if it's the Secretary of State's Office or who, but there is an official document (inaudible)

THE COURT: So is that what you explained about copyri--, copyright applicable to Exhibit Number Four?

MR. PIROSKO: No, I obje--, it, I would just like to know, again to protect myself, if, ah, if the Prosecution is, is claiming that any of these can't be copied or disseminated simply because they're copyrighted documents.

Q Judge, I'm not in a pla--, I don't really have…

THE COURT: Yeah.

Q …standing to say that because I can't speak for the State. Ah, I don't a lot about copyright law, but I know it carries personal liability, so…

THE COURT: Yeah.

Q …I'm not putting any representatives of Colorado on the hook for this, 'cause I don't really have standing to say.

THE COURT: And, Counsel, nor does this Court at this point, but it would just be my standing order that, ah, that nothing is disseminated from this hearing, ah, until the Court's heard the second part of the motions hearing and actually made findings as to, ah, my interpretation of the validity of the instrument. If things are already out there, obviously, like the Rules, you know, it's already requested, it's already publicked (sic), I don't have any, any hold over that, but whatever's presented by way of this hearing, I'm going to ask you not to disseminate it until we're finished with our part here.

MR. PIROSKO: I, I appreciate that. One of the other things I wanted to clarify for housekeeping is, since this is a public courtroom and this is a public, these are, the, ah, public audio, it's my un--, my belief is that I cannot be held to,

ah, (inaudible), or essentially withholding a transcript back. Certainly the video is not, but I think anyone can order a transcript of this hearing, even during the pendency of the case.

Q I agree.

THE COURT: And I think that it's different with copyright—we're talking about…

MR. PIROSKO: I understand.

THE COURT: …somebody else's published material or what they have rights to, but the transcript would be available. It's a public hearing. Okay. So we all have Three-A in front of us, and, Counsel, will you just look and make sure that, that it is Three-A as you presented it so we don't have anything missing and it's exactly the document that, ah…

Q Judge, may I approach?

THE COURT: Yeah.

Q I, (inaudible)

THE COURT: Okay. I'm just going to make sure that what you folks have is what was presented. (Pause) Okay, it's identical. All right.

Q May I proceed?

THE COURT: You can.

Q Thank you, Your Honor. Mr. Groff, do you have Three-A in front of you?

A I do not.

THE COURT: He does not, I have this, Counsel, is that okay?

Q That's fine.

THE COURT: Thank you.

Q Thank you, Your Honor.

A I do now.

Q Mr. Groff, with regards to People's Exhibits—and, just for the record, the, the stickers on all my exhibits say "Plaintiff's", ah, exhibits, but I'm referring to them as People's Exhibit—with regards to Three-A, or People's Exhibit Three and Three-A, are you familiar with both sets of rules?

A I am.

Q Through this initial evaluation process to, for the Department to determine an instrument, were there any rules in Three, People's Three and Three-A over this timespan, understanding that the rules changed sort of midstream. Were there any particular rules that were relevant to the Department's consideration for a new instrument?

A In the Testing, ah, section, Section, ah, Three, ah, well, let me make sure I'm referring to this correctly (inaudible), I m sorry, in Part Four of the Rule, Version, ah, Three, ah, Exhibit Three-A, Part Four of the Rule, "Evidential Breath Alcohol Testing Collection and Testing Procedures", there are components in, ah, the testing process that was taking in consideration, ah, with any instrument that was going to be replaced. One of 'em was, ah, first it had to be an instrument that was going to be approved and, ah, certified by the Department, it had to, ah, be certified, ah, annually, on an annual basis, ah, the, ah, the officers who performed the test must be certified—ah, that didn't change. Ah, breath samples consist—let's see…

THE COURT: And, Counsel, ah, can I ask him, if you don't mind since we are recording this, to refer to the subsections he's talking about as he talks to them…

Q Please.

THE COURT: …talks about ‘em.

Q Certainly, Your Honor. Mr. Groff…

A Ah, so, correct, and I apologize, so, in Part Four, ah, parts that were taken into consideration under Parts Four-point-two, Part Four-point-two-point-one, Four-point-two-point-one-point-one, Four-point-two-point-one-point-two.

Q (Pause) Mr. Groff, with regards to were there any rules that dictated things that dealt with the sequence in how it was analyzed, what the instrument had to be capable of doing or detecting?

A Ah, yes. Method of Analysis is found in the Rule of Four-point three, specifically (pause), referencing the Four-point-three-point-one-point-five is in relation to the twenty-minute, ah, observation, now referred to as deprivation period. (Pause) At Four-point-three-point-one-point-nine-point-one, a system blank analysis must be done, ah…

Q Can you explain briefly what a system blank is?

A A system blank analysis must be used during the test sequence of each evidential breath alcohol test, that’s the air blank step that is performed between each step in the sequence itself, so that, that was a consideration, it’s part of the test sequence. And Four-point-three-point-one-point-nine-point-two, ah, it refers to the use of a, ah, reference standard solution of ethanol concentration, known ethanol concentration, where the tolerance is zero-point-nine-zero to zero-point-one-one-zero grams of alcohol per two hundred ten liters of breath. Ah, that, at Four-point-three-point-one-point-nine, Four-point-three-point-one-point-nine-point-three, the results of those, ah, simulator reference

standards must be within ten, correlate within ten, plus or minus ten percent of each other. Ah, Four-point-three-point-one-point-nine-point-four, if the calibration correlation is not obtained, ah, the instrument's going to provide an exception message with a calibration correlation, ah, exception. Ah, Four-point-three-point-one-point-nine-point-five, for each, ah, EBAT, ah, results of the two subject breath alcohol tests must agree with each other within zero-point-two-zero grams of alcohol. Ah, Four-point-three-point-one-point-nine-point-five-point-one, if the, the zero-point-two-zero grams of alcohol per two hundred and ten liters of breath correlation is not obtained, the instrument will, ah, abort the test and print a no-to-agreement, ah, error message. Ah, at Four-point-three-point-one-point-nine-point-five-point-one-point-one, ah, when the no-to-agreement error message is obtained, the, ah, operator or instructor must, ah, perform the test procedure over again and restart the twenty-minute observation-slash-deprivation period. Ah, at the Four-point-three-point-one-point-nine-point-six, ah, operator must be close enough to be able to, ah, detect, ah, signs of belching, regurgitation, and take foreign material out of the mouth. Ah, at Four-point-three-point-one-point-nine-point-six-point-one, whenever that, those sorts of activities are observed, ah, they have to discontinue the observation period and restart that period, twenty-minute period.

Q Let me interrupt, Mr. Groff. With, with regards to this evaluation process, how the Department went about selecting, were, was there reliance on some of these rules?

A Yes, there was. The, the, the fundamentals of the test process, you know, the, the, the ranges for the calibration checks, ah, the tolerances that were established, the, the process of performing a twenty-minute deprivation

period-slash-observation period prior to testing, ah, what to do when encountering certain types of errors, ah, and, and how that drives, ah, re-testing, the subject had started the process over, ah, you know, how to manage the instrument, how, who is going to be operating the instrument, certified officer, these are the kinds of criteria that are existing in the Rule that were, ah, that were going to remain intact with any instrument that was going to replace the 5000 EN, and so those were the kinds of considerations that were taken into place to make sure that the, any instruments we were evaluating had the ca--, capability of doing that so there was consistency in the, the, the testing process, ah, with any new instrumentation that was selected.

Q Was that criteria spilled out in the RFP?

A Some of it was. Ah, I can refer to that and try to point out those bits if you'd like.

Q Well, at this time, I, I just want to correlate the two, so, that was, when you started this process, you operated under the 2009 Rules, correct?

A Correct.

Q And, so there was criteria contained within that rule that spelled out the parameters for which you could have an instrument, it had to satisfy that criteria, correct?

A Correct

Q And, as this progressed to the ultimate selection, did the 2013 rules as reflected in People's Exhibit Number Three, did they have similar criteria?

A They had similar criteria.

Q Okay. Was there any different criteria between the two rules?

A There was some differences in language, ah, there was dif--, the fundamental criteria, no. Ah, differences in, ah, some of the language that was used, close and continuous observation versus a deprivation period, ah, to describe that twenty-minute period of time prior to subject testing, deprivation better described what that purpose of that, ah, twenty minute was for, ah, there was, ah, references in the previous rule to the 5000 EN specifically; there are no references to, ah, a specific instrument, ah, in the 2013 version. Ah, there are just minor changes, but the substantive, ah, aspects of the test sequence itself, who can run a test, how we handle the facilities, all that remains intact.

Q With regards to People's Exhibit Number Four, the Quality Assurance Manual, is that a manual that's utilized by the Colorado Department of Public Health and Environment?

A It's, ah, utilized by the Laboratory Services Division, which is a division of the Department of Health.

Q And, does that manual provide some, ah, insight or, rather, consideration for the validation methodologies?

A It does.

Q And, are you familiar with Rule Eleven within that manual?

A Do you have a page number, Rule Eleven? Let me see if I can find it here. (Pause) Thank you.

Q I would—thank you, Mr. Pirosko. I would refer you to Page Forty-two. Are you familiar with the criteria labeled out on Page Forty-two under Section Eleven?

A I am.

Q And, can you describe for the Court what that is?

A Ah, this requirement is, ah, referencing the validation of any data, ah, pr--, protocol or piece of equipment. Ah, this, these requirements are taken from the Clinical Laboratory Improvement Amendments, or CLIA, standard requirements for diagnostic laboratories. The State Laboratory performs, ah, the Evidential Breath Alcohol Testing lab program is not the only lab in the State Lab, there's diagnostic, ah, testing of human samples, there's rabies testing, there's testing of water samples, there's a whole myriad of different types of laboratories contained within the Lab Services Division. When, ah, so that which, and, which means that there are a, ah, a lot of different regulatory compliance requirements that these laboratories have to adhere to. The purpose of the division's Quality Assurance Manual is to encompass those, those requirements, those standards of performance into one document that can cover all types of laboratories, to include the Evidential Breath Alcohol Testing Lab.

Q So would you say they transcend scientifically, scientific disciplines?

A It, it transcends different, ah, disciplines within the, the lab sciences.

Q And…

A Basically, whatever the highest bar is for whatever the regulatory requirement might be is the one that was selected as this, this manual was put together. When it comes to validation and the CLIA requirements, it has, ah, it has the, the best defined practice in order to validate a new piece of equipment in order to validate, ah, a new procedure.

Q So does that give you, sort of, a general template for the basis for which you'd go to validate a new instrument?

A It does.

Q And, can you walk through the Court as to what the elements contained within that rule are and explain in lay terms what they mean?

A Okay. So, the laboratory, at, ah, (inaudible) examination procedures, ah, Eleven-point-one, each laboratory that modifies an FDA-approved, cleared and approved test system or introduces a test system that is not subject to FDA, and, and for our discussion today, that would be one of these Evidential Breath Testing devices that are approved by NHTSA, not by the FDA, ah, they, ah, it must include methods developed in-house…

Q And, I'm sorry, Mr. Groff, I apologize for cutting you off—on, on the acronym, NHTSA, do you know, can you…

A Sorry. National Highway Transportation Safety Administration, ah, the acronym is NHTSA. FDA is the Food and Drug Administration. Thank you. I, I forget that.

THE COURT: Can you tell me what CLIA is?

A CLIA is the Clinical Laboratory Improvement Amendments.

THE COURT: Thank you.

A Thank you.

Q And I have one more—what is SOP?

A Standard Operating Procedures…

Q Thank you, Mr. Groff.

A …is SOP. So, as these have been defined, is it okay for me to use these acronyms going forward?

Q Since they've been clarified, with permission of the Court?

THE COURT: You know what, if I don't understand what you're

saying, I'm going to ask you, okay?

A Fair enough.

Q With regards to, you started to explain, or you testified, but just for clarification, the rule in the Quality Assurance Manual discusses FDA approved devices, but the rule you testified to is, this isn't, the I-9000 doesn't fall under the auspices of the FDA?

A Not exactly. Ah, what I was actually referring to here is from these CLIA requirements, and this language is taken from those requirements, is that if there is an FDA-approved testing device for diagnostic testing, then much of this criteria doesn't have to be met. If it's been modified or if it has not been approved by the FDA or it's an in-house method that's being developed, ah, then these criteria that are listed here in the Quality Assurance Manual then must be evaluated or must be, ah, looked at when they're applicable. And these criteria include precision of the instrument.

Q Describe what that means?

A Precision is an instrument's ability to be able to have a repeatable result, so let's say the instrument's measuring a point-one-zero-zero solution. You, precision is its ability to be able to replicate point-one-zero-zero, point-one-zero-zero, point-one-zero-one, point-zero-nine-nine, and you're always going to have a little margin of, ah, measurement, ah, of, ah, variability in this measurement, but, that you're seeing a rep--, repeated result. Analytical sensitivity, how sensitive is the instrument, how, how well can it detect, ah, how high can it detect accurately. Analytical specificity, to include interfering substances, for the I-9000, this is the, ah, the, is the instrument specific to ethanol, is it specific to acetone, is it specific to methanol, is it specific to

isopropanol, is it specific to some other volatile? The instrument specificity is the, what is it really looking for and how specific is it to that, ah, target. Interfering substances includes some of, of, ah, the other volatiles any of the other chemicals that I mentioned, ah, it's specific for, for ethanol, which is what we're concerned about. But it also has the ability to detect other interfering substances. Ah, if somebody suffers from diabetes and they're producing ketone bodies in their breath, ah, that acetone could be picked up by the instrument and it'll stop the test, report what's called an interferent detected, so, so, as it applies to this and the 9000, ah, the specificity in the interfering substances…

Q Can I interrupt? Can you spell ketones?

A K-E-T-O-N-E-S.

Q Thank you.

A The next, ah, criteria is a reportable range of the test results for the test system. The I-9000 has a reportable range from zero to, ah, six hundred fifty grams for two hundred ten liters, so we test it to see, ah, you know, how, how high, what is its reportable range and is it accurate on the low end of that range, the mid-point of that range, the high point of that range. Ah, reference intervals, normal values, ah, again, some of these apply, some of these don't. Ah, normal values for legal application, I suppose could be referenced as a point-oh-five-oh, a point-oh-eight-oh, ah, what is it, point-oh-one, point-one-two-oh, but there's really not a normal value when you're measuring…

Q With regards to that…

A …ethanol.

Q …element, are they, they reference points that maybe are specific to that…

A What it's referring to here is more, ah, applicable to diagnostic testing, so if you're fasting, blood sugar, as an example, is supposed to be less than one hundred grams per deciliter in the morning when you wake up—that's a normal value. If you have, you test your blood sugar in the morning and it's below a hundred, that's, (inaudible) indication of diabetes. If you wake up and test your fast your blood sugar and it's three hundred and fifty, that's not a normal value. So normal value is establishing what is the range of normal for the population.

Q So is it…

A So, this doesn't really apply in this regard for this application, so, again, some of these are applicable, some of 'em not as much.

Q So then, these general sort of quality control measures contained within the Quality Assurance Manual, were those things that were, were contemplated as to how this evaluation ultimate selection and validation of the I-9000, were, were those some governing principles, ah, that would dictate how this instrument was selected?

A Yes.

Q And, you had mentioned that with respect to breath testing instruments, that the National Highway Traffic Safety Administration, referred to as NHTSA, has some say or at least some recommendations with regards to these devices?

A So when a manufacturer develops a, a new piece of equipment, before it can be approved for use and sale in North America, it has to be sent to a third party laboratory, ah, and they're ref--, and they're called VOLP laboratories, V-O-L-P, laboratories, and they perform independent testing. The

manufacturer provides them and, ah, a, ah, quality assurance plan, which basically are instructions on how to operate the instrument itself, and there's a set of criteria that NHTSA and VOLP, at VOLP Laboratories that they challenge it to consistent criteria, ah, to determine whether the instrument is able to demonstrate accuracy and precision and sensitivity and specificity and these things that I've, I've kind of covered here 'cause these are sort of, ah, benchmarks, ah, that you would perform, ah, with any piece of lab equipment. If it meets the model specifications and it meets the criteria, then it is, ah, approved for use by, by NHTSA. Ah, if the manufacturer makes changes to that instrument, to the analytical bench—there, ah, there is a different here, the analytical bench of the instrument—it's the way it measures the alcohol, the calculations that it uses, the, the, even some, to the extent some of the, the components within the instrument. The manufacturer, ah, goes back to NHTSA and, and they inform them that we've made these changes. Ultimately, it, it is the decision of NHTSA, ah, to decide whether that instrument, that enough change has been made where that instrument needs to be reevaluated and reapproved because enough changes have been made to the analytical bench that would warrant it. Sometimes when, ah, they may waive that, ah, they may decide it's not, ah, des--, there's enough of a change to raise to a significance where it would have to be reapproved. But that approval process, regardless, has to occur before an instrument is, can be used and made available.

Q So, do you, a--, as a state agency who wants to adopt a new instrument, is the NHTSA approval of an instrument a prerequisite?

A Ah, it was a prerequisite, ah, before the, any contract could be signed. It had to be approved by NHTSA.

Q And, ah, if I may approach?

THE COURT: You may. (Pause) Thank you.

Q Mr. Groff, did your department receive, well, first of all, do you recognize People's Five?

A I do.

Q And, what do you recognize it to be?

A This is the approval letter signed by, ah, J. DiCarlo, ah, DiCarlo-Cecil (phonetic), ah, from, ah, National Highway Trans--, ah, Traffic Safety Administration.

Q And, can you speak generally to--and, Judge, pursuant to Mr. Pirosko's agreement, I'd move to tender Exhibit Number Five.

MR. PIROSKO: No objection.

THE COURT: And People's Number Five will be admitted for purposes of this hearing.

Q Mr. Groff, with regards to that letter, when did your department receive it?

A We received it in Ju--, ah, July of 2012.

Q And where were you in the process with regards to this evaluation, ah, when you received this?

A Ah, when I received this, ah, we were, we had finished, ah, the evaluation of the instruments, ah, and it was prior to the signing of the final contract.

Q So, you had started examining and looking at, ah, these different instruments, I believe you said you had three…

A I did.

Q …(inaudible) So, ultimately, you received this, and what did it indicate?

A Ah, it's a letter to confirm that the CMI Inc. Intoxilyzer 9000, ah, has been evaluated by VOLP Lab Transportation System Center and found to meet the model specifications for an Evidential Breath Testing Device. Ah, the, ah, instrument, ah, this approval letter, ah, it goes on to say, ah, that this serves as the approval letter, ah, from when the instrument was originally submitted in, I believe it was March of 2012, yeah, March 7th of 2012 is when this instrument was submitted for, ah, its testing. Ah, and then it also goes on to say now that it's been approved that it'll appear on the next Conformant Products List, just known as a CPL list, ah, the next time NHTSA publishes their list, they publish it periodically.

Q Did you and your department, in the process of evaluating and ultimately selecting a, the I-9000 rely upon the information contained within People's Exhibit Number Five?

A Yes, this was a very important step in order for us to move forward with the procurement process, the contracting process. This was, ah, this was, ah, an important criteria to have be met in order to be able to use an independent, any instrument.

Q Judge, at this time, I'm noting it's five after 12. Obviously, we have quite a bit of testimony to go. Ah, I don't know if the Court wants to entertain a lunch break, I'm happy to continue going, ah, and we can find another convenient time to break, but, this, this is sort of a transition in the testimony.

THE COURT: Okay. Ah, I think we should have a lunch break. I think we can limit it because, ah, we don't have a lunchroom, unfortunately, a

cafeteria in the courthouse anymore, it's under renovation. There are three restaurants very close, Wendy's, Long John Silver's, Kentucky Fried Chicken within a block. We can all grab some lunch. I would say, because, Mr. Pirosko, I know you have something else and want to be as efficient as possible, can we limit it to thirty minutes and be back and ready to go?

MR. PIROSKO: I'm, and I'm going to call the other attorney, make sure I have coverage, and so I don't want to rush Mr. Halsor…

THE COURT No. I just think let's be as efficient as possible. I can usually get my jurors back and forth pretty quickly, so, can we say about, ah, 12:40 we can reconvene?

MR. HALSOR: Yes, Your Honor.

THE COURT: And, so far, Counsel, ah, I have, ah, One, Two, Three, Three-A, Four admitted, and Five admitted as well, and that's it for your exhibits?

Q That is correct.

THE COURT: Okay. Great.

MS. HUESER: And, Your Honor, are we off the record?

THE COURT: No, we're on the record still.

MS. HUESER: Can we go off the record for a moment, please?

//

THE COURT: All right. We are back on the record, 13-T-9903, People of the State of Colorado versus Kenneth Van Schoy--, Schoyck. And, ah, present, ah, I have the, ah, attorney with the Colorado District Attorney's Counsel, Mr. Pirosko, an expert that's been on the stand. We're continuing with the Direct Examination of Mr. Groff. Okay. Anything before we start?

MR. PIROSKO: I just have one question. Just so I know, when I make an objection, is this microphone on?

THE COURT: That mic is on, yeah.

MR. PIROSKO: Okay.

MR. HALSOR: May I, Your Honor?

THE COURT: You can.

RESUME DIRECT EXAMINATION

BY MR. HALSOR:

Q Ah, Mr., Mr. Groff…

THE COURT: And, is the equipment on?

Q I, thank you, Your Honor, I did, in fact, turn on the camera.

THE COURT: Okay, good, thank you.

Q Mr. Groff, with reference to People's Exhibit Number Five, the one you examined prior to the break, ah, I believe you testified that that was an indicator that the National Highway Traffic Safety Administration had, in essence, placed the I-9000 on a list of acceptable in the eyes of NHTSA breath-testing instruments, correct?

A Correct.

Q Now, what was the date of that particular, of People's Exhibit Number Five?

A Ah, the date, ah, is, ah, for acceptance is March 7th, 2012.

Q And, what was the date that your Department received it?

A We received it, ah, July 23rd, 2012.

Q And, just a, I asked you on Direct Testimony previously if your department relied upon the content of that letter?

A We did, it was, ah, one of the criteria that needed to be met in order for the instrument to, ah, even be able to be eligible to be selected.

Q And…

MR. PIROSKO: I'm sorry, what was the date this letter went out? I don't see it on here.

A In the letter—is that the question? Okay. So, in the letter, ah, it's, it's referring to "We received the Quality Assurance Plan dated March 7th, 2012, the Intoxilyzer 9000. I am pleased to inform you that this admission has been approved." The date, that's the date that VOLP received the, ah, the submission of the instrument was provided, that's what they're referring to. So they get the instrument, they perform their evaluation. It may take 'em some time to get to the evaluation, but once they submit the instrument in the Quality Assurance Plan, that's, that's what they're going to dance with, for lack of a better term, and so once that process is completed and it passes, then it's approved from that date. The date stamp on the top, ah, is the date, just a hand stamp, this is when, ah, the 23rd is when the Department received this letter.

MR. PIROSKO: We just don't know the date that the Department of Transportation generated this letter?

A We don't. The only date it's referencing is the date that it was approved, which was for this March 7th, 2012 letter. There's no other dates from, ah, the author of this letter.

Q Now, Mr. Groff, with regards to, to the content of the le--, letter, rather, NHTSA's approval of the I-9000, did you have an independent source of that information separate and aside from the letter?

A We did.

Q Describe, please?

A Ah, well, we, ah, we're in consultation with the manufacturer, ah, and we were informed by them that they had, ah, received approval of the, ah, I-9000, ah, testing had been completed and approval was pending, and just like the Department, the manufacturer was waiting on the letter to be sent to them from NHTSA, or from ah, the Program Analyst, ah, J. DiCarlo-Cecil.

Q So, based on that, do you have an independent memory or recollection as to approximately when you received word that NHTSA had approved the I-9000?

A It was, it would have been some time in April, May.

Q Of what year?

A Of 2012.

Q So, in that period of time when, April or May, where were you in the process?

A WE started the evaluation process on these instruments in February of 2012, and that, ah, we had 'em for about eight weeks as we did our evaluation. I think the instruments were returned, ah, right around the first part of April of 2012.

Q Do you have an independent memory of the specifics?

A Ah, not specific dates, ah, it was in those, it was in, roughly that timeframe. They, the Request For Proposal went out in January of 2012, we had a, ah, some meetings in, ah, first part of, I think it was in January, maybe January, first part of February, ah, we evaluated the proposals, received instrumentation and started the evaluation process, returned the instruments, there was some time after that to, ah, where we had to, ah, complete the

contracting, ah, and so it was kind of all happening in that first six months of 2012.

Q A clarification from your previous testimony—the instruments, the approval from NHTSA for the I-9000 i--, is based on, well, their approval is as to something I think you referred to as the analytical bench, correct?

A Correct.

Q What does that mean, precisely?

A It's, when the inst--, when the manufacturer designs an instrument and it's going to measure alcohol, this is the design of the instrument and its ability to actually do just that--how accurately can it measure alcohol. Ah, that's what these instruments are being, ah, evaluated to is its performance, can it, can it do this in an accurate precise manner, ah, that's consistent with, ah, the standards that have, are set forth by NHTSA, ah, to, in order to be approved, ah, does it meet those me--, ah, evaluation criteria by the federal government. And the analytical…

Q If I can…

A I'm sorry.

Q So, my next question is, you spoke and provided testimony that if the analytical bench is altered, then it has to be re-apprised and reevaluated in order to get this NHTSA approval, correct?

A Right. If there's substantial changes made to the way the instrument actually measures alcohol, whether that's by changing the calculations that are used in the instrument, by whether that's changing the, ah, significant, to significant point, ah, level, the, ah, the hardware that's used or the, the components that are used to measure alcohol, when changes are made, the

manufacturer--to the analytical bench, to its, the way it measures alcohol—when those kinds of changes are made, the manufacturer, ah, will notify NHTSA and say, we have made X, Y and Z changes, whatever those may be, then it's up to the discretion of NHTSA to determine whether those changes raised enough to a significance to where another evaluation and re-approval has to occur. It can be a minor change that doesn't impact the analytical bench and perhaps another full evaluation not's needed. But that's the process that, that occurs.

Q Are you familiar with the term, like, the "sequential bench"?

A Sequential bench?

Q Yeah.

A I am not.

Q Okay. Can these instruments be modified in other ways?

A Modified, well…

Q Not from the analytical bench, are there features, are there programmatic issues, are there firmware issues that can be adjusted and modified?

A So the firmware, ah, is the operational software of the instrument. This is the various menus or features that are built into the operation of the instrument itself. Ah, the Department, after selecting the instruments, ah, worked closely with the manufacturer, CMI, to develop the firmware, but the options, the menus, the features, ah, that, ah, we wanted to our specifications on the I-9000.

Q Give me some examples of some things that you could adjust or, sort of, custom--, customize to your specifications?

A Well, all of the data a--, that is collected is retained, obviously, in the memory of the instrument. Developing the firmware, though, is, ah,

developing or determining what menu options may be available to an instructor versus an operator versus a technician. Ah, as an example of a firmware menu might the ability to reprint a test or to recall a test or to perform a recertification test. Ah, it might include, ah, options that, ah, for an instructor as an example, were they to perform a calibration check or they can perform a stability test or solution change, ah, or the technician levels where, ah, not only do we have access to those individual menu options, ah, but we can perform the calibration adjustment and have access to those menus, whereas a law enforcement officer would not. Ah, or when we're performing the verification of the calibration adjustment, those menu functions that, that we use when we're certifying the instrument. And the way the sequence is established is a menu function, you know, we can set up the sequence. Ah, the information that is, ah, provided on the, the reports is a function of the specifications of the firmware, you know, here's what's reported on these, ah, as part of that development.

Q So, understanding that, as we discussed, and through previously admitted exhibits, there were specific criteria and general criteria for establishing the scientific li--, validity of these instruments, correct?

A Correct.

Q Some specific to Colorado rule, others more generic as in the Quality Assurance Manual?

A Correct.

Q Now, with regards to the, the customization, ah, of these features, setting out to evaluate these instruments, was there any step in this process whereby your Department or staff was seeking to alter or effect what you've referred to as the a--, analytical bench?

A No. During the development of the firmware itself, there, there were no, ah, requests, requirement, specifications, ah, from the Department to change any component of the analytical bench from which it was originally approved, ah, from NHTSA, so, no changes to the analytical bench were made.

Q So, your reliance upon the NHTSA approval letter is that, that I--, the I-9000 as you received it for evaluation was an accepted breath testing in instrument by NHTSA, correct?

A Correct.

Q And, with further modification to feature menus, how you set up the reporting function, all of those things, those peripheral items, that didn't affect, in your mind, the standing of it as a NHTSA-approved instrument?

A That's absolutely correct.

Q Thank you. So, you testified previously that three instruments satisfied the bare bone requirements?

A Correct.

Q And could you describe a little bit about that, how is that determined?

A There were minimum qualifications that were provided in the, ah, Request For Proposal, ah, as an example, the instruments ability to be able to perform, ah, the test sequence that's employed in Colorado, ah, whether it had touchscreen technology, ah, whether it had the, the ability to detect interferents, ah, service, ah, warranty, ah, parts and labor, you know, the, those are some of the minimum, ah, qualifications that were set forth, ah, and manufacturers, the vendors had to have an instrument that could at least meet that first initial portal.

Q Would you please describe for the Court what the term "Evaluation

process" means to you?

A Evaluation is the process by which we follow to, to evaluate the performance of these instruments to the criteria that was set forth in the Request For Proposal prior to procurement and purchase.

Q And, as part of this process or this procurement process, were you given instructions as to how this evaluation process was to work?

A Yes, ah, yes we were. Ah, the Department of Health's most senior purchasing agent was assigned to oversee the process. In addition, the Laboratory Services Division, ah, the purchasing agent, ah, assisted us in that process for day--, day-to-day needs, ah, questions, concerns and support as needed.

Q So, this procurement officer and in the person responsible for the day-to-day stuff, did they give you instructions on, in essence, what information you could collect and what information you could retain?

A Yes, they were very clear. Any information, ah, that was provided by the manufacturer, ah, which would include instructions, ah, which would include schematics, anything provided by the manufacturer, had to either be returned to the manufacturer or destroyed at the end of the procurement process. Any other, ah, documents, any other notes, ah, data, printouts from the instruments, comments, ah, or any other document that the evaluator used to derive a final score, ah, during their evaluation was not to be retained. Only the final score sheets were to be retained and provided to the senior, ah, purchasing officer at the Department at that time which he would then tally the scores and determine who scored the, the highest by the evaluators.

Q Did you have direct contact with someone responsible for this

procurement process who provided you such instructions?

A Yes.

Q Who was that person?

A Ah, Richard Brough, Rick Brough, ah, he was the Purchasing Agent at the Department, or at the, ah, Laboratory Services Division at that time, and, ah…

Q Just for clarification, can you spell his last name?

A B-R-O-U-G-H.

Q Thank you.

A And Tim Massangale. Tim Massangale was a Senior Purchasing Agent for the Department of Health.

Q Of those two people, who did you have the most direct contact with?

A Ah, day-to-day, ah, would be Richard Brough. He was the, ah, the purchasing agent within the division. He served as a, a liaison, ah, that we could, one, ha--, have immediate contact with, ah, but, ah, Rick also was able to consult with Tim Massangale, coordinate meetings as needed as we went through the process, as Tim was overseeing this to make sure that we stayed on task and followed the process.

Q Do you have a memory of Rick Brough giving you any instructions with regards to documents to be retained and documents not to be retained?

A Yes.

Q And, I believe you testified to it, but do you remember what those instructions were?

A Yes—any information provided by the manufacturer at the end of

the evaluation period had to be returned to the manufacture or destroyed. Ah, any, any printouts and data, notes, comments, any other document that, ah, an individual evaluator relied upon in order to derive their final score for whatever criteria, that specific criteria they were evaluation from the RFP was not to be retained, only the final score sheet of the evaluator was to retained.

Q So, so clar--…

THE COURT: Can I ask a question?

Q Please do.

THE COURT: When you say, "not to be re--, retained, was the direction to be destroyed?

A In essence, yes.

THE COURT: Thank you.

Q So you mentioned that there was an eval--, that there was an evaluation, ah, something that was "to be retained"?

A Correct.

Q What was that?

A It was called an "Evaluator's Score Sheet". Ah, the components and the scope of work and the Request For Proposal, these are the items by which these instruments were originally evaluated to, and there is a clear, there must be, your clear record, there's a clear distinction between evaluation and validation. Evaluation is a process by which we follow to evaluate the performance of these instruments…

Q Of the three instruments?

A Of the three instruments, all the same evaluation criteria for all three instruments, ah, to the criteria set forth in the Request For Proposal. A

validation is what is performed after the purchase and procurement of the instruments, a validation is what is performed on every individual instrument to ensure that, ah, they meet the scientific standards of performance established by the Department and that they, ah, to include accuracy and precision prior to certification and subject testing. So, evaluating versus validating, there's a distinct difference between the two.

Q So, I, ah, walk up and put in front of you what has been marked as People's Exhibit Number Six, and Judge, I apologize (inaudible)

THE COURT: Okay.

Q Ah, but, do you see People's Number Six?

A I do.

Q And do you recognize that?

A I do.

Q What is it?

A This is a scoring tool for the Evidential Breath Alcohol Testing instruments for the Colorado Department of Public Health and Environment Evidential Breath Alcohol Testing Unit, EBAT, for RFP Number T--, TM-dash-LSD121208.

Q And, was that the evaluation form used in the evaluation process?

A It was. These are, these are the score sheets that were used by each in--, individual evaluator.

Q And that is an example of the document to be retained, correct?

A Correct.

Q Now, were there documents that ultimately had what people filled out, were those retained?

A I d--…

Q What was scored?

A Well, what was scored is the criteria that's listed and here was the minimum qualifications and it was pass-fail score.

Q To your knowledge, those were retained?

A What's that? I don't understand…

Q Were those evaluation forms that were ultimately filled out…

A Oh…

Q …retained?

A …these, yes. These are part of the…

Q Thank you.

A …(inaudible) file. Thank you.

Q So, can you please explain to me how this evaluation process went down? What took place to make the decision and selection of one of these three instruments?

A Evaluators consisted of breath alcohol testing, ah, program staff and subject-matter experts. It also included law enforcement officers from around the state, ah, that evaluated the instruments as an end user. Ah, every one of the evaluators, ah, performed their evaluation in an independent manner, scored their, ah, gave the respective score for whatever criteria, you know, that they were addressing in the score sheet, and at the completion of the evaluation, the score sheets were then sealed in individual envelopes and provided to the Senior Purchasing Agent, ah, who then, ah, opened 'em up, tallied the scores and as a result of that tally, the, ah, I-9000 was scored the highest of the three instruments and then subsequently that's the instrument that was selected.

Q All right. I want to break…

THE COURT: Excuse me.

Q Yes, Judge?

THE COURT: You said law enforcement officers and what other type of expert did you say?

A The, ah, Labor--, ah, breath alcohol testing personnel, with subject matter experts. But we also, evaluators also include law enforcement from around the state as end users who would actually be using these pieces of equipment…

THE COURT: Thank you.

A …so they had an evaluation component.

Q Let's elaborate on that. So, your staff in the Evidential Breath Alcohol Testing Unit, they were some of the evaluators?

A They were.

Q Approximately how many staff members?

A Three.

Q And, then you said you utilized law enforcement officers?

A Yes.

Q How were those law enforcement officers determined or selected?

A Ah, well, we had, I put together a list of fifty officers, and…

Q Based upon what?

A Based upon their experience, their logistics, ah, types of agencies they worked with--ah, State Patrol, Sheriff's offices, police departments--ah, they needed to represent a cross-section of rural agencies, ur--, ah, and also urban agencies, ah, different types of agencies and different logistical areas

throughout the state, so those were kind of the criteria. And, in addition, the officers that were selected, ah, were instructors, ah, they were, ah, officers who have a higher level of training and experience with these instruments who'd been around for a long time and helped train other officers, so they had a deeper knowledge base as subject matter experts.

Q How were you familiar with these officers?

A Well, because we, we, ah, train and certify all of the officers in the state, we have about five thousand operators, and another five, I'd say about five hundred and fifty instructors that were certified, ah, instructors in Colorado.

Q And you discerned that group from previous trainings based on the old 5000 EN?

A I discerned that group from those criteria that I mentioned.

Q Ah, so, explain the process as to how you received instruments for the evaluation process from the three vendors?

A Once the minimum qualifications were met, ah, then the manufacturers, ah, brought up instruments, brought out their instruments, provided us, ah, training, additional training on the instruments so…

Q Describe that for me.

A It was on-site training, it could not exceed more than two days, if I recall, ah, and it was to basically go over the functions, features of the instrument, ah, answer questions that we may have, ah, make sure that we understood the basic operation, how to hook it up, how to run tests, ah, prior to us beginning the evaluation on the particular, ah…

Q Do you have a specific memory…

A …model.

Q …whether these vendors, manufacturers provided you specific instruction guides, manuals, things like that at that time?

A They did. Ah, they provided, ah, some so--, some sort of basic operator manual or, ah, instruction manual so that we would have something to refer to when…

Q And then each…

A …when they were no longer present.

Q …and then representatives from each vendor came out and provided some training on how these instruments operate?

A Correct.

Q So, after you and your staff are imbued with that information, let me ask you this—were law enforcement officers participating in that component of training?

A They were not.

Q So, your staff received that training from the vendors?

A Correct.

Q And then you invited fifty-some officers to also test this out?

A Correct.

Q How did that take place?

A Ah, so what happened, ah, is we had officers that were local, so some of ‘em came to the state lab and did testing, ah, but actually, ah, in order to make sure that that demographic and that cross-section that I described was covered, ah, these instruments were loaded up and they were transported around the state and set up, ah, at various locations to have officers come in and actually perform, run a test and give some feedback on, and evaluate the

instruments themselves, that once they were done, ah, completing their individual tests on, on each one of these instruments, ah, they created their score sheet and that score sheet was sealed and then provided to the Senior Purchasing Agent.

Q So the score sheet represented by People's Number Six, was that used by both EBAT staff and by law enforcement?

A Ah, that's a good question. Ah, I believe, I, I, can't answer that, I'm sorry, I don't know for sure. I, I don't remember if there was a secondary score sheet for law enforcement as an end user or if it was a component of this score sheet.

Q All right. Did you and your staff utilize People's Six?

A Yes.

Q Your Honor, I don't believe I have, ah, moved to admit People's Six.

THE COURT: For the Defense?

MR. PIROSKO: No objection.

THE COURT: People's Six will be admitted as evidence for purposes of this hearing.

Q Thank you, Your Honor. So, Mr. Groff, understanding it's been, it has been admitted, so what were some of the criteria that you and your staff looked at with regards to deciding which one of these three instruments to choose?

A Well, some of the criteria including components, ah, has the instrument got the ability to detect an interferent, has the instrument got the ability to, does it have the ability to perform the, Colorado's test sequence, ah,

does the instrument have the, ah, touchscreen technology, ah, what kind of warranty, ah, comes with these instrument, what kind of technical support, what kind of training's going to come with these instruments, how, how cost, how expensive are they and how much are they going to cost to maintain over the lifespan of these instruments, so, there was a number of criteria that were evaluated. Other criteria that were also evaluated included, ah, studies for accuracy, precision, ah, analytical sensitivity, analytical specificity, ah, the reportable range, ah, how, what was its range of reporting, how stable was the instrument, ah, so, we had other tests that we conducted that were more analytical, ah, in nature versus how much we liked, ah, a touchscreen…

Q Features?

A …a feature or how, how well-warrantied or service and support was versus another—obviously there was testing involved to….

Q So, I want you to…

A …evaluate that.

Q …I want you to address the issue of the Quality Assurance Testing. You listed off a whole laundry list of criteria that you and your EBAT staff were looking for, and it addressed some of those prongs we discussed in the Quality Assurance Manual, so do you conduct tests of these instruments to authen--, to receive information that satisfied those prongs that you just described?

A Yes, we did. We conducted, some tests that we conducted were independent individual tests, ah, which means that, ah, the evaluators performed them, whatever the, the test was, ah, they performed it independently. Some tests were conducted and the results that were obtained, ah, one test was

conducted and then the data was evaluated by an evaluator to derive their score, ah, so it was a combination of different things.

Q So you had yourself and your staff conducting these tests…

A Correct.

Q …and sometimes an individual would do it?

A Correct.

Q Sometimes it was in a group setting?

A It was a group, well, it was a, an evaluation of the information. Every evaluator—I have to be clear here—every evaluator follows process carefully, could not be influenced by another evaluator. So when an, a test was performed, results were generated, review of the printouts, how does, you know, whatever that criteria was that was being evaluated, every evaluator did that independently. We never sat down as a group to (inaudible) and derive a group score, that's not how it works. Ah, a test was either done independently or a test was performed and the results that were obtained were reviewed independently, so it was, evaluators, ah, had to do everything independently to obtain their own score.

Q Now, based on your knowledge of what transpired, and pursuant to the procurement process, were any documents pertaining to this kind of testing, the Quality Assurance Testing during this evaluation period, and by that I mean when you were trying to select between one of these three instruments, was any of that retained?

A It was not.

Q These were, the printouts, this was the data, these were the notes, this is the type of information that the evaluator relied upon to create their final

score, their final number, so whatever they relied upon to create their number is, was very clearly not to be retained, only the final score was to be retained. Again, it was for the evaluation. Now, it is important to note that the protocols that are in place are modeled, many of 'em, after the same principles---to, to evaluate accuracy, to evaluate precision, analytical sensitivity, analytical specificity, interfering substances, these, reportable range—these, these things, so things that were used in the evaluation, those were also carried forth in our existing protocols.

Q So, testing methodologies for things like precision, analytical sensitivity, all right, there's no documents from the evaluation process, but what you just testified to, the testing methodologies that you used to test those in the evaluation phase were later used after you selected the instrument and began the validation phase?

A Correct. Those, those same principles that were used for the evaluation are the same principles that are incorporated into our existing current protocols. So, how you evaluate 'em, the principles we used, ah, are not much different than what we are doing now when we validate each one of these instruments before certifying 'em.

Q Well, let me ask you this, I mean, how do you, do you have specific memories, understanding there's no paperwork, of how you tested for precision during the evaluation phase?

A Yes.

Q How?

A There was a series of accuracy and precision studies that were done. One of 'em was, well, quite robust, I think it was, ah, twelve hours in

length, actually, and once the, once the protocol began, it couldn't, ah, couldn't be stopped. And what we did is we took, we took solutions of various concentrations from, I believe, going as low as an oh-two-oh up to a point-five or a point-six, pretty high, ah, value, and we…

Q Explain what solutions means?

A Okay. So these are alcohol standard simulator solutions that are a mixture of alcohol and water that have a known concentration, and then when tested, ah, will provide a known result. So we refer to them as standard simulator solutions, ah, the labs refer, --fer to it as quality control material. It's material that you know what the concentration is, you know what result you should, you're expecting to get.

Q So….

A So you already know what the answer is when you provide it so you should get that answer, in that sense.

Q And so they have, you can obtain known samples, which you can run through the instrument, expecting a known result?

A Correct.

Q To determine if the instrument can detect it and detect it, as you put it, precisely?

A Accurately and precisely.

Q Okay. What's the difference between "accuracy" and "precision"?

A So, accuracy—and I'll use a point-one-zero-zero as an example—ah, accuracy is when you provide a point-one-zero-zero solution, you expect a result of point-one-zero-zero. That's accurate. So maybe you get one accurate result, and then the next time you provide a, ah, sample, maybe you get a point-

oh-eight-oh. That wouldn't be accurate. Maybe the third time it's a point-one-two-oh. That wouldn't be accurate. The third time, you may, or fourth time maybe you get a point-one-zero-zero, well, then, that would be accurate. So accuracy is hitting the right number. Precision is being able to hit the right number, or is to be able to hit the same number over and over and over again. So if you give it a point-one-zero-zero and you get point-zero-eight, point-zero-eight, point-zero-eight, point-zero-eight, that would be precision. It's demonstrating good precision, but it's not demonstrating good accuracy because you're expecting a point-one-zero-zero result. Accuracy and precision is when you're getting both, so if I give a point-one-zero-zero, I expect a point-one-zero-zero, and I expect a point-one-zero-zero to be able to be reported over and over and over again. And so, some of the, ah, studies that we did, ah, were, ah, to, to evaluate the accuracy and precision of the instrument. When we, and it's (inaudible), ah, we did tests to make sure it could detect interference, ah, we did tests to make sure it was stable over time, ah, that it could stay on, it could operate tests over and over and over again…

Q So that's, that's what I want…

A …for a long period of time.

Q Explain the stability.

A So, stability is the instruments ability to be able to, ah, remain in, in an active working, sort of greater than normal operational mode. When a breath alcohol test is run, it gets run, unless it, there's a series of tests that are run back-to-back, for the most part, ah, most instruments maybe a half a dozen tests are run in a day, you know, in a busy agency. Rural agencies you might get a half a test (sic) run in a year. So they don't run all the time, it's like having a car in the,

the garage that only gets driven on the weekends. But then if you get that car out, it's only driven on, on the weekends and you're going to drive it across the United States, does it, is it stable enough to be able to make it without breaking down. So stability is a challenge of continuous operation to make sure that it's able to perform under those kinds of conditions without encountering problems. And so…

Q Like endurance?

A Ah, endurance is a good way of thinking about it--is it stable, is it a--, able to do this.

Q Now I believe you testified previously that reportable range was something that's not quite within the framework of breath testing?

A Ah…

Q Can you describe that?

A Reportable range is. Normal range isn't. So, so if your blood glucose, as my example earlier, is supposed to be a hundred or less when you wake up, that's normal for the population of people, that's what it should be. If it's less than that, you know, you don't have diabetes. If you wake up in the morning and your blood sugar is three hundred and fifty, that's not normal compared to the masses, so a normal range does not really apply for the application of the I-9000. Now, reportable range does. Ah, how low can it go, and how high can it report and still do that accurately and precisely. Now, with the I-9000, its reportable range is zero to point-six-five-zero. Now, a result of point-six-five-zero is probably a result, ah, in ten years' of data that I've looked at over time, looking back on results of the 5000 EN, we've never seen a result, ah, that high. Ah, but there are circumstances, ah, that, where, ah, a result can

spike and perhaps exceed that range, but that's not because the individual's at a point-six-five-oh, it could be because they had alcohol in their mouth or they regurgitated alcohol from their stomach and spiked it and it exceeded that range, ah, 'cause a point-six-five-oh is, is pretty much fatal, you know. Ah, but, anyway, that's the reportable range of the instrument, and so, for legal applications, what is important is those results that, ah, point-zero-five-zero, anything below that obviously has a different legal, ah, meaning than some, ah, result above a point-zero-five-zero. Point zero-eight-zero has a significant legal meaning, and a point-one-two-zero has a si--, significant legal meaning, I believe it's point-one-two zero-- is that right? Point-one-five-zero?

Q Anyway?

A Anyway, those are those legal marks, right, so, making sure that the instruments are, is specifically accurate around those legal, ah, per se limits, ah, is very important, so we have to make sure that it can accurately report on the low side and then, of course, on the high side.

Q Are there any additional sort of analytical tools or quality assurance measures that you guys were utilizing during this evaluation period that you can recall?

A Analytical tools or quality assurance measures?

Q The testing methods that you used to decide which instruments achieved what you wanted them to achieve?

A Well, we used the test sequence that, ah, we—I'm not sure if I understand your question. Can you…

MR. PIROSKO: I don't, I don't mind if you lead.

Q Okay.

THE COURT: Okay, thank you.

Q Well, we've been talking about the testing methodologies that you used in the evaluation process. You, you discussed the tests related to precision, analytical sensitivity, analytical—well, what about specificity?

A Specificity is its, ah, that's part of the, ah, interferent substances. Ah, is it specific for alcohol, does it have the ability to detect other, ah, contaminants that can be found in a, ah, a living, breathing human being that potentially could be blowing into one of these instruments, like acetone for a diabetic, or somebody who may have ingested isopropanol or, ah, methanol. Ah, you know, these are, these other, ah, alcohols can be found in, ah, the breath. Those other br--, ah, volatiles can be quite, ah, dangerous and all of 'em are bad, ah, so, ah, if, if there's a public health concern, ah, does the instrument have the ability to detect these other, ah, things and if so, ah, what is the protocol to be in place when it does, and for Colorado is you stop testing and you seek medical attention. Ah, so, ah, that's the specificity, how specific is it for, for ethanol, does it have the ability to detect other interferents. So…

Q So, during that evaluation process, were there any other tests to determine any of these categories that you utilize that you have an independent memory of?

A Well, we did a test for interferents, we did a test for, ah, ambience, we did a test for radio frequency interference…

Q Describe that.

A Ah, radio frequency interference, ah, the instruments are, ah, can be susceptible to where, on the analytical bench, ah, some of the components can be susceptible to radio impulses of, at certain frequencies, and so, ah, many

of these frequencies, ah, can be found, not as common as they once were, but in police stations, ah, the radios that they use, the radios in their vehicles, ah, can create a radio frequency interference, so we'd want to check to make sure that the instruments have the ability to detect radio frequency interference. Ah, we want, we check the instruments to make, ah, sure that, ah, well, we talked about the stability, accuracy, precision and sensitivity, ah…

Q You mentioned ambience?

A Ambient failures. The, ah, environment can actually, ah, impact or have impact, ah, and as conditions change in a, ah, room where one of these instruments reside, does it have the ability to detect changes in its ambient surroundings, ah, and be able to notify the user if something like that occurs. Ah, I'm trying to think of some of that analytical—talked about stability, ah, sequence. To the best of my recollection, that's, that's, covers a pretty good gamut of the things that we were evaluating in these instruments, to, in addition to the other things that are obviously provided, or had to be evaluated in the RFP.

Q Now, you testified that you weren't certain that the form admitted as People's Exhibit Number Six, the Evaluation criteria Form was necessarily what the law enforcement officers used?

A I can't recall if it was a component of this or if there was a, an additional, additional form.

Q Let me ask you this—were law enforcement officers…

THE COURT: Counsel, can I just direct you to stay nearer to the podium.

Q I apologize, Judge.

THE COURT: I want to make sure we catch your voice with all your

questions.

Q I tend to wander. I'll stay…

THE COURT: Thank you.

Q …I'll stay leashed.

THE COURT: Thank you.

Q Were your law, to your knowledge, based on your memory, were law enforcement officers conducting tests and evaluating these quality assurance measures?

A They were not.

Q What were they evaluating?

A They were evaluating as an end user, they were evaluating the ease of use, ah, the layout of the instrument, you know, the, the functioning of the, the touchscreen, ah, the way the breath hose, you know, operated or, you know, moved or, ah, basically as an end user—how easy it to oper--, to run a evidential breath test using this device versus this device, that was the scope of their evaluations.

Q So would it be accurate to say that law enforcement officers were evaluating the features and not the analytical bench?

A That's, ah, that's fair.

Q And, was it fair to say that you and your staff were analyzing both the features and the analytical bench?

A That's, yes, that's correct.

Q So, you started to testify, and you may have, have completed that as to how was the I-9000 ultimately selected from the three potential bidders, or vendors?

A So, each evaluator, after they were done deriving their scores, sealed their scores, ah, in an envelope. All the envelopes were compiled and provided to the Senior Purchasing Agent. Ah, at that time, ah, he, ah, unsealed the envelopes, started tallying all of the scores, and as a result of the scoring, the Intoxilyzer 9000 was scored the highest, ah, and the subsequently selected as a result.

Q Did you have personal knowledge of the different scores?

A I had, I have no idea which instrument was going to be selected until those scores were tallied. I knew what my su--, my preference was because I've, of course, I was evaluating it myself, but I had no idea what the other staff, ah, my other staff's evaluation scores were, I had no idea what the law enforcement officers' were, ah, it wasn't until the scores were tallied that, ah, that I knew.

Q So to your knowledge, the law enforcement officers' scores were part of the tally?

A Yes.

Q And your staff's?

A Yes.

Q So the I-9000 instrument gets selected; what happens next?

A Once the 9000 was selected, then, really, a lot of the work really began. Ah, at that time, the De--, at, from that point forward, after, ah, we started receiving the instruments, we spent a lot of time with, ah, the manufacturer to develop the firmware, ah, to our specifications, to design the instrument in a manner by which we were trying to design it to. Ah, that process took, ah, quite a bit of work, ah, to get to the point where it is.

Q So, what was it that you and, and your staff did in order to get it prepared for the field?

A So, the firmware development occurred, ah, after the, the bid process, the contracting process was completed. That process continued and, and to some extent still continues, ah, into the spring of 2013. Ah, the firmware, again, is the operational software of the instrument. These are the menu options available to an operator versus an instructor versus a technician, ah, the firmware development, ah, which includes the test printouts and what we refer to as an Intoxilyzer Performance Report, ah, was something that was, ah, took quite a bit of effort, we weren't, nobody had ever done anything quite similar to this to be able to provide a comprehensive litigation packet with every subject test, so there was a lot of work that had to go in to develop that aspect of it. In March of 2013, roughly at around that time, development of the firmware had reached a point where the operator menus, the instructor menus, technician menus, ah, the reports, ah, how the officers can recertify had been developed, and, ah, in order for us to be able to get them prepared and certified, ah, for service. Once that firmware development was completed, ah, then the, the Department was actually able at that point to finalize our Standard Operating Procedures, and these Standard Operating Procedures were then used through the course of the month of April to calibrate, adjust these instruments, then to actually verify the calibration on these instruments and then certify them for service. Once they were able to successfully complete these, these procedures, ah, then they were boxed up with the peripheral equipment, they were shipped to the agencies around the state—I believe we, ah, we did about a hundred and sixty of those instruments to make sure that the agencies around the state had

their certified Intoxilyzers so they could be set up and switched on for use, ah, on May 1st.

Q So, I want to discuss the firmware more. When you had this firmware customized, did that in any way affect the I-9000 in terms of its ability to detect breath samples?

A No. The firmware development had no impact on the analytical bench, the way the instrument actually measures alcohol. Firmware development, the way the instrument measures alcohol, for example when the instrument runs a calibration check, it's just going to run a calibration check and it's going to measure alcohol the way it measures alcohol the way it's designed to measure alcohol and that which was approved. The, the delineation here as the firmware development is, we want to have a calibration check, we want to have an air blank, we want to have a subject breath test, we want a diagnostic check, we want a breath test, air blanks, cal check. All we're doing is selecting from what you can already do and putting it in a sequence that we want to have, that's…

Q All right.

A …so, so the firmware development and the options and the menus that are available in the instrument, it's a matter of, ah, selecting which menus that we want to use, what is the sequence going to look like, the data that is, ah, retained in the memory of the instrument, what is going to be provided on these reports, how is that going to look—that's the firmware development….

Q So the…

A …but it didn't impact the, the analytical bench or how it actually measures alcohol.

Q Would you say that it's accurate that the firmware modifications were to modify the features?

A The features, the operational software, how we operate it, how we interface with it or how law enforcement interfaces with it.

Q So…

THE COURT: Can I ask a question?

Q Yes.

THE COURT: For clarification, this firmware, ah, modification, so everything that you decided to put in whatever sequence was already present, ah, within the Intoxilyzer and you just had to pick and choose what you thought was valuable and, ah, put it in sequence?

A I think that's a very accurate way to think about it. Ah…

THE COURT: So you didn't add to or change anything within the features of the Intoxilyzer?

A We didn't change an--, or request any changes to how the instrument actually performs, ah, testing.

THE COURT: Okay, thank you.

Q So…

THE COURT: Mr. Pirosko, would you like some water, sir?

MR. PIROSKO: Sure. Thank you very much.

Q You okay? (Pause) So, Mr. Groff, you testified that after this purchasing process, after the purchasing process, the selection of the I-9000, you then moved into, I believe what you referred to as the validation phase?

A Correct.

Q So, can you distinguish the evaluation phase from the validation

phase?

A Evaluation is what we performed on the instruments provided to the criteria set forth in the Request For Proposal, we evaluated it to those things. Validation is, what is performed with every single instrument. The Department established scientific standards of performance as required by the Rule. These are evident in our, ah, Standard Operating Procedures. These Standard Operating Procedures include the I-9000 calibration adjustment procedure, and the I-9000 calibration verification procedure. So the first thing we do, ah, when it came time to validate and certify these instruments--that occurred in the, ah, month of April of 2013—ah, we followed these protocols to set its calibration, we, the calibration procedure itself, ah, is, ah, the first step, verification of that procedure is the second step.

Q All right. If I may approach?

THE COURT: You may.

Q (Pause) Mr. Groff, I'm showing you what's been marked as People's Exhibit Number Seven and People's Exhibit Number Eight. I'll tender copies for the Court as well.

THE COURT: Thank you.

Q Mr. Groff, do you recognize People's Exhibit Seven?

A I do.

Q And what is it?

A It's the I-9000 Calibration Adjustment Procedure.

Q And, can you describe for the Court how that procedure was developed and came to be in its present form?

A Okay. Ah, so, the Calibration Adjustment Procedure is, ah, the

process by which we follow to adjust the instrument. Ah…

Q Describe that?

A Okay. So, when we calibrate, when we adjust an instrument, we're adjusting it to known concentrations of alcohol, these solutions that I explained earlier. So, for example, if we provided a point one-zero-zero solution, we're telling the instrument this is a point-one-zero-zero solution, and we run it through, ah, a number of tests, ah, four of 'em, and it is basically tuning itself to that point-one-zero-zero solution. We're telling it it's a point-one and it's adjusting itself to what we've told it that it is. That's basically an adjustment. We're creating a calibration curve by doing that. The Department uses five points in our calibration curve to include, ah, water.

Q So explain how the five points work?

A So, we have water—that's a zero. We have a point-zero-ah—two, point-zero-two-zero, we have a point-zero-four-zero, we have a point-zero-eight-zero, a point-one-zero-zero and a point-three-zero-zero. So we're saying this is a point-zero-two-zero, and it adjusts itself to that. Just like the…

Q And it's looking for ethanol?

A For, for ethanol, yes, exactly. Ah, and so after it's adjusted to these points, that's the adjustment itself. Now we have to verify that that adjustment was accurate.

Q All right. So before we go there, People's Exhibit Number One is your procedure for the calibration adjustment, correct?

A Ah, People's Exhibit Number Seven?

Q Correct.

A You said One.

Q I'm sorry, People's Exhibit Number Seven.

A Is, are, ah, the procedure that we follow to perform a calibration adjustment on the instrument, that's correct.

Q And, and can you describe for the Court what it contained in there, is that the specific instructions for how these are to take place?

A Correct. Ah, the instrument, ah, itself, these, this is the protocol that is followed, following the menus, it describes the menu that you go to, what you select, what you hook up, the information that's entered, the process that we follow, ah, this is that procedure.

Q Now, from a quality assurance or a scientific validity standpoint, explain the five points?

A The five points are establishing the linearity of the instrument, and they're establishing how, this is the low part, this is the low side of what it can read, here's the high side of what it can read and here are the points in between. So, we are telling it here is its linearity, we've established its calibration curve, as, as it's referred to on pieces of equipment.

Q And, with regards to this calibration adjustment, it's in this phase that you're, in essence, notifying the instrument, providing the instrument that this is the ethanol level you are expecting?

A Correct.

Q You're telling the machine it's coming, so to speak?

A Correct. Correct. That's exactly right.

Q So, that's how you establish the linearity of it?

A Correct.

Q No, does the Calibration Adjustment Procedure accomplish any

other means?

A It also, well, we also adjust the, the flow sensor—ah, that's the sensor that's used for the amount of flow of the per--, ah, person's breath as it's moving through the instrument, so that's, that's one of the, another adjustment that's performed as part of this adjustment protocol, so, that piece is being adjusted, and then also the instrument's calibration adjustment. So…

Q Okay. Let's talk about the flow, though--why, why is that relevant and significant to breath testing?

A One of their criteria for a sample to, ah, be measured is that the, the subject has to provide a breath sample at a con--, a certain flow rate, and so you have to adjust that rate so it knows whether that criteria is being met or not, so, that's why we adjust the flow on these instruments.

Q How do you accomplish that?

A We have a calibrated flow meter that is in the State Lab, it flows air through, ah, the breath tube, ah, you adjust it to, ah, three different points and it creates its, its own individual curve and so it knows that it's receiving a proper flow of air of liters per second in order to meet that qual--, that criteria that's established within the instrument, so, in essence, that's what we're doing.

Q So, as we tra--, that's one of the procedures for an instrument to be certified and placed into the field for service, correct?

A That's correct.

Q And explain the process—well, before we get there, People's Exhibit Number Eight, what does that refer to, are you familiar with that?

A I am.

Q And, what is that exhibit?

A This is the I-9000 Calibration Verification Procedure.

Q And can you explain that and contrast that to calibration, ah, People's Exhibit Number Seven?

A So, once the first procedure is performed and successfully completed, we have established its, we've adjusted it, we've made its adjustment, now we have to make sure that we verify that the adjustment that we just performed is a good adjustment, so now we have to challenge the calibration, ah, the curve that we just created, by following this second procedure, which is referred to as Calibration Verification Procedure. This procedure is, ah, quite robust in the ma--, in the fact that there's a, ah, a number of steps that are involved to make sure that we're verifying the performance of this instrument. Ah, one of the, ah, steps that we take is—ah, and it, it's, it's testing the accuracy, tests the precision, tests the reportable range, will verify the reportable range up to a point, ah, four-zero-zero, ah, we test the, ah, ability to detect interferents, we test the instrument's ability, ah, its slope detection ability, ah, there's another precision accuracy and precision check that's performed, an evidential breath alcohol test is performed to make sure that, ah, all the data is properly populating the way that it's intended, ah, and what else do we test? Ah, we test for an invalid samples, ah, improper samples, make sure that it will not accept a sample at the wrong time, ah…

Q What about ambient?

A Ambient failures are, ah, not checked as a part of routine of this Calibration Verification Procedure.

Q Does the instrument itself have internal procedures for detecting that?

A It does. Ah, the instrument has thresholds that, ah, ambients have been checked to perform that, ah, over with this process is something that we don't do, but the instrument, if the ambient surroundings change by a certain value throughout the course of a test sequence, it stops the test and it starts to actually, ah, well, it will stop the test, report an ambient failure.

Q So, with regards to People's Number Seven and People's Number Eight, are those the two procedures or Standard Operating Procedures required by the Department for an instrument to pass before being released into the field for service?

A It, they both have to be successfully completed before an instrument is eligible to be certified for service.

Q Your Honor, at this time, I would move to admit People's Seven and Eight.

MR. PIROSKO: No objection.

THE COURT: And People's Seven and Eight will be admitted for purposes of this hearing.

Q Mr. Groff, with regards to People's Seven and Eight, do these reflect the methodologies, protocols that you employed in the testing during the evaluation phase?

A They do. Ah, they are a little bit different than during the evaluation phase.

Q How so?

A Well, ah, as I explained, we are trying to, ah, evaluate the accuracy, precision, stability, ah, reportable range, ah, sensitivity, and in or--, the, the test that we did during the valuation to encompass all of those criteria, ah, its,

the stability point was the hardest one, that's where the time, that's where the time was spread out, so, so with every one of these instruments, that particular test that we ran during evaluation, I believe (inaudible), once you start it, it was, like, twelve hours long. It was a very long, robust…

Q So stability wouldn't be something that you would, doesn't fall within the scope of, People's Seven and Eight, that…

A No.

Q …typical process?

A No. What I'm trying to explain here is that during the evaluation, we were evaluating accuracy, precision, sensitivity, specificity, interfering substances, reportable range, right, so we were covering all those. The, one of the experiments we did was, ah, a very long robust one that covered a lot of those components in this one very long experiment.

Q Understood.

A Okay. So this protocol that we have here still covers accuracy, precision, reportable range, sensitivity, specificity, interferents, but they're broken out into individual components, it's not a twelve-hour experiment for every one these to do through this…

Q It's an individual…

A …protocol. Yeah, they're, they're evaluated more indi--, independently or individually.

Q So, with regards to how you actually execute these rules, what are the methods that you do to, in essence, test the reliability of these instruments?

A Well, we run the instrument through a series of nine solutions of, ah, known concentration, on the low end of point-zero-two-zero all the way up to

a point-four-zero-zero, we, ah, pay particular attention to those, ah, (inaudible) limits that are always very important, I have a, we have a point-zero-four-zero, point-zero-five-zero, point-zero-eight-zero, ah, we have a point-one-one-zero-zero and a point-one-five-zero. Ah, if we're measuring, ah, to verify that adjustment that we made, so we're expecting those results to come back, that point-zero-two-zero to come back at a point-zero-two-zero plus or minus a certain tolerance, and the same with every one of those other, ah, samples. We test the interferents, ah, to make sure that it has the ability to stop a test if it picks up something other than ethanol, ah…

Q So let me in--, let me, let me interrupt you here because you testified that during the calibration adjustment, you're letting the instrument know about the standardized solution that's coming in—that's to adju--, ah, adjust the calibration?

A Correct.

Q For the verifica--, or the validation of the calibration, do you notify the instrument what the level of the solution is?

A So where I was going with that is that, ah, when we are pre--, ah, challenging it to these known samples, we're, we're blowing through a simulator that is hooked to the breath tube to simulate a, a breath sample. The instrument has no idea what it's about to measure, all it knows is it's about to measure something and give it a result, so it's an unknown, and so then on, we know what the result is supposed to be because it's an assayed solution…

Q Explain, explain "assayed solution"?

A "Assayed" means it's been tested and we know what the results or the concentration of that solution is. When it's, on the bottle it says point-one-

zero-zero, it's been assayed, it's been tested to, and says, yes, this is a point-one-zero-zero solution, it's not a point-two-zero-zero solution, it's been assayed. Okay…

Q So.

A …"assayed" is a fancy word for, word for "it has been tested", and so, we provide an assayed material of a known concentration, ah, into the instrument to measure it just like it would if it were a, ah, normal breath sample or any other unknown, the instrument doesn't know, it's just going to give a result now at this point.

Q So, and, and I'm sorry, I think I was using the word "validation", for the calibration verification, you are introducing how many assayed samples?

A Ah, nine plus an interferent that is, ah, acetone with a point-zero-two-zero.

Q Is that also an assayed…

A It is.

Q …material?

A It's assayed, we know it's a point-zero-two-zero, and we know that, ah, there's seventy microliters of acetone that's added to that five hundred milliliters of, of solution, with the expectation that it is, that we should not be receiving any measurement whatsoever, ah, we should have, the instrument should be able to discern and detect between the, ah, alcohol or the, the interferents, so…

Q So you listed a series of interferents that the I-9000 looks for; how many interferents?

A Ah, when we challenge the instrument for its verification, we're

challenging the instrument to acetone. This is the same, this is consistent with the testing that's performed by VOLP Laboratories, it tests (inaudible) microliters, ah, to, ah, a point-zero-two-zero alcohol solution. During the evaluation of the instruments, we tested the instruments to other interferents, ah, in addition to acetone—methanol, isopropanol, toluene, (inaudible), ah, those are the ones that I can recall off the top of my head.

Q How did you conduct those?

A Ah, it was a serial dilution in a point-zero-two-zero, ah, a solution of point-zero-two-zero. We started with very low concentrations, ah, (inaudible) around twenty microliters. To give you a sense of how small that is, ah, a microliter, it takes a thousand microliters to make one milliliter, okay? There are five hundred milliliters in a bottle of solution. So, we're talking about five hundred thousand—if I have my math right—five hundred, five hundred thousand microliters in five hundred milliliters, we're talking about se--, so if you break that up into five hundred thousand parts, seventy of those five hundred thousand parts is acetone. We started with twenty of those five hundred thousand parts to see if it would detect that, then we went up to forty to see if it would detect that, went up to sixty to see if it would detect that, and kept doin' that on up, ah, to see how high it would go before it finally started to, to detect that with each one of these instruments. The standard that the instruments have to meet, ah, for NHTSA, is that they do that, ah, at seventy microliters and point-zero-two-zero of acetone, so all the instruments have to be able to at least be able to detect acetone because that is the, the volatile that's going to most commonly be seen in somebody's breath because of, ah, so many suffer from diabetes, and so that's a, that's a byproduct that can commonly be found in the breath and it

needs to be able to discern between the two.

Q So then…

THE COURT: Can I ask a question? This interference with the, with the acetone, is it just acetone or is it combined acetone and ethanol?

A It's a combin--, combination of acetone…

Q It's a combi--…

A …and ethanol.

THE COURT: And that ethanol, is, is there a level of ethanol?

A Point-zero-two-zero.

THE COURT: Okay, so it's both?

A So it's both.

THE COURT: So you're telling me that when the instrumentality detects the acetone, it clo--, it shuts down and it doesn't detect the ethanol?

A That's the challenge.

THE COURT: Okay.

A That's the test. If it, if it measures alcohol and doesn't pick up the acetone, that's a failure, so it cannot, ah, give us a result, we know that (inaudible) can't give us a result, it needs to be able to detect that small amount of acetone and stop the test, that's the interferent detection test.

THE COURT: Thank you.

Q So, Mr. Groff, with regards to the Calibration Verification Procedure, when you run one of these procedures and you introduce these nine known assayed samples, you run the interferent sample, how long does that process take?

A It, to get through this protocol, it takes a couple of hours, little over

a couple of hours. My, my st--, I'm a little slower at it than my staff, I think my staff had it down to about two, two hours, maybe two and a half hours.

Q So it has to run through this, and then it has to pass; how does it pass in the eyes of Department, or in the eyes of the procedure?

A So in the eyes of the procedure, ah, when, ah, in the procedure itself, there's a section that talks about the interpretation, so, you, you run a test but how do you interpret the result? Ah, for example, when we run it through the individual solutions, the, ah, acce--, ah, we know what that, we know what the measurement is, and we know what the acceptable range is, so every one of those challenges, (inaudible) accuracy, precision, they have to fall within a certain tolerance. That data, when we're performing that test, is provided with every subject breath sample on the Intoxilyzer Performance Report under the I-9000 calibration verification record, so when we perform this, it's, that's, it's provided there. In the SOP, it gives the acceptable tolerances as well. Ah, in addition, ah, there is a, ah, stability test that 's run, and that's where we take a, ah, a solution of a point-one-zero-zero and we run it, ah, consecutively, I believe it's twenty times in a row, and it's a stability test, and it's, again, it's another accuracy and precision measure. Ah, we perform an invalid test, ah, just to ensure that the instrument is able to discontinue a test, ah, when the slope detector doesn't, ah, isn't able to obtain a level reading, and this is to guard against the mouth alcohol effect, so we challenge it to make sure that it, ah, is operating properly.

Q Explain that, please? How does that process, how do you test that?

A Oh, so, we, ah, the, the technician will introduce a, ah, alcohol or

alcohol-derived product, typically we use a breath spray because the al--, ethanol is typically the carrier for, ah, some of the mouth sprays, and we'll provide a breath sample into the instrument and, ah, knowing that that mouth alcohol event that we just created, ah, is, we know it's mouth alcohol, ah, it should be able to detect that and stop the test, so, that's how we challenge that.

Q From your experience with breath testing, the, this test with regards to the slope detector, what, what is it meant to, ah, to discern?

A The slope detector is, ah, the instrument's ability to be able to take a level reading when somebody's providing a breath sample and alcohol is present, there's going to be a rise in the concentration of alcohol, but eventually it's going to start to level off, and that leveling-off, ah, of the slope, is what it's referred to, ah, that reading, that slope has to remain level, it can't continue to abruptly rise or abruptly drop, ah, 'cause that could be an indication of a mouth alcohol situation, ah, so it has to be able to maintain a nice, ah, steady, level l reading, for a defined period of time, ah, before it's able to take a measurement and report a result.

Q What's the purpose of the twenty-minute deprivation period?

A The purpose of the twenty-minute deprivation period is to mitigate the mouth alcohol effect up front, ah, and it, after the last drink or consumption of alcohol, it takes some time for any residual alcohol in the mouth that may be remaining to dissipate, ah, to not, no longer be present, and so that twenty-minute deprivation period is intended to deprive the subject to ability to, ah, first to remove anything that's not permanent in nature from their mouth, ah, the second is to deprive them the ability to put anything in their mouth. Ah, the third is to, ah, make sure that, ah, during that period of time that they, ah, the officer is

observing them for obvious signs of belching, regurgitation, intake of any foreign material into their mouth cavity so that when it comes time to provide a breath sample that the conditions for pro--, providing an ade--, adequate sample are, are, is, ah, optimum as can be.

Q But the mechanism that you go through as part of the verification procedure is to challenge the instrument to detect what would be functional for the breath alcohol?

A Correct.

Q And you described it before, how do you do that?

A So, ah, well, we talked about the twenty-minute deprivation, and that's part of our test sequence, and an important part of it, but if, if something occurs that's not observed by the officer, then we have to rely on the instrument's ability to be able to stop the test and detect if there's a mouth alcohol situation, if they belch or bring up some stomach contents that may have alcohol in it, then that's going to impact the, impact the stability of the reading of the instrument and, and its level slope, and so we have to be able to test the instrument to make sure that that, that safeguard or that function is actually working. And, ah, at the end of the sequence, then, of course, the instrument is going to, ah, compare the first and second breath alcohol result from the subject to make sure that they also correlate within, ah, an, an agreeable tolerance, in our case it's a point-zero-two-zero, so you can't have one result that's a point-two and one result that's a point-one, it's too much of a discrepancy and it would stop the test, so, so, all of 'em together are strung together as one of many, part of many of the quality assurance measures put into the test sequence itself.

Q Let me ask you this, Mr. Groff, do you have the ability without, say,

getting your staff drunk to simulate actual breath tests?

A Of course.

Q How do you do that?

A Well, we use a simulator, ah, it simulates a breath test, we use, again, this assayed solution that we can put it into a simulator and then provide that, ah, sample of blowing through the simulator, ah, to get the alcohol vapor to move through the instrument itself so it can take a reading.

Q Will that function in the exact same was as though a person who has ingested alcohol, would it read the exact, would it read accurately?

A It will read accurately.

Q Are you capable of doing that today in the courtroom?

A I am.

Q Can you describe what that process would entail?

A Ah, the first thing, ah, we would need to do is actually hook up the instrument and let it warm up. Ah, we have, ah, brought bottles of solutions of different concentrations, ah, for demonstration--I have a point-zero-eight-zero, I've got a point-one-zero-zero, and I've got a point-two-zero-zero solution. Ah, and, ah, I could show you the process by which the Department follows, ah, if it pleases the Court, to see, you know, here is how this is assayed and here's how it's verified that this is the right concentration, ah, here's how we provide, ah, a breath sample through these simulators, ah, to simulate a human subject. Ah, we're just providing the force of air, the actual lung itself is the simulator itself because that's where the alcohol is contained, so, so that's how we replicate that. Ah, this can also be done with a dosed subject, but that isn't something that we decided that we wanted to entertain today was to have a, a dosed subject

come into the courtroom, so, ah…

Q Mr. Groff, just as a logistical matter, to proceed to, in order to do this—and, Judge, I would ask permission to be able to do this, to allow Mr. Groff to…

MR. PIROSKO: (Inaudible)

Q …to run, run some of these simulations--what, what practically do we have to do to get to the point where we can do that?

A Ah, I could set up the instrument right here on this table if that's okay, I think you might have a good vantage point.

THE COURT: No, I'm going to go down to wherever you're at and actually watch it.

A Okay.

THE COURT: Ah, but did you also bring with you something that had, would have the acetone that might show a…

A I did.

THE COURT: You did? Okay.

Q So we would like to do that as well, too, Judge.

THE COURT: Counsel?

MR. PIROSKO: I have just a couple clarifying…

Q That's fine.

MR. PIROSKO: Mr. Groff had talked about, ah, Mr. Brough, and you mentioned Tim something—I didn't (inaudible)

Q His, his last name is Massangale, and it's spelled M-A-S-S-A-N-G-A-L-E. He's a Senior Purchasing Agent for the Colorado Department of Public Health and Environment. On the RFP, which I'm, I'm going to, ah, just assume

that you have seen, if you noticed on the RFP, where it says “TM”, hyphen, that’s where that TM comes from, (inaudible).

MR. PIROSKO: You also mentioned there were three staff from the Department of Health, were you one of those three?

A I was.

MR. PIROSKO: And, and, who are the other two?

A Ah, Michael Barnhill (phonetic) and Bob McDuffy (phonetic), Robert McDuffy.

MR. PIROSKO: And are we able to get their CV’s?

A Ah, no. No, they’re not available right today. And Robert McDuffy doesn’t work for the Department any longer.

MR. PIROSKO: He got, he got, he was fired or, or something?

A Ah, yeah, he separated from the Department.

MR. PIROSKO: Ah, and then also, ah, you have been talking about five points on the (inaudible), and I just want to make sure that I understand this is that the five points (inaudible) or point-oh-two, point-oh-four, point-oh-eight, one-oh-three-oh, is that (inaudible)

A Actually, technically, there’s, there’s six because the first one is a water. Right.

MR. PIROSKO: Okay. (Inaudible)

A And so we have a five-point calibration.

MR. PIROSKO: And…

A Ah, in--, and then water.

MR. PIROSKO: Ah, I know this may be getting off base just a little bit, but the question I have is the issue with Weld County where there’s a problem

with the test, did that have to do with this calibration adjustment procedure?

A No, actually it did not. It had nothing to do with the instrument's ability to actually accurately measure alcohol or its calibration.

MR. PIROSKO: It, it's just (inaudible) calibrate it correctly?

A That's not correct. Ah, it…

Q Judge, we're getting a little off-base here.

THE COURT: Yeah. Okay, let's stay with what we had designed to do today.

MR. PIROSKO: That's fine. (Inaudible)

THE COURT: Okay. And then, just for the People, before I forget, Mr., ah, Pirosko did ask for a bit of discovery through your witness, I think it was, was it the briefing schedule regarding the saturation point?

MR. PIROSKO: Essen--, yeah, essentially there was a, a roadside sobriety checkpoint, there was a checkpoint (inaudible) This wasn't a sobriety checkpoint but there was some other…

THE COURT: Briefing information I thought it was?

MR. PIROSKO: Yes.

MS. HUESER: That's correct, Your Honor, and I had requested it previously, but it doesn't look like we, we received it so I'll request it again.

THE COURT: Okay. All right. So…

Q What, what do we need to make this happen, Mr. Groff?

A Okay, so if, if it's okay, ah, we need to, ah, I'd like to demonstrate, and if it's okay, I'd like to have my staff assist me, but we'll set up the instrument…

THE COURT: Ah, let's set it up near a mic so if there's any

conversation it can be recorded.

Q Are we putting, Judge, with the Court's permission, can we put it right in front of the reporter's stand, would that be…

THE COURT: Ah, there's not really a mic there that's going to catch. You can put it up here if it works up here.

A Do I put it on the table right there?

Q Yeah.

A (Inaudible) That would work fantastically.

THE COURT: That's fine.

Q Defense Counsel table?

MR. PIROSKO: Yeah, it, no, it's fine, you can do it wherever you want. I would want one favor—Mr. Johnson's in the courtroom, he's another defense attorney, I just saw him sitting there, when this demonstration's going on, is it okay if he could observe?

THE COURT: Ah, I don't know. We, we have limited this to the parties of this case, and, until we actually, ah, we got, ah, the rest of the motions hearing done, so I would stay with that. Yeah, I'm may, yeah, this is for this case, these parties.

Q I would understand Mr. Pirosko has left the room, I would like to record what you guys are doing.

A Of course. So as these, ah…

THE COURT: You know what, let's just wait (inaudible) (Pause) Sir, I'm sorry, who are you?

UNIDENTIFIED MALE: Ah, I'm (inaudible) Mr. Pirosko's referring to. Am I excluded from the entire courtroom?

THE COURT: Yeah, you're excluded from this. This is a hearing so we can take care of these issues. We had agreed upon at the beginning that it would be relative to this case and that there wouldn't be any dissemination other than transcripts until we can have the second part of the hearing.

UNIDENTIFIED MALE: Okay, understood. Thank you.

THE COURT: Thank you.

A Now, as we are getting this set up, we've got the simulators, once, ah, they have to be powered on and they've got to warm up a little bit.

Q All right. Be--, before we get this, Mr. Groff, can you see, is the light on that microphone on?

A It is.

Q Judge I assume that verifies that we're recording?

THE COURT: It does.

Q Ah, I don't know, Mr. Groff, would it be useful for the Court in consideration of the issues to go step-by-step and explain just the assembly, how you, you set one of these up?

A Correct. So, what we are doing right now is we're hooking this instrument up. Ah, as it's, ah, sent out into the field, you know, obviously, it's powered down, collapsed down, law enforcement officers, they expand it and they start to hook up the instrument just as, ah, Anthony and Mike are doing right now, so they continue to hook this up so we can get it powered up. These are examples of the standard simulator solution. These particular solutions are manufactured by a company called RepCo Marketing, Inc. They come with a lot number, ah, they come with, ah, a volume, they come with a manufactured date, ah, they come with a, ah—here's the volume—expiration date, in this case 5-28,

and they al--, should also tell us the concentration, in this case this is a point-two-zero-zero, and they also come sealed. So we'll, the Department will order, ah, a supply of, of these different concentrations. Here's another one, again made by RepCo, and this one is a point-one-zero-zero, here's the expiration date, the bottle number, they number each one of the bottles so this one's 1476 out of however many that they made in that particular lot. Here's a solution that is, ah, produced by, ah, Guth Laboratories. Guth Laboratories, Guth is the company that actually makes these simulators, and they also make the solutions for the simulators. This particular, ah, it's just a different vendor, ah, the solutions, they again, they come sealed, they have a lot number, ah, a volume, manufactured date, ah, expiration date and a bottle number. And this is important information on these labels. As you may recall, in the past, ah, the Department would make the solutions and they would provide that solution to a law enforcement agency and we would provide them a solution label. And now what we're doing is we're purchasing this, ah, commercially, and the solution label is actually adhered to the bottle itself, the bottle's not retained, the label's not retained, but the information that's on this bottle is what the law enforcement officer and the instructor is actually putting into the instrument, which will then, ah, appear later on the, ah, Intoxilyzer Performance Report under the Solution Change records. That's where they get this information. Okay. And I also wanted to show, if I could, the Department provides (pause) so this instrument, this, these processes, these processes that we followed with the, the, ah, calibration adjustment and the calibration verification, those protocols that we've just been discussing, that's occurred with this instrument. This is the certificate that accompanies this instrument, so, for reference. This is, ah, the Intoxilyzer 9000 Certification

Worksheet.

Q Pardon me. Before we (inaudible)

A Okay, well, ah…

Q So…

A …what I'd like to do, though…

Q Hold on. Let's talk about it, let's get this stuff marked.

A Okay.

Q So, can I see that?

A Well, do you want to mark it for this example for today? You're more than welcome to if you'd like but….

Q I just want to see one of those and mark it as an exhibit…

A Okay.

Q …and then talk about it.

A I understand. That's fine. And, and (inaudible)

Q (Pause) All right. Hold onto that.

A Okay.

Q Mr. Groff, ah, you, you grabbed a document, I have now marked this as People's Exhibit Number Nine. Can you explain what this document is?

A This is, ah, referred to as a I-9000 Certification Worksheet. We have our standard, ah, operating procedures that are developed. Our practice is, ah, that we use this certification worksheet to document those, those, ah, standards of performance that we've established in our procedures, this documents that those standards have been met. So this is a, a document that we use to record the instrument's serial number, where it's located, ah, the IP and, ah, IT information that we need to communicate with it, ah, if it comes in for

a repair what the nature of the problem is, what we've done if it comes in for a repair, what parts might have been used. When we do the adjustment, ah, those, those, ah, tolerances that are important to us get recorded on this record, ah, the calibration verification, all the various steps they've passed and where a tolerance or, ah, a threshold is important, it's recorded, ah, the certificate ID number that's generated when this process is completed is recorded, ah, and then a, when we go out and do our facility inspections, this verification protocol is also followed once a year, the verification is an ongoing process, and so, ah, that's, when that certification period is up, we have to go through this procedure again, so we use that to document that, ah, and we check out the in--, ah, equipment inventory where we're onsite at one of the facilities located within the state, and I check all the equipment, make sure that it's present and operational and so on and so forth.

Q So, just to clarify on this, so when you release an instrument, an I-9000 into the field, they have to go through this certification worksheet first?

A We document everything we do on the certification worksheet. This is an internal document that records that, what our procedures say that we're doing, this is our checklist to make sure it's been done, and the technician who performs it fills this out, but then a different, a secondary reviewer, a different technician other than the person who did it reviews it for completeness and accuracy, and that step, that process has to occur before the instrument is actually finally certified and shipped out.

Q And then…

A And this records that process.

Q And then, as part of the rules, are these recertified by way of these

certification worksheets every year?

A Ah, by way of the rules, the instrument has to be recertified once a year. How we, the Department determines to recertify these instruments is actually left to the discretion of the Department. Now, of course, we're going to employ rigorous standards and, and have validity to what we do, we can't just, you know, bless it and say you're certified, we actually have to challenge it. This is a work, internal worksheet that documents our activities on these instruments over the course of time, okay, so…

MR. PIROSKO: (Inaudible)

Q Please.

MR. PIROSKO: I have an objection and I have a couple questions.

THE COURT: Okay. And People's Nine will be admitted as evidence.

MR. PIROSKO: Mr. Groff, I want to point out a couple of things. First is this ID number at the upper right hand, or upper left hand corner, that's essentially a Bate Stamp number, correct?

A This is a, this form is generated out of an access database that was developed within the EBAT program, and every time one of these sheets is, ah, created or, ah, inputted, it stamps a ID number on it.

MR. PIROSKO: An individual ID number?

A Correct.

MR. PIROSKO: There are no two, there should be no two worksheets with the same number unless it was photocopied, correct?

A That, that would be appropriate, yes.

MR. PIROSKO: And then, since these machines came online a little

bit more than a year ago, how many instruments does Colorado have?

A We have two hundred.

MR. PIROSKO: Okay, so, just using the rough number of two hundred, there would have been two hundred of these produced when we first got the instruments and they were deployed (inaudible)?

A Not exactly. Keep in mind that we had to develop this database.

MR. PIROSKO: I understand.

A And so, you know, the, every time there's any input, whether the certification worksheet was completed or not, ah, it, it would have created a number, so you'll see gaps in the numbers.

MR. PIROSKO: As of today, do you have a ballpark of what this number is?

A Ah, it's got to be over a thousand…

MR. PIROSKO: Yeah.

A …I would imagine.

MR. PIROSKO: So, two hundred instruments, approximately a thousand, if a, if a Defense attorney asks for the worksheets for a specific instrument—and I've asked you this question before—we would have had the original certification, the first annual certification, so that's two, and possibly if the machine went in for some issue, we wouldn't expect more than five worksheets on any individual? And the reason I ask this question is a lot of times we ask in discovery for worksheets of an instrument and the Court often thinks we're asking for thousands of documents and it's going to be over-burdensome for the Department, and I think that as we're talking about this, it's probably only a couple of pieces of paper that doesn't take much to produce?

A The Certification Worksheet is not a problem, it's the CORA request that asks for all certification worksheets that, that, you know, argue about the ID number and there's, you know, have two hundred instruments versus fifteen hundred or a thousand of these that have been generated. Once, if I get a call fr--, as an example, if I get a call from an officer saying, "I'm having a problem turning the instrument on", I can go into this database and initiate a worksheet, it gets a stamp ID and says, ah, "received call and the problem is" you know, they're having a hard time turning it on. The officer brings in the, the instrument, ah, and maybe it's received by one of my staff, "What's the problem, why you bringing this in?", "Oh, well, you know, the, it's not turning on." "Okay." So they go in and, guess what, they create another worksheet. So the first one that I generated may not actually ever be completed, but all the work that's ever done for these instruments gets recorded here, and the key is, is, is that it's this process because if there's a repair, it can't go back out and be certified until these things have been done, and so the completion down here where it gets signed off, that's what actually completes this and actually allows us to be able to print it.

THE COURT: And can I interrupt?

A Yes, ma'am.

THE COURT: This number here will identify a particular instrument and it does not?

A Incident.

THE COURT: An incident. And how would it…

A So if you…

THE COURT: …how would a defense attorney gather all the

correct…

MR. PIROSKO: From the serial number.

THE COURT: Okay. So there is a way that, that you're keeping track of everything that's done on one instrument in particular, correct?

A So think of it in terms of, like, an Excel spreadsheet where down the left you have all the numbers and you use the next line, well, maybe that line you end up not using in your data, but you use that line and that number that was kinda (inaudible) assigned to it, okay, so it's kinda similar.

MR. PIROSKO: Based on your example, that, ah, an officer may call and you may initiate one of these where it starts but it doesn't fill this out and then if I, as a defense attorney, are asking for all of the worksheets on that instrument, on that one that you started but didn't necessarily complete, is that gonna be turned over to me?

A If it's identified, if it, if we know that it's there.

MR. PIROSKO: Well, what I'm saying is…

A I mean, I don't know if I, how to answer that actually.

MR. PIROSKO: This is, this is the question—if I call, let's say that somebody called on this specific instrument, you started this but it didn't get completed for whatever reason, I then do a discovery request on this serial number. In addition to the ones that were completed, is the one that you started going to be…

A Pending.

MR. PIROSKO: …turned over in discovery?

A There's no, I don't know if I'm allowed to defer to my staff or you just want me…

THE COURT: If you can just answer if you know.

Q Answer to the best of your (inaudible)

A Ah, I, I don't know. I, the only way to know for sure would be to go back through the database and look at any, one of these tickets, I guess what we refer to 'em as, that was not completed…

MR. PIROSKO: So…

A …and so it'd maybe do an audit to determine which ones. We use this for other, ah, this database for other things, too, so…

MR. PIROSKO: Just to try to establish…

A Yeah, I, I'm sorry I can't answer your question better than that.

MR. PIROSKO: Just to try to establish a definition, how would you refer to one of those incomplete tickets, how would you, like, for the defense to say if we use a certain—or, I don't want there to be twenty different descriptions for the exact same kind of document?

A Well, as the da--, database stands now, I cannot print one of these until it's been completed, okay, so I would s--, I'd recommend, just for, to, for reduction of headaches, if you want to know what's been done on an instrument, ah, then I would ask for the completed I-9000 Certification Worksheets.

MR. PIROSKO: Well, however, that's not showing all the possible issues. If there's three times that somebody called on this instrument--I'm going back to the Denver Police Department, you know--if they're calling up and saying we have an ambient fail, we have an ambient fail, we have an ambient fail, and several of your staff are taking the call and initiating this but not completing it, in Denver they have hundreds of those ambient fails, and so there may not have been, there may have been concerns but not a completed, ah, sheet, and we

need to know that, and so now we don't have that ability to find out.

A Well, I, I don't want to misspeak…

MR. PIROSKO: Sure.

A …especially today, and under oath…

MR. PIROSKO: Okay.

A …but this is a question that's fair and I will get a response to you…

MR. PIROSKO: Okay. Okay.

A …after I have better information since I really can't consult, 'cause these individuals are not under oath but they can answer it for me just like that, so maybe by the end of the day I'll have your answer for ya.

MR. PIROSKO: Okay.

A Ah, all right. This next document is the, ah, the Certifi--, Certificate of Analysis Worksheets that come with these bottles of solution. When we order a point, ah—which is this one?--this one is a point-one-zero-zero solution, it's been analyzed, it gives us the, the, the raw reading from the, ah, from the, ah, GC analysis, (inaudible) the manufacturer verified it, and, ah, the tolerance that it has to be within in order for it to even meet the industry, the manufacturer's specifications, so it's been tested; in the past, we would make the solution ourselves, then we would send it off to a laboratory to be validated or verified.

Q Ah, Judge, I'm going to refer to these as Ten-A and Ten-B

MR. PIROSKO: I have no objection.

A And I want to, ah, verify something here. Gentlemen, we do have copies of these? These aren't our only copies? Okay. Ah…

THE COURT; Okay, so, I'm just going to interject, we're going to, ah, admit People's Ten-A and Ten-B as evidence for purposes of this hearing.

Q Thank you, Your Honor.

A Thank you. So, and this one's not necessary, it's just yet another example. So, I wanted to show an example of the different manufacturers for the bottles that are present right here, okay?

Q And just to clarify, Mr. Groff, this is what you receive with these assayed samples?

A Correct.

Q And that's what you rely upon, one of the prongs you…

A Correct.

Q …one of the things you rely upon to establish their value?

A Correct. Ah, it's been assayed, ah, and we received it assayed with the, the results that it was assayed at. And, in addition, what we, we do at the Department, now that we've received, let's say, ten boxes of this, whatever this is, this is a point-one-zero-zero, so we just got ten boxes of this stuff, we'll pull out a bottle and we will run it on our certified reference instrument, which is one of these instruments that sits in our laboratory, it's kind of our, our gold standard instrument, and then we will pull a bottle out just to make sure nothing happened during the, the transport of that shipment and we will then, ah, perform a stability test (inaudible) So there's actually two checks we perform.

Q So then you're running the assayed sample through the instrument to see what its results and see if those fall within tolerance?

A Correct.

Q How may times do you run that?

A Ah, I believe it's, ah, ten, ten times.

Q So it's on the second page of People's Ten-A. Is that also included

in, in other samples?

A It is.

Q All right. So that's standard practice for these assayed materials?

A So this was a one-oh solution as an example, we ran it ten times and we got an average of a one-oh-one.

Q An that's within the range that's described on the first page?

A That's right. They said, ah, it's a value of a point-one-zero-zero plus or minus three counts, so it could be as high as a one-oh-three or as low as a ninety-seven; this one was tested at a one-oh, point-one-zero-zero and we tested it on our instrument, we got a point-one-zero-one.

MR. PIROSKO: Ah, I have a question about that, and I also have a question about these lot numbers. Do you know if there's a system to how these are numbered? This looks like it was made in 12, the first two numbers are 12, this looks it was made in 13 and the first two numbers (inaudible)

A I don't know how the manufacturers delineate their lot numbers. I'm s--, typically when you delineate a lot number, you're going to include some sort of lineation of the year, maybe the month or day or something like that, but, ah, and that could very well be what this is, a 12-1-8, I--, you know, I would just be speculating, I have no idea, so.

Q All right. So, with this in mind…

A Now…

Q …now what would be the process for conducting a simulated test?

A Okay, so, we have an instrument, it's, ah, warming up, I have a simulator here, and this one I'm going to add the point-oh-eight-oh, just to make sure that there's no sleight of hand or mistake, there's a point-oh-eight-oh, which

is this one. This is a point-one-zero-zero, and this one is a point-two-zero-zero. This is a point-zero-eight, you see that? Okay. Got the traceability right here, I open it up, this is what an officer would do, got another seal on here, pour it into the jar (pause). This is going to simulate one of our breath tests. Screw the jar down, make sure it has a good seal, don't want air leaks. Now what we have to do now is we have to, we'll turn 'em on and let it warm up. This one is our acetone, this is the one we--, that we're going to test for our interferent. This one is a point-one-zero-zero. It's a RepCo point-one-zero-zero.

Q Okay.

A Okay? Seal. Break the seal. This is the process by which a, again, law enforcement would perform in order to perform a solution change.

MR. PIROSKO: Mr. Groff, I, I know that in prior testimony essentially when we have a (inaudible) but over time and over years, that number's going to degrade?

A Correct.

MR. PIROSKO: Correct?

A That is correct.

MR. PIROSKO: And so, it wouldn't be unusual for us to see a point-one-oh solution over time go down to point-nine-nine, point-(inaudible), is that correct?

A That is correct.

MR. PIROSKO: Would age or use ever cause that number to go up?

A Not typically. Typically, if you start to see, ah, the, ah, values climb, that's usually a function of the simulator getting too warm.

MR. PIROSKO: Okay. Understand that, that we have degradation as

an issue for that point-one-oh-two to start to change, when we see results of, ah, with different standard simulator numbers off of the point-one-oh or point-oh-eight, or one-two-oh, in this situation, ah, what is the solution that we're always using for the actual field test, was it point-one-oh solution?

A It's a point-one-oh solution.

MR. PIROSKO: And I know that we can go to an oh-nine-oh to a point-one-(inaudible)?

A That's correct.

MR. PIROSKO: …is that correct? What are the things aside from degradation that might cause that number to change while the solution is still in, in (inaudible) thirty days or sixty days and we see it sometimes go to an oh-nine-eight, a one-oh-one, oh-nine-five, oh-nine-five, point-oh-one-oh, one-oh-three, what causes that variation?

A There's a couple of factors that you could see during the test. You see how these, these are heating up right now? They do need to heat up and stabilize and it takes it about, you know, ten minutes, fifteen minutes for them to really do that. It takes the instrument twenty when we have it completely shut down, ah, otherwise they're on all the time and it only takes a couple minutes to warm up. But if this has been shut off, or if an exception has been encountered on the simulator itself, okay, so, let's say the little rotator's not agitating or the motor stops spinning, whatever the case might be, ah, it could throw itself into an exception, ah, and turn itself off. So if an off-, and officers are trained to, you know, look at this and, you know, if I have some troubleshooting that they can follow, which is really, shut it off and turn it on, that's about all they can really do to recycle it, but if they're not waiting long enough for it to come up into full

(inaudible), you could see one-oh-one-oh, oh-nine-nine, all of a sudden you see a oh-nine-two, because it, that's, that is a potential scenario, it's not an uncommon scenario. Ah, you're going to see the degradation over time, as you indicated. And if you start, we don't see it very often, but if you do see it start to rise, ah, you know, these, we maintain these simulators at thirty-four degrees and it's to maintain stability in its reading, but if you heat it up, it's going to increase the, it's going to increase the reading. So if these simulators start getting too warm, ah, you know, the, the heater is, starts staying on longer and the little resistor's not shutting it off in time, it could be cooking the simulator solution a little more and you all of a sudden you might see it start turning high. That's when you're typically going to find that.

MR. PIROSKO: What are the exception messages that are associated with the simulator solution or simulator?

A Oh, we are, ah, I have, I have some…

Q If, if I, if I can, Mr. Pirosko…

MR. PIROSKO: Okay.

Q …I do have the exception messages as an exhibit that I was going to tender, and if you want to re-approach this issue…

MR. PIROSKO: That's fine.

A Okay.

Q …you certainly can.

A So this it the point-two-zero-zero solution that I was referring to.

//

(Short conversation between the witness and his staff regarding locating solutions, etc. to perform the testing has not been transcribed.)

//

A So we'll let that one warm up. Now, what I'd like to show you at this point are, ah, the various menu options that are available. This was part of the firmware development for these instruments. So you can see, you can see the menus that are on here, as we developed this firmware, the, the types of things that, ah, that we've incorporated into this particular version, this Colorado version. Oh, sorry.

THE COURT: Yeah, and I would keep your voice up, too.

A I will, thank you. Okay. So, ah, the firmware version included everything from the state seal to the images in the background, you know, things like that, of that nature. Ah, the start button is to start a subject evidential breath test. The instrument has to be in the ready mode in order for that to occur. There's a time stamp, ah, date, that's at the bottom of the display. There's options, now, the, ah, access to the instrument is strictly access-controlled, and it's controlled through these cards that we issue to every single officer. These cards can be, ah, sorry, these cards can be accessed, ah, they're provided by the Department, and every time an officer is certified, they're provided one of these cards and it, it gives them their operator ID number, their name and the, ah, date of their initial certification. The, if they, an operator has to recertify every one hundred and eighty days. If that operator does not do so, then it will automatically just lock 'em out, then they have to go through another class and then they get a new card. So if they're able to gain access to this instrument, they're certified at the time of that test. Ah, they can select to either put in their information manually or they can swipe their card. In this case, we'll swipe the card. Okay? Now, what I'd like to show you first—and if you notice here, if I try

to stop this, I can't do that, it's gotta be a double-tap, just to prevent somebody from doin' that. Ah, actually, let me, we're going to enter an operator number. Operators do not create a secondary PIN. In this, if they are within a hun--, ah, thirty days of their expiration date, this is a friendly reminder to them—you need to do a re-cert. They have to physically acknowledge this in order to continue, and they can still continue this other test. These are the three menu options that an officer has available to them as an EBAT operator--they can reprint the last subject test, they can go in and they can recall the subject test—they have to give, ah, two of these three fields have to be entered in order to be able to do that.

MR. PIROSKO: How long does this function, if, if I want to go pull up somebody from six months ago…

A Yeah.

MR. PIROSKO: Okay.

A Memory's not an issue with this, so, so as long as, ah, it's, there's memory in this, ah, instrument, it will always hold every test that's been conducted, and, of course we download these results to preserve 'em in case something did happen to the hard drive, the, it's been backed up. But it's also designed in a manner as well to where you can't mine data. It's not by officer, you can't go in and start mining the data, so it, it's, if you need to recall a test, we need a last name, a first name and an event date. And so if we get a request for discovery for the printouts on a test, we're going to drive 'em back to the law enforcement agency who has this instrument and have them go in and give that information and they can actually reprint all of those from the instrument that actually performed the test.

MR. PIROSKO: Well, if you can't mine date directly from the instrument, can the Department mine data if I wanted to say…

A We…

MR. PIROSKO: …pull up all the tests for Officer John Smith in the Frederick Police Department?

A Ah, yeah, we can, there's those mechanisms through, obviously, discovery or through CORA, ah, we would have to create reports and we'd give you estimates on what it's going to take to do that, but, yes, short answer. Ah, reprint the last test—and this is what they go into to do a recertification. And, if you'll notice, they can't change their ID, they can't change their certification date, but what they do perform is they, if they change their name or if they're at a different law enforcement agency, all the law enforcement agencies are here and, ah, they go and they also update, we make 'em re-enter their email, direct phone and, ah, operators don't do a PIN. And so they, that's, these are the demographics to keep them updated in our database if they move around, it's very difficult to do that, so we have them do it as part of this process. The next option that we have is for our instructors. And I would prefer it if we didn't record their ID and PIN number, please? Ah, so these are the four menu options that are available to them. They can do control testing so they can run a calibration check on the instrument, they can---and that's just a, just one cal check--they can do a stability test where they can run a series of calibration checks in a row. They can do a breath test, which is just an air blank and a breath test and an air blank, or they can have the instrument perform a self-diagnostic check, okay? Configuration--they can go into the general settings and while they can enter here, the rest of these menus, they can't change this, this is, these are functions

that only we have access to, but showing the results, ah, the data entry, all of that information. Ah, but how many copies do they need, some agencies need three by default every time they do a test, some just need one, so by default it's a one, but they can change the number of them that they want. Standard change--they go into this menu, they can't change whether it's an internal or dry gas or any--, it's always a wet, wet bath, referring to this. The target value—point-one-zero-zero, keep that in mind so—oh, I'm sorry—keep that in mind so we can answer your question later about Weld County. Ah, then, from the bottle, you take the lot number from the sticker and they type in the lot number, okay, they type in the bottle number—ah, in this case, ah, where's my bottle number? Here we go—8-5-4, and then they type in the expiration date, and the expiration date's right there, and once they enter these fields, they hit this checkmark and the instrument then does ten calibration checks in a row, and that's the data that is provided on the IPR for every solution change, so it records the date, the time, ah, so on and so forth.

MR. PIROSKO: For later on, this point-one-zero-zero, how did that field get populated? Was this populated by…

A By us.

MR. PIROSKO: …by the Department?

A Right. That's why it's grayed out…

MR. PIROSKO: Yeah, I…

A …at this access level, okay? It can't be changed or altered. That's all they can enter is just for this activity. If the, ah, solution change fails, it brings 'em back to this screen, and then they do some basic troubleshooting, if need be, if, ah, you know, the simulator's not attached properly to the side of the

instrument or there's a leak or, you know, the, the basic troubleshooting you do before they reattempt. Ah, currently instructors have a recertification button and it's the sa--, it works in the same exact capacity as the operators'. And then there's a utility function, there's monitors, it gives a status update. This helps if they're having problems with the instrument, ah, we can look at this either remotely or we can have them, ah, look at this, ah, right here. If they need to do a purge, there's a continuous pump, they have access to that. There's a cooling fan. I don't know why it does that, it just does. I always laugh about that. But, these are the various channels, ah, this is the pressure, atmospheric pressure, this is for if we use dry gas instead of these wet baths. So this basically is like a diagnostic screen. There's a monitor for the simulator and it's giving us information about this, ah, simulator that's hooked to it. It's Guth Labs, here's the model, the manufacture date, version, serial number of it, the temperature that it's reading, whether the heater's cycled on or off and so, okay? And they can set it into an idle mode. That just puts, that just puts it and stops spinning the thing, ah, before they can turn it back on. Again, these are only for instructors. There's a test for the printer. Just make sure the printer is working. And then, of course, they can reprint the last subject test like an operator or they can also recall a subject test in the same manner as an operator. These are the menus that they have available to them. This is part of that development of the firmware that I had mentioned earlier.

MR. PIROSKO: You used the term firmware and software. Isn't there a difference between those two terms?

A There's hardware, there's the operational software, could be considered source code, ah, for the, ah, the, ah, analytical bench, that's a type of

software, ah, there's the firmware—firmware is an IT term for how we interface in the menu options, so I, I try to stay consistent with my terminology with IT folks the best I can, but…

MR. PIROSKO: So is…

A …it's difficult.

MR. PIROSKO: …does the Department have the ability to change well, can it change the soft--, or firmware, does it have the ability to change the software in any way? Can, can the Department of Health change the source code or anything…

A Oh, god, no, ah, as a matter of fact, I can't even make a change to one of these functions without the manufacturer making it for us. We have to ask them, like, instead of the abort button being up on the right hand corner I'd like to have it down on the lower left hand corner, that has to come from the manufacturer, we'll request it, they make that change, we would upload that firmware change and make sure it's where we want it.

Q So I'm going to clarify that then, so, for the firmware modifications, CMI had to do those at your request?

A Yes, based off our specifications.

Q So you asked for the features…

A Correct.

Q …they put together the features.

A Right.

Q You had no ability to alter those?

A No, we have no ability to alter those. So this is the technician menu, this is the menu that, ah, my staff and I have available to us, and our

control testing is a little bit, ah, more robust, I mean, the cal checks, stability, breath test, diagnostic, those are all the same. Instrument certification initiates a calibration verification procedure, okay? Ah, and so, once we start moving through this procedure, and then I, you can see the test ID number, I don't want to move down this procedure too far because it's been done and it's a two-hour, two-and-a-half-hour process and I'm sure you don't want to see that. Ah, but I can reprint the information so you can see the data that was generated as we did this. But, anyway, this is the menu that we go to, to perform that activity. We have a configuration, we have general settings where we can, how many copies, the location, the information that's been populated in, on the printouts, we're putting this here. We can show the results or not show the results, field settings, you know, the, these things are turned off. Ah, test sequence, here's where we can establish or, ah, set up our test sequence. Standard change, see how we have access to this, it's not grayed out, so this is where we enter the target's, ah, value.

MR. PIROSKO: Can you go back a screen? We were talking about the analytical bench, there's also, and we talked about, there's a sequencing bench, too, isn't there, and, and is this the screen that you're allowed to then go in and, and adjust…

A So, if you could, yeah, oh, I'm sorry, if you could, yeah, ah, Mr. Halsor asked the same question about the sequencing bench, and is that defining the sequence that we use? Okay. If that's what you're referring to, then that's where we do that.

Q (Inaudible)

MR. PIROSKO: Yeah.

A Okay. And as you can see, the test sequence that's currently set in this instrument is the test sequence that we use statewide. Ah, the standard change, this is where we indicate is this a dry gas, wet bath, the target value of the solution that we're using, okay? So we have access to enter that information. Oops, sorry. And then the network settings, this is where we put in the IP address, the gateway, the subnet, the kinds of settings that we need in order to remotely communicate…

Q So the network settings then allow these instruments to communicate with the Department?

A One of the questions that was asked earlier is firmwa--, once firmware was developed, ah, and my response was the fir--, it's still an ongoing process. It's coming in phases. The firmware development of this instrument was to get these things established. Ongo--, right now we communicate via analog modem, dial-up, and it's a very cumbersome and inefficient way to communicate with all these instruments. Ah, the next, ah, firmware release that we are expecting, we'll be transitioning from, ah, analog to, ah, VPN, so we'll be able to actually communicate with these instruments via the internet and upload and download 'em. So, ah, these network settings are part of that before it's enabled.

MR. PIROSKO: Right, right now, as the, as it's set up, does the Department do any regular monitoring of these machines by a modem, or do you just wait until there's an issue?

A We have active quality assurance monitors that we monitor.

MR. PIROSKO: And, and, can you briefly just tell us, do they do that on a ba--, a daily basis, monthly basis, certain instruments, what are they looking

for…

A It depends on the monitor. Ah, we monitor the instruments for a number of different things. Some of 'em are, ah, monitors that are conducted on a weekly basis, ah, some of 'em are bi-weekly, some of 'em are monthly, ah, it kinda depends on, that's the, the nature of quality assurance, you know, you, you've, you dial it up or you dial it down based upon need or what you've identified.

MR. PIROSKO: The, the reason I asked that question, you can te--, talk about it later, again, in Weld County, there was an issue there that was going on for a while that wasn't caught by multiple police officers, wasn't caught by the Department, and so I'm just wondering if there was an explanation for that, but we'll get into that later.

A Okay.

Q That one—I'm sorry, one question—the test sequence…

A Mm-hmm.

Q ...for the I-9000, is that the same as what was, the 5000 EN?

A It is. There's a wait…

Q Can…

A Yeah, it's the same, it's the same sequence. Ah.

MR. PIROSKO: Is it the same sequence for other, like, Georgia?

A I can't speak to other states. Ah, recommendations, from, ah, the Committee on Alcohol and Drugs is that you have at least on calibration check, you have to have at least two breath, ah, samples from the subject, ah, and you have to have a correlation period, ah, any of that has, ah, you have to, at least a minimum of fifteen-minute period, so they give you the guidelines. Ah, some

states do one cal check, some states don't do a cal check at all. You know, we tend to try to go and meet every one of those recommendations and maybe, and wherever we can exceed 'em, so. The maintenance, this is where we, ah, gets into the software, firmware updates, maintenance logs, calibrations of the instrument, breath test settings, ah, image, selecting the image—these are, these are settings that, ah, technicians have available to 'em. This is how we'd do our calibration adjusts is from this menu, how we adjust the flow is from this menu, there's an ITP atmospheric calibration, ah, (inaudible) of a tank—some of these are related to, again, the dry gas, ah, canisters. So these are the menus that we have available to us as technicians, and, of course, the manufacture has another level of menus that they have available to 'em that we do not. So, with that, ah, the first thing I think we will do is we are going to perform a breath test. And I'm going to demonstrate for time savings here, I'm going to us this point-oh-eight-oh. For every subject test, so that you can see how the, see, what an officer has to actually do, they come up to the instrument and they have to ensure that it's in ready mode. If the instrument has gone into a standby mode, it will, ah, come out of standby, it takes two minutes, and then it kind of heats the cell up—the instrument's always on, the simulator's always on. Once it gets in a ready mode, they can actually start a test sequence. The first thing that it's going to ask an officer is, ple--, the operator, "Please choose your method of input". In this case we'll use the access card.

Q Judge, I think I'm going to, gonna ask, Mr. Groff is using some cards which apparently reveal operator information. What I can offer to the Court, if acceptable, I would submit to Mr. Pirosko and the Court an un-redacted version so that everybody has an authenticated version of the entire proceeding.

Ah, I do have the ability to stick in, ah, a little black box over that information, and then for future dissemination, after this is done, we can reveal that one.

THE COURT: Okay, that sounds fine.

A Because the access I'm using here is, ah, gives access to the additional menus, this is not something that we want to have divulged. So when an officer is getting ready to run a test, ah, you'll notice all their information is grayed out, they can't change their information when they're getting ready to run a test, it is what it is. It'll ask if the operator's the same as the, as the, ah, the arresting officer; ah, if it is, it, they'll automatically just fill it in. If it's not, they'll type in who the arresting officer was. Then they ask for driver's license, "Please choose a method of input". Mr. Pirosko, you got your license? All right. I'll just make up a name here. So, so, here we'll put in, ah, zero-point-zero-eight-zero test. Okay? And date of birth is 0-1…

Q Put, ah, 8-29 for the date of the hearing.

A Okay. 8-dash-2-9-dash-2-0-1-4, male, female, we have unknown just 'cause, and, and this is free text, ah, could be anything. Colorado, 80230, so you enter the information, the date of the offense—and I'm sorry, what was the date again? 0-8…

Q 2-9.

A …ah, 2-9-2-0-1-4, ah, time of the offense, I'm going to say, so we're not waiting for twenty minutes. As they put in this information, officers are trained, ah, unless they're in a situation where they have a number of tests that have to be run in sequence, like at a checkpoint or something of that effect, is to use this time, ah, and when they use the time-off of the instrument, if I put in 1508, it will s--, it, once they're done inputting their data, it's going to count down

that twenty-minute period, it won't start the sequence until that twenty-minute period has elapsed. If they take their time, if they've been doing their observation in another area of, ah, the facility or wherever and twenty minutes has gone by, they can enter that time whether they get it from their dispatch or wristwatch, I don't care, as long as, if it's, if it's less than twenty minutes from what the timestamp is on this, it's going to count down the remaining time.

THE COURT: Is this somebody from…

MS. HUESER: She's an intern with our office here.

A So we can indicate here is there's a crash, if there's not a crash, whether it's unknown, injuries. Again, this is kind of information that can be collected in part of the mining process.

MR. PIROSKO: Mr. Groff, I need to back up. You don't have to change the screen to (inaudible). If you've got two officers that come into the station at essentially the same time and they don't want to wait, I always thought that they would push a button here and that would determine the time it gets printed out, and you're saying that it's manual and they can actually pick a different time than what's on there?

A Correct.

MR. PIROSKO: So, now, if we have two officers, A and B, and A starts and enters his or her information and they're waiting for the twenty minutes, can they step aside and a, and a second independent sequence start?

A No. If the instrument is doing a countdown, the instrument's locked up. So if they start their test—and this is an important aspect actually—if they, ah, started that where the time sequence is counting down and they have to stop the test, you're going to get a printout, and they'll have to explain why

they have to stop that test, ah, you know, another officer needed to use the instrument and I had to re--, you know, whatever. So, ah, so they could, that way, ah, the concern was at busier agencies or at checkpoints where you have limited instruments and maybe a number of people that have to be tested and they've got officers assigned to 'em, they can be doing their twenty-minute then when it's time they just get in and do their test, put in the time that they started their twenty-minute and move on. A majority of the tests that are done, because of our training, the officers actually use the timestamp on this instrument, they put in their data, it starts counting down, they sit 'em down, they do their, whatever, paperwork or…

MR. PIROSKO: So…

A …whatever other things.

MR. PIROSKO: …so one instrument is one test from start to finish unless it's aborted?

A Right. Okay? So, here is from the rule itself—these are the acknowledgements, deprivation periods conducted at the facility. They have to that. If they try to move forward and don't, it'll give this pop-up. "Subject has removed any foreign material from the mouth cavity not permanent in nature prior to starting"—they have to acknowledge that, because they're signing and attesting that they did this at the end, so that's why this is put in for this purpose. Ah, "Subject has been deprived access of foreign material", and "The subject has been observed for signs of belching, regurgitation or intake of foreign material."

MR. PIROSKO: And a cough is not a problem?

A A cough is not a problem. Ah, a cough is, no. Now, if there's, if they're belching and they're, you know, bringing something up, well, that's

different, you know, I mean, it's a subjective call by an officer. So the start time of the twenty-minute deprivation period, I'm going to, for time's sake, let's say, give me—let me think for a second—(pause) they can review their input or they can continue. Now, I put in just below that twenty minutes, just so you could see how it's counting down, even if it's five seconds it's going to count down the remaining period before it starts to sequence itself. (Pause) Once the time has elapsed, it gives that horn. Now for demonstration purposes today, this is our subject. He is Mr. Point-oh-eight-oh. We know that because we poured it from this point-oh-eight-oh or whichever bottle it was, it was a point-oh-eight-oh solution.

Q Can you explain the sequence, Jeff?

A So, first it's an air blank. The air blank is establishing, it's like a tear on the scale, it's establishing its zero reference point as it's, ah, sniffing the air around us. Now it's doing the calibration check from the simulator. It's a point one-zero-zero solution, ah, the results of this cal check have to fall within, ah, point-one-zero-zero plus or minus, ah, the range of point-oh-nine-one to one-one-oh, and we got a point-one-zero-one. So then it does another air blank, and when it's doing that air blank, alcohol has just been introduced, vapor has been introduced in the measurement chamber, the analytical bench, so the air blank is sucking air from the breath tube and it's kind of cleaning itself out before it takes its next measurement. The next measurement is the B for Breath.

MR. PIROSKO: If the calibration comes in above or below a point-one-oh (inaudible

A If it com--, if the cal check is outside of the tolerance, then…

MR. PIROSKO: I'm not talking about outside the tolerance, inside the

tolerance but (inaudible)

A Oh.

MR. PIROSKO: …if it's, if it's…

A If that's a one-oh-one and somebody has a point-oh-eight-one, is that, is that what the question is?

MR. PIROSKO: Yeah.

A No. Ah, there's analytical variability in any measurement you take. The instrument does not know whether that sample is, that it's measuring is originating from that or from someone's breath, it's an independent measure, and so that analytical variability, for many of the reasons that we discussed, ah, will never endorse or stand behind, well, there's this fudge factor, because that same argument never occurs the other direction when we see a point-oh-nine-five—how come we're not adding a point-oh-five?

MR. PIROSKO: Well, I don't know if it does or not.

A It doesn't. So, ah, my point is, is that these are all independent measures, and so, and the lower of the two is what is reported on the subject. Ah…

MR. PIROSKO: So, so if the cal check comes in either plus or minus, the machine does no adjustments before the subject test?

A No, no, it's just taking a, it's just reading what it reads and it needs to read it within a certain tolerance.

Q So, Mr. Groff, can you please explain to me, ah, and for the Court, what you're doing now, how this differs from an individual's test?

A The difference is, if I were drinking and had alcohol on board up to a point-oh-eight-oh, I would be providing the breath sample right now. The

difference here is that my lung, okay, the air coming from, originating from my body and from my lungs, ah, has no alcohol in it at this point. So, I have to, this is my surrogate lung. I'm simulating a lung, right? This is the blood, the air space above is the air in my lungs. By provi--, blowing, so, this is the mouth, okay, I'm plugging it in right here to the mouth—maybe. There we go. Now all I'm doing is providing the forced air to bubble this thing, okay? It'll, it'll go for three minutes, asking, calling for a sample. The subject has no idea what the result's going to be, that's masked. If they refuse at this point, that's where they can enter "Refusal". Time to blow, I'm not going to blow. If they want to stop the test, maybe they provide a little sample and the refusal will go away as you'll note, ah, and if they stop, you know, like, I'm not doing this anymore, then they can stop the test and explain, the subject's not going to blow anymore. So, there's two mechanisms there for the officer to stop the test if needed. This flow here, there's a minimum flow that has to be obtained, point-one-five-liters per second is the tolerance. A volume, a minimum of one-point-one liters has to be provided in order for the instrument to even be able to take a reading, so that's two of the four criteria. This little halfway mark is a visual indicator for the law enforcement officer that enough sample has been provided. (Pause) And I'll stop right there. So, it was able to take a reading by indication of that tone, I provided enough sample. Now, it prompts the officer, you know, remove the spit trap, it'll indicate that so they can move forward, and it continues on with this air blank.

MR. PIROSKO: So, ah, what are the four factors…

A So…

MR. PIROSKO: …how many can the officer see?

A He can see two of the four. The, the four factors are: flow rate, point-one-five liters per second, minimum volume, one-point-one liters, which is where that blue bar was, ah, there ha--, they have to provide that flow, after they get past the minimum volume and they're providing in a consistent manner, they can't start and stop and start and stop, they have to provide it in that consistent manner after they've re--, reached the minimum volume for a minimum of one second. And, the last criteria is the level slope.

MR. PIROSKO: So it's flow rate, minimum volume, time…

A I think, realistically, it's, it's, gotta get the volume first, okay, and once you have that volume, are you maintaining your proper flow, are you continuously providing flow. Now that you've got the volume and the flow met, are you doing it for a long enough period of time, and in that period of time, are, is the instrument able to take a, a level reading?

MR. PIROSKO: And which two can the officer see?

A They can see the flow and the volume.

MR. PIROSKO: And, but the officer would be able to, to understand if there was enough time because as long as the tone is going on, correct? Once time is reached, the, the tone goes off?

A Ah, no. So, the, the important thing, and this is important with our training, is consistency in the breath samples. Consistency in the breath samples is, is a big variable, and so if, in my example, I try to fill up the whole blue bar. If I would have stopped just beyond the blue bar, then the second sample, we, we want the officers to have them stop right around the same area, and as you, and when we get to the next breath test, you'll see it'll be highlighted where, how far I blew on the first sample, it's an indicator for the law enforcement

officer how much sample was provided.

MR. PIROSKO: And, and, and what was that, ah, area with the bar you said?

A That's the volume.

MR. PIROSKO: Volume?

A Mm-hmm.

MR. PIROSKO: And so you want the officers to try to get as close as possible on the two blows?

A Correct. Consistency between the first and second breath sample is an important variable, and the idea in addition is that we're trying to get, ah, and expiratory breath sample, we want the deep lung air, so somebody who's big in stature, they provide just the minimum across the line, well, they may have only half-emptied their lungs. We want to get a representative sample of the deep lung breath sample. So, you know, they're going to encourage the, the subject to, ah, keep blowing as long as they can, and, you know, and that bar indicator is there to help them know that they've met the minimum requirements, but if they provide a little sample—I'm sorry?

THE COURT: No, go ahead.

A If they provide just enough on the first one and blow the back out of the instrument on the second one, all they've done is increased their probability of ge--, of obtaining a no oh-two agreement.

THE COURT: So, can I ask a question?

A Of course.

THE COURT: So, one of the things the officer can't see is the level reading but if there isn't a level reading if the air pressure isn't level throughout,

will the machine abort, or what will happen?

A Ah, it, and, okay, so, in this example, what I intended to do, ah, is, the first sample, ah, that I provided was a single breath attempt sample, I, I did it one time. This next one I'm going to provide is what we refer to as a multiple breath attempt sample, and this impacts the way these histograms are appearing on these records, just like in Mr. Van Schoyck's case. And so, ah, if I don't meet the minimum requirements for it to take a sample, the instrument's going to beep at me and call for more sample just like it was before, it was just beeping—it'll do that for three minutes. So if a subject gets, ah, is doing a test and they blow and they stop and they blow and they stop and they blow and they stop and they never meet the requirement, well, they can do that for three minutes and eventually it's going to time itself out and report what's called a "deficient sample".

MR. PIROSKO: I, before we, before you start, so this, the one with the bar, the volume…

A That's the one-point-one mark.

MR. PIROSKO: That black line doesn't necessarily, it never moves…

A No.

MR. PIROSKO: …it's not, it's not associated with an individual's expiratory air?

A No.

MR. PIROSKO: And the reason that I'm asking, part of this question I don't know how to ask the question is, I've always heard the harder you blow the higher you go, and so if you're trying to get the officers to essentially get the same volume both times, is that in order to try to limit the discrepancy and, and

the results of the two blows?

A That's correct.

MR. PIROSKO: Okay .

A Consistency is important. The two-minute wait period, it gives your lungs time to re-equilibrate. If somebody stops right here and let's say they get a point-oh-eight-oh, or whatever the result might be, and then the next one, they completely blow out the—you see it when you start getting a, in results of above a one or a one-twenty, it's more common. You don't see that much of a no oh-two, that oh-two discrepancy at numbers less than a point one-zero-zero routinely, but if somebody's, let's say, at one-twenty, average in the state is one-fifty, say they're one-fifty, and they blow and their first one is a one-thirty and they just barely cross the line but the second one, the officer's, like, oh, blow, blow, blow, blow, we want you to totally fill, you know, fill the bar up and keep blowing and they do that, maybe that result's a, ah, a one-sixty-five. Now they just got a no oh-two agreement. And it, and it doesn't, it's not advantageous to do that because now you have to start the sequence over the lower of the two is going to get reported anyway, so, ah, anyway…

Q Are you, are you going to have a circumstance where somebody blows a level higher than what their actual content is?

A No. Ah, the, unless there's a mouth-alcohol situation and all of the safeguards fail, ah, breath, ah, alcohol measurements are an indirect measure of the blood; blood is the gold standard. If somebody is a point-one-zero-zero on their blood and they blow into an instrument simultaneously, on average, they're going to get results of a point-oh-nine-oh, there's about a ten-percent bias in favor of the Defendant on a breath test versus a blood test. So,

that bias is built in due to the physiological variabilities, the partition ratio, there's a number of factors that go into that, ah, but, ah…

THE COURT: Well, this d..

A …you won't exceed the blood.

THE COURT: Just, his, his idea that the harder you blow the higher you'll go, so if somebody's just blowing right past this line and the next time they're blowing all the way across, is one likely to be higher than the other?

A Yes.

THE COURT: And is it the one that's going across to be higher?

A The more you blow, the higher you'll go is a, it's apropos, ah, because the more you blow—not the harder you blow—but the more you blow, the deeper lung sample that you're providing, the more representative sample you're getting of your blood alcohol.

THE COURT: So….

A But it will always be lower than the blood alcohol.

THE COURT: So when these officers are certified to do these tests, are, is there a…

A I'm sorry, we got to chatting and ruined the test. We ran out of time.

THE COURT: Sorry. So…

A Quite all right.

THE COURT: …I mean, I mean, is, is there a certain point that the officers are directing these people to blow to past that line or not to blow to or, I mean, you gotta pass the line, but…

A So their training is such that they know that line is there because

they know they've got to get a sample past that, otherwise it's not going to meet the criteria and just keep calling for sample. So, our training is that we are trying to get end expiratory breath sample, encourage the subject to blow into the instrument to get the most representative sample, even if they completely empty their lungs the best that they can, ah, that's still not going to be at a level that's going to exceed their blood.

THE COURT: Okay.

A You always have residual air left in your lungs and you can't roll somebody up like a tube of toothpaste to get it all out, so there's always a little bit left, ah, but you want to get the most representative sample. We know that the bias is built in there but it's got to be representative. So…

THE COURT: Okay.

A …consistency is important is what I'm trying to say. So they'll encourage 'em, fill it up, fill it up, fill it up, fill it up, and, you know…

THE COURT: All right, thank you.

A …that's what they do.

MR. PIROSKO: Just, just very briefly, why before the person blow do you require a twenty-minute deprivation period and between blows one and two it's only two to four minutes?

A Ah, okay, so, the—that's a good question—so the reason we do that is the twenty-minute deprivation period is to ensure that any residual alcohol left in the mouth a--, after the last consumption of a drink has had time to dissipate and is gone, okay? So, the twenty minutes is to, ah, mitigate the mouth alcohol issue. The two minutes between the two is to allow the lungs time to re-equilibrate, to get back into that steady state between the alcohol now that it's

maybe circulating through the bloodstream and the alcohol that is, ah, escaping into the lungs. You've just emptied your lungs and you've just filled it back up with fresh air, so if you don't give that time for it to kinda come back into that, so, if we have a can of gas in here and the room smells like gasoline after a little while and at some point it's going to just smell like gas, but if I come in here with a big fan and open the doors and blow all the smell out, ah, it's not going to smell like gas as much but the can may still be here, but once I seal it back up at some point in time it's going to come back into that smell of gas, right? It's kind of the same idea. So…

MR. PIROSKO: But when a person breathes the first time, are they, if they were measuring the, the alcohol left in their mouth, not after a drink but just the fact that (inaudible) alcohol saturates your breath and your lungs, isn't that increasing the alcohol level?

A Ah, no, ah, think of this…

MR. PIROSKO: That's fine.

THE COURT: Okay.

A The answer's no. So, ah, so I'm going to retest and I'm going to say yes, so in this case it timed out. Ah, and this is a good example for a later exhibit, which is, ah, the exception messages. This is an example where if, if it times itself out, the off--, the comments box came up and the officer is obligated to, ah, they must enter comments. They have to explain why did three minutes go by and you couldn't get a result, you know. In our case, of course, we were, we were, ah, talking, but if, ah, it could be for many reasons, maybe the subject became combative, maybe they passed out, I mean, who knows, maybe they said, "I'm not doing this." Wha--, whatever the circumstance might be, they have

to enter that comment. If they stop the test, they have to, again, mandatory comment, explain once you started the sequence, what were the circumstances, why did you stop that test. Ah, if the subject refused, ah, then they will—same (inaudible)--ah, if they refuse it's a mandatory comment and they have to explain, you know, there's usually a comment or something that's made.

Q Ah, I want to interrupt here. So on any give subject test, it always runs a calibration test, correct?

A Always.

Q So there, no matter what, an individual where this is a test in the field, it's always examining a known sample?

A With every test. It brackets the subject's tests, which are the breath and the breath, with a calibration check, a quality control check, and it ends the sequence with a quality control check, and in between the two breath tests, you'll see where the D is located, every step is, is, ah, separated by an air blank, but if you'll notice, there's a diagnostic check, it's just another internal…

Q And what is the diagnostic check?

A It's checking internal, ah…

Q All right, let's not blather, let's get our test done.

A You bet. So, I'm going to go back to this, and I'm going to do a, ah, one blow test attempt. Here's another thing—every time there is a new test or a, ah, a breath test is administered, the instruction is to have a new spit trap. It's just an additional safeguard, but it has no impact. (Pause) Okay. And you get that tone, knowing that it was able to take that reading. If it wasn't able to take the reading, it would go back to the beep.

MR. PIROSKO: Do you have time for a question while we wait?

A Of course. Yeah, we have a few minutes now.

MR. PIROSKO: If I wanted to weigh myself and I'm looking at the scale and the, it's not sitting on zero, I'm going to make an adjustment to make sure that I get the correct weight. My understanding is that this comes up with a one-oh-one or a one-oh-three or an oh-nine-five on the calibration, there are no adjustments before someone starts to breathe into the instrument?

A So if it—that's true.

MR. PIROSKO: Okay.

A You can't, ah, adjust, the only adjustment that can be made is when we're doing the actual adjustment at the State Lab. Ah, during the, the testing, you know, that's why there's a heavy reliance on, on the quality of the solutions. Ah, the solutions, it says it's a one-oh, if it says it's an oh-eight, it's been, it's been assayed, we're, we know that that's what the result is, then we're going to expect it to be within that, ah, be that result plus or minus an acceptable margin of variability, you know, and, so, that margin of variability, ah, is just inherent with any measurement, so…

MR. PIROSKO: And, can I ask one question, Mr. Halsor?

Q The diagnostic phase, the D-phase, what exactly is it doing during the diagnostic phase?

A It's checking all the internal electronics, it's checking the, the cell temperature, it's checking the breath hose temperature, it's, ah, checking its communications, it's, it's checking the electronics of the instrument itself.

MR. PIROSKO: I have a question. If, if we take the one-oh solution, the machine's been warmed up, there's nothing wrong with the simulator, when I put a one-oh solution in there and it comes up at a one-oh-three, what does that

mean, because we know that's a one-oh?

A Okay. So it's a one-oh…

MR. PIROSKO: Where, where is the error?

A Okay. So, there's, ah, I could do that one-oh, well, let's see if I have, let's see here, if I have a, a good example. Here we go. This was a one-oh solution. This is, ah, this is to demonstrate, this was from our previous test, okay, whenever a test is discontinued it's going to report the exception, in this case it was a deficient sample, right, we just had one of those out of a total of one test, okay. So, now, the solution change on this instrument, ah, we know it's a one-oh solution, and we know that there's tolerances that it has to, one, be adjusted within, that it has to be verified within those ten solutions that I was talking about earlier, here's, here was the solution, concentration that it says on the bottle, here's the actual measurement that was obtained by the instrument itself. And here is the range that it has to fall within. When the solution was changed, it was a one-oh solution, we had a ninety-nine and a one-oh and a ninety-nine and a ninety-nine and there was ninety-eight, then there was a one-oh-two, and there's a ninety-eight and a ninety-eight and a ninety-eight and a ninety-nine, averaged out at a oh-nine-nine. That is measurement of uncertainty, that is analytical variability in any measurement and that's to be expected, so if somebody is an oh-eight-oh, which I understand what, how this applies, ah, if somebody is an oh-eight-oh, they provide a breath sample and they're an oh-eight-oh, they provide another breath sample, it might be an oh-seven-nine, they provide a third breath sample, might be an oh-eight-three, they provide a fourth sample it might be back to an oh-eight-oh. So, that's just the nature of any measurement.

MR. PIROSKO: Yeah, but that can be a function of them blowing longer or harder…

A There's that, too.

MR. PIROSKO: …(inaudible)

A Consistency.

MR. PIROSKO: But we're talking about a piece of machinery or an instrument, and if we know that there's, that's supposed to be exact one-oh…

A No, I never said that. We know that…

MR. PIROSKO: Okay…

A …this is a one-oh…

MR. PIROSKO: All right.

A …and it comes with a certificate of analysis and, and the Certificate of Analysis says this is a point-oh—in this particular example…

Q You're referring to People's Ten-A?

A I am referring to People's, let's say People's Ten-B—it's saying that it's a point-one-zero-zero, it was measured by a GC, with a plus or…

Q Can you say what a GC is?

A Ah, a gas chromatograph. Ah, and, with a plus or minus tolerance of point-zero-zero-three, okay? This is a point-one-zero-zero with a tolerance of three percent. This could have been as high as a one-oh-three or as low as a ninety-seven and still been acceptable and sent out.

MR. PIROSKO: Okay. This to me appears to be a boilerplate flaw…

A Okay.

MR. PIROSKO: …that this number doesn't change.

A That number doesn't change. That's the tolerance by…

MR. PIROSKO: Okay.

A …the man--, ah, I don't want to, I'll go back to this.

THE COURT: Okay..

A So, on the second breath test, I am going to demonstrate a multiple breath attempt, all right? (Pause) Didn't make the minimum bar, so it's going to call for more sample. Now, I have just charged this system, I have just charged the sample chamber with alcohol from my lung or my simulator lung. (Pause) There we go. That time I met the criteria so now we got a measurement. Now, we will note when we get the printout the difference in the appearance of the two, two curves.

MR. PIROSKO: What you just did here, I'm assuming that that, when this was hooked up here and you stopped blowing, there's some type of, ah, gate valve or something that doesn't allow that air to escape while you hesitate?

A (Pause) I think I just got some of the liquid.

MR. PIROSKO: The what?

A I just got some of the liquid come up into my (inaudible) testing that. The actual, ah, gate valve, because it's a simulator, the gate valve is actually on the instrument itself.

Q So, I'm sorry, can you explain that again what you did…

A So…

Q ...for the record?

A …the flow here, I'm blowing into the instrument to get air to come out here. If I suck it back in, I'm sucking air into here and I'm actually sucking the solution back up into the tube, so, this is, this is open, but inside the instrument

itself there's a valve, so once it's done collecting its sample, ah, there's a valve here that, ah, because it, if it continues, then, then, you wou--, wouldn't want any vapors from the, the simulator to mix with any other part of the sample from a subject.

Q So what is it, Mr. Groff, that would prohibit, perhaps—let's say you have a user who registers a very high breath alcohol level, let's say a point-two, maybe higher, ah, and then somebody else comes in shortly thereafter, what's to prevent that previous person's very high level from affecting a subsequent user's?

A It's this first air blank that's being performed. This first air blank is the zeroing of the instrument. It's, first it's clearing out, ah, the air in, ah, the chamber itself. If it can't effectively clear it out and it's still detecting alcohol, it actually will give a different error message, ah, it'll give a purge failure typically is what it is, it's not able to purge itself, ah, and get the alcohol out. But when it starts that first air blank, ah, when it starts that first air blank, it's like the tear on scale and it's zeroing itself to make sure that any alcohol that might be in—oops—any alcohol that might be in the surrounding ambient, ah, environment is not, ah, being, ah, is not impacting a subject test, it's kinda, like I said, zeroing itself. If it's not able to clear itself out, it's going to give a, ah, a purge failure, and if the ambient conditions change too much, the course of the sequence itself, it'll stop and record what's called an ambient failure, the ambient conditions have changed too much from its initial zeroing.

MR. PIROSKO: These, these Exhibits Ten-A and Ten-B, they, the Certificates of Analysis, those are relatively easy to obtain for discovery purposes?

A They are. If, ah, yeah, they are. We, we maintain these records and, ah, we can provide them upon request.

MR. PIROSKO: Online?

A We've talked about it actually.

MR. PIROSKO: How would you prefer us to do?

A Well, depends on the request. We can't, honestly, ah…

MR. PIROSKO: A lot?

A Ah, if we get a lot, then maybe we will, ah, establish something online where you could type in the lot number and then get access to a PDF of it, right?

THE COURT: So right now it's not part of the litigation packet? No?

Q No.

A All right. Ah, there was one other test, and I believe that, ah, the good Judge was interested in seeing, and I would like to demonstrate for you, and that is…

THE COURT: So did we actually get a result on that?

A Yes, ma'am. So here are our four printouts. If you will note…

Q Hold on. I'm going to set this down for a second.

A Okay.

Q Okay.

A It turned off.

Q Okay. Let's staple that.

A Okay.

Q And I want to staple the other one.

A Ah, the other one? The other one that ended in…

Q Yeah.
A …that timed out?
Q That's fine.
A All right. Here ya go. And these are…
Q But before we talk about…
A Okay, I understand.
Q Correct, so…
MR. PIROSKO: Ah, and you might want to re--, when we had the…
Q That's fine.
MR. PIROSKO: …video of that we might want to just, 'cause people are going to want to see those who are watching the video.
A I understand, I, I, I'll wait until we run our last test. My arm is getting tired. So I'm gonna, I'm gonna separate these out…
THE COURT: My clerk has a stapler there. I don't know, do you have her to run copies for you?
A I wanted to demonstrate interferent detection. This is the point-zero-two-zero solution.
THE COURT: And you might want to wait…
A Oh, I understand.
\ THE COURT: Yeah. Does anyone want a break? Are you good?
A Ah, I'm, I'm good. Are you guys are good. I know that, ah, I have a colleague outside that is sitting outside, patiently waiting. I don't want to take breaks if everyone—unless you need a break?
THE COURT: No, I'm good, I'm good.
MR. PIROSKO: He's just discussing purchasing, correct?

A Correct.

MR. PIROSKO: (Inaudible)

A Okay.

THE COURT: I don't, if you don't have an issue, he can come in.

A I think Mike and Anthony are probably out there keeping him company, so let's just keep goin'…

THE COURT: Okay.

Q We asked for sequestration…

THE COURT: Yeah.

Q …let's keep it as it is.

A Okay.

THE COURT: Now, are we going to get through these tests today or are we…

A Yes.

THE COURT: …going to get through one other test today?

A We can…

THE COURT: What's your…

A …we'll do this one and if you'd like, I can demonstrate the slope detection and we're probably done with our examples, okay? I think we kind of covered…

THE COURT: Okay, so, at this point, I think what would, what I would like to see happen is for purposes of this audio-video to get through as many tests as we can as efficiently as we can so we, I can see what the validity appears to be just by what we're doing today.

Q I'm fine with that, Judge, and just to plan, 'cause we're at 3:30…

THE COURT: Yeah.

Q …we'll continue that. Honestly, my testimony, ah, after we went through this process was to maybe explain the handout, explain the printout, ah, the error messages and possibly discuss law enfor--, officer training, but I, I think that that's something where if we can't it get done today…

MR. PIROSKO: Ah, are you going to get to (inaudible)

Q I, I will try and get him…

MR. PIROSKO: 'Cause if you can't, we'll just bring him back in December.

Q I, I would probably prefer the procurement guy to go…

MR. PIROSKO: Okay.

Q I, I think, honestly, that's my own assessment. Some of these peripheral issues on the officer training, the error messages we could deal with in December if we needed to.

MR. PIROSKO: Yeah.

THE COURT: Well, Mr. Pirosko, for your perspective, how many of these tests do you actually want to get through today? What would be important for you? We've got one done…

MR. PIROSKO: Mm-hmm.

THE COURT: …the point-oh-eight, and we've got one that's got an interferent…

MR. PIROSKO: Ah, I'm not, I don't care about interferents. Ah, slope detection would be, I mean…

A Okay.

MR. PIROSKO: …the Court…

A I, I would, ah, if a recommendation, I would recommend seeing, because as part of our verification of performance, interferent detection is an important aspect, especially for those suffering from diabetes. Slope detection is a very important, ah, test because it, it covers the mouth alcohol argument in any form or fashion and how we test the instrument to make sure that that component, that safeguard is working, and so I…

THE COURT: Can, can we get to those…

A …I feel…

THE COURT: …too?

A Yes, ma'am. And they won't, we don't have to do a full test sequence. The full test sequence is really what takes, ah, some time. Okay. So I'm going to initiate another breath test here. We're going to use our, and, again, the operator card. Ah, enter the demographics, ah, this one is our---(pause). Ah, case number is, ah, free text, so they can put anything in that they want. Acknowledgements.

MR. PIROSKO: (Pause) Is the sample chamber the same size?

A Ah, from the 9--, 5000? It's smaller, it's quite a bit smaller, actually. It's, ah, it's got three chambers. There's one for the simulator, and there's one for the subject sample and then there's the measurement chamber, so, that, they don't actually comingle except for in the sample chamber, they come in different routes. It's, ah, ah, piece of aluminum, machined aluminum, it's got the (inaudible) with the detector on one end and the, and the filters on the other. I mean, the source on one end and the detectors on the other. Now, ah, for this test, what we have here is a point-zero-two-zero solution with seventy microliters of acetone that's been added to it, so, seventy microliters, seventy

microliters is a, ah, very small amount, it's just a very, very miniscule drop when you, when you see it on the tip of pipette. (Pause) And it, I don't know if you caught that, but it said "interferent detected" across the bottom, and it stops the sequence at that point.

MR. PIROSKO: You said seventy microliters. Is there a, was there, does that show us a specific (inaudible) seventy and is there a lowest level of detection?

A Ah, seventy is the standard by which they're evaluated by NHTSA.

MR. PIROSKO: Okay.

A …so that's our rule of, that's, that's our benchmark that we measure it to.

MR. PIROSKO: I see.

A Ah, we can go lower, ah, but that's the standard that they're held to by the federal government.

MR. PIROSKO: As the machine is configuring Colorado right now, if someone had acetone below seventy, it might not catch that?

A Ah, it's very possible. Ah, but you, but it's also, ah, it's, it's not, ah, seventy microliters in their body and they have less then it doesn't pick it up, I mean, it's not necessarily apples to apples in that regard. We're talking about parts per million found in the, ah, the, the vapor itself and how many parts per million have to be present in somebody's breath. Ah, and that's an answer I actually can't give you, I, 'cause I don't know.

MR. PIROSKO: I understand. I just want to make sure that I'm speaking correctly. And so seventy microliters is the lowest level of detection of acetone?

A Seventy microli--, --liters is the level of detection by which we test it at.

MR. PIROSKO: Yeah.

A It will go lower…

MR. PIROSKO: Yeah.

A …but we test it to the, to the same specifications that it's held to by, ah, NHTSA.

` MR. PIROSKO: And the acetone, is that just for, would be caused by a diabetic, anything else (inaudible)

A So, unless they're drinking those chemicals, ah, that's not something that's gong to be found in the breath, it's going to found on, they're going to be contaminating an environment, and so that would be actually a different error message.

MR. PIROSKO: Okay, but it's, we're really just talking about (inaudible)

A Right.

MR. PIROSKO: Okay.

A So here's the first, ah—while that exhibit's being marked, ah, then I can do the last test. This is, ah, Listerine breath spray. Those little Listerine breath sprays ha--, ah, typically have alcohol as their carrier. Inhalers have alcohol, typically ethanol is their carrier for the medicine. And this induces a mouth alcohol effect. Ah, I could have used a, ah, actual, you know, whiskey or, you know, bottle of rum or something like that and rinse through my mouth, but I would have hyper-saturated my mouth and this is a little, this is a very small amount, which allows for a more miniscule detection. (Pause) (There is some

largely inaudible and random conversation going on regarding the input of data, that has not been transcribed.) (Pause) Now with this scenario, I'm actually going to blow directly into the instrument. I'm going to contaminate my mouth.

THE COURT: So why are you choosing to do this one different and blow right into (inaudible)

A Ah, because, ah, I'm trying to induce a, ah, mouth alcohol situation where it's going to see an abrupt rise and drop of the, ah, alcohol measurement reading. Blowing through this, I'm not able to induce an abrupt rise and drop because it's at a constant state. This, by providing this because the, alcohol is a carrier, ah, then I'm contaminating my mouth but it, it's a short-lived effect, ah, so, that's why I'll be able to blow through that tube. (Pause) And it gives me an "invalid sample", which means it (inaudible). In the event of an interferent detection, the officers are trained to discontinue testing. There used to be a little bit of subjectivity and we took a more of a conservative approach in that, ah, if, ah, they get a, ah, interferent detected, (inaudible) of those interferents could be detected, they're all bad, health-wise, and so we instruct our officers to have them seek, ah, a blood sample and have a, ah, get checked out.

THE COURT: So, Mr. Pirosko, I'm comfortable with the amount of testing done regarding the three samples. Are you?

MR. PIROSKO: I just have, ah, one question. Where's the exhaust port? (Pause) On the in--, on the Intox--, on the 5000 EN, when there were sample capture, is it fair to state that what happened was a silica gel tube was essentially attached to the back of the machine at the exhaust port?

A It was attached to the back of the machine. Honestly, you know, that was really before my tenure, honestly. I mean, I'm not, I can't…

MR. PIROSKO: No, that's fine, but I…

A …I don't, right, and I would defer to say that would be the obviously place that it would go would be towards the exhaust port. Ah, I don't think it was siphoning off an exhaust somewhere else, it wouldn't make sense.

MR. PIROSKO: And, if, in fact, I know this isn't set up for sample capture, if this were set up for sample capture, that might be where the capture took place, (inaudible)

A Ah, ti's, ah, I guess in theory engineering-wise, maybe that is, ah, where it would be. I know that the manufacturer doesn't offer that as an option, though, so, it would have to be engineered for that, and then re-approved by NHTSA for that use and so on and so forth.

MR. PIROSKO: I appreciate that. One of the reasons I ask that question is this exhaust port has, ah, threads as if something could be attached there.

A Ah, you know…

MR. PIROSKO: Do you, do you know why?

A I believe that that is part of the attachments for the dry gas canisters. The dry gas canisters actually sit back here and there's another plastic piece that sits over this, and it could be the way this is being exhausted, there could be an extension or something that is part of those fittings for the dry gas connection, but that would be speculation.

MR. PIROSKO: Why would, why would you exhaust into a dry gas canister?

A Well, if you are, if you're con--, if you're containing this area back here, and this is exhausting here, maybe it's an extension, a muffler extension…

MR. PIROSKO: We just don't know?

A I just don't know. So I would only be speculating.

MR. PIROSKO: All right, that's it.

THE COURT: Are we done.

A Okay, thank you. We're done.

THE COURT: So…

Q Judge…

THE COURT: …if you don't mind admitting those formally…

Q I'm going to do that.

THE COURT: …and make sure I keep track of 'em.

Q Give me just a moment, Judge. And then what I'd like to do, Judge, for our purposes, since we've just gone through this, I believe we what—four results, or do we have three?

MS. HUESER: We did clearance of the mouth alcohol…

Q Right. And the oh-eight-oh…

MS. HUESER: The oh-eight test and then the invalid sample (inaudible).

Q Okay. So let's go through these. And then I think, Judge, for our benefit, we'll start it off with these as Ten-A and Ten-B, I believe, for the solution. I, I would propose for these test results, ah, we do 'em Ten-C, (inaudible) along those lines.

THE COURT: Okay.

MR. PIROSKO: I have no objection.

A Can I make a clarification to answer your question please?

Q Hol--, hold on.

THE COURT: You know what, why don't we—hold on just a second. Next thing, we're really done with the testing, then you should be up on the stand near a microphone, and then I believe your counsel's going to mark those exhibits, formally introduce them to the Court, make sure we're all on the same page before we go forward with anything else.

//

(A lot of inaudible, overlapping and spotty conversation between the Court, the attorneys and the witness clearing up confusion of the marking of the proposed exhibits has not been transcribed.)

//

THE COURT: And, Counsel, did you, did you actually admit Exhibit Nine?

Q Let me take a look, Judge. No, I did not.

THE COURT: Okay. So does the witness have it? I, I know we've been talking about it, but…

Q He does not.

THE COURT: Okay.

Q And, I guess this would be, originally, Your Honor, I—oh, (inaudible) Okay. I think, 'cause we, I think the last before we started starting testing we were, we were talking about Exhibit Nine.

Q I, what do you show Nine as, Your Honor?

THE COURT: Ah, the I-9000 Certification Worksheet.

Q Oh, that's correct. Ah, I, I did not. Okay. And you have a listed copy, Your Honor?

THE COURT: I do not. I know that we were talking about it and I

wrote about it, but I don't have a copy of it.

Q All right. Well, as we're putting this parade of exhibits together…

THE COURT: Okay. And then, Mr. Pirosko, if you would look over those before the Court actually admits 'em so that we are clear that you are not going to have an objection to those test results coming in?

//

Q Okay. Your Honor, what I have in front of me, ah, is People's Exhibit Number Nine, which I've tendered, the I-9000 Certification Worksheet.

THE COURT Okay. So this is gonna differ that what you gave to me today, so we're…

Q Oh, it looks like it doesn't. Judge, I had four copies of one—this one shows an ID number of 621, but I think it was meant to be representative of, simply a demonstrative exhibit of what these certification forms are. I think the original one had a number of 437 on it.

THE COURT: Do you want this back?

Q Give me a second.

THE COURT: Okay.

//

Q Okay, Your Honor, your clerk is making copies of Ten-A, Ten-B and the correct Nine. I will get those to the Court. Ah, where we are proceeding is Peoples' Exhibit Ten-C would be the point-oh-eight test results from the demonstration.

UNIDENTIFIED FEMALE: It, Ten-C is the one-one (inaudible)

Q Oh, I apologize, you're correct. That was the, we started with an oh-eight but the, it was a timed-out sequence, reference to as Test Timed-Out,

that's Ten-C.

MR. PIROSKO: (Inaudible)

Q Yeah, that's a good idea, Mr. Pirosko, thank you. Ah, it shows, Ten-C is start time of 14:53 and end time of 15:13. Ten-D is the point-oh-eight test, the successful completion test, which started at 14:53, it shows end time of 15:28. People's Exhibit Ten-E is referred to as the "Interferent Detected Test" that began at 15-hundred-hours, ah, it, well, this is what it shows, start time 15-hundred-hours, end time 15:45. If memory serves, Mr., ah, Groff was utilizing the times to, ah, was manually inputting the start time in order so we could do a, a quicker sequence in order to get through the test. Then, we are waiting on copies so we can get to Ten-F.

THE COURT: What was, ah, and what was A and B, 'cause you started out with C?

Q Ah, Judge Ten-A and Ten-B are the certificates from the manufacturer of the assayed samples.

THE COURT: Okay.

Q Since we filled those out, we only had one copy each. I have your, your clerk making copies.

THE COURT: Okay. All right. And just, ah, Counsel, what I'm going to ask you to do is—and you can send one to Mr. Pirosko…

Q Yes.

THE COURT: …this that you gave me initially we were following it for some time…

Q It's worthless now.

THE COURT: …we are no longer following the Exhibit List, so, if

you would revise it with what actually was exhibited today and accepted today, ah, and get a copy to both of us so I can actually organize my notebook accordingly.

Q I will, Your Honor.

THE COURT: Okay. So, is that what you have, Mr. Pirosko, regarding Exhibits Ten-A, B, C, D and E? And some of it I think is forthcoming?

MR. PIROSKO: I don't have A, B and (inaudible), C, D, E and F.

THE COURT: Okay. And I thought we had made copies of A and B?

Q They're coming.

THE COURT: They're comin'?

MR. PIROSKO: I, I do have a question (inaudible).

Q Hold on. If, if I can clear, clear this one up. Judge, I also have tendered copies both to, to the Court and to Mr. Pirosko, ah, which is referred to as Exhibit Ten-F. This was the demonstration test referred to as "Slope Detector", ah, the exhibit reflecting start time of 15-hundred and end time of 15:52. Ah, furthermore, I now have People's Exhibit Number Nine. This is the re-tendered People's Exhibit Number Nine, it is the I-9000 Certification Worksheet Reference ID Number 458, which if my memory serves correctly, is the one that was identified in the demonstrative video. If I may approach?

THE COURT: Thank you. You can.

Q And then I further have copies of Ten-A and Ten-B. Ten-A is the Certificate of Analysis for one of the assayed samples from Guth Laboratories, and Ten-B is the Certificate of Analysis of the assayed sample from RepCo Marketing Company.

THE COURT: Okay. So I have all of those. I have Nine, Ten-A, Ten-B, Ten-C, Ten-D, Ten-E and Ten-F. I have everything.

Q I haven't provided Nine.

THE COURT: Ah, 458, is that it? I believe that's, that's the same thing?

Q You have that?

THE COURT: Yeah. Yeah.

Q I'm giving it to Mr. Pirosko. (Pause) Mr. Pirosko, did you, you said you had a question about Ten-B?

MR. PIROSKO: Ten-B. Mr. Groff, do you have Ten-B?

A I have none of these.

Q Oh, well, let's get you some.

MR. PIROSKO: That's okay. (Inaudible)

A Yes?

MR. PIROSKO: This histogram with, ah, Breath Sample Two Ten-B, I didn't recall, was that the intentional, you were intentionally trying to create (inaudible) in the BAC line going up the y-axis?

A Exactly. What I was trying to do in Breath Sample One was to demonstrate a single breath attempt versus a multi-breath attempt, ah, to show the difference in how the histograms are going to, ah, appear as a result of, of doing that.

MR. PIROSKO: Okay. Ah, for verification purposes, do you understand (inaudible) where something is cut off?

A I do.

MR. PIROSKO: In the past, I believe there's been testimony in other

cases where essentially, like the State of Georgia, if you start breathing into the instrument and stop, their BAC line is actually going to, ah, show up on this histogram and start (inaudible), their histogram actually starts over here and will show the whole line, not just a stop and then it goes straight up, is that correct?

A Ah, it's a setting within the instruments themselves, ah, as far as, ah, what part of the histogram you want to have displayed and reported, ah, you can set it to report the entire histogram, you can set it to report the sample that's actually measured. Ah, for our settings, we have a sample that's actually measured.

MR. PIROSKO: Okay. Colorado has the ability, if it wanted to, essentially, show this, the, the first breath before you stopped?

A Correct, it's a feature.

Q Ah, just for the record, do you want to use the camera at all to kind of convey what you're trying to discuss here?

MR. PIROSKO: All I'm trying to show is that, that, this was two breaths with a big break in between, so instead of the line actually going down to the x-axis, the horizontal axis, Colorado has set theirs up such that a first breath wouldn't show up on this histogram.

THE COURT: And you're talking about Breath Sample One?

MR. PIROSKO: Breath Sample Number Two.

THE COURT: Oh, Number Two. Okay. Thank you.

Q And that's in reference to Ten-B?

THE COURT: Yep.

MR. PIROSKO: I have no objection to any of those documents.

THE COURT: Okay. So I will admit, for purposes of this hearing,

Plaintiff's Nine, Plaintiff's Ten-A, Ten-B, Ten-C, Ten-D, Ten-E and Ten-F. All right.

Q Ah, Mr. Groff, I would like to turn your attention to People's Exhibit Ten-D.

A Okay.

Q And, with regards to People's Exhibit Ten-D, this was the oh-eight-test, correct?

A Correct.

Q And this was a successful test, correct?

A Correct.

Q So when there is a successful test with the Intoxilyzer 9000, can you describe the reports that are produced from that?

A Ah, the, the printouts are going to indicate the subject information, their name, ah, the, the location of the instrument, the serial number, the test number itself, ah, has a sequence, ah, to it, ah, the case number, date and time of the offense, basic demographics that were entered into the instrument by the officer, ah, during the first part. It's going to indicate the, ah, operator who performed the test, and the arresting officer. Ah, then it's, ah, the next, ah, field that you see is the twenty-minute deprivation period. These are where it records the start time and the end time of the sequence itself, the acknowledgments that the officer, ah, selects when they're doing their data entry related to the twenty-minute deprivation. Once the sequence then begins, ah, it's going to, it records every single one pf the steps in the sequence itself, ah, with an air blank, simulator temperature, one calibration check, air blank, subject sample, provide the volume that was provided, ah, air blank, diagnostic check, air blank, wait

period, air blank, another subject sample, the breath volume, air blank, a simulator temperature measurement, the second calibration check and it's completed by an air blank. Then the lower of the two results is what's reported. And it will also, ah, provide the timestamps for each one of those steps. If any of those steps fail, ah, the instrument will stop the test, report one of the eighteen exception messages its capable of, ah, reporting. It will also record the histogram for the first breath sample and the second breath sample, and in the histogram, ah, across the x-axis, across the bottom is the number of seconds that the subject provides a sample—in this case two seconds, four, six, eight, ten, twelve. As, ah, it starts with its scale of, of up to six seconds, but once six seconds is exceeded, then it will rescale at twelve seconds. If twelve seconds is exceeded, it will rescale to twenty-four seconds, and so on.

Q Mr. Groff, I'm going to interrupt you right there because you started to talk about this, this first page with the information—does that have an official name?

A This is a, an Evidential—I'm sorry—Intoxilyzer 9000 Evidential Breath Alcohol Test, or an EBAT Test Report is the name of this document.

Q And at one point, as you re--, starting to explain things, you mentioned the "Comments" sections, ah, well, not even that, you, you referenced the box that would refer to "Errors", correct?

A Ah, well, yeah, no, ah, what I had stated was where the, ah, test sequence is recorded in the middle of this document, if those steps fail, it's, the instrument is designed to stop the test and report an exception message if one of those steps…

Q All right.

A …are not successful.

Q That's the segue I'm looking for. May I approach?

THE COURT: You can.

Q Ah, Mr. Groff, I'd like to show People's Exhibit Ten-G. If I may, Your Honor?

THE COURT: Thank you.

Q Are you familiar with document Ten-G…

A I am.

Q …Mr. Groff? What is it?

A This is the Intoxilyzer 9000 Exception Message Guide. This document is posted next to, to ev--, every one of the Intoxilyzer 9000's, ah, at the law enforcement agencies, and what it does is it lists the message that, ah, the exception message it has encountered, it, ah, gives a description of what that exception is, ah, the action that the Intoxilyzer operator, ah, would take, ah, the Intoxilyzer and operator action, actually, and also the corrective action that the Intoxilyzer operator would undertake before trying to resume testing or repeat testing. This, this document also at the, ah, is broken into different sections. The top section, the first three exception messages that are encountered require that the test, entire test process be re--, ah, started from the very beginning with another twenty-minute deprivation has to be initiated. Those three exceptions require that. The next three, ah, exceptions, the test sequence aborted, subject refused, deficient sample, ah, these are exceptions if encountered, the officer must, ah, provide comments and notes in the comments box at the end of that sequence to, to offer further information as to what the circumstances were that resulted in that type of exception.

Q And that would occur on the EBAT Test Report in the lower left hand corner?

A So, in the…

Q That's…

A …when an exception is encountered, ah, the EBAT Test Report, where, ah, or Exhibit Ten-D, ah, is probably not the best example but Exhibit Ten-C is a better example where an exception actually was encountered. And in this example, ah, the, ah, test timed, ah, timed-out, three minutes had gone by and a breath sample had not been provided and it timed itself out and reported it. What is reported here, ah, on this printout, ah, all four pages are still provided, ah, the sequence number, the test number still sequenced, ah, and as we talked about the other documents, ah, it's also recorded in other areas of the other documents, but you will notice there is no sequence, there is no histograms. The first breath sample in this case was provided, it was the second breath sample that had timed out, but it doesn't give results of the first breath sample. If it doesn't successfully complete this test sequence, then no result is going to be reported, and so, and what it will also do is where the test sequence is documented, it's going to provide what the exception is and it's also going to provide the corrective action on the printout itself, which is consistent with what they're going to find on the Exception Message Guide, listed next to the Intoxilyzer. This is an example of one of the exceptions where the officer actually had to, mandatory comments are required. This, this situation, what was typed in was "test timed-out".

Q And then, with regards to the histograms that are contained on the test, test report, that's a new feature, correct?

A It is.

Q And, as Mr. Pirosko, ah, indicated, the way the, the settings are on this feature for a Colorado test may be in contrast to the Georgia test if, if we accept that, is it shows only the successful test, correct?

A It does. And by default, the successful test is always going to be the last breath sample that's provided, so if the sample is provided and it's not adequate and they stop, the subject stops blowing, ah, and then resumes blowing, it's going to start re-recording that histogram, basically it's going to pick up where it left off, ah, and will continue to do that as many times as necessary until it's actually able to take that measurement or it will time itself out.

Q So, if that occurs, that doesn't register an error, does it?

A Ah, if what occurs, I'm sorry?

Q If what you talked about, ah, in your demonstration as a multi-breath test.

A Does that register as an…

Q Correct…

A …exception?

Q …does it register an exception or an error?

A It does not.

Q Okay. So, you're looking at the histogram lines themselves to discern whether this multi-breath test occurred?

A The, the determination that was made when looking at these histograms and deciding what part of the histogram, how much of the histogram is going to be recorded is really the, the importance of the scaling that is being displayed here. Very rarely do we ever see a scale that goes greater than twelve

seconds. Ah, most individuals can't provide a breath sample of that flow rate for longer than a twelve-second period of time, that's, that's kind of extreme. It can happen but it's rare. But when it's scaled like this, we can keep a close eye and visually have a good representation of the level, quote/unquote level slope that we're looking for. Ah, it's the last second of measurement, if you'll notice, on these histograms where the breath sample, the br--, which is the lighter of the two lines on these histograms, that's measuring the actual breath itself. So if somebody were, ah, blowing and letting off and blowing and letting off, you would see it rise and drop and rise and drop, and it's reflective of that sample that they're providing. The darker bold line is representative of the actual alcohol measure, the alcohol that's being measured, so you'll see an abrupt rise until it eventually starts to level off and it's, it's relatively level slope. It's not perfectly level, but there's no more abrupt rise or abrupt drop, and that's what it's looking for, and it, where the breath sample is stopped being provided, that's where it's taking its measurement. If the criteria were met at the, in this example, at the four-second mark and all the criteria were met, then the measurement would have been taken then, which might be a little bit lower than where it was taken at the nine-second mark.

THE COURT: Can I ask a question about Ten-B? Refresh my memory, I may have, well, there's, there's different, between Breath Sample One and Breath Sample Two, explain again why there's an immediate slope on Breath Sample One, and Breath Sample Two there is not?

A Okay. So what is happening, and if it's okay as I speak if I can refer, so as, ah, the, ah…

Q This is what I would like—this is the recordkeeping part, the

record-making part of this, ah, is when you're trying to explain a diagram, I would rather we have some video…

THE COURT: That's fine.

Q …of what you're trying…

THE COURT: Do you want to go up and explain that?

Q …to (inaudible) And you, let's speak up 'cause you're not really close to a…

A Okay, let's see if…

Q …microphone.

A …I can, see if I can do this here. Kinda backwards. So, in the first breath sample, you will notice that, ah, it starts at zero. Right before the breath sample was provided, and if you recall, the instrument actually does an air blank, and what it's doing when it performs an air blank is it's bringing in fresh air from its surroundings, it gets sucked in through the breath tube, goes through the sample chamber, exhausts out the bottom of the instrument, and it's the, ah, it's basically getting itself ready to take a measurement. So, with its, we have an established clean slate. Sample gets provided, there's a bit of a delay until the alcohol from, has made it through the tube and has now made it into the little sample chamber and started to measure. It doesn't take long, half a second, maybe. And then you'll see an abrupt rise of the alcohol measurement until eventually is starts to reach its full concentration, then it will start to level out—it's call the knee of the slope—and this, ah, it will start to level out and continue to remain level as long as the sample is being provided. In a human sample, it's, ah, or any of these samples, really, but in a human sample it's not always fully level, you know, it's, it's not abruptly rising anymore, but it, the deeper, the lung

sample that has been provided, it's going to go a little bit higher, a little bit higher, a little bit higher until the person's just out of breath at that point. Now, so if, this is a single breath attempt. Now, in a multi-breath attempt, as demonstrated with this one below, sample was provided. Alcohol from that simulator was introduced through the breath tube into the sample chamber. But as you noted, I stopped blowing, I didn't meet the criteria for it to take a measurement. The instrument did not do another air blank and clean itself back out to restart a perfect example of a curve, so it's calling for more sample, the system has now been charged with that subject sample, not something else but that subject sample, and when the sub--, ah, person, ah, resumes blowing, often what happens is if they're calling for more sample the subject will take in a breath and then start to blow, and you'll actually see a little drop in the measurement as it resumes it will rise, 'cause they've just kind of diluted their upper air with fresh air.

THE COURT: Okay.

A Okay? So…

THE COURT: Thank you.

A …so on the slope, you'll see a bold line immediately rise. That's just an immediate response in the detector that it's, it's, there's, it's, it's measuring from zero but all of a sudden it, I mean, it takes just a millisecond…

THE COURT: Okay.

A …and it's all of a sudden reading and it, kinda resuming where it left off.

THE COURT: Thank you.

A So…

Q Ten-D. And I'd like you to take a look at Ten-H. And, Judge, I'd also like to admit Ten-G, which, I believe, is the error message.

THE COURT: Any objection?

MR. PIROSKO: No.

THE COURT: Ten-G will be admitted for purposes of this hearing.

Q Your Honor, I've also tendered to Mr. Groff and Mr. Pirosko what we're referring to as Ten-H, and that, ah, Mr. Groff, do you recognize Ten-H?

A I do recognize Ten-H.

Q Have you reviewed that document before?

A I have.

Q And, who's the subject test matter for Ten-H?

A It's Mr., ah, Van Schoyck.

Q For purposes of Ten-H, when you talked about the multiple, multi-breath test, on the histogram on Mr., Mr. Van Schoyck's, Schoyck's histograms, is there—let me ask you this—how do you interpret or read those histograms?

A Well, in this case, ah, and just like in the previous exhibit—thank you—in the previous exhibit, ah, there's a single breath attempt where it started from zero, rose and leveled out, and as you can see here, because this came from an individual, ah, that, you know, again, it's, it's level, it's not abruptly rising like it does when it initially starts to measure, but it's still very slightly rising, but it's a level, what is referred to as a level slope, there's no more abrupt rises or drops once it's reached its plateau. In the second breath sample, ah, breath attempt, ah, there was a, an initial breath attempt, and then a subsequent breath attempt. Whether that was one, whether that was five, I, there's no way to know, but regardless, ah, this is a mul--, this is indicative of a multi-breath attempt, and

where you have the immediate rise off of the y-axis, ah, as it resumes measuring from where it left off and as the subject provided more and more sample, in this case we went out in a scale of six seconds across the bottom, so the scale above was up to twelve seconds, but continued to, to, ah, measure, measure, measure, measure, measure until, ah, no more breath was provided and it was, took its reading at that point in time.

Q And, Your Honor, I'd move to admit People's Ten.

MR. PIROSKO: No objection for this hearing.

THE COURT: And, Counsel, do you care that your client's name is on this document?

MR. PIROSKO: Well, I, I would just ask that they redact it for, if any of this gets distributed outside the courtroom.

THE COURT: Or on the video? I don't know, that would be difficult.

Q Judge, I can tell you, just as an offer, I, I'm, I'm fairly decent at audio/video stuff. Ah, I, I can probably redact this stuff, but, like I said, what we do is I will submit the un-redacted copies to both the Court and Mr. Pirosko, and then I think by the time we get to December, I can offer up the redacted video for review by all parties, and then at that point, we can make a determination…

THE COURT: Okay.

Q …as to…

THE COURT: I'll admit…

Q …(inaudible)

THE COURT: I'll admit Peo--, ah, People's Ten-H for purposes of this hearing.

Q Thank you, Your Honor. Ah, Mr. Groff, I would like to turn your

attention back to People's Exhibit Ten-D. This, of course, was the oh-eight successful sample, correct?

A Ah, excuse me, I believe you took my Ten-D.

Q Distinctly possible.

A Okay.

Q Mr. Groff, you explained earlier that the creation of the Calibration Adjustment Standard Operating Procedure and the Calibration Verification Procedure transmitted over into the paperwork, is that correct, the evidence of that?

A Correct.

Q Can you please, referencing Ten-D, ah, explain to the Court, ah, where this information is contained?

A Okay. So, ah, the first, ah, the first page of the printout is the actual Subject Breath Alcohol Test Report, specific to the individual and the information from the officer who operated the breath test. The next three pages are what is referred to as, well, the next page in, in our exhibit here is the certificate, ah, it's the certification for, certificate for the, this instrument that we performed these examples with.

Q But let's stop there. This is a good point to stop there. What is required for an instrument to be issued one of these certificates?

A Has to successfully pass the calibration adjustment and the calibration verification procedures in order to be able to have a certificate and be certified for field use.

Q And, explain to me, with the I-9000 and the validation process as opposed to the, ah, as opposed to the, ah, the selection process, or the

evaluation process, I'm sorry, when you ultimately selected the I-9000 instrument and started this process in which you said May 1, 2013 these instruments, approximately a hundred and sixty were put into service, were they given these certificates?

A Yes, they were. Ah, they were imbedded in every one of the instruments as part of the design of the firmware. Ah, once, as I demonstrated earlier on the instrument there, the very--, verification protocol, I-9000 verifications, calibration verification protocol, ah, that, what we follow in that procedure, it's also built into the firmware of the instrument itself, it's the process by which we follow to do this. The data that's generated as a result, ah, is what is imbedded in the memory and provided on these reports. One of the features of the 9000 is we can also imbed forms, and so if it successfully, it, it's kind of an if/and sort of scenario—if it's able to pass the calibration adjustment, then we move onto the calibration verification. If it passes the calibration verification in its entirety, then it's able to be certified and the information that's imbedded on the certificate and form as part of the, the firmware, ah, will then be attached with a, ah, certificate ID number and the date of the certification period for that particular instrument.

Q So the firmware enables this?

A Correct.

Q And prints the certificate?

A Correct.

Q As a function of the instrument?

A Correct.

Q And, if, does the instrument recognize the dates of on--, the, the,

one-year period?

A It does.

Q And so, if, for whatever a reason an instrument is out in the field and that period of time has elapsed, what will happen?

A Ah, they, it will disable itself, ah, if it hasn't been recertified by the time the expiration date rolls around, ah, yeah, the instrument just disable itself.

Q And who's responsible for that recertification?

A The Department is.

Q Does the law enforcement agency have the ability to do that?

A They do not.

Q So, it requires EBAT staff to do that?

A Absolutely.

Q And how does that take place?

A So, we know that once a year we have to go to every facility and perform a facility inspection and to make sure the environment that the instrument's being main--, held in is being maintained properly. And as a result, what we've, in, ah, what we do is we bring, ah, the simulators that are needed, the oh-two-oh all the way through the point-four interferent, all the equipment we need to go through the Calibration Verification Procedure, we bring that with us now to the facilities themselves and actually revalidate and recertify that instrument at that location.

Q And is that what the Certification Worksheet is?

A The Certification Worksheet, again, whether we're doing that activity at the law enforcement agency as part of our annual facility inspection or we're doing that at the, the State Lab is, ah, that Certification Worksheet is, ah, a

part of that process regar--, wherever that's done.

Q Thank you. Now, I'd like to turn your attention to what would be the third and fourth pages of People's Exhibit Ten-D. Does that particular part of this document package have a specific name?

A Yes. This is what we have coined the I--, I--, I-9000, Intoxilyzer 9000 Instrument Performance Report, or IPR.

Q And does that IPR report carry i--, any identifying information as to the subject?

A It does, at the top, ah, part of this document and there is the same subject name fields with the same information as, that's found on the printout. It also have in the same fields at the top, the location of the instrument, serial number of the instrument, the test sequence, case number, ah, the demographics associated with that individual's test.

Q What quality assur--, ah, quality assurance information is pulled through the firmware and published onto here that reflects the measures contained within your Standard Operating Procedures?

A Ah, a number of 'em, actually. Ah, the IPR is in, is, by design, our record for those protocols that we have followed to record those activities. It starts with the calibration adjustment record, which is in the lower left hand corner of Page Three of the exhibit.

Q What does that reflect?

A And it reflects the calibration adjustment and its calibration adjustment record in the I-9000 certification record, and it, and it reflects the date that the instrument was adjusted, and, and the user ID of the technician who performed that activity. It also has the certification period. Ah, in this particular

example, we have a period of 5-13-14 to 5-13-15, and prior to that, we had 7-25-13 to 7-25-14, and so it will keep track of the certification periods, ah, every time one of these, ah, verifications are performed. Above that, in the middle, really in the middle left of the, ah, document is the solution change record, and during the demonstrations, I was showing the process by which the certified instructors change the solution, ah, the test date, the test time, ah, their ID is imbedded, and then, of course, they're entering the lot number, the bottle number, the expiration date, and the target value that's entered by the Department staff is listed there and the target range of ninety-five to one-oh-five is also listed there. Now, I want to be real clear on the record here about what this means. The ni--, oh-nine-five to one-oh-five, this is only applicable to the solution change. We know that when we open up a brand new bottle of solution, ah, the process is once a bottle of solution has been opened and they enter this information and it starts, the, the, solution change procedure, it runs, ah, does ten calibration checks in a row, we expect that that new solution, that all ten of those initial samples are going to be within oh-nine-five to one-oh-five, because it's a new bottle of solution. But the operating tolerance, ah, in the field for subject testing is still, remains oh-nine-oh, point-oh-nine-oh to point-one-one-oh, that's the tolerance. Once it goes outside that tolerance, ah, the test is going to be discontinued, it's going to, by design, it's going to report an exception message.

Q Mr. Groff, are you familiar with what are acceptable tolerant ranges in the scientific community?

A Ah, yes, the standards are, ah, typically ten percent. Ah, in the American, ah, ABFT, ah, is the Accreditation…

Q All right, I'm going to interrupt you. What is ABFT?

A Ah, yeah, it's late in the day, I'm sorry. American Board of Forensic Toxicologists. Thank you.

Q Thank you.

A Ah, that's the accreditation, ah, or the entity for forensic toxicology laboratories. ABFT sets their acceptable standards of tolerance for a blood alcohol measurements at ten percent, so…

Q Thank you.

A Ah, now, back to what this record means. And so the first, ah, ten, the first ten samples on the solution change, if any one of those ten fall outside of that tolerance of ninety-five to one-oh-five, it's not successful. It'll either report the average, the standard, the relative standard deviation. In addition, ah, the, ah, in the past, the 5000 EN, ah, had logs. We were really the only state that actually had logs that recorded every single one of the of the subjects' tests, recorded the calibration check results and recorded the, the subject, ah, EBAT result and a few other bits of information, officer information—age, sex, just…

Q The solution's log contained all the identifying information…

A It did.

Q …of those parties?

A It did. And so, when we would, ah, actually, ah, provide them from the Department, we would redact at least the names, but most of those logs were acquired by law en--, from law enforcement agencies directly and many times they were not redacted. Regardless, the information from these, ah, logs, ah, that was useful, useful for the Department, useful for the Prosecution, useful for the Defense, useful in a manner to try and, ah, evaluate, ah, at a glance the, the instrument's performance over time. A common practice was to rec--, ah, for

discovery was to request thirty days' of these logs prior to an individual's test and thirty days of the logs after the subject's test, that was kind of the standard practice. So, moving forward in redesigning the, the litigation packet, I guess, for lack of a better term, ah, when it came time to evaluate, ah, the performance of the instruments, it, there was, there was, ah, credibility in looking at the tom--, the calibration checks and the averages of those calibration checks over time. There was reason to look at it. And it more was for consistency than anything. Ah, so what we designed was a sixty-day average of all of the calibration checks, ah, that occurred in the sixty days prior to that individual's test. And, so, ah, the instrument is de--, by design, will take into account every calibration check that's occurred and keep a running average. Now, over time, ah, the solution will deplete and as the solution depletes, ah, that average will start to drop. Now, an additional quality assurance measure is that when the instrument starts experiencing calibration check results that fall below that ninety-five, it starts depleting to the point where we're getting between a ninety and ninety-four, if it sees a certain number of, ah, results--and the tolerance is actually six in a row, that'd be three subject tests where they're between a ninety and ninety-four--it's going to, ah, flag a warning, or if it sees a total of ten over the course of the solution from the date it was changed that fell below the, or above that tolerance, it's, it provides a warning on the instrument itself, and that warning, in essence, says, you know, the solution, time to change the solution, please contact a certified instructor, and in the demonstrations where some of those popups would come up where they'd give a warning or something didn't get entered, it looks similar to that but with a different message, and the officer actually has to acknowledge that. They may still be able to continue their test because it's still

following, falling within acceptable times as specified in the Rule, but it's starting to deplete. And so, ah, so, that, with the training that we provide is such that when you see that notify your instructor, let 'im know time to change the solution, if that officer in the middle of the night doesn't do that, then perhaps the next officer will, and until that, ah, solution has been changed, that me--, that warning will continue to return. Once a solution is changed, then it goes away. However, if it's not changed, ah, and it starts, ah, getting results that are below that tolerance of oh-nine-oh or above the one-one-oh, then it's by design is going to stop the test and record an exception message, and not record a result at all.

THE COURT: Counsel, let me, let interrupt there. It's about 4:35. I don't intend to go much longer after 5, so I don't know how much testimony you still plan to get in today, but just, everybody's ability to sit, listen and actually process the information, I think it's, it would be, ah, burdensome for everybody if we go much later than 5.

Q I'm wrapping up, Your Honor.

THE COURT: Okay, thank you.

A And, I'm sorry, I will be more, ah, concise in my responses. I just want to make a clear record.

MR. PIROSKO: (Inaudible)

Q Right. So, with the 5000 EN, the previous models, what were the rules concerning solutions changes?

A So, with the 5000 EN, ah, the logs, the instrument had a memory capacity that was limited, it could only hold about a hundred and five, a hundred and six tests in total, and if the information that was contained on these logs was not preserved, printed and preserved, then at some point then the oldest, ah, test

record would fall out of its memory, so it was designed that it would only do ninety—s--, ninety-eight, ah, ninety-six tests, twenty-eight days, and a hundred cal checks total and, ah, twenty-eight days. And the instructor would go and they would, they'd preserve that record, law enforcement agency was required to maintain that record and they would change the solution at the same time as a matter of course. With the new instrument, memory's not an issue. In essence what was happening with the 5000 EN is that the memory capacity of the 5000 EN was driving the solution change on the instrument.

Q So driving the solution change policy?

A Correct. And so, now, ah, the instrument's memory on the 9000 is not of an issue, so we designed it to where the solution needs to be changed as needed based off of its performance, and so these quality assurance criteria that I previously mentioned are those things that are put into place so that when it starts to deteriorate, still within tolerance, it's going to get changed and continue to be operational. If it falls outside of tolerance and a instructor doesn't change it, then it's going to stop the test and it's not going to be able to perform testing until that solution is changed. So..

Q Thank you.

A …the, yeah, it's based off its performance.

Q So with regards to the IPR, and I think you touched a little bit on it, the I--, it shows the I-9000 Verification Record, correct?

A It does.

Q And that encompasses what is the verification, Calibration Verification Procedure, ah, Standard Operating Procedure, correct?

A It does.

Q And so, it includes our nine known assayed samples?

A It includes the nine assayed samples, the measure--…

Q The interferent…

A …--ment that was…

Q …sample?

A The interferent.

Q And then, below it, it talks about verification test, stability test; can you quickly address those matters?

A So the verification case is basically just that, it verifies that the data has been imbedded properly. A stability test is a series of calibration checks, it's twenty in a row. Ah, we perform the invalid sample, that is the slope detection sample that I demonstrated, and improper sample—that's when a sample is provided at, ah, an improper time. Ah, and then we do a final evidential breath alcohol test. Once all of those are completed, then what the instrument is designed to do is it provides a certificate number, a unique identifying number, and so the Court understands, ah, the way it's delineated, same with the test number above, it starts out with 0-4-2-5—that's the serial number of the instrument, the last digits, the four digits of the s--, ah, instrument itself. Fourteen indicates the year that it was performed. And, the 0-0-0-1 indicates this is the first verification, ah, that has been performed in 2014 on Serial Number 4-2-5. And the "I" stands for "inspection". Ah, and, ah, with the test number above, it's the same scen--, scenario, Serial Number 4-2-5, 2014, this is the 28th test that's been performed on this instrument in 2014 on Serial Number 425. Ah, the bottom right hand corner of this IPR is what is referred to as I-9000's sixty-day exception message record, and this is the, this will record in the sixty days prior

to the subject's test every exception that's been encountered on that instrument. In addition, it will also record the number of evidential tests that have been performed on that instrument in the sixty days prior to that person's test. And not only does it provide the, the, the sixty-day record, but it'll, it'll indicate specifically which exception was encountered and how many of that, those particular exceptions were encountered in that period prior. So this is a good, ah, monitor for many different reasons, actually. Ah, one is to monitor for trends. Ah, now our instructors, and our, our, are trained to look at, ah, these, ah, exception message records, ah, because they may, it may identify a training issue within their staff, ah, within their officers. For example, if they see a number of subject refusals or a number of deficient samples or something to that regard, ah, you know, there might be something that's a trend that's going on within their agency and they can look deeper into it. Ah, if there are, ah, diagnostic failures or unstable references, some of these exceptions can be encountered, ah, more often than not are just kind of deal-breakers for the instrument that are just, it's going to disable itself, that's when they're going to get a phone call, ah, if we haven't already received, ah, if we haven't already identified that it, the problem has occurred.

Q Okay. I'd, I'd like to turn your attention now to the, the maintenance history…

A Okay.

Q …record on the IPR. Can you please give a brief description of what that is?

A So, this is a running history and this form, this page will continue to grow over time as the instruments remain in the field and this is documenting the

activities that have occurred with this instrument over time. So, when we perform the calibration adjustment and it's successfully completed, we document the date, the technician name, or an ID, actually, and the I-9000 calibration adjustment successfully completed. Once that's performed, then we do the calibration verification procedure. Once it's successfully completed, that is documented. If the instrument is returned from the field for repair, then there'll be another entry that says, ah, returned for repaired, ah, instrument repaired on, returned to service, and then you may see another entry of calibration adjustments successfully completed, calibration verification successfully completed, so it's basically the maintenance history in a similar manner that was provided in, ah, that the Department's always provided for its instruments over the years.

Q So it records what that maintenance history is so that the end user gets to see all this information?

A Correct..

Q So, the manifestation of the, the EBAT Test Report and this IPR, that was the firmware development in terms of the records to be kept on this and what would other be described as the transparency concerning this, correct?

A Correct.

Q So, this was all developed, these units and subsequent units that were released May 1st, 2013, correct?

A Correct.

Q And the I-9000, as it's configured here with the features that you've discussed with the reporting, that's what's in operation today?

A Correct.

Q And that's what was in effect at the time of Mr. Van Schoyck's test, correct?

A Correct.

Q Is the I-9000 in its confi---, in this configuration the certified instrument in the state in the eyes of the Colorado Department of Public Health and Environment?

A It is. It's the only instrument that's used statewide.

Q And that's considered the certified instrument of the state?

A It is.

Q May I have a moment, Your Honor?

THE COURT: You may.

Q Hold on.

MR. PIROSKO: Mr. Groff, I just want to clar--, clarify, we're looking at the fourth page on Ten-D, which is the maintenance history.

A Yes?

MR. PIROSKO: And this is a generic question, we're also looking at these, ah, worksheets that you're talking about, sometimes they get filled out totally and sometimes they don't. I know these are two separate tests, but if, if a technician fills out one of these worksheets completely, does this automatically populate onto the maintenance history for this machine?

A These are two different documents…

MR. PIROSKO: I understand.

A Okay. So, so if an instrument comes in—to explain the process—so if an instrument comes in for repair…

MR. PIROSKO: Mm-hmm.

A …it would be documented on this worksheet or this certification worksheet that we have.

THE COURT: And what exhibit is that, Counsel?

MR. PIROSKO: Nine.

THE COURT: Nine? Thank you.

A Okay. So it would be, ah, documented on Exhibit Nine, the nature of the repair, so on and so forth. If it required it to be readjusted, that would be documented there. If it req--, then, of course, it would be revalidated or re-verified, ah, before being recertified. The activities that occurred on that worksheet then get put in to that maintenance history, so…

MR. PIROSKO: Manually or automatically?

A Manually. So when we're performing that, ah, record when it comes time to put in that language, we type on the keyboard, you know, ah, on the instrument itself and, you know, we've completed this, we've completed this, but the first entry if it came in for repair is going to be this date received for repair, nature of the repair--that's, that's the information we use to verify that, that it's being properly imbedded in that instrument.

MR. PIROSKO: The only reason I asked that question, so it's possible for one of these worksheets to get filled out but if someone doesn't manually place it on the maintenance history, it may not show up, someone could, could just forget?

A That I can't say that that's not an impossibility. The processes we have in place where a primary and secondary review by two individ--, individual technicians, so we try to mitigate the probability, but that's also one of the reasons why we have that internal document that we maintain, ah, quality

assurance reviews to make sure that these things are being conducted, so.

MR. PIROSKO; If I did a, a discovery request on Ten-D as it stood right here for the worksheets, I should probably get two?

A They're actually, we have the other one.

MR. PIROSKO: I, I, I don't want 'em, I'm just asking generally?

A That would be correct.

MR. PIROSKO: Because it would appear to me that there should be two worksheets based on what's here.

A And based off of the period of time because it went into service, I don't know, July, and we had another recert, annual recertification, so, yes, if it, ah, came in for another repair, then you're going to see an extra entry of the calibration verification has been successfully completed, you'll see the repair entry and the verification entry after that.

MR. PIROSKO: And if, if a technician properly filled out two of these worksheets and it was logged on here so there are essentially four entries and I did discovery of this, I should get at minimum four worksheets?

A You'll get two.

MR. PIROSKO: I would, I would get the two that are on…

A Yeah, as I explained, on that certification (inaudible) where we document the calibration adjustment, right—do you see that in the middle of the certification worksheet? Right here. Okay. The calibration adjustment, okay, that's recorded. So this, we're talking about one activity in a string of events, right? So, calibration adjustment, calibration verification.

MR. PIROSKO: I understand. So now tell…

A (Inaudible) right so, so I may have done this and this but you're

going to see those two entries that correspond into just one sheet.

MR. PIROSKO: I understand that part. I'm, I'm saying without doing the calibration verification, not the annual thing, but say in between the, the two annual certifications, the machine came in twice…

A Okay.

MR. PIROSKO: …for whatever repair it was, and, and the worksheet gets filled out totally…

A Okay.

MR. PIROSKO: …and the technician properly transfers that information to maintenance history…

A Right.

MR. PIROSKO: …and so if there were two of those on here, two problems that it was fixed, and they were printed on here and I did a discovery request, I should get at minimum four of those worksheets?

A Nope, you more than likely are going to get two. And the reason I say that is, if it comes, you're talking about two separate—let's keep it simple—one repair, okay, comes in for repair, we'll be able to record that, all right, we fixed it. So we go to do, and then after that, maybe we didn't need to recalibrate it, maybe the repair was just a broken breath tube or something, we just had to plug a new one in, but we're going to re-verify it and recertify it. So what you're going to see reflected on there is the repair, and it'll have the date, and then you're going to see, ah, I-9000 calibration verification successfully completed, this instrument was certified for service—those two entries are going to correspond with this one page, 'cause this happened first, it got recorded there, this happened second, it gets recorded there, so when you're trying to marry it

up, you, for that example, you're going to get one page for those two entries.

MR. PIROSKO: Maybe I'm not making myself clear. I'm just assuming that these first two entries are one worksheet and that was the original…

A That's correct.

MR. PIROSKO: …the very original. The next two entries were for the, the first annual recertification.

A Correct.

MR. PIROSKO: Okay. So, if I, if, as it stands right now, if I asked for worksheets, I would get two?

A Correct.

MR.. PIROSKO: If this machine came in for a repair in between here…

A Correct.

MR. PIROSKO: …and that was logged and I asked for worksheets, I should get three?

A Correct.

MR. PIROSKO: All right.

A Does that make sense? Okay.

MR. PIROSKO: Sorry.

THE COURT: Can I ask a question?

A Yes, ma'am.

THE COURT: This I-9000 Certification Worksheet and the maintenance history record on Exhibit Ten-B, both of those are filled out only by the Department of Health?

A They are.

THE COURT: They are? Okay. So, the machines are brought to you, you fill this out and then you manually do, ah, you continue with the maintenance history depending on what you did?

A Correct.

THE COURT: And is all this in Ten-D, is this all part of a litigation packet?

A It is.

THE COURT: It is?

A In, in the past, with the 5000 EN, it was common for the legal community to come to the Department for records on the instrument, it'd go to law enforcement agencies for records on, for logs and maybe a third agency for records on certification information (inaudible) to perform the test. When we designed this, we were trying to, ah, maximize the efficiencies the best we could by providing what was the same information and in some cases more information, many cases more information at the time of every subject test, and so it's just, it's just there, and it, and we determined that the information that's provided here is what we need to ensure the proper performance of the instruments and if this is what we need to perform our function, then why not just disclose it full transparency.

THE COURT: So if an officer runs a test on a subject, that test is going to look like Ten-D with all four pages attached?

A Every time.

THE COURT: And it's at the police department as soon as that test is run?

A Every time.

THE COURT: Okay. Thank you.

A And if it needs to be recalled, it can be reprinted directly from that specific instrument at any time.

THE COURT: Thank you.

Q Your Honor, at this point, I'm ready to conclude. I was originally going to ask Mr. Groff some questions about some of the training issues. I think that more has to do with the discovery core of issues and can wait until December. I'm going, at this time, I have no further questions. I'd like reserve on that. I suspect it'll come up. I think if we get Mr. Brough on the stand, I can be done by 5.

THE COURT: And, Mr. Pirosko, do you have additional questions for this witness, sir?

MR. PIROSKO: Just a, a briefly. There was a certificate for the instrument, the annual certificate, essentially, well, (inaudible) that's just for the instruments, not for the facility, correct?

A That's correct.

MR. PIROSKO: That's all I have.

THE COURT: And, I'm sorry, for the instruments, not for the what?

MR. PIROSKO: Facility.

THE COURT: Okay. All right. Okay. Thank you, sir, for your time today.

A Well, thank you for your time, Your Honor. I appreciate it.

THE COURT: All right.

A And, would you like these exhibits?

Q Ah, ple--, just stack 'em and we'll organize them (inaudible)

THE COURT: I have all my exhibits here, so I don't need anything additional.

Q And you have all of yours?

MR. PIROSKO: (Inaudible)

Q Right.

THE COURT: All right. Have a good weekend, sir. All right. Sir, if you'd come forward to my right? I'm very sorry for your long wait today. Raise your right hand. Do you swear and affirm that the testimony you're about to give this Court will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes, Your Honor.

THE COURT: Have a seat. Your voice is tape-recorded. Please speak up into the mic.

RICHARD BROUGH, JR.

the witness herein, having been duly sworn, was examined and testified as follows:

BY MR. HALSOR:

Q I also want to apologize, Mr. Brough, for the, the timing of these things. Never one of my strongest suits for, ah, of lining up my witnesses. Would you go ahead and say your name and spell it, please?

A Ah, my name is Richard Brough, Jr., R-I-C-H-A-R-D, B-R-O-U-G-H…

Q How are you…

A …Junior.

Q My apologies.

A Sure.

Q How are you employed, Mr. Brough?

A I work for the State of Colorado Laboratory Services Division.

Q And what is your current position?

A Ah, currently I am the Deputy Director (inaudible).

Q And, have you had some previous positions with the Department?

A Ah, the Department of Public Health or?

Q Yes.

A Yes. Ah, I have also been the Fiscal Manager at the laboratory from September 1st, 2009 to, ah, I think it was May of 2012, so about, about (inaudible) three years I was the Fiscal Manager at the, ah, laboratory as well.

Q Are you familiar with an RFP for a new breath-testing instrument with the EBAT Department from the Colorado Department of Public Health and Environment?

A Yes.

Q And how were you involved with that?

A Ah, I, I worked with the program to, ah, help that, help advise them on writing the RFP, and I worked with, ah, the purchasing group as well to, ah, help them any way that I could. I was, my position was, I was kind of the purchasing/fiscal person at the laboratory, so I was kind of in the middle of it.

Q And what do those responsibilities involve as the Purchasing Agent?

A Ah, the, the purchasing, I was the Fiscal Manager at the laboratory, Purchasing Agent was with the Department.

Q And what do you do as a Purchasing Agent? Are there, are there rules that govern what you can purchase with you, how, how those purchases

are to take place?

A Yes, there are procured rules and, ah, the purchasing agent at the Department level, ah, decides what sort of mandate, ah, an agency will use to procure something, and then there are (inaudible)

Q But you were sort of the point person who hands down what those rules are going to be?

A I consulted with the purchasing office and then worked with the program, ah, to make sure we stayed, to help the purchasing group to stay, make sure we all stayed within the rules of the (inaudible)

Q Are you familiar with Jeff Groff?

A I am.

Q And, did you provide instruction or guidance to Jeff Groff in the EBAT Department with regards to this particular RFP?

A Yes.

Q And, with regards to document retention, did you provide them with, ah, feedback as to how this particular procurement was to work insofar as what documents were to be retained and what documents were not to be retained?

A Yes.

Q Do you have a recollection of what those instructions were?

A Ah, yes. Ah, towards the end of the selection, ah, when (inaudible), ah, I called the Purchasing Office, ah, to be kinda, make sure everything is complete. They have a purchasing file they retain at the Purchasing Office and it, kind of a checklist of what they retained in that, and I asked them, when they said we were done, I asked him, I said, ah, “Is the bid file

complete?", and he said, "Yes", I said, "So you're, you know, we're all, we're all set, we don't need to, ah, have any other documents in the folder?" and they said, "No, we're, we're good to go, the folder is, ah, the bid folder is complete". I said, "Good", and then I let the committee know.

Q So did you give Mr. Groff and his department, a--, again, instructions as to documents that were not to be retained?

A I told them that we did not need, that, that the Purchasing Office had the documents that they needed, ah, for the bid file to be complete.

Q So did you give any indications as to, to discard, dispose, destroy documents that didn't fit what was contained in the file?

A Ah, yeah, I told them that any other documentation that we had that they filed, the Purchasing Office did not need for the bid file we did not to retain them.

Q Did you give them any instructions as to personal notes, anything along that in terms of testing documents as to what should be retained or not retained?

A I was aware that there were personal notes, ah, additionally, personal notes are not retained in the bid file, so the Purchasing Office told me that the file was complete and I didn't, didn't seem unusual that there would be, ah, didn't think anything about it, those documents being retained because they're not generally retained, it's not typical that those documents be retained.

Q Now, you met with me just the other day, correct?

A Yes.

Q And I interviewed you?

A Yes.

Q And was there discussion in your own words about chicken scratch or…

A Yes.

Q Can, can you speak to that, what your instructions were regarding that?

A Yes, ah, generally speaking, evaluators will take various, ah, notes for themselves through the period of an evaluation, ah, and we kind of refer to chicken scratch notes, and these types of documents are not retained.

Q Now, what's your, what's your overall background in, in terms of, of procurement?

A I was a Purchasing Agent, ah, with the Department of Nature Resource and Executive Director's Office for three and a half years, ah, and then I was Fiscal Manager at the laboratory for almost three years as well.

Q About how many procurements or, or other equipment-type purchases do you think you may have handled in your career?

A Ah, between commodities and services, ah, less than a hundred, more than seventy.

Q I--, is, did this par--, did this particular RFP deviate from normal practices?

A There was only thing about this bid that was, ah, a little bit unique, which was the three instruments that the evaluation committee evaluated—generally speaking, if you're evaluating a good, ah, the vendor will provide you with one of those goods so it can be evaluated by the committee, ah, and often, generally speaking, I should say, the committee, the three or four members of the committee are the only ones who will get to use that item or use, get their

opinion of that item. Ah, in this case, ah, when we were developing the bid, me being the Purchasing Agent, myself and the committee with Jeff, and, ah, we had talked about the fact that the committee, since they were kind of tech-y, subject matter expert people, that they wouldn't really be the best people for user-friendliness, ah, part of it, you know, as far as the touchscreen and, and how law enforcement officers would actually be able to interact with the instrument, ah, and so, as we're talking with the Purchasing Office, we agreed that it would be okay if, ah, they got law enforcement officers to do, ah, like hands-on user friendliness testing, and then they took their scores, submitted 'em to the Purchasing Agent, the Purchasing Agent tallied those scores to give user friendliness, because it just didn't seem, it just didn't seem right or, as—well, I shouldn't say "right"--but it didn't seem as thorough to have kind of techie people evaluating instruments for user friendliness because, you know…

Q So you opened it up?

A So, we, yes, we allowed, ah, law enforcement officers to evaluate it. Other than that, it was a, it was a pretty typical bid, ah, but generally the evaluation committee would be the only ones, but in this case (inaudible)

Q And did you provide for an allowance for scoring sheets?

A Yes, ah, this, this bid had a lot more, it was a lot more detailed than some bids because of, of the scope and what the evaluation committee wanted to do. I believe there were forty-nine different gradable, ah, criteria that were, ah, submitted by the evaluation committee.

Q But those were retained?

A Yes. All score sheets that were referenced in the RFP that were going to be done, evaluated, those were retained, yes.

Q All right. No further questions.

THE COURT: Mr. Pirosko, did you have anything you wanted to Cross on?

MR. PIROSKO: I do, Your Honor, but, ah, I'm going to ask that this witness be brought back in December, mainly because I haven't seen the video, but I do have a couple of questions I would like to, ah, today if that's possible?

THE COURT: Okay.

CROSS-EXAMINATION

BY MR. PIROSKO:

Q Mr., it's Brow (phonetically-spelled), you said?

A Brough.

Q Brough. Mr. Brough, I know nothing about purchasing, I know nothing necessarily about document retention policies, but I asked a couple of people yesterday some, ah, just basic questions, and is it fair to say that in, in a normal situation when a purchaser is trying to determine, ah, what product to buy from different vendors that at the end of, ah, the evaluation—actually, let me back (inaudible), was there anything from any of these three vendors that would requi--, that required destruction of any of these documents?

A I'm not sure I understand your question?

Q Well, did, ah, Draeger say, well, we'll, we'll submit our, our, ah, breath machine for testing by the State of Colorado but if you don't select us, we want you to destroy any of our documentation?

A I wouldn't know. That type of dialog would not be typical between a vendor and a purchasing agent.

Q Okay. I don't need to know whether it's typical, I need to know in

this specific case. If you don't know the answer, that's okay…

A I don't know.

Q …I'm going to ask you to try to find out before you, you come back in December whether or not there was any specific part of this bid process where any of these three vendors required destruction of their documentation at the end, whether they were selected or not.

A Of their documentation?

Q Yes. The next thing that I'm going to ask, and I would like you to look into if you don't know, that was destruction—the oth--, the same question comes to return of their, any of their documentation without destruction, back to the company--so we'll give you this documentation, you can have it, if you don't choose our product, we would like you to return this as opposed to destroy it. And, I want you to think very carefully about the words you use when you're testifying as far as what was told from Purchasing or Procurement back to the EBAT people, and I don't want to put words in your mouth, please use whatever words you want, but I, I may be paraphrasing that when (inaudible) what's in the file, ah, you or the Purchasing Officer said "we don't need those documents" versus "I want you to return those documents to the vendor", or, "I want those documents destroyed", was there any instruction that came from you or anyone else in Purchasing or Procurement that demanded that EBAT or anyone else destroy these documents?

A Can you repeat what you just said that I said because I did not (inaudible)

Q Yeah, I believe it was "Purchasing did not need", essentially you were saying, hey, we don't need those, we don't need that, not necessarily…

A What I…

Q …that you don't need to keep 'em, EBAT, it's just that Purchasing or Procurement doesn't need 'em?

A The conversation was, "Is the bid file complete?", "Do you need any other", "Is there any other documentation that we should retain"…

Q Well, who…

A …and the answer was no.

Q …who was that conversation with?

A Tim Massangale, the Purchasing Agent.

Q To who?

A To me.

Q And he, he said what to you?

A He said that the bid file was complete, we do not need any other documentation for the file.

Q He told you that they don't need it anymore?

A Any other documentation for the file.

Q Okay. And then what did you do when you were told that?

A I conveyed that message to the committee that we did not need any other documentation for the file

Q Okay. Again, choose your words carefully—you just said…

MR. HALSOR: Judge, I'm going to object to his instruction. He can ask the question, the witness can answer.

Q Okay.

THE COURT: Okay. And I'll sustain it. If you have a, a direct question regarding that, go ahead and ask that.

Q You told a committee that you, that Purchasing doesn't need to retain those documents?

A That Purchasing had the documents that they needed for their file.

Q Okay. Did you ever tell anyone, whether the committee or Mr. Groff or any of the staff or anyone else that these documents would be destroyed?

A Told them that we did not need the documents anymore. I did not, I told 'em we didn't need documents anymore because the bid file was complete and I really didn't have any, typically I don't have any in--, interest in what happens to documents.

Q Okay.

A If they choose to destroy them…

Q In a situation where, ah, there's a purchase of a, of a item and later the item doesn't perform up to what was claimed by the vendor, wouldn't the buyers have to go back and look and see what the documents said in order to try to resolve the issue?

A They could, and that documentation is entailed in the RFP bid proposal, which is retained.

Q Ah (pause) is there, I don't understand the command structure and who, you know, reports to who—is there anything that you're aware of within Colorado State Government that required destruction of these documents?

A (Pause) I'm not aware of any requirement, no.

Q (Pause) Who is, who is your legal representative, I mean, just, is it the Attorney's General's Office, do you know?

A For the Department, for the State?

Q For your, for your part of the, not you personally…

A Right, for the, for the Department.

Q Purchasing or Procurement. Do you know?

A For the Department for Public…

Q Yeah.

A …Health and Environment, I believe that would be Anne Hocks (phonetic)

Q Okay. Did, did you or did anyone that you know ever run this through Legal what you should do with these documents?

A I don't know.

Q I have nothing further right now. Again, I have to…

THE COURT: Okay.

Q …talk to my people.

THE COURT: All right. Anything further from the People?

MR. HALSOR: No, Your Honor.

THE COURT: Okay.

MR. PIROSKO: I, I would just ask…

THE COURT: Thank you.

MR. PIROSKO: …he be, report back.

THE COURT: Yeah, ,and sir, we did actually have to schedule a second part to this motions, ah, so, ah, the Defense Attorney—and is he under your subpoena?

MR. HALSOR: Ah, we will re-subpoena him.

THE COURT: Okay. They'll re-subpoena you to come back, so they'll have some more questions. Ah, but thank you for coming and thank you

for your patience with us this morning and this afternoon. You are excused.

A Thank you.

THE COURT: Thank you.

MR. HALSOR: Thank you, Mr. Brough.

THE COURT: All right.

MR. PIROSKO: Judge, the only question I have is I know that the Court was going to put something in, in the, ah, register or minute orders about, ah, a protection order. I don't know if that's available right now. I would ask if it is, if I could get that printed out, mainly because if I talk to anyone, I want them to see and sign that for me, ah, so I don't get in trouble. And I would just like to also clarify that my understanding is essentially that I should be able to at least discuss or disclose this with anyone who's essentially working with me on this, and what I'm talking about is my paralegal, which would be Mr. Todd, with the understand that he cannot disseminate this to any--, to anyone other than talk to me about it or my experts. Ah, I imagine I'll probably be talking to Drs. Lantz and Sulik at the Rocky Mountain…

THE COURT: I'm sorry, who?

MR. PIROSKO: Drs. Lantz, L-A-N-T-Z, or Sulik, S-U-L-I-K, they're at Rocky Mountain Labs in Ft. Collins. They are actually a certified, a state-certified forensics laboratory, they do blood testing and breath tes--, or blood testing for, ah, the police agencies and they're one of the agencies that (inaudible) ah, and then if I have co-counsel on this case. That's all I can think about right now.

THE COURT: Do you have co-counsel on this case?

MR. PIROSKO: No, but I'm going to talk to one.

THE COURT: Well, I mean, it doesn't give you the opportunity to

talk to a number of attorneys until you decide who your co-counsel is.

MR. PIROSKO: I imagine my co-counsel's probably going to be Tim Bussey out of Colorado Springs.

THE COURT: So that would be the person I put here, Mr. Bussey? I just don't want you to go talk to the entire Defense community, Counsel?

MR. PIROSKO: I, I under--, I don't want to do that.

THE COURT: Okay.

MR. PIROSKO: I, I got a fair shake here.

THE COURT: Okay. And I, I think we all got a good idea as to how this Intoxilyzer came about. Ah, okay, so I'm just going to enter some things. My clerk does not have that ready. She obviously has been running, doing a lot of things, and that's just been requested, but we can have something ready for you…

MR. PIROSKO: Email's fine.

THE COURT: Ah, no, we're, I'd rather that, that we actually give you something physical and we make it part of the, the, the file, ah, so we can keep this record as clean as possible as to what this protective order is going to entail so that everybody's clear and that there won't be any, any questions. Ah, okay, so, from my recollection this morning, we had a discussion before any of this started, and that would be that the Prosecutor would be able to present, ah, his witnesses. I don't think you finished with everybody or did you?

MR. HALSOR: For the most part, Judge, I did.

THE COURT: Will you be presenting more on, on the next date?

MR. HALSOR: The only thing that I really ask to reserve on, and, like I said, I think this more on the subject of the Rule 16 core issues, the disclosure,

is I'd like to reserve on the issue of the officer training…

THE COURT: Okay.

MR. HALSOR: …ah, I think I have covered my bases on the scientific evidence today.

THE COURT: Okay.

MR. HALSOR: Ah, I'm going to get Re-Direct anyways on Mr. Groff, so I think…

MR. PIROSKO: I, I don't mind if he re-opens.

THE COURT: Okay. All right. And, ah, so then my recollection again was that, ah, the Court would enter a protective order just based on your representation regarding Mr. Todd, and, ah, that would be that you could confer with him regarding, ah, the information, ah, but that he could not, ah, disseminate it to anybody else. Okay. And then, Dr. Lantz and Dr. Sulik potentially are wit--, expert witnesses for you, do you, or…

MR. PIROSKO: Well, I, I, and again, I'm not necessarily expert on, ah, endorsements and everything, I believe that I'm allowed to confer with experts even if I'm not going to call them?

MR. HALSOR: That's true.

THE COURT: Okay.

MR. PIROSKO: Yeah.

THE COURT: But those are the two people that, that we can…

MR. PIROSKO: Exactly.

THE COURT: …limit that to? And then you said potentially co-counsel Mr. Bussey?

MR. PIROSKO: Tim Bussey.

THE COURT: Okay. So those four individuals can have privy to this information, they're not to share it, I assume, with anybody, ah, amongst but yourselves, the four of you?

MR. PIROSKO: Correct. It's, ah, Bussey is B-U-S-S-E-Y.

THE COURT: Okay. And then for the People, any objection, generally? I'm going to reduce it in writing and then we will forward a copy to both.

MR. HALSOR: I have no objection.

THE COURT: Okay. Now, there's, ah, obviously a transcript that's going to be derived from today and I don't know who's going to get it first, but I would like to take some notes other than my handwritten notes regarding everything.

MR. HALSOR: Sure.

THE COURT: The best way I could do this to keep track of all of this, ah, and make sense of it, honestly, is to have a look at that transcript, so could I ask whoever gets it first to forward a copy to the Court so I can compose some notes?

MR. HALSOR: We'll split the cost.

THE COURT: Okay. And then can I give you a deadline 'cause I'd sure like to, I'd like to get this together, ah, so I can get a good grasp of everything from my notes and the transcript, ah, and just be ready to go the next time around.

MR. HALSOR: That's fine, Judge.

THE COURT: Okay.

MR. HALSOR: Do you, do you think, what, 'cause we're in

December, do you think getting it in November is fair?

MR. PIROSKO: For what?

THE COURT: Ah, can we do it, it's going to take our…

MR. HALSOR: For the transcript.

THE COURT: …transcriber, ah, I don't know…

MR. PIROSKO: Six weeks, probably?

THE COURT: That would be fair, so if we give you all of September and the middle of, of October, could we do that?

MR. PIROSKO: What's that deadline for?

MR. HALSOR: For the transcript.

THE COURT: Just to get a transcript…

MR. HALSOR: To get the Judge a transcript.

THE COURT: Yeah, I would like something…

MR. PIROSKO: Oh, we'll, we'll…

THE COURT: I want to take some notes and make this make some sense.

MR. PIROSKO: We'll, we'll order it and we'll talk about whether to expedite or whatever, we're just going to split the cost…

THE COURT: Okay, I appreciate that.

MR. PIROSKO: …as opposed to one of us getting it and the other one wait and just see if I can (inaudible)

THE COURT: Okay. So, between the two of you, can you make sure that the Court has a copy of the transcript of this hearing no later than October 17th, the middle of October?

MR. HALSOR: We will.

THE COURT: That be fair?

MR. HALSOR; Yeah.

THE COURT: Okay.

MR. HALSOR: That's fine, Judge.

THE COURT: Okay, I appreciate that, 'cause I'd like to, to put this, and I have plenty of stuff to do in between and I want to make sure that, that we're ready to go. Okay. So we have the next motions date is?

CLERK: Next motion date, December 12th, at 8:30.

THE COURT: And then we're going to reserve that day, ah, for purposes if the Prosecution needs to reopen anything and for the Defense to present, ah—and did you check with your witness, ah, Mr. Pirosko, whether or not she can be present, the one that couldn't be present today?

MR. PIROSKO: Oh, Dr., Dr., ah, I don't know if I'll need her or not.

THE COURT: Okay. And then if, can we get, I don't know if you want to email my clerk, the first names for Dr. Lantz and Dr. Sulik?

MR. PIROSKO: Robert Lantz, L-A-N-T-Z…

THE COURT: Okay. And, Dr. ….

MR. PIROSKO: Pa--, Patricia Sulik.

THE COURT: Okay, thank you. Okay. Ah, we will prepare that protective order and send it to both of you, ah, Monday…

MR. HALSOR: Judge…

THE COURT: …or Tuesday.

MR. HALSOR: Judge, one last thing, I am going to take the video. Obviously we ran a lot of video today. Traditionally for court cases, I've tried to put them on CD 'cause it's easier to write on them and mark them up—I will try

and do that, delivering copies to Mr. Pirosko and the Court, ah, hopefully next week. Ah, if the video is too big, I will probably put them on flash drives, ah, and then put them in a, ah, sometimes they don't always play on everybody's computer, so, we can, we can elect different options, but I will try and get that to the Court and Mr. Pirosko by next week.

THE COURT: Okay. Can we give you a deadline?

MR. HALSOR: Ah…

THE COURT: But I would like one, too, I would, I would actually like to review this…

MR. HALSOR: I will do what I can, Judge, we have the Labor Day weekend. I am pretty good in the beginning part of the week, so I, there shouldn't be a reason I can't do this…

THE COURT: Okay, let's just say, can we give you 'til September 12th?

MR. HALSOR: Sure.

THE COURT: That gives ya a couple weeks, okay?

MR. HALSOR: Yep.

THE COURT: Okay. Now, did we have another deadline, 'cause I remember we were tossing something else out, out there, other than the next motions date. Was something supposed to happen in the next couple of weeks that wasn't, was it discovery?

MR. PIROSKO: It was just discovery.

THE COURT: Okay. All right. Okay. Then I think we're good to go, folks. Mr., ah,…

MR. HALSOR: Thank you, Your Honor.

THE COURT: Yeah. And, Counsel, can we also get, ah, a new exhibit list, revised?

MR. HALSOR: I will include that with your videos, Judge.

THE COURT: Okay. Appreciate that. All right. You folks have a good night, have a good weekend.

MR. HALSOR: Thank you, Your Honor.

THE COURT: You're welcome.

//

(Whereas the proceedings on this day were concluded.)

JUDGE'S CERTIFICATE

I, DIANNA R. ROYBAL , Judge of the County Court in and for the County of Adams, State of Colorado, who presided at the hearing of this cause, hereby certify the foregoing to be true and correct.

Done at Brighton, Colorado, this _____ day of October, 2014.

_____

THE HONORABLE DIANNA R. ROYBAL

CERTIFICATE

The above and foregoing is a complete transcription of the electronic recording taken at the time and place above set forth.

_____*Lori C. Maier (via email)*_____

Lori C. Maier

October 3, 2014