COUNTY COURT, COUNTY OF ADAMS, STATE OF COLORADO

Traffic Action No. 13-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 12th day of December, 2014, before THE HONORABLE DIANNA R. ROYBAL, Judge of the County Court, Division 4.

FOR THE PLAINTIFF:	JILL HUESER
	Registration No. 42324
FOR THE DEFENDANT:	GARY PIROSKO
	Registration No. 20453

PROCEEDINGS

(The following proceedings were had and entered of record on this the 12th day of December, 2014.)

THE COURT: Kenneth Van Schoyck, 13-T-9903. Good morning.

MR. PIROSKO: Good morning, Your Honor. Gary Pirosko, registration 20453 for Mr. Van Schoyck, whose presence was waived.

MS. HUESER: And Jill Hueser for the People, Your Honor. Mr. Halser (phonetic) was previously the special prosecutor on this case. He has left the CDAC, so I will be handling the hearing, but I'm asking the Court to allow me to designate him as an advisory witness.

THE COURT: Okay. Any objection to that, Mr. Pirosko?

MR. PIROSKO: I'm sorry?

THE COURT: Any objection to having Mr. Halser be the advisory witness for the DA?

MR. PIROSKO: Yes, there is. He's not a member---he's not a party to this action. They haven't endorsed him as a witness.

THE COURT: Are we not going to go forward with what we were doing last time? I thought we were going to do a cross-examination and---

MR. PIROSKO: Yes.

THE COURT: Is there still going to be video tape, etcetera?

MS. HUESER: I don't believe---do we have the video?

UNIDENTIFIED MALE: I didn't bring the video for this (inaudible).

THE COURT: Okay. So we're just going to have the hearing, do a transcript, etcetera?

MR. PIROSKO: Yes, Your Honor.

MS. HUESER: We are going to continue the hearing, Your Honor, but there's no requirement that an advisory witness be a testimonial witness, or an endorsed witness for that matter. You don't have to endorse witnesses for a motions hearing. Quite often, an investigator is an advisory witness who is never actually called to the stand.

THE COURT: I'm going to allow him to be an advisory for the People for a couple of reasons. One of them is the context of what we are doing as far as the Intoxilyzer 9000 is fairly separate from the actual case and the facts of Mr. Van Schoyck's case, and that was involved primarily in the last part of it. And it think it would be wise to have him involved in this part, as well.

MR. PIROSKO: I appreciate the Court's position, I just need to make a record. I believe that last time that we were in court there was an attorney, Nate Johnson, who is a defense attorney with Rhidian Orr's Law Firm. I had asked the Court to allow him to stay in the courtroom to be able to observe what was going on. My understanding from Mr. Johnson is that the Court asked him to leave, and there was a statement I believe that the Court made that the parties had agreed to close the courtroom. I personally don't recall ever saying such a thing, and so at that point my client's due process rights I believe were affected, and so I think that this is now a double standard. I still understand the Court's ruling but I just need to make that record.

THE COURT: Mr. Pirosko, for clarification, you, me, Mr. Halser and Ms. Hueser agreed that we would do the Intoxilyzer 9000, that it would be audio and video taped, that it would be a closed hearing as far as no other attorneys would be allowed in. The whole idea is it's not going to be disbursed until the Court gives you the authority to disburse it. To have somebody from the

defense bar in the courtroom would have violated our initial agreement, and that agreement was between you, me, Mr. Halser and Ms. Hueser.

MR. PIROSKO: Okay.

THE COURT: So I have a very different understanding of that.

MR. PIROSKO: And I haven't had time to go back and read that part of the transcript, and so I was just trying to remember off the top of my head. The Court may be one hundred percent correct and I may be one hundred percent wrong.

THE COURT: Yes. And that order is still in effect that until we're finished with what we're doing, we gave you a limited number of people that you were going to consult with. And that individual was not one of those individuals.

MR. PIROSKO: I understand.

THE COURT: Okay. So how do you folks want to proceed today?

MR. PIROSKO: Judge, there's two short witnesses and the first witness, Mr. Brough, who was on the stand last time, has to catch an international flight. I've agreed to take him out of order.

THE COURT: Okay.

MR. PIROSKO: And then also, Ms. Gillim-Ross is in the courtroom and she---I have about ten questions for her and I don't mind taking her out of order too just so she can get back to work at the department. And then Mr. Groff I understand is on his way.

THE COURT: Okay. So how soon can we start?

MR. PIROSKO: Right now.

THE COURT: Okay.

MR. PIROSKO: And I believe if there isn't one already, I'd ask for

a sequestration order.

THE COURT: I'll order a sequestration. (pause) Okay. So, Mr. Pirosko, you're just going to start in?

MR. PIROSKO: Yes.

THE COURT: Okay. And sir, what is your name?

THE WITNESS: Richard Brough, Jr., Your Honor.

THE COURT: Okay. So your first witness, Mr. Pirosko?

MR. PIROSKO: I'll call Richard Brough to the stand.

THE COURT: Alright. Sir, if you'd tell us your name, spell your last name for the record please.

THE WITNESS: Richard Brough, Jr., B-R-O-U-G-H, Your Honor.

THE COURT: Thank you.

CROSS-EXAMINATION OF RICHARD BROUGH, JR.,

BY MR. PIROSKO:

Q Mr. Brough, taking up where we left off last time, I know that we asked you a few questions. What is your position again at the---with the State?

A Currently I'm a deputy director of the laboratory services division in the department of public health and environment.

Q Okay. And I want to focus in on the Intoxilyzer 9000 verification or validation study, and essentially what happened to the documentation for that study. How were you involved in this issue?

A At the time I was the fiscal manager.

Q You were---I'm sorry? Can you get closer to the microphone at all?

A At the time I was the fiscal manager at the laboratory services

division and I acted as a liaison a little bit between the purchasing agent and the bid committee.

Q Who was the purchasing agent?

A Tim Massingale (phonetic)

Q And who was on the committee?

A Jeff Groff, Mike Barnhill (phonetic), Bob McDuffy (phonetic).

Q Okay. What were you asked to do? What was your initial assignment?

A My role was to help them with writing the scope of work, make sure that the bid itself was thorough. The laboratory is located at a separate location from the main campus where the purchasing agent was so it was easier for me to help communicate between the two. And the bid was done very well, not protested, and we had one of the vendors who wasn't selected actually thank us for such a transparent and thorough bid, that they were involved in actual development of the bid itself.

Q And who was that vendor?

A I don't recall.

Q Was it one of the three or was there a fourth?

A It would have been one of the three, though we did have a mandatory pre-bid meeting, and there was a fourth vendor at that one. Through the pre-bid meeting they realized that they were not able to---that their instrument wasn't going to meet the minimum qualifications, so they thanked us for letting them know up front what our qualifications were going to be and how we were going to be conducting the bid so they didn't waste a bunch of time and effort trying to do a proposal on an instrument that was not going to meet the minimum

qualifications.

Q Okay. The communications that you had with the committee, were those oral? Were they written? Were they electronic?

A All the above.

Q And what happened to the written communications that you were having?

A In regards to email?

Q Well email. or handwritten, or typed.

A Email communications, per department policy, are deleted after ninety days in the email system. That's the department policy. But as far as written communications, I think it should be stated that State rules, whether they're (inaudible) rules, fiscal rules, human resources rules, they dictate what you need to retain. They don't say "Don't retain post-its. Don't retain chicken scratch notes." I mean the rules would be three miles long. They list what you do need to retain, and you just retain those items. So those notes that you might be referring to would not be something that would be recorded. I've done at least seventy and no than probably one hundred different bids throughout my career with the State and I have never known anyone, and I personally have never seen anyone retain the documentation that you're referring to. It's just not something that is required in the purchasing rules or retention policies. The things that were required were retained.

Q Okay. I'm not talking---and I want to separate out and you can separate out, and I need to back up a little bit. I'm not trying to back you into a corner. I'm essentially letting you talk about whatever you want.

A Yes. I just don't know what kind of notes I guess, you're talking

about. Because---

Q Yes.

A ---the last time you spoke, you were specific to chicken scratch-type notes that were from the evaluation committee. And now you're talking about communications from me or the purchasing agent to them. I guess I'm unclear what sort of notes you're talking about. Regardless, neither one would be required to be retained.

Q Okay. The two big types of essentially groups of communications or documents, one is essentially the documentation of the actual evaluation or validation of the instruments once they started to be---you know, once they came into the department's possession, and the other set of documents is anything that doesn't deal with that. And so which set of documents were you talking about?

A Both.

Q Okay.

A The communications between myself and the bid committee or the purchasing agent and myself, those communications were largely email. I mean, I'm not one to necessarily write down a handwritten note and copy it and distribute it, so they would have all been emails as far as those communications. As far as documentation of the evaluator's personal notes, those are not something that's retained. What is retained in the bid folder, per the purchasing rules and documentation policies for the state of Colorado are items that are spelled out in a bid. This bid was exceedingly thorough and it had I think forty-nine different criteria that were evaluated. And the purpose for evaluators to read the proposals, test the instrument, were to come to be able to put an

appropriate grade on that sheet in that functional area. Also, if there were any clarifications that needed to be made the vendors were welcome to come out, the venders were able to come out for a maximum of two days where they worked directly with the bid committee. So if there were any clarifications, they got them at that time.

Q These approximate forty-nine criteria, did you help develop those?

A Absolutely. Yes.

Q What's your background as far as breath testing systems, prior to you helping put together this bid?

A My background for breath testing systems is only of being the fiscal manager of the laboratory services division.

Q You knew nothing about a breath instrument?

A No purchasing agent is the subject matter expert on which they are writing a bid for.

Q Okay.

A The job of the purchasing agent is to assist the committee, the subject matter experts themselves, in writing proper criteria so that it can be graded properly. Purchasing agents are not subject matter experts. That's not their role.

Q Okay. So you didn't know anything specific about the hardware of the breath testing instruments, and you didn't know anything specific about the software of the breath testing instruments?

A Correct.

Q I'm just going to throw out something, I don't necessarily know because I don't have that RFP with me, if one of them was---the instrument has

to detect RFI. Would you have known what that was?

A Again, the purchasing agent's job is to assist the bidding committee in---I don't. I don't know what RFI is.

Q Okay. Yes. I was just asking a yes or no question.

A No.

Q You wouldn't know?

A No.

Q And so your involvement in putting together this bid was more of a technical contracts type?

A Yes. Assisting the purchasing agent in making sure that the criteria was thorough, fair and within the purchasing rules of the state of Colorado.

Q It wasn't scientific?

A No. That's the job of the bid committee.

Q Okay. Did any of the vendors---let me back up. In your experience is there a difference when someone buys something from a vendor or they submit their product for evaluation? And let's say there's three or five people that do that. Obviously, one---

A Submit it? Three or five people that submit, or three or five people that evaluate?

Q Or what?

A Three or five people submit, or three or five people evaluate?

Q Submit.

A Okay. Thanks.

Q There's three or four---three to five vendors.

A Sure.

Q And they each submit a product for evaluation and only one wins the bid or is awarded the bid, and the other four don't. And so is there a difference in the way that you would handle the documentation afterwards, such that---this is where I'm trying to get to, if someone is a losing bidder, I could understand why they would want their documentation back and the State wouldn't want it. But if someone is a winning bidder, if something happens with that instrument later or that product later and the State has to sue them and they have to say "Well you know what, we went back and you didn't do what you promised because here is the documentation that showed that this is what you promised." Is it appropriate to destroy the documentation from the winning bidder?

A I have no idea what that scenario you were talking about. I don't---I have no idea what your question is really. I mean are you---I don't know what you're asking.

Q Okay.

A Because vendors, when they submit their instrument in any---their bid proposal, okay? They have an opportunity. The opportunity is first of all, it's going to become public information so they're not going to ask for it back because it's going to become public information. Okay?

Q What's going to become public?

A Their bid documents. What they submitted as a bid document. What those vendors submitted as a bid document is retained. The personal notes and the ongoing within the evaluation committee is not public information and those documents are not retained. So if vendors were to ask for some

document like that to get back, they really wouldn't know what they would be asking for because it's not public information and it may not even exist. It may exist, I mean if it's---I guess the question that you're asking, in my experience has never happened and is extremely hypothetical.

Q That what has never happened?

A Vendors don't ask for anything back afterwards, unless they have something that is a schema. Alright? If they have software and they have a schema which is proprietary.

Q Mm-hmm.

A They don't want that being public information because another vendor can come and basically steal their rights, their schema, you know, their little blueprint. That's the only thing that's allowed to basically be not made public information that a vendor can get back after evaluation period.

Q Okay.

A And again in my experience, the example that you gave, I've never heard anything like that.

Q Alright. In the request for the proposal in this case, did any of the vendors demand that their documents or the results of testing on their instruments be destroyed?

A Did they request it?

Q Did they request that?

A I don't---

Q Did they say "I'll give you my instrument, but you know what, at the end I want everything destroyed."?

A I don't know.

Q Well you were involved intimately in the RFP, right?

A In the RFP, but you just asked me if the vendors asked for that. The RFP process doesn't necessarily mean that there's going to be extensive communication between purchasing---between a liaison. The communication strictly is between the purchasing agent and the vendors, not the---yes. I mean, I'm not---I was not the purchasing agent for this bid.

Q Who would I ask for documentation or communications on whether or not any of these vendors specifically asked for their documentation or the results of the testing on their instrument to be destroyed?

A I don't know who you would ask.

Q You what?

A I don't know. I don't know who you'd ask.

Q You're not aware of any documentation of any of the vendors asking that their information be destroyed or the validation data from the testing on their instrument, are you?

A I wouldn't know those conversations, if they would have happened.

Q Okay.

A My guess is that they didn't happen. Vendors were all very pleased with the award. It was not a protested award. Any, like I said, notes, post-its, information of that sort, you know would have been---

Q Okay.

A ---(inaudible) bid file, it would have been recycled. That's very customary. What you're---the documentation that you're asking for, again is not something that ever---anyone has ever asked for or that I'm aware of that any purchasing agent or myself has ever retained.

Q Okay. I'm mostly interested probably in this hearing from going forward---in going forward in this hearing with my questions with you with the data that resulted from the testing, the validation data.

A That would still lead to an evaluator's scoring on the score sheet which was part of the bid file.

Q Correct. That's what I'm talking about. What part did you play in---do you know if prior to the testing actually starting, was there a pre-test evaluation plan of this is what we're going to do? And then they implemented that evaluation plan?

A Can you kind of clarify your question for me? I don't know what you're asking.

Q Alright. This is what I'm trying to do, I'm trying to find out if there's an intermediary step. There is a step where you put out an RFP and then there's a step where they start to evaluate the instruments that come in, correct?

A Yes.

Q Prior to them starting that evaluation, they had to have had a plan in place of what they were going to do.

A The RFP spells out the plan. So the RFP is a---you've seen it, right? I assume. It's a numbered document that's says one-point-one.

Q I've seen the RFP.

A And what they want to see that it does, it has to meet this requirement. And then there's a description of how that instrument meets that requirement. Then there's the grading sheet that says one-point-one, what's---you know, how does it score there? So whatever is under one-point-one, the committee will go and conduct that test to verify that that instrument does what it

says it does, and then they score---they do their individual score sheets and then they would score that.

Q I can give you an example.

A That would be great.

Q And this is---I'm just pulling this off the top of my head, I don't know if this was part of it or not, let's just say that the State wanted the instrument to be able to do RFI, radio frequency interference, and they wanted to make sure that the instruments that came in had that capability. And so in the RFP they say "We need to make sure that your instrument can detect RFI." Great, it's in there. At some point in the future, the evaluator is going to be checking that machine to see if it does RFI. Is that fair so far?

A Yes.

Q Okay. In between those two steps, they're going to have to---I would assume that there was a plan that said "Okay. This is what's going to happen when we get these instruments. Jeff, you're going to check for RFI and this is the way that you're going to do it. Mike, you're going to check for standard simulator solution issues and this is the way that you're going to do it. And we're going to do this separately and we're going to run this many tests, and we have to make sure that when we're running these tests, we have a certain humidity in the room and a certain temperature of the solution." That's what I mean by an evaluation-type plan. Do you know if that existed?

A They did this with the vendors themselves. The vendors came on our property and worked with the evaluation committee.

Q You're saying that the vendors developed the evaluation plan?

A No. The vendors---the committee developed the evaluation plan.

They ran the instruments, and then if there was any clarifications needed they got those clarifications from the vendors themselves. My understanding---you're asking me some techy-type questions as well, and I, as you've asked me before if I'm familiar with the interference and how that would be conducted, no. The purchasing agent's position and my job as liaison was to help them in writing the RFP in compliance with the state of Colorado purchasing rules. And that's what we did. And the evaluation committee designs the approach on how they're going to validate each one of those (inaudible). How those things were approached were spelled out in the RFP.

Q What you just said, that very last thing, did you take part in any portion of that evaluation plan?

A Evaluation plan, as far as writing the RFP? Yes.

Q No. Not writing the RFP, we're past that; writing the evaluation plan. I'm taking this now that we have four steps, developing the RFP, something that I'm referring to as an evaluation plan, the actual validation, and then you're saying that after the validation, if they had questions they could try to get clarification from the vendors. That would be step four.

A From one another because they were subject matter experts and the vendors. It would not be---it would not---no. I would not be involved in that process because I am not aware of how---I'm not the subject matter expert.

Q Okay. That's fair. I think last time you had mentioned something about when the validation was done, this documentation got destroyed.

A Recycled.

Q Recycled. Alright. Walk me through that. How did that happen? When did it happen? Who told who to do what, and what part did you play?

A Well we had, as I recall there was---spoke with the purchasing agent, the purchasing agent said "The bid file is complete" and I said---

Q And who was this again?

A Tim Massingale.

Q Mm-hmm

A The purchasing agent. "Bid pile is complete" and I said "Do you need anything else?" He said "No." And that was what was relayed to the committee. And then about some time after that, I don't know, it wasn't a long time.

Q Like how long?

A I just said I don't remember.

Q Days? Months?

A It was two years ago. No. A couple weeks, maybe.

Q Okay.

A I mean a week or two. I believe Jeff had asked me---

Q Jeff Groff?

A Yes. "You know what to do with this?" and I said "Well this document, this is---what are these, your notes and stuff?" And he said "Yes, these are… you know, notes." And I said "Well the bid file is complete. Notes to your---your personal notes, your chicken scratch notes, that sort of documentation is not something that's retained." And I said "We have---" The governor's energy office encourages recycling and all that, and we have (inaudible) agreements and so I said---"(Inaudible) recycle bins, so you recycle it." And that was it.

Q So the notes, are you talking about these bid-type notes? These

chicken scratch notes?

A Yes.

Q Okay. So Jeff Groff came to you and you two discussed and there was a decision made, you explained to him that he could recycle his chicken scratch-type notes?

A Yes, sir.

Q Alright.

A Which is also customary and what is---that is the process. This is a combined bid.

Q Okay. So essentially you are the person that would be responsible, had told him to recycle, which essentially is destroy. I mean recycle gets chopped up, correct?

A Yes.

Q And so you knew that they would get chopped up?

A Yes. I knew that these notes were not---they're not something that we retain. So they were not something that needed to be retained.

Q That's fine. Now what I would like to talk about is the validation data. What happened with the validation data destruction?

A My understanding is that those all were---those are part of the notes, those are part of the testing of the--- you know, for the evaluators to come to that score on the evaluation sheet. That's what the State purchasing rules are is that the evaluation committee has the ability to use notes, do experiments, to come up with a criteria to grade something.

Q You talk about State purchasing requirements.

A Mm-hmm.

Q Do State purchasing requirements, is there a specific part in the State, what are they rules? Regulations?

A I'd say purchasing rules, (inaudible) code, I think it might be called.

Q Where would I get a copy of that?

A The State purchasing office.

Q And what would I ask for specifically? What's it called?

A I think it's called the State Purchasing Rules or code. And you'd have to ask for an older version. I think that what you'll find is that again, it tells you what you have to retain; it doesn't tell you what you don't have to retain. I just want to make that clear. The State of Colorado doesn't have a purchasing code that's you know, six feet high that says "Don't retain post-its. Don't retain handwritten notes. Don't retain---" It just says what the bid file needs to retain, and that's what we retained.

Q Did Mr. Groff ever ask you specifically what he should do with the validation data?

A I don't remember. No, to my recollection. It was a couple years ago.

Q Okay. I note the---so the documents that were retained were---what was everything that was retained?

A (Pause)

Q Let me back up a little bit. Did you say last time that someone came and actually handed you some---handed you the doc---did you ever see the documents that were going to get destroyed?

A No.

Q You don't know if it was two pieces of paper or two thousand

pieces of paper?

A That's correct, because from my point of view it didn't matter.

Q Okay. You knew that this was a scientific experiment?

A Yes. I work in a laboratory.

Q And that you were buying $1,700,000 worth of equipment?

A Yes.

Q And this data was going to be used essentially to try to obtain criminal convictions?

A Yes.

Q You knew that before it was destroyed?

A Yes. And I understand what the purpose of the Intoxilyzer is.

Q Okay. That what?

A I said I understand what the purpose of the Intoxilyzer is.

Q Okay. So what was retained?

A All the items that---okay. So you have your RFP, the evaluation committee's---I'll try to list it all but please forgive me if I miss something because I mean---alright. So you have, generally speaking, you have the vendor's R---the RFP from the State.

Q Yes.

A You have the question and answer period where there's--- clarifications are allowed to be made, which they were significant.

Q And that's been retained?

A Yeah. Yes.

Q The questions and answers back and forth?

A Questions and answers are posted publically. Yes.

Q And where would we find those?

A In the bid file.

Q Okay.

A RFP, the submittals themselves. Oh, there was---

Q Those questions and answers, was that questions and answers prior to you obtaining the instruments, or was that the questions and answers that we were talking about in stage four where if the evaluators had questions or the vendors, they could ask it at that point?

A No. How it works is an RFP is released and the evaluation committee and the purchasing agent, they work together to write the best RFP that they can. But often, not intentionally of course, there might be something that needs clarification.

Q Sure.

A Whatnot. And so vendors are able to email in to the purchasing agent. The purchasing agent filters out this question, generally speaking, so the evaluation committee doesn't necessarily know who they're coming from, they just know they have these questions to answer. And sometimes those questions are just questions that are answered, and sometimes they would---might result in an adjustment of the RFP if something needs to be clarified or whatever. So that's how that works because as the RFP gets released, the four that you'll submit that are RFPs, they have opportunities to get clarifications about anything in the RFP really, about how it's going to be evaluated, about what's going to happen to the grading criteria for the evaluators, like how it's going to be evaluated. It's just an open forum I guess kind of---not open, but it's public information. But that's retained. What else is in there?

Q How about the questions and answers from step four? Clarification after the testing had started. Clarifications between the vendors and the department of health after---

A That would have been---no. That's not something that was like posted publicly on bids or anything like that. The vendors were on property.

Q They what?

A If the evaluation committee had some questions like---I guess they asked the vendors while they were there on property.

Q Would those have been retained?

A Not to my knowledge, no.

Q Okay. I know you're---so besides the RFP and the stuff that you just said was in the bid file, as far as the documentation from the actual valuation (sic), I think I've seen essentially like six pages of what I would consider a small score sheet. Not a full Excel but it's, you know, it has those---I think what it is, it has those forty-nine criteria on it, and then it has the three evaluators, Mr. Groff, Mr. Barnhill, and the third evaluator. And it just has their digitized final score, a three, a five, and that's it. Is that your understanding of all that exists from the actual valuation (sic) study?

A I believe so. That and there was---there was a hands on piece because they wanted to, I believe you talked about this last time too, the evaluation committee are kind of techy people.

Q Yes.

A And they're not the ones who are ultimately going to be---

Q Sure.

A ---using the instrument.

Q Police officers.

A So---right. There was an opportunity for some police officers to come in---

Q And users?

A ---and give it kind of like a user friendliness evaluation.

Q Yes. It was a touchy-feely---

A Right.

Q ---evaluation from police officers. Do you like the touch screen and stuff. They didn't do anything scientific though, correct?

A Correct. Yes. They got---

Q Alright.

A And that's in there.

Q So what we have essentially---and are those evaluations from the police officers, are those kept somewhere?

A Yes. Their scores.

Q But I mean, do you know if that was a situation where the officers were just told "Give us a score" or "Give us your feedback"?

A I don't recall.

Q Okay. You may have never seen this but are you aware that the state of Georgia did an evaluation on a 9000?

A No.

Q Okay. They produced a one hundred and twenty page document which essentially lists everything for the public to see. And it's things like "What was the temperature of the solution when we ran the RFI testing? What was the humidity in the room when we did this testing?" And all this information was

available for the public, and also for peer review. Have you ever seen, maybe not this document, but other types of validation studies that were made available to the public and for peer review?

A No.

Q Okay. Are you aware that the department of health has an archive area that they're supposed to put their validation studies in, and not destroy them?

A Validation studies for what?

Q Well like the 2000---well the evaluation study for the 5000 EN? Do you know what that machine is?

A No. I do not.

Q The 5000 EN was the previous model of the Intoxilyzer used by Colorado. Did you know that?

A I was unaware of that.

Q Okay. We'll tie that up with Mr. Groff, but I've got his transcript that says in fact there is such an area and it does contain the previous valuations (sic) for the public to see, or anyone else to see for peer review, for the work that they've done when they're deciding on an Intoxilyzer or a breath test. That's in their building. Were you made aware of that?

A No. I would like to state that I'm not aware of any requirement to retain that documentation (inaudible) rules.

Q Okay. You're talking about a requirement and I'm talking about an opportunity. You had the opportunity to just take this information and stick it on a shelf, correct?

A I suppose, yes. An opportunity but not a requirement, correct.

Q Okay. Other than destroying this information, did you discuss any other options?

A (Pause) I don't recall.

Q Do you think that may have happened?

A I'm not sure what kind of question you're asking. I mean I don't---it was two years ago. I don't remember having any conversations about that. There's no requirements to retain it. It's not normal to retain. I've done a number of bids. I was working with Tim Massingale who has also done significantly more bids than I have, and it was not---it wasn't something that we ever would think of retaining someone's personal notes, or---and I didn't know the other (inaudible).

MR. PIROSKO: If I may have a minute? (pause)

Q You said there's no requirement to maintain that?

A No to my knowledge.

Q Is that under the State purchasing department there's no---correct? Are you familiar that the department of health laboratory service division has rules and regulations?

A Yes.

Q And that's 5 CCR 1005-2?

A I'm not familiar with that number.

Q Okay. Have you read those?

A Possibly, I know some of---

Q I'm sorry? What?

A I know some of our lab rules. I'm an operations person, I'm not a scientist.

Q Okay.

MR. PIROSKO: Judge, may I approach?

THE COURT: You can.

Q Mr. Brough, I'm going to hand you a document. And there's actually, for simplicity's sake, there's two back-to-back. And what these are are the rules and regulations for the department of health. And I think that we might have been in a transition period here, so I got two different dated ones. One is the ones that were effective 3-2 of 2009, and the next are 2-1 of 2013. I'm going to hand this to you. I'm going to ask that it be marked as Defense Exhibit A.

A I think the 2009---well the 2013 ones wouldn't be appropriate, right? Because this happened in 2012.

Q It's---the 2013 is only being produced to see whether or not there's change.

MS. HUESER: Your Honor, at this point I think we're getting pretty far afield on the rules of the laboratory. This gentleman is a purchasing agent. He is not involved in the scientific reliability of the instrument, which is really what we're here discussing. I think we're getting kind of far afield. He's already testified that he's not familiar with this document. It's not really part of his area of expertise, so I don't really see the relevance of this line of questioning.

MR. PIROSKO: There's only one question, and it has to do with the retention of records.

THE COURT: And he's not familiar with this?

MR. PIROSKO: I'm sorry?

THE COURT: Does it give him the duty to have done something different by knowing and recognizing this rule that you're going to point out to him?

MR. PIROSKO: If I can ask a question a different way?

Q Mr. Brough, did you seek to find out whether or not there were any other rules or regulations that related to retention of validation data or modified methods to include accuracy, precision, analytical specificity and such to the instruments that the department was evaluating?

A As a purchasing person, I referenced to the purchasing rules.

Q Before you destroyed that data or had it destroyed, did you seek out any legal opinions from like call the AG's office, or any of the legal people at the department of health?

MS. HUESER: Objection. He's asking for privileged information.

MR. PIROSKO: I'm not asking what happened, I'm just asking if he made the inquiry.

MS. HUESER: I believe that would be privileged if he had. The question of whether he had any conversations with counsel that represents CDPHE would be privileged.

THE COURT: And Counsel, I think he's testified that it's not his interpretation of his position that he had to do any of that. He followed a certain set of rules. He's unaware of the rules that you put in front of him. Whether or not, I understand you're just trying to see what his due diligence was before he made his decisions. I don't think you can get into whether or not he consulted with legal counsel as to other alternatives. So I'm going to steer you away from that area.

Q Mr. Brough, the department is required to maintain that validation information, isn't it?

A (Pause) I don't know how I would know that. I just---I told you, I

was dealing with the purchasing rules. I wouldn't know.

Q You were talking to the head of the department. Did you inquire from him?

A Who are you talking about, the head of the department?

Q You were talking to Jeff Groff about these documents and what to do. Did you ask him "Well do you have any requirements?"?

A Not to my knowledge. No.

Q Who physically destroyed this evidence?

A I don't know.

MR. PIROSKO: I have nothing further. If I don't get to ask any more questions, if I don't have any more for you, have a good vacation.

A Thank you.

THE COURT: Alright. Cross-examination for the People?

MS. HUESER: Nothing for this witness, Your Honor.

THE COURT: Okay. Can the witness be excused?

MR. PIROSKO: He may.

THE COURT: Alright. Thank you, sir.

MR. BROUGH: Does that mean I can leave?

THE COURT: You can leave. You're all finished with us. Thank you.

MR. BROUGH: Thank you.

THE COURT: Have a good day.

MS. HUESER: Can I take just a five minute break, Your Honor, to go to the bathroom?

THE COURT: Sure. And just for a timeframe, folks, how many

witnesses will I be listening to today?

MR. PIROSKO: The next witness should probably, hopefully only take about fifteen to twenty minutes. And so the Court knows, I have fifty pages of questions for Mr. Groff.

THE COURT: Okay. And I have a schedule this afternoon. I did dedicate this day for this case but I have to be out of here by about 3:00 this afternoon.

MR. PIROSKO: Okay.

THE COURT: So we will work accordingly. Everybody kind of be cognizant of that schedule. I also do have to take a lunch break today.

MR. PIROSKO: That's fine.

THE COURT: So it's going to be at least 12:00 to 1:00 for that.

MR. PIROSKO: I understand.

THE COURT: Okay. Alright. We'll take just a couple minutes here.

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(Break)

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THE COURT: Be seated. Thanks. We are back on the record in case number 13-T-9903. Alright. And just so I'm familiar, who are the other people in the courtroom here?

MS. SPETTIGUE: Your Honor, my name is Corelle Spettigue (phonetic) and I represent the health department. I'm with the AG's Office.

MS. GILLIM-ROSS: I'm Dr. Laura Gillim-Ross. I'm the State laboratory director.

MR. PIROSKO: She's our next witness.

THE COURT: Okay. Alright. Your next witness, Mr. Pirosko.

MR. PIROSKO: We would call Dr. Gillim-Ross.

THE COURT: Ma'am, if you'll come forward to my right please. Raise your right hand. Do you swear and affirm the testimony before 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 into the mic. Your witness, Counsel.

LAURA GILLIM-ROSS,

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

Q Dr. Gillim-Ross, please state your name for the record and spell your last name.

A My name is Laura Gillim-Ross, G-I-L-L-I-M - R-O-S-S

Q And how are you employed?

A I am the laboratory director for CDPHE

Q And when did you become the laboratory director of CDPHE?

A Interim lab director in July of 2013, and then in October 2013 it was formalized.

Q Have you testified in court before?

A I have.

Q Okay. If there's any question I ask that you want to try---you don't understand or you want to try to change the wording to make it more

understandable to all of us, please do so.

A Thank you.

Q What is your educational background?

A I had my doctorate in biomedical sciences from Mt. Sinai School of Medicine.

Q Okay. As part of your duties as the director of the laboratory services division, do you sign the certificates for the 9000, similar to the one that I have in my hand?

A I do.

Q Okay. Do you---is that an electronic signature?

A It is.

Q Okay. The certificate that you sign says quote “Pursuant to the Colorado Board of Health Rules pertaining to the testing of alcohol and other drugs (5 CCR 1005-2) the CDPHE certifies and approves the use of the listed Intoxilyzer 9000 to perform evidential breath alcohol testing (EBAT) for the purpose of determining alcohol content.” Do you recognize that language?

A I do.

Q Okay. What documentation do you review before you sign one of these certificates?

A I review the standard operating procedures that are put into place to certify instruments and the maintenance on instruments. I then also cert. review any documentation in regards to how frequently those are performed and the individuals who have competency to perform.

Q I’m sorry. I can’t hear what you said.

A So I review SOP, so standard operating procedures on how they

will calibrate, and certify those instruments. I review documentation in regards to the competency of staff to perform those calibrations.

Q Okay. So the SOPs and the competency of the staff, and that's it?

A Correct.

Q Before---and how do you go about---what's the process to get your signature on one of these documents? Do you tell---do you personally do it? Do you ask someone to do it for you? Is it done one document at a time?

A The electronic signature is entered into the system by the technician who has been approved to put the signature in place following the completion of the standard operating procedure.

Q And so is there some type of paper trail that you have developed that outlines what that technician has to do before they attach your signature?

A That would be the standard operating procedure.

Q And what is that document called and where do I get a copy of it?

A I don't know the exact title. It's the standard operating procedure for certification of instruments, and I believe you've requested it before.

Q I don't know that that's true, but I appreciate that. When did the department establish scientific standards of performance for evaluating these instruments?

A That was prior to my time as laboratory director, so I'm not sure.

Q Okay. But you've read those documents, is that correct?

A I have read the standard operating procedures for performing the calibration and certification. I have not read the documents for how they established their criteria.

Q So you've never read the standards of performance?

A I've read the standard operating procedures, not the standards of performance.

Q If you're not familiar with the scientific standards of performance required under 5 CCR 1005-2, how could you attach your signature to one of these certificates that the instrument was certified in compliance with 5 CCR 1005-2?

A As laboratory director it's my responsibility to ensure the processes are in place to follow the scientific method. Those processes have been reviewed and are in place. It's not required for me to know the specifics once the documentation is (inaudible) to show that they have met all the criteria.

Q When you say that you're not required, is that under the department's rules and regulations? Or is---

A It's federal.

Q Federal? And what rules and regulations---federal rules and regulations are you referring to?

A The Clinical Laboratory Improvement Amendment.

Q Okay. Can you explain what a validation study is?

A I can. Specifically for any scientific method is where you're demonstrating that the method you're utilizing produces accurate results, is reproducible, sensitivity, you have to determine sensitivity, and specificity.

Q Okay. Have you seen any validation studies for the Intoxilyzer 9000 as deployed in Colorado?

A The Intoxilyzer 9000 was deployed prior to my time. The validation was approved by the previous laboratory director, and it's not standard practice to go back through and re-approve all validations performed prior to you time.

Q I appreciate that, but my question was have you seen the study?
A No, I have not.
Q Okay. Do you know whether one exists?
A I do.
Q You do? And what is your understanding of whether it exists or not?
A It does exist.
Q And what is your understanding of what is contained in what exists?
A It occurred prior to my time as laboratory director but it's my understanding that during evaluation of several instruments, they looked at the specificity, reproducibility, all of the necessary criteria.
Q I appreciate that but maybe I'm not making myself clear. Do you know how many documents exist?
A I do not.
Q Do you know what type of documents exist?
A I do not.
Q Okay. Have you read the State statute, the DUI statutes?
A I have.
Q Section 42-4-1301 (6 C) of the CRS for 2014 directs the Court to take judicial notice of the design and operation of breath testing instruments certified by the department. What can you tell us about the design and operation of the Intoxilyzer 9000?
A I cannot tell you anything more than what is in the standard operating procedure.

Q Okay. Does the department of health have any authoritative documents detailing the design and operation of the Intoxilyzer 9000 from which the Court can take judicial notice? And if so, I'd like you to name those documents.

A I do not know.

Q Alright. (pause) Dr. Gillim-Ross, this is a study that was produced by the state of Georgia when they did their valuation (sic) study on their 9000. Have you ever seen this document?

A I have not.

Q Are you surprised that a validation study on a scientific instrument resulted in a document that's about one hundred and twenty pages long?

A I am not.

Q Okay. What would be the purpose of retaining scientific data in an experiment?

A The two purposes that I can think offhand, one is it's required in some testing areas by rule or by law. In other cases it's to refer back to or to demonstrate the validity of your testing.

Q So that the---it could be for transparency purposes, is that correct?

A Correct.

Q And if someone wanted to reproduce the study to make sure it was done correctly? Essentially, peer review?

A It would depend on the study and I'm not clear on your question.

Q Okay. Do you know if the Intoxilyzer 9000 validation study that Colorado did was peer reviewed?

A I do not know.

Q Okay. Would that have been something now in your position that you would require?

A We typically in our laboratory have never requested peer review of any of our validations.

Q Okay. You had mentioned rules and regulations. Does the department have specific rules and regulations pertaining to testing for alcohol and other drugs?

A We have the board of health rules.

Q Okay. And is that 5 CCR 1005-2?

A I believe so.

Q Are you familiar with those?

A I have read them.

Q Okay.

MR. PIROSKO: If I may approach?

THE COURT: You can.

Q (Pause) Dr. Gillim-Ross, I've handed you what's been marked as Defense Exhibit A, and just to make it simple I suggest that what that is, is the cover page for the last two sets of rules and regulations for the department of health, and then a couple of pages just to get us to the correct section that has to do with document retention. Is that a fair explanation of those?

A The pages that you have attached are actually the toxicology laboratory certification check list. I don't---

Q Yes. Their facility inspection.

A Yes.

Q Is that fair?

A Correct.

Q And those were the rules and regulations that were in place at the time---the first set. I know the second set is post validations, but the first set of documents, the first three or four pages, that was the rules and regulations that the department was operating under at the time of this validation study?

A These are the rules and regulations for laboratories performing testing on blood and urine.

Q Mm-hmm.

A I do not know that they cover evidential breath alcohol, so I'm not seeing the connection between the two.

Q I suggest that section four, I believe that talks about blood testing certification of officers breath testing post mortem. That document is about fifty pages long. I just took out those two just to get to essentially that one highlighted section. Do those rules and regulations require document retention for validation studies?

A They do.

Q Alright.

MR. PIROSKO: Your Honor, I'd move for the admission of Defendant's Exhibit A.

THE COURT: For the People?

MR. PIROSKO: I can ask also the Court to take judicial notice. It could go either way.

MS. HUESER: I guess I don't see how it's relevant. These are rules relating to blood testing, not evidential breath testing. So I don't really see how they're relevant to the proceedings.

THE COURT: Counsel, are they not People's Exhibit 3 and 3A that were already admitted at the last hearing? Is that what you've---

MS. HUESER: They may be.

THE COURT: ---handed her?

MR. PIROSKO: They may be, and I---they may be.

THE COURT: Right. Are you giving her the 2009 or 2013 or both?

MR. PIROSKO: I attached both just for chronological. I understand the 2013's were not in place at the time.

THE COURT: Okay. It's specifically you've just given her certain parts or sections of those documents?

MR. PIROSKO: Yes. I didn't want to---

THE COURT: Okay.

MR. PIROSKO: I didn't want to make the Court's file ten inches thick.

THE COURT: Any bigger than it is?

MR. PIROSKO: Yes.

THE COURT: Well let me know what exactly you've given her and I can look at hers as well, but you're talking about just section four, I assume?

MR. PIROSKO: Yes.

THE COURT: Of that document?

MR. PIROSKO: Essentially on the first documents, it's going to be on page three, it's question twenty, and it's highlighted.

THE COURT: Okay. And that should be contained in the People's exhibits.

MR. PIROSKO: I'm not interested in a testimony of anything else

about that document.

THE COURT: Alright. Alright. Any objection by the People to the admission of that for purposes of this hearing?

MS. HUESER: No objection, Your Honor.

THE COURT: Okay. I'll allow that to be admitted at this hearing as a defense exhibit. And I'm sorry, the People had numbers, so you're going to have letters. Is it A?

MR. PIROSKO: Yes, A.

THE COURT: Okay. Thank you. And Ms. Hayden (phonetic), this hearing is actually limited to the parties that are present before the Court today.

MS. HAYDEN: Okay.

THE COURT: Thank you. Okay.

Q Dr. Gillim-Ross, are you familiar with an archive area at the department of health?

A I'm not sure what you're referring to. There are multiple storage areas.

Q Okay. I know that you're probably not familiar with this testimony or transcript. I'm going to suggest to you that I have a transcript that Mr.---I'll ask questions to Mr. Groff, so this is subject to tying it up with Mr. Groff's testimony where in fact he is talking about an area at the department of health that is an archive area where they store prior validations, like the validation on the 5000 EN. Are you familiar with that area?

A We have multiple areas, so I'm not sure which specific he's referring to but yes, we have archive areas.

Q If you want to archive a study, you can do it?

A Yes.
Q Without any problem?
A We do it off of our retention record requirements, but yes, you can retain.
Q A retention records requirement? What's that?
A For the health side of the testing, we retain things for five years, just data that has to be kept.
Q Where would I find that, and what's it called?
A It's in each individual laboratory. It doesn't have a specific name.
Q I'm sorry? What?
A It's in each individual laboratory or work unit. This is more than an evidential breath testing lab, so I'm speaking in generalities as far as where it would be located.
Q So at the time that the department did the valuation (sic) studies on the Intoxilyzer 9000, there was a document retention policy in place that required them to keep those documents for five years?
A Those are for documents that we generate. I believe that I don't have the experience from the Intoxilyzer where that data was generated.
Q So every document that you generate---or that the department generates is supposed to be kept for five years?
A No. Specific documents.
Q Would that be validation study documents?
A It depends on what the validation, the purpose of the validation was.
Q Well which validations or documents are supposed to be retained

to your knowledge?

A Anything related to testing or instrumentation, which we did maintain those for the---

Q To testing or what?

A Validation implementation of instrumentation. Those were maintained. What we generated has been maintained.

Q What's your understanding of the documents that were retained?

A For the Intoxilyzer, we have everything that we did for our bid. That's about all that I know of that we have in house.

Q When you say everything that you did for your bids, are you talking all of the documents? Let me separate this out and you can further clarify it if you'd like. I'd like to talk about at minimum, two sets of documents. One set of documents were the things that you did for your bid that were pre-validation testing. Okay? The give and take of who was going to bid and everything like that. That would be one set of documents. The second set of documents would be documents that were generated during the validation process, test records, environmental conditions, who did what essentially. Can you further explain which of those sets of documents and what parts of each set were required to be retained?

A For the I-9000, I cannot as I was not laboratory director at the time.

Q And so that would be something that we have to---well, is that information, information that would necessarily have to come from a witness? Or is that information the policies? Would those policies have been documented somewhere?

A Our retention policies are documented; however, in regards to

what is maintained, that would have to be from the laboratory director at the time, as far as what the interpretation of the guidelines.

Q And so in this case we would have to call Mr. Butcher (phonetic) to the stand, is that correct?

A Potentially.

Q I'm sorry?

A Potentially. I can't speak for him. I don't know.

Q Okay. To your knowledge based upon your position now, is there anyone else that we should be talking to about the requirements of document retention at that time?

A No. It would be the laboratory director.

Q (Pause) Thank you very much, Doctor.

MR. PIROSKO: I have nothing further.

THE COURT: Thank you. Cross-examination?

CROSS-EXAMINATION

BY MS. HUESER:

Q I just want to make sure that a couple things are clear. The Intoxilyzer 5000 EN used a process called infrared spectroscopy to test for alcohol in the breath. Am I correct in that?

A I believe so.

Q Okay. Is this not your area---

A It's not my area.

Q Okay. To your knowledge did the method actually used to test for alcohol on the breath change from the 5000 to the 9000?

A I don't know.

Q Then simply to be clear, the rules that defense counsel gave you an excerpt from, you've said they applied to what type of lab?

A We utilize them for the certification of forensic toxicology laboratories, so blood and urine and other human samples.

Q Okay. Do forensic toxicology labs do any sort of evidential breath testing?

A Not that I know of.

Q Okay. (pause) Just one more question, Doctor. In your position as the head of the laboratory services and as the person who does sign off on these Intoxilyzer 9000s, do you have any questions or concerns about the reliability of the testing methods employed by the Intoxilyzer 9000?

A I do not.

MS. HUESER: No further questions.

THE COURT: Any re-direct?

MR. PIROSKO: No, Your Honor. Thank you, Doctor.

THE COURT: Can the witness be excused?

MR. PIROSKO: Yes.

THE COURT: Thank you, ma'am.

MS. GILLIM-ROSS: Thank you.

THE COURT: Can I have that exhibit please? Thank you.

MS. HUESER: And Your Honor, may we have a brief break before calling Mr. Groff to the stand?

THE COURT: You can.

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(Break)

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THE COURT: Be seated. Thanks. Alright. We are back on the record in case number 13-T-9903. All parties are before the Court. Your next witness, Mr. Pirosko.

MR. PIROSKO: I will recall Jeff Groff.

THE COURT: Mr. Groff, if you'll come forward to my right. Raise your right hand. Do you swear and affirm the testimony you're about to give the 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 tape recorded. Your witness, Counsel.

JEFF GROFF,

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

BY MR. PIROSKO:

Q Morning, Mr. Groff.

A Good morning.

Q You understand that you're still under oath?

A I am. I do.

Q Alright. We're going to be here a while and I'd like to just try to speed this up if you and I can come to some type of agreement. Just a couple of things, when I ask you a question and I say you or the department of health, if you're okay with it I would like you to answer to both you as an individual or you as your position at the department of health. And if you want to qualify an answer to not be you speaking to both of those positions, could we just state it?

So I don't have to say "What did you do?" and then back up that question "What did you do as the head of the department?"

A I understand. Sure.

Q Do you have any questions about that?

A I don't believe so.

Q Okay. And again, if I have---if I ask a question and I'm not necessarily artful in the way that I ask questions, we've been through this before, and I ask it in a limited fashion like "Did you ever talk to someone?" In a situation like that where I used the word talk, but you otherwise communicated to them either email or in writing or something like that, could you just explain "I didn't necessarily talk to them but I did have contact with them."?

A Sure.

Q And again, I'm not a scientist and I may use the wrong phraseology, and I'm not trying to back you into a corner; I'm actually letting you try to talk as much as possible, and so if I ask a question that isn't artfully phrased, please feel free to suggest how I should ask the question, or how you would like to answer the question. And if I agree with your rephrasing, I'll let you just go ahead and answer the question that you rephrased it. If I don't think that we're on the same page, I'll just try to rephrase my original question. Is that fair?

A Fair.

Q Alright. And finally, if I ask you a question and you're able to state a citation like "I know this because it's in a rule" or "I know this because I got this information from someone or I read it in a statute" or "This is a scientific principle," could you just let us know?

A If I know the reference, yes.

Q Okay. The first question I have, is the Intoxilyzer 9000 infallible?

A Well that's a pretty open ended loaded question. No piece of equipment is infallible. Instrumentation has been maintained and then at times it needs to be repaired. So if maintenance and repair make it infallible then I'd have to say that the instrument is not infallible.

Q Okay. We just took a break from court. A few minutes later I walked outside and you were having a discussion with the two prosecutors---or the prosecutor and Mr. Halser, and your legal representative. We just got done with two witnesses on the stand, Mr. Brough and Dr. Gillim-Ross. Did any of your conversation out in the hallway during that break deal with what the two previous witnesses testified about?

A No. No.

Q Okay. At the time the state of Colorado awarded the bid for purchase of the Intoxilyzer 9000, what agencies or organizations other than CMI had conducted validation studies on the Intoxilyzer 9000?

THE COURT: I'm sorry, Mr. Pirosko, can you state your question again please?

MR. PIROSKO: Sure.

Q At the time that Colorado awarded the bid for the purchase of the 9000, what agencies or organizations other than CMI had conducted validation studies on the 9000?

A Other than the manufacturer, CMI, the instrument was tested and evaluated by the National Highway Transportation Safety Administration. I believe that there was some testing being conducted in the state of Georgia and they were looking at the instrument as well. Those were the two that I'm aware

of.

Q Okay. And both of those were at the time that Colorado awarded the bid?

A The NHTSA evaluation would have been prior or coinciding to right about the same time. I couldn't give you specific dates, and I'm not sure when Georgia was doing theirs. Colorado and Georgia were looking at the instruments around the same---roughly the same time.

Q You don't know whether NHTSA or Georgia had essentially conducted their evaluation studies at that point?

A I believe NHTSA had. I couldn't tell you about Georgia.

Q Okay. At the time that Colorado was looking to replace the---again, in order to speed this up if I talk about the 9000 or the 5000 EN, what do you believe I would be referring to?

A The evidential breath alcohol testing instruments that have been used in Colorado.

Q Okay.

A Or are in use in Colorado.

Q And just so we can shorten what we're talking about, the 5000 EN was the instrument that was in place prior to the 9000, is that correct?

A That's correct.

Q And there was a 5000, a 5000 EN, which meant enhanced?

A That's correct.

Q And a 9000?

A That's correct.

Q Essentially those were the last three instruments that we had?

A Correct.

Q Alright. At the time that Colorado was looking to replace the 5000 EN, who are all the parties responsible for approving the methods used for evidential breath alcohol testing in Colorado?

A That would have been the breath alcohol testing program was responsible for establishing those protocols.

Q And do you know who was involved in that program, the individuals?

A Myself, one of my staff members, Mike Barnhill. We had two other staff members at that time that are no longer with the program but they were involved as well.

Q And who were those two?

A Bob McDuffy and I'm not sure if Rick Rainzellow (phonetic) was still---the other gentleman's name was Rick Rainzellow. I don't know if he was---it was right around the time that he left the program when we started the evaluation, so I don't know if he was part of the initial start of the evaluation. I don't believe he was. I think he may have already left the program prior to us starting our evaluation.

Q Just so, because we're on that subject, the three individuals that eventually did the validation in Colorado were yourself, Mr. Barnhill and Mr. McDuffy?

A Those were the three that were employed with the department. There were other individuals that were included in that evaluation that include law enforcement officers from around the state.

Q Okay. But the three individuals from your department?

A Correct.

Q Alright. And then I talked about the evidential breath alcohol testing. That has the acronym EBAT, is that correct?

A That's correct.

Q Just again, so we could try to speed up these questions. And I just want to clarify for the record too that when we use the term Intoxilyzer, that's an actual brand name from the manufacturer CMI, correct?

A That's correct.

Q No other manufacturer manufactures an instrument called an Intoxilyzer?

A That's correct.

Q Alright. I had asked historically, but now I'm going to ask currently, who are all the parties responsible for approving the methods used for evidential breath alcohol testing in Colorado?

A Who are---well it's again, it's the breath alcohol testing program, myself as the program manager. I have three staff that are in the program. It's Mike Barnhill, Anthony Nistitch (phonetic), and Andrea Bacon. And of course approval of our protocols, it expands beyond just the staff within the EBAT program that includes review from our quality assurance program and our laboratory director, Dr. Gillim-Ross.

Q Going back to Mr. McDuffy who was one of the three that helped with the validation study for Colorado, Mr. McDuffy was---was he subsequently fired from the department?

A Yes. He was released from the program.

Q Alright. Given your training and experience as the program

manager for EBAT, do you believe that the Court and a jury's reliance on tests from the 9000 depend on scientific validity of each test?

A I do.

Q What name would you like me to, or all of us to refer to the validation study that you undertook? What should we call it? Do you want to just call it validation study?

A Well for clarification, let's make sure that we understand our terms here. Validation study is performed on these instruments on an ongoing basis. These instruments are validated for their performance prior to them being certified and placed in the field for subject testing. That includes the calibration adjustment and the calibration verification. That's the validation that's performed with each instrument. And if it successfully passes those protocols then it's certified for service. If you are referring to the process that was undertaken prior to the procurement of these instruments, that's an evaluation of the instruments.

Q And what year did that take place?

A 2012.

Q So we refer---if we want to talk about post-RFP when you got the instruments and you were looking at them and scoring them, we should---it's probably best for clarification going forward to talk about that as the 2012 evaluation?

A No. That's not what I said. 2012 is when we evaluated them. Post-evaluation is when we purchased these instruments. Each one of those instruments are then validated. Their performance was validated prior to them being put into service. There's a big difference between the two.

Q And that's why I'm trying to clarify this. That period of time where

the three of you in your department were running the tests on the three different instruments, approximately how long did that take?

A About three months.

Q What would you like to call that period of time?

A Evaluation.

Q The 2012 evaluation?

A Correct.

Q Okay. Who commissioned that 2012 evaluation?

A Can you clarify commissioned? I don't understand what you mean by commissioned it.

Q Who ordered it? Who ordered it?

A Who ordered it?

Q Yes.

A Well it was time to replace the 5000 EN, so we started the procurement process to---

Q Who told you to start the procurement process? Who came to you and said "Mr. Groff, do you think we need a new instrument?" or "Mr. Groff, we need a new instrument."? Where did that come from?

A It came from within our program. It was time to start looking at a replacement for the 5000 EN.

Q What individual came to you and said "Start this process"?

A No individual came to me and said that. That was a collective decision by myself and my staff. It wasn't a directive that was mandated to me and through my program to replace the instruments. It was a decision that was made within our program so we started that discussion to initiate that process.

Q Okay. So it's fair to say that an idea was generated among your staff and then you went to the powers that be and said "We think that we need to have an evaluation of a new instrument."?

A That's fair.

Q Okay. (pause) After you made the decision to go forward, what was the first thing that you did? Walk me through a chronology.

A We initiated the project---

Q And I know the dates are going to be ballparks.

A I believe it was in the spring of 2011, and the first step was one, to identify a funding source that we're going to---

Q To identify what?

A Funding.

Q Okay.

A You know, it costs money to replace these things and so we needed to identify a viable source of revenue to be able to purchase these pieces of equipment. That took some time. That took about a year, maybe a little longer. Once the funding was secured---

Q And I know that I'm going to---just so I don't lose my place, I know I'm going to have to make you lose yours, where did the funding---I'll ask a couple of questions. Where did the funding come from? What was the number? Were there any restrictions on that funding?

A The funding came from basically three different sources. It came---there was a grant that was awarded to us from NHTSA. There was some funds that were made available to us from the Colorado State Patrol, and there were funds that were made available to us through a grant from JAG, Judicial

Assistance Grant, I think is what it was referred to as.

Q What---

A In total, I think we had, it was about $1,700,000, something in that neighborhood. I don't have the exact figures. I think $1,100,000 to $1,200,000 came from state patrol, about half a million dollars maybe or just under that, maybe---no maybe it was $250,000 came from the NHTSA grant, and I think we had $100,000 or $150,000 from the JAG award.

Q Do you recall whether or not there were any strings attached to any of those grants?

A Well the strings would be made to be used to buy the equipment. You know, to assist with the replacement project as a whole. So other strings without having the criteria of the grant in front of me, I couldn't go into specifics but I mean it was money that was earmarked for this project.

Q Do you know if that grant paperwork exists today?

A I would imagine it would. I don't know. I think it does.

Q Where would I look for it and what would I call it?

A The procurement documents or the financial documents probably could be accessed or obtained either from those three sources individually, or perhaps our division's chief financial officer.

Q And what would that person's name be?

A Rick Brough.

Q Or have been? Oh. Okay. Okay. Thank you. What was the next step?

A So after funding was identified, then the next step was to start the purchase and procurement process so we could initiate the evaluations.

Q What did that consist of and who was involved?

A It consisted---well who was involved was Rich Brough, and we had our senior purchasing agent with the department assist in that process, his name was Tim Massingale. There was another person I think was one of the senior contracting agents I think that was involved but I don't know who that person was, not part of the department of health. I think they might be in the controller's office, but I'm not one hundred percent sure on that.

Q What if anything, do you recall?

MS. HUESER: Your Honor, I would ask the Court at this time to just kind of limit this to the scientific reliability questions. We're getting pretty far afield. Defense counsel has already indicated that he has fifty pages of questions for Mr. Groff. A lot of this has already been covered in the previous hearing regarding the process for hearing it. So I would ask that we somewhat limit it. This is not a discovery expedition for defense counsel to formulate new (inaudible) requests.

THE COURT: Counsel?

MR. PIROSKO: Judge, as the district attorney just stated, this was covered in the previous part, essentially under his direct examination. I'm doing follow-up questions for it. The Court stated that the purpose of this hearing was---this is technically not a Shreck hearing, this has to do with the validation process. This is all about the validation process.

THE COURT: Some of it is about the validation process. I think you are moving further and further away. I mean he's identified a lot more as far as the funding process than was ever covered on direct examination. I don't know that we need to know as much as you're asking. What I would like you to

concentrate on is the actual validation process, evaluation process, and those things that you need to cover to get a thorough cross-examination. But it is going to be a time issue, so if you do want to get through your fifty pages, I would direct you to concentrate on those.

MR. PIROSKO: Well Your Honor, my position is that I think that all of this is important to the validation process, because if he received funding and there were restrictions on that funding or there were limitations on that funding or because of the amount of funds that they got, they had to cut corners, I think that's all extremely important in this process.

THE COURT: Okay. And if that's really what you want to get to then those are the questions you need to ask right there.

MR. PIROSKO: Okay.

THE COURT: Okay?

MR. PIROSKO: But I still have to ask that background information of the funding and where it came from in order to ask the next question.

THE COURT: And I think he's given you that, where it came from and even the amount and proportion of, but if you think there were some sort of prohibition or some strings attached with the funding that would have made a difference in how the evaluation or validation process proceeded, you can ask those questions.

MR. PIROSKO: Okay. I'm not intentionally trying to extend this hearing.

Q Mr. Groff, we talked about the 2012 evaluation being the time period. Was there a plan that was developed to implement during that period of time? This is how we're going to go about---I understand that you developed the

RFP, I'm not talking about that. What I'm talking about is, what are the steps we are going to do during this three month period? I refer to it in my notes as an evaluation plan. Was there some type of system set up to follow during that period of time?

A Yes, there was. The---

Q And what would we call it?

A The evaluation criteria.

Q Okay.

A The evaluation criteria was listed in the RFP and those aspects that were listed in the RFP are what we were allowed, to give us the parameters for evaluating the instruments to. So without the RFP in front of me, I believe some of it was you know, ease of use, test screen technology, accuracy and precision, the ability to detect interference. Those were just some of the criteria that that's what we evaluated the instrument to, were those criteria set forth in the RFP.

Q I appreciate---and Mr. Brough talked about like forty-nine, I think there was probably like about fifty different criteria. I understand that there were criteria listed in the RFP, essentially to the vendors "Does your instrument detect RFI?" or whatever it is. I'm not talking about that. What I'm talking about is essentially once you got those instruments, did you have a game plan that said "Okay. Jeff Groff is going to be responsible for this. Mike Barnhill is going to be responsible for this. We're going to have to make sure that the temperature in the ambient temperature is X if we're going to do this in order to be able to replicate it again. That the humidity in the room is going to have to be Y in order to be able to replicate it again."? The more detail of exactly how you conducted

the experiments, not what you were necessarily looking for.

A Okay. So in evaluating the instruments, for example accuracy and precision, there was one particular study that we performed and it took a total of, I think about twelve hours, thirteen hours to perform. It was a whole series of running the instrument through its linearity using different---

Q Okay. Was that written out somewhere, "This is how we're going to check for linearity."? Do you know what a pre-flight checklist is like with an airplane?

A Sure. Sure. I understand what you're asking me. Was it written out? Yes, we had it written out "This is how we're going to perform these different tests."

Q And this is why I'm asking. You understand peer review, correct?

A I understand what peer review is.

Q And replication and transparency?

A I understand all three.

Q What I'm trying to get to was there a type of document that was created, or a game plan such that I could take that and hand it to a different scientist and say "Do everything that the department of health just did for the past three months."?

A Was there something written out?

Q Was there something developed? I don't---

A Yes, there was something developed. The testing that we did, the data that we generated, that information just wasn't retained. But yes, we had a protocol that we followed so that each one of the evaluators, myself, my staff, we were all doing the exact same thing, replicating it to get our results to see if we

were getting consistent results.

Q How do you know that the other two evaluators were doing exactly what you were doing?

A Because they were following the standard process.

Q How do you know that?

A Because we all had the same process to follow, I mean we evaluated them independently and the data that was generated was compiled and if they didn't perform it the same way we wouldn't have had the same data, we wouldn't have had the same results.

Q Okay. Let me just pull an example out of thin air and you can give me a better example if you want. You weren't all sitting next to each other using the same machine, were you?

A Some cases, yes; a lot of cases, no. We were doing independent testing.

Q Okay.

A Depending on what we were testing.

Q At the point you're doing the independent testing, again use whatever example you want, let's just say that one of the criteria that you wanted to do in this testing was make sure that you were running a test when the simulator solution was exactly thirty-two degrees, and you did it that way when you're doing independent testing. Did you have anything documented that showed that Mike Barnhill did it at thirty-two degrees or he might have done it at thirty-two point one?

A That information would have been compiled at that time. And when we reviewed the data, that's when we verified that we did it all the same

way. We knew how we were going to run these experiments, got the printouts from the instruments, reviewed the data to make sure that it met those criteria that we were trying to get to, accuracy, precision, its ability of detecting interference. Yes. We followed all the same process when we went through these protocols, when we were performing them independently, and it was verified by the data that was generated.

Q So you're familiar with Georgia's finished product?

A I am.

MR. PIROSKO: (Pause) Judge, if I may approach?

THE COURT: You can. (pause) Thank you.

Q Mr. Groff, I've handed you what has been marked as Defense Exhibit B. Can you identify that document?

A The document you just handed me?

Q Yes.

A It's the evaluation of breath alcohol testing instruments to replace the Intoxilyzer 5000 from GBI Crime Lab in Georgia.

Q Is it fair to say that what this document is, is essentially Georgia's finished product when they went through and evaluated the 9000?

A I am familiar that this document exists. I can't give you the specifics that's in this document unless I sit here and read through the entire thing, but this is what they do to evaluate, or did to evaluate their 9000.

Q Is this everything similar, maybe not step by step, but did you test for the same types of stuff?

A Alright. Give me a minute.

Q And when you were talking about, and I don't care which page,

you---well, let's go to something.

A What was the question? Do I need to answer that question?

Q Yes.

A Okay. So you're going to have to give me a minute so I can identify what steps are in here that were similar in nature to what we did.

Q Well no, I didn't want to ask that---I didn't want you to go through and say "We did this, and this, and this, and this, and this."

A That was the question.

THE COURT: But sir, he's taking his question back. Listen to his question.

Q Yes, I'm taking it back. Let's just---let's pick a page, whatever page you want. I'm looking at page forty-seven of one twenty in the bottom right hand corner. (pause) And I'm looking at the top, it says operational equipment in the first---they're talking about barcode readers.

A Okay. So, so---

Q Forty-seven of one twenty?

A You're going to pick the page? What page is it?

Q Yes. Forty-seven of one twenty.

A (Pause) Okay. Barcode readers. Got it.

Q Okay. And I don't care which one of those subjects you take, and I'm not specifically saying that our department of health tested for barcode readers, I'm just trying to get sort of like the format here. You were talking about documentation when I was asking you about like independent testing where you and Mr. Barnhill and Mr. McDuffy may have not been in the same room at the same time using the same instrument. Are you saying that essentially there

existed at some point some type of document similar to this where you kept track of a category and a summary of what that category was about, and the results of the three instruments that you were looking at?

A That would be accurate.

Q Okay. Let's just take another page.

A How about the next page?

Q Sure. If there's something on one of these pages you want to talk about, go ahead.

A So I did mention already, previously we discussed accuracy and we had---when we evaluated the instruments we tested the instrument's ability to provide accurate results. We evaluated how many calibration points the instrument will allow you to use. We looked at the linear range of the instruments. If you go to page forty-nine, the precision.

Q Okay. You did a lot of the same categories?

A Absolutely.

Q Alright. That's fair. I'd like to just pick a page that has like an Excel spreadsheet on it with digits and percentages and decimal points, whichever one you want.

A (Pause)

Q As just an example, I'm not trying to get the same stuff that you tested for.

A Okay.

Q What page do you want to talk about?

A Sure. How about page one-oh-seven?

Q (Pause) Okay. The same type of question, when you're talking

about that independent testing, did you develop charts like this?

A We developed charts. We reviewed the data that was printed in its instrument's ability. So in this example here on page one-oh-seven of this document, it's talking about mouth alcohol, what is the test for mouth alcohol? The instruments were of course tested for mouth alcohol. I mean that's a similar nature to one of the things we would have evaluated these instruments to, the (inaudible). They---their ethanol source is a breath spray, a mouth spray that contains ethanol, and that's what they used, and ours is very similar to that. I think we used Listerine to detect, so yes, similar in nature. When we tested that instrument we would have tested it to see if it had the ability to detect mouth alcohol.

Q Sure. But the difference that I'm trying to get at, if we look at the two---essentially the two pages that we had just looked at. One was a category on how the instrument performed, and they documented that. This type of chart or any of these other charts like this is more or less had to do with conditions of the atmosphere at the time, what was the temperature? What was the humidity? I know it's not maybe on that chart that you're looking at but I've seen it in different charts in this---so it has to do with things, not how this instrument performed but could we take that instrument and put it back in the exact same environment with the same numerical values of the solution or the heater tube, temperature, or something like that and replicate it? Did you keep documentation---did you develop documentation and charts like that?

A Not as nicely refined as these. You know, we were evaluating (inaudible). All the testing was conducted at the State lab. It was conducted in a static environment. The State lab is humidity controlled. The temperature is

controlled. We didn't test the---

Q What was the temperature on the day you did any of these tests?

A I can't tell you. I don't know.

Q Because you didn't document it, correct?

A No, it's not because I didn't document it. You asked me what it is and that was two and a half, three years ago. I can't tell you what the temperature was that day, but it's a building and it's got a temperature control---it's a temperature controlled environment. It's you know, what that temperature is. I don't---is it seventy degrees? Is it seventy-two degrees? I can't tell you what it was on the day that we did that test.

Q Okay. What was the heater tube temperature on the day you did RFI testing?

A The heater tube temperature? Specifications for the heater tube temperature---

Q No, not what was the specifications, but what was the actual temperature?

A Of the heater tube?

Q Sure.

A I can't tell you what that temperature was on the day of our testing.

Q Mr. Groff, if I gave you this document and I asked you to go replicate Georgia's testing, and it's got all this detailed information on it, do you think you could do it?

A Probably.

Q If Georgia came and said "Hey, give us what you have saved from your validation---or evaluation---your 2012 evaluation. Give us the documents

that you saved." Could they replicate your testing exactly the way you did it?

A They could replicate our testing.

Q Really?

A Yes. They could replicate---

Q And what if they said "Mr. Groff, what was the temperature in the room on the time you did this?" what would you tell them? "I don't know."?

A I'd have to go back and look what the temperature was on those particular days. That is recorded. But you know, that's recorded by our facilities management, because the environment is strictly controlled. It's a state laboratory, the environment has to be controlled in the entire building to include the space where the evidential breath alcohol testing lab is located. So you know, the criteria that we evaluated these instruments to is carried forth in our existing protocols.

Q We're getting way off base here. Could you hand some documents to a scientist and say "Replicate what we did. Peer review it."?

A (Pause) The closest thing that I could provide to---

Q Could they replicate it?

A The closest thing that---

MS. HUESER: Your Honor? Please allow the witness to answer the question.

THE COURT: Let him answer your question. Go ahead, sir.

A The closest thing that I could provide for peer review would be our existing protocols to replicate how we validate the instruments, because those protocols were established off of how we originally evaluated these instruments, to establish accuracy, the precision, its reportable range, its ability to detect

interference, its ability to detect mouth alcohol. Those same criteria that these instruments were evaluated to was translated then into the protocols that we use to validate these instruments.

Q Mm-hmm

A So if I were to provide our protocols to the state of Georgia and say "Replicate what we do" they would very easily be able to replicate what we do.

Q Mm-hmm. Protocol tells us what we should do, correct?

A It tells us---yes. It's the process by which we follow.

Q This document not only---this Georgia study tells us not only what we should have done, but what we did and here's the numbers down to decimal points. Do you have anything that goes beyond what your protocols were that documents what we did, such as things like down to decimal points?

A Those documents were not retained.

Q Why?

A Because it's part of the procurement process. When we're purchasing a commodity, it's a piece of equipment. How it's evaluated to the RFP, those---the data that's used that the evaluators used to derive their final scores for those things are not retained. And so what is retained is the information when each one of those instruments are validated and put into the field. And that data is provided with every subject test, which I do not believe Georgia provides. So if you're asking how---where is the documentation to show that these instruments are functioning properly is provided with every instrument, it's provided with every subject test.

Q I'm talking about the evaluation three month period.

A And I've answered this question. So the evaluation of the

instruments, the data that was generated that the evaluators used to derive their final scores was not retained.

Q And I want to make sure that we're talking about two different sets of data, and you can add a third or fourth if you want. I want to make sure that what we're talking about when we're talking about---when we're answering these questions is data that essentially was RFP-type data that was cursory to the actual data produced during that three month period, during the valuation period, or the evaluation period.

A Right. That's correct.

Q Okay. Is there any data from the non-evaluation period? Data, documents, communications, whatever, that was retained?

A After the evaluation was completed, the instruments were procured---

Q Was there any documentation from the non-evaluation period that was retained?

A All of the data after the non-evaluation period is retained. All of that data resides in the instruments. All of that testing data is provided with every subject test. So to answer your question, yes.

Q What was the serial number of the Intoxilyzer 9000 that was used during that evaluation period?

A I couldn't tell you what that serial number was. It was---

Q Where is that---

A ---the evaluation---

Q Where is that---

A It was the evaluation instrument that was provided to us by the

manufacturer. I don't know what the number of it was off the top of my head.

Q Where is that specific instrument right now?

A I couldn't tell you. It belongs to the manufacturer. They provided us an instrument to perform evaluations on and when the evaluations were completed, that instrument was returned to the manufacturer.

Q So the---so you used an instrument from the manufacturer for the evaluation period. You just said that if I wanted to get that information I can get it because essentially---well, you didn't say I could but you said that information during that three month period from that instrument is still in that instrument.

A I doubt it.

Q And we sent that instrument back to CMI?

A That instrument went back to CMI. It did.

Q So we don't have access to that information, do we?

A No, you don't.

Q We don't have information from the other two vendor's instruments, do we?

A No, you don't.

Q Did you try to download that instrument data and save it before you sent it back?

A No, we did not.

Q (Pause) You've worked in a reference library, is that correct?

A A reference library?

Q Yes.

A I have not worked in a reference library. I don't understand the question.

Q Have you testified---what types of laboratories prior to the department of health did you work in?

A Oh, a reference laboratory.

Q Laboratory, I'm sorry.

A I thought you said library, I'm sorry. I've worked in various laboratories. That's correct.

Q What is a reference laboratory?

A A reference laboratory would be a lab where if your blood is drawn, then it's sent to LabCorp. It's not tested at your physician's office, it's sent to a reference laboratory. That's a lab that the sample is referred to, hence the term.

Q Which reference laboratory did you work in?

A I worked at---it was called Quest, or what became Quest. It used to be called MedPath back in the day.

Q When did you work there?

A 1989, 1990, somewhere in that---I don't know, it was years ago.

Q How long did you work there?

A I worked there for about… oh, not more than a year.

Q What were your duties?

A Running laboratory samples.

Q Is one of the purposes of a reference laboratory to later be able to provide associated reference values for references or sources of traceability of test results?

A No.

Q Really? Okay.

A Well not of what you've just asked me. You asked me where I was

employed. And I'm telling you I worked in a reference laboratory that received samples from all over the area. LabCorp is one example, Quest is another example. Samples are received from a larger region and they're tested. You know, we test your cholesterol, do micro testing, hematology testing. That's a reference laboratory.

Q What is traceability?

A Traceability is the ability to trace back a known standard back to NIST, National Institute of Standards in Technology.

Q It's not just known stand---traceability isn't just that, is it? Essentially, you could trace anything back to its origin?

A It's tracing a sample back to, or tracing a control where it applies, control back to where it was manufactured and was it manufactured to specifications where it could be traced to NIST. So when you purchase a control material and it's---for this context here, so if we purchase a control material and it says it's a 0.100 or a 0.400, there's traceability back to how that was created, how it was tested, how it was verified to make sure that it actually is a 0.400 or close to it.

Q How many standard simulator solutions were used during this three month evaluation process?

A How many bottles?

Q Yes.

A How many concentrations of… many bottles. There was many bottles that were used of different concentrations. I couldn't tell you exactly how many were used, it was quite a number.

Q Do you have the serial numbers?

A Serial numbers of the solutions?

Q Well whatever number you used to be able to trace that solution back.

A The solution was commercially purchased. So---

Q If I said "Mr. Groff, I want to be able to trace back the solutions that you used in the evaluation of these three instruments. Give me the numbers so I can look it up." Could you do that?

A Hmm? I don't know. It's possible.

Q How would you find out?

A We would have to go back and look at order slips, try to get lot numbers, see if they even---if they even still are around.

Q Okay.

A You know, it's the same material that we currently purchase from the same vendors.

Q I'm not worried if it's the same material, I'm talking about traceability of a very specific bottle of standard solution that was used during this three month period. I want to trace it back. Could I do that?

A I don't know. I don't know. I can't answer that question without going back and looking through previous records and orders of solutions---

Q I'm not---

A ---to get lot numbers, to be able to refer that information back to get that traceability back from that manufacturer.

Q Let's just give an example. You purchase a batch of standard simulator solution. It comes in a box, there's twelve bottles in there. And we can go back and get a purchase order that says "On this date, October 13th of 2012,

we received a box of twelve bottles."

A Correct.

Q And I want to find out, and I want to trace back, and you picked the second bottle in the second row and used it for this testing. I want to be able to trace back that specific bottle.

A I don't think---

Q Do you have the records---

A That would not be possible.

Q Okay. And so right now, no one can trace back the standard simulator solution that you used, any of the standard simulator solutions that you used during this evaluation period?

A The only way we could look into that would be to look at the packing slips and lot numbers that were ordered in that period of time. Once we have the lot numbers, we could go to the manufacturer and get their traceability.

Q You can't specifically tell me what bottle of solution was used during any of these tests?

A A lot number, when they make these solutions, they make these solutions in large quantities and it's a lot number, okay? Say the lot number one, and in lot number one and then they make fifty gallons of some alcohol solution. They pour it out into however many bottles that lot is going to be able to---

Q They make a hundred---

A ---make.

Q They make a thousand bottles at one time?

A So, yes. So lot number one yielded one hundred bottles.

Q That's fine.

A Some manufacturers will label---or number their bottles, so it could be lot number one, bottle number one; lot number one, bottle number two. The lot, the big vat that they make is what is tested. That's where the traceability is, not the individual bottle.

Q Mm-hmm. And so they make a large amount, fifty-five gallons, one hundred gallons, they pour it out into one hundred or five hundred bottles, and what they do is they certify the fifty or one hundred gallons?

A They certify that lot, that batch that they make.

Q Yes. They don't certify a bottle?

A Not each bottle.

Q And this solution is mixed, correct? In a fifty-five gallon drum or whatever, one hundred gallons?

A Right. The department made solutions for years, so yes (inaudible).

Q Okay. They don't go and test each bottle?

A No.

Q Each bottle can contain a different amount?

A Hmm, could it? Is it possible? (pause) It's highly improbable. I doubt it. We're talking about an aqueous solution---

Q I'm asking possibility, not probability.

MS. HUESER: Your Honor, I would ask again that the witness be allowed to answer his question without being talked over.

THE COURT: I don't know if there's a big difference, but you can explain your answer.

A So when the solution is made it's primarily water with a little bit of

alcohol that is added into this water. It could be a small---when the department---we made this for years and the department used five gallon carboys. They call them carboys, five gallon jugs, and we would make three five-gallon jugs at a time. And we would test each one of those five gallons. We might test a little from the bottom, the first bit that comes out. We'll test another one from the middle and one from the top, and we'd send those off to get them verified.

And then to address that exact concern that you had, was there a difference in the solution that's mixed? You want to make sure it's mixed. And the manufacturers, how they make their solutions, the quantities that they make, whether it's five gallons at a time or fifty-five gallons at a time, I don't know, but what I do know is that the solutions that are commercially purchased are like any other control material that's purchased for any laboratory. They're tested prior to them being issued and sold. They have to meet various type tolerance of accuracy, and how they test them is the traceability that counsel is referring to. They test them on GC-headspace, they're using commercially purchased controls that have traceability. And once that solution has been tested and verified, then the certificate of analysis is issued with that lot number and it's made available by the manufacturer at that time.

Once that solution is received, then we do additional testing on it to make sure that it is---that nothing happened to it from the time that it was shipped from the manufacturer to the time we received it, and to verify the performance of that solution before we put it into use. We test it on our instruments prior to it being issued out at the agencies. So there's a number of checks that are put into place to verify that the concentration that is stated on that bottle for that lot indeed is that concentration.

Q Are you familiar with the concepts of metrology, traceability and uncertainty?

A I am.

Q Were you familiar with those concepts at the time you undertook the 2012 evaluation?

A I am.

Q Did you design your evaluation using those concepts?

A We designed our evaluations to look at the accuracy, the precision, its reportable range. We looked at variability in result to make sure they didn't exceed what the manufacturer stated as their stated measurement of uncertainty. So yes, we took those into account.

Q How did you document each of those?

A We documented them as we ran the test to get our individual scores. We looked at the results to make sure that it met the criteria or the claims of the manufacturer. Manufacturing claims that the instrument when it's calibrated has to fall within the tolerance of plus or minus 0.003.

Q How did you---

A And so if it fell outside of 0.003, then that would have been evident in the instrument's performance, the printout for the instrument, and if it wasn't able to meet those criteria, it didn't pass---it didn't get scored nearly as well as one that was able to. The criteria that were put forth during the evaluation were again, to the RFP, and it looked at basically the functionality of the instrument, it's ability to be able to accurately measure and meet those criteria that were set forth. And it was more than just accuracy and precision, there was a number of aspects in that RFP that we were evaluating it to. But keep in mind that there

was a certain bar that these instruments had to pass in order to even be considered or to obtain a score, to even be a part of the evaluation. Then the evaluator scored them to see how well they performed to those criteria. But that was the first bar. Is this the one that is a good enough package that we can move forward with and then establish our standards of performance to validate these instruments to, which are actually at a very robust and in some cases higher challenge, or a higher bar that they had to meet before they could be put into service. But they had to meet a minimum bar during the evaluation process.

Q Okay. My question has to do with how did you record that? And this is where I'm trying to go. When you took one of those and you recorded it, did you record it in such a way that you just gave it a three on a scale of one to five, or did you give it something that said the results of this specific thing that we're testing right now came out to 0.012?

A A scale of one to five.

Q Okay.

A The results that were---that we obtained from these instruments were then used to score it on that scale.

Q Was there some type of measurement? Now you said that some of these criteria you were testing, essentially the three of you together, and some you were testing individually. Is that correct?

A That's correct.

Q Is there some type of measurement that when you were testing these---and I want the answer both ways, as a group or individually, that… (pause) in short, that when you saw some result and you marked it down as a three, that Mr. Barnhill would see that same result and mark it down as a three,

and a thousand other people who saw that result would mark it down as a three, as opposed to it just being “Look, if you think it’s a three, that’s fine; I think it’s a two, so you can give it a three, I’ll give it a two and it will work out in the total.”?

A I think it’s more the latter. The individuals that were running tests on it, myself, my staff, law enforcement, you know they’re subject matter experts and they---the intent of the evaluation was to make sure one, that we were evaluating them in the same manner but that we also used our training and expertise to derive our own individual scores. So if I scored something a four or a five and one of my staff scored it as a three or a four, that was their prerogative based off of their assessment of it.

Q So the scoring wasn’t based on science, it was based on personal experience?

A It was based on both.

Q Okay. Which of those criteria---are there any of those criteria that we looked at, let’s say there’s fifty just for an even number, fifty that Colorado looked at, and I don’t know if that’s the number or not, but if we took all fifty of those, were there any of those criteria that there’s absolutely no way that the scoring could have varied between a thousand people? Everyone would have had to come up with a three on that criteria?

A I think when you look at the overall scores of looking at overall scoring, you’re going to see a trend or a pattern. If somebody, again it’s their decision do they give it a one, do they give it a five. If one of the three instruments didn’t perform---if you’re looking at three instruments and you’re evaluating all three for let’s say interference, and Instrument A does very well and is able to detect all the interference, Instrument B does pretty well but there

has to be a little more interference for it to detect, and Instrument C couldn't detect interference at all. So that information is then used to derive a score. When you would look at the scores of the evaluators, you're going to see the same trend, Instrument A was scored higher than Instrument B versus Instrument C. So if Instrument C was scored as a one and someone gave it a two, and Instrument B that scored an OK, was you know scored at threes maybe with one at a four, and the first instrument that performed the best had fives and fours, you would see that sort of probably difference in scoring, but the overall conclusions by three independent evaluators would have been the same.

Q Let's just---we're going to go on the last statement. The individual scores would have been the same. Let me just throw something out and correct me if I'm wrong. Let's take something like RFI, radio frequency interference, is that correct?

A Correct.

Q That essentially could be caused by an outside electrical source?

A That's correct.

Q A cell phone, a police radio, a router? Am I on this, or close?

A You're close.

Q Okay.

A A radio---

Q I'm just trying to, for my purposes I need to dumb this down. Let's just say that you're doing---the three of you were doing individual testing on RFI and the scale is one to five, and you test it for RFI and it seems to work fine, you give it a five. Mr. McDuffy tests for RFI and it seems to work fine, he gives it a five. Mr. Barnhill is testing his instrument and little does he know that he's got his

cell phone in his pocket and the cell phone goes off and he's got it on mute and so there's no sound, but there's this electrical signal and all of a sudden the machine goes whoa, and it doesn't operate properly, I'm going to give it a one. Is that potentially what could have happened? And it doesn't have to be that, it could be any one of these categories where the score could be a five, could be a one based on the circumstances individually, could that have happened?

A I would have to say, is it possible?

Q Is it possible?

A Is it possible? I suppose it's possible. Is it probable---

Q And don't get---

A ---or likely?

Q Don't get stuck on this being based on a phone going off.

MS. HUESER: Your Honor, again I'd ask that the witness be allowed to finish his statement.

MR. PIROSKO: Let me clarify the question.

THE COURT: Okay. Go ahead.

Q I don't want you to get stuck on is it possible or probable that a phone would have gone off. What I'm trying to do is get a global picture. Is it possible that during these individual evaluations, because there was no specific criteria to what is a one, or a two, or a three, or a four, or a five, it's just personal preference, is it possible that the numbers could have been all over the board?

A I would have to say that's not possible.

Q Why?

A Because what we were evaluating these instruments to were the basics. You know, does the instrument got a touch screen? Let's use that as an

example, does the instrument have a touch screen?

Q I want to talk about something scientific, not the touchy feely.

A Does the instrument have the ability to when you give it a 0.100 solution to give you a result of a 0.100? Does it have that ability to do it? If all three of them were able to do that, then all three were going to be scored accordingly.

Q If we could---

A They don't necessarily have to be ranked. Does the instrument have the ability to detect an interferent? And we'd test it with different interference. This one was able to do it, this one was only able to do it with some of them, this one wasn't able to do it all. They're going to get scored accordingly. And so is it possible that there would be wide deviations in the scoring? I don't recall seeing wide deviations in the scoring. The scoring you know, they're individual scores by individual subject matter experts. They're their own scores, and those scores are tallied at the end. The higher score wins the day, and that's you know, in essence the procurement process. Once the instruments were scored, there was the Intoxilyzer 9000 that was scored the highest by all of the evaluators. It outperformed the other two. And so that's the one that was chosen.

Q Let's go two ways on this. Let's do the touchy feely touch screen, do we like it or not? Let's say that the Denver Police Department likes this instrument. They like the 9000 and they want it. And so they tell all their officers "Look, when you go in---we want this instrument, so when you go in and it asks you about the touch screen, put down a five." And let's say the Dacono Police Department doesn't like the 9000 and they tell their evaluator "Look, when you

go in, we want this instrument, so because there's no standard of what's a one, a two, a three or a five, you put down ones." Could that have happened?

A No. That's impossible.

Q Impossible?

A Absolutely.

Q Why?

A Because of the way that the evaluators and special law enforcement and the way that the evaluations were conducted. They were conducted very empirically. We had a very strict---one evaluator, and I didn't make this very clear, one evaluator cannot influence the score of another evaluator. When we were writing our protocols, we did them independently. If one test was done, the data was reviewed independently. I had no sense of what my staff had scored. I had no sense of which one they liked best, even within my own staff, to follow this process and be (inaudible). I had no idea as to which instrument scored the highest.

Q Sure.

A Until we were done with the score sheets and when every evaluator sealed their own score sheets and they were unsealed by our chief---our senior purchasing agent and that's when they were tallied. It wasn't until that moment that I knew. Law enforcement, I hand selected a number of officers from around the state to get a cross representation that is (inaudible) blinded, for the touchy feely stuff as you so put, ease of use, did they like the way the instrument was set up? Did they---you know, there was a list of things that they were evaluating it to. And these instructors were selected from around the state. They were senior instructors. No, I take that back, not always senior instructors;

we had to get a cross section. It was important that we included state patrol. It was important that we included the sheriff's offices. It was important we included the police departments. It was important that we included metro agencies versus rural agencies. And so these individuals that were selected, they got a phone call "Hey, I'm going to be in Glenwood Springs, can you meet me at this location? I cannot tell you why I'm going to be meeting you. Are you available? I'll give you more details if you are." They'd show up and I'd say "Okay, here it is. We have three instruments, I've got some criteria. Would you be willing to evaluate this instrument and score it?" If they were available, they were able to do it and I went around the entire state and did that. They sealed their information, there was no cross communication. It happened in a very rapid succession in a matter of just a few days, three to five days as I recall. So everybody was very much blinded so there wouldn't be that kind of influence. That kind of influence would have disrupted the entire evaluation process.

Q Okay. So you go to Glenwood Springs, you ask an officer to come in and evaluate with the touchy feely stuff and you say "Look, let's just take ease of use as the criteria on a score of one to five. What do you give it?" Is that so far---are we on the same page?

A That's along those lines. There was a number of things that they evaluated to.

Q I understand, but I just need to kind of limit this.

A Right.

Q You didn't say "Look, here's kind of the parameters of what a one is, and here's the parameters of what a two is, and here's the parameters of what a three is." You didn't do that, did you?

A No. Well I explained to them---

Q My three could be your five?

A I explained to them how the scoring works, “Here’s what you are going to be evaluating this to. You have a scale of one to five. You have three instruments. You need to scale that performance on a one to five for each one of those criteria.” And then they would generate their own score.

Q What was a three?

A Three would be about midrange.

Q And how far does that midrange go?

A It’s up to the individual evaluator.

Q Okay. So it wasn’t---so that part wasn’t scientific?

A So going back to the touchy feely example of the touch screen, one of the instruments had a very small rudimentary touch screen, one had a little bit bigger touch screen, and one had a larger color touch screen. So if the one that was the smallest might have gotten scored a one or a two because that was the one that was least liked by that evaluator. The one that was the midrange one got the three, the one that was the---the one they liked the best got the four or five. So that’s an example of how an evaluator probably would have scored because they’re ranking them.

Q Let’s take one of the other categories that you were talking about and just general. We were talking about standard simulator solutions and the scoring and doing this individually. If you’re doing something that is testing a category dealing with standard simulator solution on Monday and you’re using this instrument which we no longer have, and you’re using a standard simulator solution and it reaches its limit of that solution. Then on Tuesday that solution

gets changed, and on Thursday Mr. Barnhill is doing the same category but he's using the same instrument but a different simulator solution, scientifically he's testing something different, isn't he?

A No.

Q Okay. (pause) Oh, getting back, I asked you this question and you expounded on something different but we were talking about metrology, traceability and uncertainty, and I asked you "Did you design the study using those three concepts?" And you went on to some other concepts that you used, but what about those three concepts?

A I believe that I answered that yes, we did take those into account.

Q Those three specifically?

A Metrology.

Q Mm-hmm.

A Measurement of uncertainty.

Q Mm-hmm.

A And what was the third one?

Q Traceability.

A Traceability, absolutely.

Q Okay. And let's take metrology, what did you require in your evaluation?

A Metrology is making---as an example that we spoke about earlier was making sure that the environment is the same environment that they're testing it, and they were all testing it at the same lab for these types of instruments.

Q And so you said they're all tested essentially at the same place.

You're talking about they're all tested in the same building?

A They're all tested in the same space within the same building, yes.

Q Okay. But you don't know if the atmospheric conditions were the same on one day versus the next?

A They would have been within---they wouldn't have been identical I would imagine but---

Q Really?

A ---the temperature---the ambient temperature of the rooms and the relative humidity within those spaces doesn't change dramatically from day to day to day. Just like---

Q Really?

A It's a real world---it's controlled but it's also a real world environment.

Q Would it change from month to month to month?

A It might.

Q Seasons? Humidity?

A Right.

Q Rainfall? Precipitation?

A But we did not---we didn't do this testing from month to month to month. This was---

Q You said three months.

A We had these instruments for three months in total. So these experiments that were performed were performed in close proximity to one another. It wasn't---we didn't want to test the first week we got the instruments and then did the other test the last week we had the instruments. The tests were

set up and they were run in short order in a time span that was within a few days of each other.

Q You didn't record the temperature of the laboratory on the dates you were doing this?

A I think I answered that question and the answer is no.

Q You didn't record the humidity?

A Same response.

Q You didn't record any of the atmospheric conditions?

A Those things are recorded by our facilities management, so no.

Q You didn't record it and take it into consideration in your evaluation?

A We did take it into consideration.

Q How did you do that?

A To make sure that the relative humidity and the temperatures are maintained, and so that's part of what goes on in an entire laboratory.

Q How did you do that during this three month period?

A By making sure that the temperature---the thermostat wasn't turned up by facilities management, that we didn't put a humidifier into this space. You know, again the building is very carefully environmentally controlled. It's the State laboratory, there's a lot of testing that is conducted there. The entire building is controlled with its environment. Did I record what the relative humidity was each day of those experiments, or what the temperature was within that space that day? The answer is no.

Q Did you as a---do you consider yourself a scientist?

A Yes.

Q Did you as a scientist go and do that independently or did you just rely on the maintenance man?

A Both.

Q What did you do individually?

A Make sure that the environmental conditions were not going to be changed by the maintenance man.

Q And what did you do? Did you send him a memo and say “We’re going to be doing some testing over the next month.”?

A No. Actually, frankly that was a conversation with our facilities management manager.

Q Who was that?

A Mike Trujillo.

Q When did that happen?

A Prior to the evaluations.

Q What was---

A Asking about how is the temperature controlled? How is the humidity controlled? That’s why I know that the---that’s why I know, I’m able to testify to this information about how that entire building is maintained, its temperatures and its humidity because it’s not just our laboratory, our space, but the temperature and humidity has to be very carefully monitored regularly throughout the entire building. What I wanted to make sure was that there wouldn’t be any substantial changes to the relative humidity or the temperatures during the period of time that we were doing these evaluations.

Q This scoring of one to five, because of your background do you understand the concept that when you’re doing testing there should be certain

agreed-upon percentages where if the test results fall outside of that range, you should be able to trace back the cause of the differentiation?

A If an instrument falls outside of an established tolerance or range, yes, you're going to look into what may have been the cause that could have contributed to that.

Q Okay. So at some point if there's too much drift from a specific point, we should be able to trace back and find out why? And possibly just do retesting?

A Possibly, yes.

Q Okay. So this scoring of one, two, three, four and five, not the touchy feely categories but the scientific categories, was there a range for what a two is? A numerical range?

A Yes. That would have been---a two would have been one greater than one and one less than three. I don't understand what you're asking me frankly. I've tried to explain that this numerical score that was provided by the evaluator, the evaluator gives that score. It's their discretion based off their training, experience and knowledge as subject matter experts to decide what number, numerical value is going to be assigned to a particular instrument. We had three instruments to evaluate and we were looking at different criteria that we were evaluating these instruments to. If all instruments performed marvelously in a particular criteria then their scores would have been reflective of that; they would have all gotten a five. Or if they didn't do well, they would have all gotten a one or a two. But the final score that is provided by an evaluator is their discretion. It's not a two means X, a three means Y, it has to fall within this parameter to be a three, or it has to fall within this parameter to be a two.

Because you know what that would be? That would be removing the discretion from the subject matter expert and possibly even influence their score. It's their discretion to be able to provide that number and rank that individual criteria from the RFP.

Q So your scoring during the evaluation process was based on--- what did you say? Personal…?

A It's their own discretion.

Q Discretion. Okay. I'm sorry.

A Based on their training, experience---

Q Discretion. Don't---

A ---and knowledge---

Q Discretion.

A ---as subject matter experts.

Q Alright.

THE COURT: Folks, it's ten minutes 'til twelve so we're going to break now.

MR. PIROSKO: That's fine.

THE COURT: We'll start back about ten minutes after 1:00. And just some direction for this afternoon because I'm going to limit this to about 3:00. When you answer questions this afternoon, Mr. Groff, I understand this is an information sharing sort of forum. I want you to listen very carefully only to the questions he's asking you and I want you to limit your answer to that. If he needs more information then I'm going to rely on him to ask you a different question so that the answers could relate only to the question he's posing to you. Okay?

MR. GROFF: Yes.

THE COURT: I appreciate the information that you're giving us but there is only so much information that I really am relying on to get by way of this forum. Counsel?

MS. HUESER: Your Honor, first I would just let the Court know, I know Mr. Groff has to pick up his children from school. They get out at 3:15, so if we can conclude a bit before 3:00 so that he has a chance to do that. I'm sure there will be some argument at the conclusion. I think one of the things is we concede that the notes from the evaluation period as it's being referred to, were not kept. Like so this continuous questioning about "Did you note this? Did you note that?" We concede, those notes are not available. It's our position that there's no due process right in the procurement process for these instruments.

THE COURT: Counsel, I'm going to let him do a thorough cross-examination just as I let Mr. Halser do a thorough examination.

MS. HUESER: Yes, Your Honor. I just think---

THE COURT: And it was very thorough, so I'm going to give him his opportunity to question pretty much everything that was talked about in direct, and if he wants to go further because he has more information, I will allow that too. If you have relevancy objections, you're welcome to raise them as those questions are being asked.

MR. PIROSKO: I have a suggestion.

THE COURT: Okay.

MR. PIROSKO: And this is just something that was brought up. First of all, I don't mind Mr. Groff, I don't want to hold him up from going to pick up his children. If we had to continue this, you know we didn't get through it, I

don't care about that, I'm just putting it on the record. In order to try to simplify this and concern about giving extra information, and I appreciate that, if the parties want, and I don't know how this would be done, I don't mind submitting my questions, essentially stopping me submitting my questions to Mr. Groff, that he can provide written answers to it. That may make it---but it's just a suggestion.

THE COURT: No, I think we're going to limit it to an open forum and a transcript that can be reviewed both parties.

MR. PIROSKO: Sure.

THE COURT: And the Court being involved in that process. So we'll continue with the same forum that we're at. Maybe a different suggestion might be if you want to relay to those ahead of time so he can be prepared in the way he intends to answer. If not, then we can use that probably close to two hours to finish up. My intent, Mr. Pirosko, is that we're able to finish today.

MR. PIROSKO: I understand.

THE COURT: So let's try to stay within that, and again, that's where I---very direct questions for the information that you want and only the answers that he's calling for. Alright, folks. The courtroom will be locked over the lunch hour so if there's anything important to you, go ahead and take it with you. And we are going to reconvene about 1:10. Thanks.

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(Break)

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THE COURT: Alright. Good afternoon, everybody. We are back on the record in case number 13-T-9903. Both counsel are present, the witness

is back on the stand. Mr. Groff, you're still under oath to tell the truth, and Mr. Pirosko, you can continue with your cross-examination.

MR. PIROSKO: Thank you, Judge. Just a couple of issues for housekeeping purposes only. If the State had made an at least open possibility of a type of stipulation, and although it wouldn't satisfy every question that I have, it may satisfy---serve two purposes if we could craft something. And my thought is something just on the topic of, aside from the scoring sheets, from the evaluation of this---not the validation just the evaluation, aside from the scoring sheets, all other data has been destroyed. And I say that for---it could possibly serve two purposes. One, it could get rid of a lot of my questions as far as that that data just doesn't exist. I'm still going to have questions of why but just that it---specific data doesn't exist, but I think more importantly from all the parties here, I think we're all trying to do the right thing and get as much information out as possible, and I think if that was understood, that issue wouldn't have to be pleaded and litigated in these cases.

THE COURT: So that the prosecutor agrees that aside from the scoring sheets related to the evaluation process all other data compiled has been destroyed, recycled, whatever.

MR. PIROSKO: However they want to word it.

MS. HUESER: I think defense counsel should just ask Mr. Groff that specific question.

MR. PIROSKO: Okay. That's fine.

MS. HUESER: And then we don't have to go into "Did you write down this? Did you write down that? Where is that data?" because I think Mr. Groff can testify what is out there, what is not.

THE COURT: Okay.

MS. HUESER: You know, like I---

MR. PIROSKO: That's fine.

MS. HUESER: And obviously there are things we don't know. Is there data still on the instrument that they sent to us for testing that was sent back? No idea.

THE COURT: Okay. Go ahead, Mr. Pirosko. You can ask and then we'll just get that established on the record and then we'll continue from there.

MR. PIROSKO: I have just a couple of other housekeeping matters. And this is literally just to put it on the record, I know it's not probably going to change anything. When I walked in today, I have---and you see I have fifty pages of questions, each (inaudible) there was ten, fifteen on each page. I got to page four this morning. Although during lunch hour I went through and probably---and I just highlighted probably twenty percent of the questions that I have remaining, so I've probably cut down eighty percent of the questions that I have simply because of the time limit. I think my client's---when we went through the direct on this the prosecution had no time limit, they had all day, and we're all aware of the fact that it takes much longer to cross-examine a non-friendly witness than it does to essentially do direct on it. I think my client's due process rights are affected by the limitation but I understand the restraints.

THE COURT: Counsel, can I just direct? It is a cross-examination so if you feel like you need to lead to get the answers that you're looking for, you're giving this witness a lot of leeway to speak and he's speaking a lot, and a lot of it is repetitive. I believe we could cut back on the time substantially if more

direct questions were (inaudible), and more direct answers were given and then we could move on to the next topic. So let's try that this afternoon and see how far we go. Okay.

CONTINUED CROSS-EXAMINATION OF JEFF GROFF

BY MR. PIROSKO:

Q Mr. Groff, just so you know I probably have, I'm guessing around one hundred and twenty questions. We probably have around one hundred and twenty minutes. I'm going to try to ask them yes or no. If you can answer it that way I appreciate it. If you want to follow it up later with some kind of explanation, you're more than welcome to do that. If it's something that you keep down to fifteen or thirty seconds, that would be the best option. So getting back to this first question, and please put it in whatever type of stipulation or wording you want. Globally, aside from the scoring sheets that were produced from the evaluation period, are you willing to state that all other documentation has been destroyed?

A All the data that was generated during the evaluation was not retained. It's not in our possession.

Q It was destroyed? When you say it's not in your possession.

A It was never retained. It was shredded, it was destroyed. It's gone.

Q Okay. Thank you very much. Regarding that, and I understand paper, hard copies… Electronic data, was anything during that three month evaluation period recorded electronically, such as an Excel spreadsheet?

A No. No. The only thing that was retained was the final score sheets.

Q Was anything relating to that evaluation period recorded on electronic means? Emails? Anything?

A No. The only thing that was recorded and retained was the final score sheets from the evaluators.

Q No, I mean just initially was it kept electronically, before it was destroyed?

A No. The only thing that was retained was the final score sheets from the evaluators. That's all that's retained from the evaluation period.

Q I understand that you're using the word retained, and I mean originally documented electronically.

A No. The only thing that was retained in any form or fashion, electronically, hard copy, any other means, was the final evaluator's score sheets.

Q So some data during that period was recorded electronically, originally?

A No. The only thing that was retained from the evaluation period---

Q I'm not---

A I'm trying to answer the question. I don't know how else to answer it. The only thing that was retained was the final score sheets from the evaluators.

Q Forget retention. I'm not talking about what was retained. During that three month period, was anyone using a computer to do anything about the evaluation? Sent emails back and forth? Put numbers in a spread sheet? Anything? Communications with CMI?

A Sure. There was communications among the staff about the types

of testing that we were doing.

Q Okay. That's---

A That could have been in the form of verbal. That could have been in the form of emails.

Q That's fine. That's all I need. As part of this destruction of that data, did anyone direct anyone to wipe any computers?

A Did anyone…? No. There was never a directive to wipe the computers.

Q In any form? No one---and use whatever terminology, no one said "Destroy the electronic information also."?

A Our instructions were very clear from our purchasing folks who guide us through this process, was that any of the information that was compiled, used to derive those final scores by those evaluators was not to be retained. Whether it was an electronic format, whether that was in paper format, it didn't matter. Anything that was used to create that final score from that evaluator was not to be retained.

Q Is it your understanding that if something is erased off a personal computer or a personal work computer at the department of health that it still remains on the main server?

A I would have to say probably not. Any of the communications via email especially, OIT, our office of information technology, there are certain timeframes that emails are actually retained. After that, they're purged just automatically. That's just practice within the State office of information technology. Servers of course are backed up.

Q Okay. You, in this case back on 8-29, and I'll state that it's on

page fifty-four and it starts at line nine, you testified that quote “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 a diagnostic lab, environmental lab and so forth. The fundamentals are the same.” Do you agree with that statement?

A I do.

Q Did the department of health adhere to the same types of laboratory practices when evaluating the 9000?

A They did.

Q Is the 9000---I might have asked that already, that question. What’s the scientific method?

A Scientific method?

Q Yes.

A Is to evaluate the accuracy, the precision, the reportable range, analytical sensitivity, analytical specificity to include interferent substances. Those are the types of scientific methods that would be employed when evaluating any piece of equipment, laboratory equipment especially.

Q Did you use the scientific method in your evaluation of the 9000?

A We did.

Q What steps of the scientific method did you use in the evaluation of the 9000?

A All of those that I just mentioned.

Q Anymore?

A No. That pretty much covers it.

Q Anymore?

A No. Well other scientific methods? Part of an evaluation that would be kind of wrapped into the scientific method would be repeatability, integrity of the information or data, accuracy of final reports. I think the administrative processes would be used to input the data, and there's the pre-analytic, analytic and post-analytic phase of any lab test. The pre-analytic is everything you should do prior to the test. The analytic is the test itself, and that post-analytic is the results and reporting. So all of those are outside of---really would fall within that. Analytic aspect is the accuracy, precision, reporting range. It's more of that analytic component. But the pre-analytic is how do you put in the data? Is it printing it accurately on a report? Is it consistent with the information that was input? How is it retained (inaudible)? Is it able to be retrieved? Those kinds of things.

Q Did you deviate from the scientific method in any way when you were doing the 9000 evaluation?

A I would say no.

Q Okay. (pause) Prior to Colorado's evaluation of this 9000, this machine, this hardware was new, correct?

A The instrument was new. That's correct.

Q And the software was new, correct?

A Yes. That would be correct.

Q And just so we're on the same page, Colorado's software could differ from Georgia's software?

A As far as---it would have---the firmware could be different. That's the specifications on the instrument for how you interface with the instrument, how you input the data, the kinds of screens that you see when you're putting

that in. The software or the source coding of the instrument would remain the same, and how it actually measures alcohol and how it does that function.

Q Prior to Colorado's implementation of the 9000, neither the hardware nor the software had been field tested?

A I would say that's not completely accurate. It had been tested.

Q Why don't you give us a brief explanation?

A So the source code of the instrument, how the analytical (inaudible) and how the instrument actually measures alcohol, that was tested and evaluated by NHTSA. The firmware, based off of the State's specifications, what do they want as far as the fields that are entered, how the reports look and that kind of thing, so that's custom tailored by the manufacturer.

Q Okay. I want to clarify a question. When I went through my questions I found better wording so I may ask the same questions with a different word. Did you score each instrument according to predefined objective criteria?

A Yes.

Q Who decided the predefined objective criteria?

A The evaluation team.

Q Did you test only one individual instrument from each vendor?

A We did.

Q Okay. When you testified in (pause)

MR. PIROSKO: If I may approach?

THE COURT: You can.

MR. PIROSKO: (Pause) Before I go any further, Judge, I'd like to mark and admit Defendant's Exhibit B, which would be the Georgia study.

THE COURT: For the People, any objection?

MS. HUESER: No objection, Your Honor.

THE COURT: Defendant's B will be admitted for purposes of this hearing.

MR. PIROSKO: And I don't know if we have a copy of---we just marked it.

THE COURT: Thank you.

Q Mr. Groff, you testified in the department of motor vehicles express consent hearing back on July 29th, 2014, The People of the State of Colorado versus Jennifer Adele Morton, Case number 14-332058, is that correct?

A That's correct.

Q Alright. And Mr. Boyer (phonetic) was the defense attorney in that case?

A That's correct.

Q And there were questions essentially a lot of the same types of questions, but that case had a lot to do with the retention of the second sample.

A It did.

Q Alright.

A As I recall, yes.

Q But Mr. Boyer was asking you certain questions about the validation of the 5000 EN?

A The validation or the evaluation?

Q Evaluation.

A The evaluation? He was.

Q Okay. And I'm going to refer if you need it to page forty-seven, right around the line twenty-three. You testified in that case that when Colorado

was evaluating the 5000 EN, they used multiple instruments from a vendor.

A Line twenty-three?

Q Forty-seven, twenty-three.

A (Pause) The question on page forty-seven of this transcript, line twenty-three is a question from Mr. Boyer. That's the question.

Q You said they compared multiple machines. Were you talking about one machine?

A So to reference this, the question was asked and it says "Okay. It's multi-paged." "They actually…" this is the question from defense, "They actually compared multiple machines and they went through to see whether it was accurately collecting and reflecting second samples, correct?" And my response on the next page was "Sure".

Q Do you know if they used multiple machines from individual vendors?

A So in the context of this question, did we evaluate different instruments during the evaluation, not multiple instruments from the same vendor. So we received one instrument from the three vendors who provided instruments.

Q I know that happened in the 9000. Do you know what happened in the 5000 EN?

A I have no idea about the evaluation that was in part of---that part of the program---

Q Sure.

A ---when they evaluated the 5000.

Q If only a single instrument from each vendor is tested, how do you

know that all the machines manufactured by that vendor is good or better than the specific machine sent for evaluation?

A That's a good question, because every single one of the instruments are tested and validated prior to verifying its performance prior to being certified and placed into service. So the same protocols were employed whether we had one, ten, or two hundred instruments, the same process occurs for every single instrument independently.

Q Every machine is a clone of the other instruments?

A Yes. They're all manufactured the same just like saying that every Honda Accord is a Honda Accord for that particular year, make and model. Are there minor differences? Do some of them work better than others? There are many factoring issues with that particular model, then if there is, then it's going to be identified during the validation of that instrument when we put it through its (inaudible) before it's certified, so---but they're all manufactured using the same process, the same components.

Q Could there be major differences between any two?

A Not---no. Not major differences. No.

Q If there were only minor differences, shouldn't all the machines break at the same time with the same issue?

A Not necessarily.

Q Okay. Just to clarify this destruction of the information, why don't you walk through as quickly as you can, the chronology of how that happened, when it happened, who said what, what questions were asked.

A Well I'm not exactly sure what you mean by destruction of documents. Can you elaborate on what you're referring to please?

Q Yes. You testified earlier that other than the score sheets, all of the data from the evaluation process is no longer available.

A Correct.

Q I understand that you want to use the words no longer available or recycled, I refer to it as destruction of evidence, but whatever terminology you want to use.

A Okay.

Q How did that occur?

A That occurred---there would have been printouts from the instruments, that they would have been recycled, they would have been shredded. We didn't retrieve the data from the memory of these instruments.

Q Mr. Groff, when you're---specifically, this is a pretty big issue and so I prefer you not use the words 'we'. If you can identify individuals, what was said by whom to whom.

A I doubt---I can't elaborate to that kind of specificity that you're asking. If you want me to globally sum up the chronology of what occurred, we evaluated the instruments. We reviewed the information, the data that was generated.

Q I don't want to go there.

A The information that---

Q Wait.

MR. PIROSKO: Your Honor, I'm going to ask that this be nonresponsive.

THE COURT: Yes. I'm sorry. Just listen to his question and only answer that question.

A Okay.

THE COURT: Okay. And if he needs more, he'll ask a different question.

A Okay.

Q You can give me a global answer to start. I want very specific to this data that is no longer available, how did that occur? If you can be specific and mention names? Whether or not you can say "I know that Mr. Barnhill was involved at one point. I know that Mr. Smith was involved at one point. I don't know the specific words that they used but this is what happened, these are the parties." So that I can go back and try to find out what those people have to say too, but I need to know why this evidence was destroyed.

THE COURT: Mr. Pirosko, ask a specific question.

MR. PIROSKO: Okay.

THE COURT: Ask him a specific question that he can answer.

Q What was the first step that happened in the destruction of this evidence?

A The first step? The first step was we compiled the data to generate all the scores.

Q Okay. All the data was compiled. We're past that.

A After the scores were compiled… after the scores the evaluators had scored, and everyone was complete, had finished their review of the information to get their score, the information that was---the documents that were provided to us by the manufacturer, documents that were generated during the evaluation, they were either destroyed or returned if they---

Q Mr. Groff, I understand those documents---

A I'm trying---

Q ---were compiled, I want to know how and why---

A Counselor---

Q ---they were destroyed.

A ---I am trying to go through a chronology that occurred two and a half years ago and I'm trying my best to answer your question.

Q Okay. I'd like you to start from we have all the documents.

A That's what---

Q I don't need to know the history of getting the documents.

A That's about where I was at before you interrupted me. Okay. I'm trying to recreate this---

Q Go ahead.

A ---chronology. Now if I'm allowed to finish, I'd be happy to. After the scores were---the evaluators created their scores, the remaining documents were then destroyed. They were then shredded. They were then recycled. Use whatever term you want, they were no longer retained, that's the term that I'm going to use. Any documents that were provided to us by the manufacturer was returned back to the manufacturer or destroyed upon their request. That was not retained either. That occurred sometime around the month of May maybe, or April, whenever we finished that evaluation in 2012, prior to selecting the I-9000. That's about the best I can answer your question.

Q Who directed the destruction of this evidence?

MS. HUESER: I'm going to object at this point, Your Honor. Defense counsel is using loaded language in an attempt to create a transcript that he can use against this witness in the future. There were no cases related

to this information at the time that it was not retained, it's not evidence and this is not destruction of evidence, and I would ask the Court to not let him characterize it as such.

THE COURT: Mr. Pirosko, we could get through this just a lot quicker, and Mr. Groff, we could get this a lot quicker. We've already heard all the information. The only question he's asking you, what documents existed and when did they get destroyed? Did anybody tell anybody else to destroy them? That's really all he wants to know. So were there any documents that were destroyed or recycled? Did anybody tell you to do that? When did that happen? If none of that happened, then that's all you have to tell us.

A The answer is yes, there were documents. Yes, they were destroyed. They were at the direction of our purchasing agent and them guiding us through that procurement process. We had very strict, very clear instructions that any information used to compile our final scores was not to be retained. Only the final scores by the evaluators was to be retained. That occurred sometime around the month of, I think it was April of 2012, maybe May of 2012. It's when we completed the evaluation. I think it was April of 2012 from memory.

Q Who was that---

THE COURT: And Mr. Pirosko, if you have specific questions then go ahead and ask him to follow up.

Q Who was that person?

A That would have been Rich Brough and Tim Massingale who were the ones who were guiding us through that process.

Q Were you---so it was just those two without you involved? Or were you involved in that discussion at any time?

A I was involved in discussions through the entire process, the procurement process. It was not---

Q Mr. Groff, I'm limiting this to the period of time for the destruction of this information. Were you involved in any of the conversations between Mr. Massingale and Mr. Brough on the destruction or what to do with this information?

A I was.

Q What part did you play?

A I played the part in ensuring that the instructions that were provided by them was followed, and not retaining that information.

Q Did you tell them to specifically not retain that information?

A I did not tell Tim Massingale or Rick Brough to not retain information. I was told by Tim Massingale and Rick Brough that that information could not be retained.

Q What was your response?

A Okay. I mean that's the State procurement rules, they're the ones getting me through the process. I followed those instructions.

Q You didn't say anything like "This is scientific information, we can't destroy it."?

A No. Not to my memory.

Q You didn't try to overcome them just saying we're going to shred this information?

A I can say that I---I was disappointed that we had to---that we were not allowed to retain that information. It was a lot of work.

Q Did you voice that disappointment to anyone in any way?

A I do not believe so.

Q Did you try to contact legal sources in any way to say “Hey, I don’t think this is right” or “What are we supposed to legally do?”?

A No.

Q You didn’t voice your displeasure to either of those two?

A I just made--- No. I was, like I said, I was disappointed that we weren’t allowed to retain it, but by the same token I wanted to make sure that we followed that procurement process very carefully. So what my feelings were about it were irrelevant when it comes time to follow any state procurement process. We needed to follow that process, and we followed it to the letter.

Q In relationship to this transcript from Mr. Boyer’s case, I’m going to look on page twenty, somewhere around line fifteen. Is it fair to say that you were being asked questions about some documentation about quote “court specific findings” closed quote, of from some 2000 regulations, and Mr. Boyer asked you quote “Do you know where those studies and findings are?” closed quote, and you testified “They’re archived at the State laboratory.” Did you make that statement?

A It’s on line twenty? Looking at line fifteen, okay. The language of one point two… (pause) Yes. So in the context of what the line of questioning was---

Q Okay. You did make that statement?

A Yes.

Q So the laboratory where you work at has a specific place to archive studies and findings?

A We have a repository of peer reviewed studies that we use. There

was studies that were performed back in 2007 when they were making changes to the instruments at that time. And they were---they're in our archives. I believe they're in our archives, but it was 2007 and we have a five year retention schedule, so I don't know if they are even still around, but they may be. And if not, they may be part of the board of health rules---or transcripts.

Q The laboratory that you work at has a specific place to archive studies and findings, yes or no?

A Yes. We retain records for a minimum of five years.

Q Okay. Who is in charge of that archive?

A I guess technically, it would be our custodian of records.

Q Who is the custodian of records?

A I believe it's our office of legal and regulatory affairs. That would be Ann Hawes (phonetic).

Q What's that archive area called?

A The file room?

Q If I wanted to ask for some---

A The bowling alley.

Q What's it called?

A It's called the bowling alley. It's a long skinny room---

Q The bowling alley?

A ---that has a bunch of file cabinets. You know, records are kept in different places so the custodian of records is I believe Ann Hawes.

Q So we're not talking just about a banker's box full of some studies, we're talking about a hallway full? Or more?

A No. You're asking where they are retained. I didn't say it fills up

that entire room. It's a room where we have file cabinets that we keep---we have studies. Most of them are electronic anymore. And ones that are related to instrumentation beyond the five year retention schedule, a lot of that stuff doesn't exist anymore because it's beyond our retention schedules.

Q The laboratory at the department of health has in the past archived large volumes of studies and findings. Is that a fair statement?

A I think it's fair to say---

Q That's fine. Have you ever been in that area?

A Sure.

Q Okay. Do you have access to that area?

A I do.

Q You knew that that---have you ever placed anything in those archives?

A Anymore I don't work with a lot of paper copies anymore.

Q Have you ever placed anything in those archives?

A Yes.

Q Okay. At the time that this conversation took place between you and Mr. Brough and Mr…. I think it's Massingale, did you---you were aware of that archived area?

A Yes.

Q Were they aware of that archived area?

A I believe Rick Brough probably was.

Q And---

A Because he worked in the division. Tim Massingale, probably not.

Q Did any of the three of you say "Well maybe we should just put this

in the archived area since it's a study and findings."?

A No.

Q Relating back to that transcript, on page twenty-one, right around line twenty-one, you testified, and this was in regard to the 5000 EN, that essentially any time that there's an update to software, it gets documented. Is that a fair summation?

A That's fair.

Q I'm sorry?

A I said that's fair.

Q Okay. So the department of health has evaluated Intoxilyzer software in the past? Is that correct?

A It is.

Q Okay. If a member of the board of health, and that's essentially the mother agency above the department of health, correct? Board of Health?

A Yes.

Q They oversee?

A Yes.

Q If a member of the board of health wanted to go and look for findings or studies, they would go into this bowling alley area, is that correct?

A Yes. That would be one of those areas.

Q Yes. In that transcript on page twenty-two, right around line twelve, you testified in regard to that question about the board of health being able to access that, quote "They always have that opportunity and it's always available for review." closed quote. Did you make that statement?

A I did.

Q So if the board of health, any member of the board of health wanted to go and access archived information, they could just walk down the hallway and pull it off the shelf?

A I suppose. It would probably be a little---they would probably need a little help. I don't think they could just stroll in there.

Q Okay.

A But yes.

Q Are you subject to performance reviews?

A I am.

Q If the person who does your performance review wanted to go back and look at your archived work, could they also get it from the bowling alley area? The archived area?

A Sure.

Q Okay. Same question for a non-employee scientist. If some scientist from the---

MS. HUESER: Objection. What is the relevance of this?

THE COURT: Mr. Pirosko, what is the relevance?

MR. PIROSKO: It has to do with whether or not this was a valid validation---or evaluation, Your Honor.

THE COURT: Well I know the whole hearing is basically about that, but other than his knowledge that there is a place in the department of health where you can archive information, and he chose not to do that in this situation, how is any of this relevant to what I need to determine here?

MR. PIROSKO: Because I think the Court needs to be able to take judicial notice of things, and based on the validation studies, and I believe that

these validation studies were a sham.

THE COURT: Okay. And I get that point, but to speculate as to every other possible situation that he didn't do would be wasting the Court's time. So if you want to know what he did, ask him specifically what he did. If you question what he did or why he didn't do something, question that as well. But to speculate every other thing that could have happened would be in my opinion wasting the Court's time.

MR. PIROSKO: Well---

THE COURT: So I already got the point that there are archives that exist and he's aware of them. He's placed things there in the past. They did not choose to do that in this particular situation, and somebody could have reviewed his work, wanted to see it, couldn't do it because that didn't happen. Is there anything else I should know about the whole process here in the archives?

Q Mr. Groff, you knew that that data was quite probably going to be useful in every type of DUI breath case in the Colorado---in the state of Colorado going forward?

A The evaluations data?

Q Yes.

A No. That data would not we useful moving forward.

Q If a defendant or a defense attorney wanted to check their breath test, that data that was destroyed could have been a gold mine, correct?

A No. That's a matter of opinion.

Q Is that why you destroyed that data?

A I answered that question. That data was not retained because that's how the State purchasing procurement process for a commodity is

performed.

Q Okay. Was each instrument evaluated to determine if there was any adverse case law or rulings out there regarding that instrument, a previous model of that instrument like the 8000, or any of the manufacturer's data master CMI?

A Legal case review of that particular instrument that we evaluated was not part of the RFP. No, that was not evaluated to that.

Q You didn't go and say "You know what, there's some cases out there and they're attacking the CMI 8000 in Ohio and Florida and they're attacking CMI in Florida and Arizona and Minnesota, and that may be something that we should look into."?

A Counsel, there are only five, really five manufacturers that even make these evidential instruments.

Q Mr. Groff, that's not my question.

A I'm trying to answer the question.

THE COURT: Actually sir, you are not trying to answer his question. Listen to his question and then only answer that question.

A Okay.

THE COURT: Thank you.

Q As part of your evaluation process did you look into the legal problems of the instruments or their prior generation or any of the manufacturers?

A No.

Q So you don't know what problems the CMI 8000 was facing?

A I do.

Q Did you know it at the time of your evaluation?
A Some of them.
Q Some? But not all?
A Colorado didn't have the 8000, so I didn't have to experience a lot of those challenges. A lot of it is hearsay.
Q Okay. You didn't look into the problems with the 8000 at all?
A No.
Q You don't know if those problems carried over into the next generation, the 9000?
A No. There was no way to know that.
Q You didn't even research it, correct?
A No. There was no…
Q Did any of the vendors complain in any way about the RFP?
A No. To the contrary, they were complimentary.
Q Did any of the vendors complain in any way about the evaluation process?
A No. To the contrary, they were complimentary.
Q Did any of the vendors complain in any way about the award of the contract to CMI?
A No. Not at all.
Q What specific credentials allowed you to design and conduct the evaluation studies?
A I don't understand that question.
Q Essentially, what in your background qualified you to design and conduct the evaluation study?

A It was based off of scientific principles, based off of how laboratories---

Q Scientific principles is not part of your background. What in your background gave you the credentials to design and implement the evaluation?

A Twenty-five years of practical laboratory experience, five years of---greater actually at that point, of serving as a regulatory inspector for laboratories that perform this type of work, regardless of the type of instrumentation. My training, my education, my experience, all of those were---

Q Prior to evaluating the 9000, how many evaluation studies had you designed in your career?

A (Pause) Half a dozen, maybe.

Q What types of evaluation studies did you design prior to the 9000?

A The evaluations were performed when we did various---

Q No performed; designed.

A Designed? Re-ask the question, please.

Q What types of evaluation studies did you design?

A I designed evaluation studies for replacements of hematology analyzers, chemistry analyzers. I'm trying to think of some of the other pieces of equipment. Different various laboratory kit methods that were used. Any time there was change of instrumentation or testing methodology, you have to design an evaluation to make sure that---that we get accurate, precise results.

Q Prior to the 9000 evaluation, had you ever in your career designed or conducted an evaluation study dealing with breath testing instruments?

A No.

Q Since the 9000 evaluation was your first attempt, did you go to any

person or source for guidance in designing the 9000 evaluation?

A Yes.

Q Who?

A I conferred with specifically a gentleman by the name of Lee Meltzer.

Q How do you spell his last name?

A M-E-L-T-Z-E-R.

Q Who was he?

A He was the breath alcohol testing program for the state of Montana.

Q Okay. Anyone else?

A Matt Cohen (phonetic) who was the program administrator in Texas. Um… think of some of the others that I talked to. (pause) You know, there would have been others but I'm sorry, I don't know their names.

Q That's fine.

A Sorry.

Q What parts of the 9000 evaluation study did you design yourself?

A The accuracy precision studies, the interference detection studies. Maybe… linearity studies. And some of them overlapped those days because they covered some of the analytical sensitivity, some of the analytical specificity to include interference, the interference covered that. So a good chunk of the analytical testing that was performed.

Q This is going to be somewhat of a compound question, or a two part question. For the other parts of this study that you just didn't talk about, were those all designed with you in cooperation with one or more parties, and /

or was there any part of the 9000 evaluation study in Colorado that other people designed without your input?

A My input was part of all of the---

Q Okay.

A ---the process.

THE COURT: I'm sorry, what was your answer? Your input was?

A My input was---

THE COURT: Part of all the process?

A Yes. I was part of the entire process.

THE COURT: Thank you.

A In one form or fashion.

Q In that transcript, right around page fifty-one, around line three, you testified quote "Part of the inspection process and in my experience is laboratories have to---quality control and quality assurance programs as a part of how they operate, and in order to remain compliant with any requirement regardless of the type of laboratory, when evaluating laboratories to those standards very often you have to evaluate the validations that are performed on various types of instruments." Did you make that statement?

A I'm sorry, you referenced---

MS. HUESER: What page are you on?

A ---page fifty-one, line three and that's not---there's nothing there on the page, line which you've just referenced.

Q (Pause) I'll find that electronically. Mr. Groff, to your knowledge did you ever make a statement that very often you have to evaluate the evaluations that are performed on various types of instruments? Essentially, you have to be

able to go back and check people's work?

A That's true.

Q Okay. Why is that important?

A Well any time---first, it's a cornerstone in laboratory testing. You have to perform a validation before turning out subject results to ensure an instrument is functioning properly. And it's also part of regulatory compliance oversight. So you know, one of the requirements is was a validation performed? And we reviewed the validations to make sure that they verified the performance of an instrument before they start to draw out patient results.

Q And that's a core scientific concept, isn't it?

A It is.

Q That's a critical scientific concept, isn't it?

A It is.

Q How does a scientist go about evaluating the validations or evaluations performed by someone else on various types of instruments?

A That depends on the regulatory structure that they have to be compliant to, but in essence, a validation needs to include those components that I previously mentioned, accuracy, precision, reportable range, analytical sensitivity, analytical specificity to include interfering substances. They need to look at the instrument and validate it to those measures to make sure that they get accurate results.

Q (Pause) I'm going to let you rephrase this whichever way you want, but essentially this evaluation process, were you the person with the final word?

A No. This was a collaborative effort.

Q Okay. Well when it came down to making any decision, who was

the ultimate decision maker?

A It was a collaborative effort. My voice had equal weight as far as what instrument was going to be selected, as others.

Q If Mr.---if the procurement officer came and said "We're going to shred this information," could Mr. Barnhill have said "No, we're not."?

A (Pause) I suppose he could have, but---

Q Who had the authority to overrule that procurement officer?

A Nobody has the authority to overrule the procurement officer if you're following a process that they're guiding you through. They were the subject matter expert on how to do the procurement, so who could overrule their decisions, their determinations, I can't answer that. I don't know.

Q Laura Gillim-Ross couldn't have said "No, you're going to go put that on a shelf."?

A I doubt it.

Q The chairman of the board of health couldn't have said "No, you're going to go put that on that shelf."?

A I think that's a question for the State procurement rules. I really can't answer that.

Q (Pause) After you designed the evaluation plan, or study, but before you started to implement it, did you have anyone else independently critique it?

A No.

Q Could you have?

A I don't know the---I don't know. I don't know if we would have been able to do that or not. We didn't seek external input and if we wanted to seek

external input---

Q You're saying internal input?

A External input was received prior to us starting an evaluation. You know, getting guidance from those that are experienced in this field who run programs in other states. These are the kinds of things you want to make sure you cover you know, to reaffirm the kinds of tests that we wanted to conduct, putting together---that then drove us putting together the RFP and then evaluating it to those criteria. But once that process was started, I don't know the answer if we would have been able to go and seek additional external input. External input was sought after---prior to us beginning.

Q I know that this is probably going to be just a wild guess and I appreciate that but your budget was about $1,700,000. Is that fair? Roughly?

A Roughly.

Q Do you have any idea what portion of that budget might have been eaten up or directed towards just that three month evaluation period?

A It was about---

Q It can be a percentage.

A I want to say none of it.

Q None?

A None.

Q That was all done free?

A Well nothing is free. We have operating budgets that we operate under. None of the money that was used was for the evaluation. We had to do that on---that was just part of our normal work within our existing budget.

Q During this three month period, so you had three departmental

employees, EBAT employees working on that evaluation?

A Yes.

Q And other department of health employees working on that three month period?

A Well there was Rick Brough who works in the division.

Q Okay. How much---

A He spent some time helping us.

Q Just a real, real, real rough guess, how much time do you think Rick Brough spent on this process, time wise?

A I don't know. I honestly don't know how much time he spent putting the contract together, meetings and things like that. I have no idea.

Q It took him a while though, correct?

A It took some effort, yes.

Q Sure. And the same thing with you and your other two employees, during this evaluation process, were you working on it like eight hours a day, five days a week for three months?

A Not necessarily. No. There were days when it was longer than eight hour days, I can guarantee that.

Q Okay. Would it be fair to say that totally the three of you probably spent several hundred hours during the evaluation process?

A I think that's probably fair.

Q Okay. And so you developed an evaluation plan that was going to take three employees away from their other duties for several hundred hours, and you didn't take a half hour to send that to anyone and say "Hey, can you just look over this and see if this seems like we're on the right path?"? You just

jumped into it?

A That's (inaudible).

Q Okay. (pause) What qualifications did you require of the law enforcement evaluators?

A The minimum. I want basically three different criteria. The first thing had to be instructors.

Q And on a breath machine?

A Correct.

Q Okay.

A They had to be trained certified instructors. They needed to represent various aspects of law enforcement, state patrol, sheriffs, police departments. And they had to represent different geographical areas throughout the state, metropolitan and urban, rural areas.

Q Did any of the law enforcement officers have any input into the evaluation plan?

A No.

Q Okay. Did you allow---other than those two parties that you mentioned, one from Montana and the other from the other state, did you allow anyone else who was not a department of health employee to get involved in the evaluation plan or process in any way?

A No.

Q Okay. Did any of the evaluation plan, was it derived from any of the vendors?

A No.

Q (Pause) Had you ever evaluated any other breath testing

instruments prior to evaluating these three instruments?

A Yes.

Q What? When? Give me the specifics.

A One of the responsibilities of the department is to review and approve the ignition air lock devices. These are not evidential breath testing devices, these are the devices put into vehicles. So that's one of our (inaudible) so we're constantly evaluating a new air lock device or a new or included preliminary breath testing device too, for approval so there's other devices.

Q I'm going to ask you the same---going forward, I'm going to ask you this next question several times but I'm just going to change the entity that I'm asking you about, and I'm going to ask you as it relates to both the evaluation and the validation. And the question is this, are you able to identify any educational accrediting body that has accepted your methodology, either for the evaluation or the validation? Educational accrediting body?

A No.

Q How about academic organization?

A No.

Q How about scientific organization?

A No.

Q Aside from the department of health employees, was your methodology for either the evaluation and / or the validation reviewed for scientific errors by any scientists?

A No.

Q Could you have done that?

A I don't believe so. I don't believe we could have sent our data off

to others to evaluate. So, no.

Q You couldn't have prior to either the start of the valuation (sic) or the evaluation, gone to Dr. Gillim-Ross and said "You know, Doctor, just so I make sure that we're not wasting a bunch of time and money and coming up with a bad result, would it be okay if I just sent this out just for a preliminary inspection by some scientists who know what they're doing?"?

A As I mentioned, those kinds of conversations occurred before we put the evaluation together. Seeking out guidance from other program managers and other experts in the field as to the types of things to evaluate is the type of input that was received and then incorporated into what was eventually used.

Q Is it fair to say that from those people that you talked to prior to, you got some general guidance?

A That's fair.

Q And then you incorporated that general guidance into the valuation (sic) and the evaluation?

A Into the evaluation and eventually the validation.

Q Yes. And so you incorporated that general information?

A I would say that's fair.

Q But you got general information and then some time passed, then you wanted to develop this plan and carry out the plan, but you didn't say to anyone else "Hey, you know what, I got some general guidance and I want to make sure that I got it right, or I want you to just double check my work."? You didn't do that?

A No. The answer is no.

Q Is that the generally accepted way to do things in the scientific

process or method?

A Yes.

Q Okay. (pause) Do you know if the final evaluation method that you used has ever been validated?

A Yes.

Q By whom?

A A lot of what was used in the evaluation was---

Q No, no, not a lot of it, I mean one hundred percent.

A One hundred percent? No.

Q What scientific principles allow you to use a never-validated evaluation method?

A You're going to have to repeat that question.

Q What scientific principles allow you to use a never-validated evaluation method?

A Scientific principles were used for the evaluation. I don't---and again sir, I'm not---

Q I understand scientific principles were used but the evaluation wasn't made up one hundred percent of scientific principles, was it?

A Yes, it was.

Q So I could---if you had written this down, all I would be reading is scientific principles, not a how to?

A Scientific principles, well first off to understand what those principles are, and I've mentioned them numerous times, accuracy, precision, reportable range, analytical sensitivity, analytical specificity including interfering substances, these are the scientific principles. This is what you base your

testing and your experiments around. How you establish accuracy on one test method may be a little different than how you were going to establish the testing you do for accuracy on a different test platform. But those are the things that have to be evaluated. So are you getting an accurate result? Is the result precise? Were we able to get the same result over and over? Is it the right one? What kind of linearity? How low can it measure accurately? How high can it measure accurately? These are the principles by which any scientist is going to base their evaluation and eventually their validations (inaudible). So all of those were employed in the evaluation. All of them are cornerstones in our existing protocols with our validations. So hopefully that explains that.

Q Did you deliberately use an evaluation method you knew had never been independently validated?

A No.

Q Have you ever discussed employment opportunities with anyone associated with CMI?

A No.

Q Have you ever socialized with anyone from CMI?

A Socialized? At conferences, I see these folks at conferences.

Q Okay. Were you---I may have asked this but I don't recall. Were you involved in the drafting in any part of the request for proposal?

A A little bit.

Q Prior to or during that drafting of the request for proposal, had you gone and researched any of the vendor's essentially marketing materials, prior to the conclusion of the draft of the request for proposal?

A No. No. I had familiarity with all of the vendors that are out there.

I think I mentioned there's a small handful of them, and I had an understanding of some of the technology that they employ in their devices, but I didn't go and research the marketing material, the vendors. Again, we tried to be quite empirical and create the criteria by which we felt we needed for Colorado's breath alcohol program, and then we would see what instruments were able to meet those minimum criteria.

THE COURT: Folks, we've been at this for about an hour. Let me give you about a five minute break. Everybody make yourselves comfortable and be back about twenty after. Thanks.

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(Break)

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THE CLERK: All rise, court is now in session.

THE COURT: You can be seated. Thank you. Alright. We're back on the record 13-T-9903, and Mr. Groff is still on the stand, Mr. Pirosko is still continuing with cross-examination. You can continue, sir.

MR. PIROSKO: And Judge, I just wanted to confirm the Court needs to leave at 3:00, correct?

THE COURT: I have an appointment that---

MR. PIROSKO: That's fine.

THE COURT: ---it would be best if I left at 3:00. If there isn't a conflict with the witness, I can stay longer.

MR. PIROSKO: Okay.

THE COURT: I think he said 3:30?

MR. GROFF: I'm okay.

THE COURT: Did you---

MR. GROFF: I think I've got some alternative arrangements---

THE COURT: Okay. Yes.

MR. GROFF: ---so that we can---

THE COURT: If it will be helpful to you, Mr. Pirosko, I can stay probably until a quarter after 4:00.

MR. PIROSKO: Thank you.

THE COURT: Okay? But please be---

MR. PIROSKO: I understand.

THE COURT: ---efficient with your time. Thank you.

CONTINUED CROSS-EXAMINATION OF JEFF GROFF

BY MR. PIROSKO:

Q Mr. Groff, were there any requirements for the production of manuals as part of the request for proposal?

A There was.

Q And briefly, what were those requirements?

A That they provide us an operating manual so that we'd have some basic instruction on how to set up the instrument and run tests.

Q Just an operator manual, not a technical manual?

A I believe there was some---one of the requirements was to provide technical information on the instrument as well.

Q And I just again, want to make sure we're using the same technology and have the same understanding. What manuals are you aware of that exist relating to the Intoxilyzer 9000, whether you're in possession of them or not?

A There is a training manual that is provided by the manufacturer for those who---in the State programs when they come and do the training. There is an option for an operator manual that could be purchased at $50 apiece for the instruments and it's just a rudimentary operational manual, here's how you turn it on, here's how you hook up the dry gas, here's how you hook up the wet vat simulators, you know basic operational things, here's how you calibrate and test the instrument. And that and the (inaudible) of marketing information and that's it.

Q No technical manual?

A There isn't a technical manual. There isn't a manual that---there's a quality assurance manual that was provided to NHTSA for its evaluation. It's just one of the documents that has to be provided as part of that process. But there isn't a manual that lays out all of the technical, like schematics and you know, proprietary information. No.

Q If an instrument breaks and a technician wants to fix it, what manual would he or she go look at?

A Well we received training from the manufacturer at the manufacturer, (inaudible) how to troubleshoot the instruments and then replace components as needed. So if there is, depending on the infrastructure of the breath program an instrument may just get sent back to the manufacturer. If it's a simple repair or just a fundamental component replacement or has to be replaced, troubleshooting to identify is it a board or is the speaker, or how to replace the touch screen, that's the kind of training that's provided. So a lot of that work can be done internally.

Q When you say internally are you talking internally at the

department of health or internally at CMI?

A Internally at the department of health.

Q And so repairs can be done by the department of health or the machine could be sent back to CMI?

A Yes. If we can't---if we need assistance in trying to troubleshoot an instrument rather than we contact CMI or perhaps even sending it back to have them (inaudible) repair, if indeed it gets to that point.

Q So there's no manual that you're aware of that's sort of like a troubleshooting manual, (inaudible) for the purchaser?

A There is none.

Q And is there a troubleshooting or fix-it manual that CMI has for its own technicians?

A I can't answer that. I don't know.

Q Okay. And so as part of your evaluation process, you didn't look at any of these troubleshooting guides or how to fix it?

A We looked at basic schematics that were provided to us in the documentation that they gave us during the evaluation. You know, the electronic schematics of the instrument, how to troubleshoot a circuit. That's why the department has an electronics technician so that they can troubleshoot these circuits to identify the source of a problem. The instrumentation today is really, I hate to overuse the term but it's more of a plug and play. You have different boards within these instruments and if you identify a certain component or board as bad, you just replace that component or that board. It isn't like the old instruments where you're changing individual resisters on a larger board. It's a different newer technology kind of. Our computers are, you know you plug it into

your hard drive or you replace a DVD reader, you know, I mean it's more like that. So we all went back to the manufacturer, we had a training to be able to troubleshoot these instruments to be able to identify where the problems may lie and repair them if we can repair them or replace the component if it needs to be replaced and it can't be repaired. If we ever come across a scenario where we cannot identify or troubleshoot what the source of a problem is, the manufacturer is always there and we can send the instrument back to them and they can do it. So we try to do as much of it as we can but we always have the support of the manufacturer if need be.

Q For lack of a better term, does the department of health possess troubleshooting guides?

A No. We have troubleshooting techniques that have been taught to us, but we don't have little manuals or guides or you know, it was the techniques that were taught to us during our training.

Q How much is one of these machines? About $8,500?

A I think they're priced around seven, I think (inaudible) push it up to about---I think we pay about $7,500 a piece for them.

Q If I buy a toaster---

A Or $8,500 maybe.

Q ---I get a troubleshooting guide. You're saying that an $8,500 or $8,000 piece of scientific instrument didn't include a troubleshooting guide at least?

A I think the difference here if you're going to compare it to toaster is that you get a basic troubleshooting guide that comes with your instructions. You didn't have the manufacturer of the toaster send you to the factory and provide a

week's worth of training on the troubleshooting. That's the difference.

Q Nothing documented on how to troubleshoot? Nothing written down on how to troubleshoot one of these instruments?

A As far as any guide, no.

Q Well as far as anything?

A Well we always document what we do to troubleshoot and to repair it.

Q I'm sorry, what?

A We do document the activities that we take whenever we have to make a repair. And that's always recorded.

Q (Pause) So which of these three documents, the training manual, the operator manual for $50, or the QA manual does the State now posses, or did it posses at the time of your evaluation?

A At the time of the evaluation we had an operator manual. And I cannot---I don't know, I think the QA plan may have been part of those documents that were provided to us. It was a three ring binder, they had a bunch of different documents in it. I think there might have been some basic schematics in there, the internal workings of it. The operator manual, I know that that's an option that the manufacturer will provide, again at $50 per instrument and they'll give you the first one and then after that you pay $50, but it's a rudimentary document. It's how you adjust or calibrate the instrument. And how you adjust and calibrate the instrument is built into the software of the instrument, so having a paper manual or following the prompts on the screen, they're one and the same. So we elected not to purchase $10,000 worth of manuals that were useless to us.

Q I appreciate all that, I just want to move ahead a little bit. What happened with all those documents or manuals? Do we still posses them?

A We do not. Part of the (inaudible) was they had to be either returned to the manufacturer upon completion of the evaluation, or destroyed.

Q And if the State wanted to, can they get a hold of CMI and say "We need a copy of those back."?

A I guess we could request them if we felt the need for them.

Q Could a member of the public make that same request?

A Sure.

Q And you know CMI well enough, CMI would not grant a request from the public to get any of their manuals, would it?

A Probably not.

Q Okay. And so for all intents and purposes those are not available to the public?

A No. Maybe the operator manual, but I can't speak for CMI what they would provide and what they would not. I do believe that their QA plan that they submitted to NHTSA is public, because that's in a public (inaudible).

Q Again, I'm going to ask you the same questions with several different entities, and the question has to do with are you able to name any scientific organization that has accepted or published any of CMI's manuals?

A No.

Q Scientific organization?

A No. No.

Q How about scientific journal?

A (Pause) Published? I need to think about how this question is

phrased, I'm sorry. I'm going to have to say no.

Q How about university scientific press?

A No.

Q How about commercial publisher of scientific books?

A (Pause) Manuals? I'm going to say no.

Q Would you admit that CMI is not an academically accredited scientific foundation; it's a private company?

A Well academically accredited, they are ASCLD / LAB accredited. Whether you might consider that academic accreditation, I don't know but it is an international accreditation.

Q The question was, are they an academically accredited scientific foundation?

A I don't know. I don't think so.

Q CMI is a private business, correct?

A It is.

Q And as a private business, they're out to make money?

A I would imagine that that's part of their business model.

Q Any research that CMI does is to make money?

A I can't speculate on how to answer a question like that. I'm sorry.

Q Did any of the CMI manuals that you looked at name their author?

A (Pause) No.

Q Was part of the evaluation process looking at error or exception messages?

A Yes.

Q These used to be called error messages and now that's been

changed to exception messages, is that correct?

A That's correct.

Q But essentially they're the same thing with a different name?

A In essence.

Q Why was that name changed and who changed it?

A That name was changed. It was changed going from the 5000 EN to the 9000. Error messages versus exception messages, it's semantics.

Q When, and I get this mixed up, you subsequently to the purchase wrote a manual for these 9000s, is that correct? Or some type of document for guidance for officers?

A Right. We did put together an operational guide as a resource for officers when they're performing a task, or a re-cert, or changing solution.

Q What term do I use to refer to that?

A It's called the I-9000 Operator Guide---

Q Okay.

A ---For Law Enforcement.

Q So if I say operator guide, we're just going to talk about that one document that you produced.

A Okay.

Q Okay. So this operator guide, the law enforcement officers use that in their training?

A They are all provided a copy of it as part of their training.

Q And that's what they're trained from?

A That's not what they're trained from, it's just a reference guide so that when they go to run a test they can look through this guide to help them run

that test if need be, if they forget a step or if they need to recertify. It's just a guide, operation guide.

Q Does the content of the officer's training relating to those things that you evaluated, the error / exception messages, does that now come from the manual that you wrote?

A The training on the exception messages is part of their eight hour, sixteen hour course. We post an exception message guide next to each instrument so it's all the exceptions the instrument is able to produce, and they're trained to them and what to do if they encounter them.

Q Okay. When you were doing the evaluation, you and your two employees were doing the evaluation, you were going through these error / exception messages. I'm going to talk about four of them, invalid sample, subject refused, deficient sample, and unstable reference. Invalid sample, subject refused, deficient sample, and unstable reference, you're familiar with those?

A I am.

Q When you were doing the valuation (sic) what is the standardized measurement of invalid sample?

A That is evaluating the instrument's ability to stop---

Q What's the standardized measurement of invalid---

A I don't have an answer for that because I don't understand your question. I'm sorry.

Q Okay.

A The standardized measurement is---

Q Sure. Let me put it back to this way, when we were talking about

that scale of one, two, three, four, and five, there was nothing standardized about that. You couldn't---there was no standardized measurement of whether it was a two, a three, or a five, correct?

A Okay. Yes.

Q Alright. I'm asking the same question about what is the standardized measurement that makes up an invalid sample.

A The way the invalid sample was initiated is by using a breath spray that contains a small amount of alcohol.

Q I need to stop you because maybe I'm not asking the question correctly, and let me just jump ahead a little bit. You did an evaluation on these error / exception messages knowing that eventually this instrument, if it gets chosen, is going to be out there in the field and different officers are going to be using it.

A Correct.

Q And what I'm trying to do is find out whether or not you did as part of you evaluation, to make sure that if this instrument got chosen, when this instrument got put in the field and there were one hundred officers that got an invalid sample exception message, they would all be measuring it in a standardized manner. There is no standardized measurement for invalid sample, is there?

A I still, I don't---either you're not asking the question properly or---I don't understand your question, a standardized measurement for an invalid sample. I can explain what that is but---

Q Let me jump ahead.

A ---I don't understand your question. I'm sorry.

Q I'll try to ask a different one to make it simpler. Subject refused, that's an exception message, correct?

A It is.

Q Officer A and Officer B have the same subject, the same fact pattern. We could be using a video tape of a subject and Officer A says "That's a subject refusal," but Officer B may not say that, correct?

A Okay.

Q They just can have different interpretations---

A Sure.

Q ---for the same error or exception message?

A An officer interpretation for a subject refusal---subject refusal is a function of the instrument. It's stopping the test and reporting refusal.

Q It's a function of the instrument?

A Yes.

Q What happens if an officer is just standing there and says "Blow in the machine" and he says no? That's not a function of the instrument, is it?

A I'm here to answer questions about this instrument and I'm trying to tell you how the instrument stops a test and reports an exception message of a refusal. The circumstances by which an officer stops that test, that's subjective. The only thing---

Q It is subjective.

A Right. But how the instruments reports an exception message is the same. It doesn't matter once that test is stopped and reported as a refusal, it's a refusal. The circumstances for them pushing that button and stopping the test and reporting it as a refusal is all over the map, but how the instrument does

it, that doesn't change.

Q All four of those exceptions or errors are subjective, correct? Invalid samples, subject refusal, deficient sample, and unstable reference.

A They are not.

Q Which ones---

A They're not subjective.

Q What's that?

A They're not subjective. They all follow the same measurement or the same algorithm or the same process for any one of those exceptions, regardless of the circumstances. If there is an invalid sample, it means it wasn't able to take a level reading and it stops the test as a result. A deficient sample, an exception message is because three minutes went by and the subject did not provide a sample that could be administered. Three minutes is three minutes, it doesn't matter what instrument it is, three minutes goes by, it stops the test, it times itself out, reports deficient sample. So how an instrument is going to report, any one of those four that you've mentioned is going to be the same for every instrument.

Q I didn't say how the instrument reports it. You testified first that a refusal is subjective.

A By the officer. The instrument doesn't know, but yes.

Q Okay. By the officer?

A Mm-hmm.

Q And so in those four exception messages, there can be subjective decisions made by the officer that have nothing to do with how that instrument processes it.

A That's where I disagree. The only one where there's a subjective determination is the refusal, as we've just discussed. The other three, there's no subjective determination, it's the instrument's performance. The officer isn't--- there is no subjectiveness there at all, it either meets the criteria or it does not. It's not subjective.

Q What's the difference between an invalid sample and a deficient sample?

A An invalid sample is a sample that is unable to get a level reading. It's what was referred to with the 5000 EN as the mouth alcohol detected. It's unable to get a level slope, and so (inaudible) level reading and hence, it reports invalid sample. A deficient sample, as I explained, is the sample was deficient. They did not provide an adequate sample in a three minute window and it timed itself out, three minutes has gone by, it stops, reports deficient sample.

Q If an officer believes that someone is screwing with the test and not blowing hard enough, what's going to happen?

A Well there are four criteria that have to be met. If they're not all four met, it's not going to take a reading.

Q And what's going to be the message?

A It depends on the circumstance.

Q On what?

A It depends on how the sample is being provided. It depends on if someone is blowing and stopping, and blowing and stopping into the sample chamber while they're providing a sample and it's not an adequate sample because they're starting and stopping, and starting and stopping, it's not going to be able to get that reading. And if (inaudible) there for a three minute period of

time then the instrument is just going to time itself out. It's a deficient sample. The criteria for taking the measurement were not met and so it's just going to time itself out. That would be a deficient sample. If the person is blowing and stopping, and blowing and stopping, and then they turn around and say "I'm not going to continue," then the officer can actually abort that test at that point and record it as a refusal based off their statements, based off the circumstances. A deficient sample can result, it can time itself out, maybe somebody is trying to provide a sample and they become combative and the officer has to focus their attention on that subject and take care of them and the instrument is just going to time itself out and report that. Maybe they passed out. You know, maybe they get sick. There's hundreds of circumstances relating to that and those circumstances are explained by the law enforcement officer, but the instrument is going to function the same way regardless.

Q I'm going to go back a little bit to that numbering system, the one, two, three, four, five, and you said there was no set criteria for what constituted one number versus another. And I unfortunately, I didn't write down the page number, but the Georgia tests for precision in Georgia's summary stated quote "The manufacturer stated precision was evaluated. A stated precision of three percent or less was awarded a score of ten, a precision between three percent and five percent was awarded a score of three, and a precision greater than five percent was awarded a score of zero." So they took away this subjective testing, and obviously that could have been done. Colorado didn't do any of that, did it?

A We looked at the data and each individual evaluator scored it based off the data that was provided. There weren't strict criteria like that.

Q Were not?

A Were not.

Q In any of those approximately fifty categories?

A The strict category---I can't say---I can't answer that because I don't have all fifty categories. There's you know, some of the testing, if it was outside of what the manufacturer is claiming, like the three percent for example, if it's outside of that it's not even meeting the manufacturer's claims. I mean they had to at least meet what it was approved for by NHTSA and what the manufacturer claimed it was going to do. So if it wasn't able to do that it was not going to get scored, or very well at all by the evaluator.

Q My impression of what you said when you were talking to---or selecting the law enforcement officers was that when you were going to be out in the field, say like up in Glenwood Springs, you personally would go and meet with a law enforcement officer and have a discussion about their participation in this evaluation. Is that correct?

A Yes, that's correct.

Q In Georgia, when Georgia was doing their evaluation, they used independent third parties as surveyors. Their report lists a company called Survey Monkey. Did the department---did our department of health use any independent disinterested parties in any part of this evaluation process?

A The third parties that we used, we didn't attach a survey monkey to our evaluations. Our third party evaluators were law enforcement, the end users.

Q Okay. Did anyone else besides yourself go and meet with these law enforcement evaluators?

A No. It was just me.

Q Just you. And approximately how many law enforcement

evaluators were there?

A I think we---

Q Rough number.

A I think we chose ten percent and I think we ended up with five, so I think at about five, it was about twenty-five, roughly.

Q Okay. When you went and met with, let's just use the number twenty-five and I know it may not be accurate but it's close. When you went and met with each of these twenty-five, you didn't meet with them all twenty-five as a group, did you?

A That's correct.

Q When you went and met with each of these law enforcement officers, did you have essentially a preprinted presentation such that every single law enforcement evaluator got the exact same instructions?

A That's exactly correct.

Q You wrote that out?

A There was---yes, the criteria that they scored it to. I set up the instruments---

Q I understand the criteria.

A Right.

Q What about the process that they were supposed to go through? Did you just have a general conversation with each of them and say "…and here's the criteria."?

A That's accurate.

Q Okay. And so is it possible that any two of these law enforcement evaluators didn't get the exact same message?

A Sure. I mean---

Q Okay.

A Sure.

Q The Georgia evaluation showed that the I-9000 had disadvantages in the areas of lack of sensitivity to compounds other than alcohol, potential lack of durability in case and breath tube design, and lack of field data. Did you guys find the same?

A We found similar findings. The interferent detection was---it worked fine. The interferent detection, it met the standards by which it is evaluated federally, easily. But it is a smaller device, it's got a plastic case, it's not that heavy (inaudible) casing like the 5000 EN, and so durability is something that we were concerned about. And we have seen breath tube failures just from normal use, so those things that were highlighted in Georgia's evaluation are similar in nature to some of the things that we identified ourselves.

Q Was the I-9000 at a disadvantage---did you find it at a disadvantage in any other categories?

A (Pause) I think I would probably have to agree with the other criteria. The fact that it was a brand new instrument, had not been out in the field for a long period of time. That was a bit of a concern because it was a bit of an unknown there, but the instrument had been---was different enough from the previous version, iterations of the Intoxilyzers that we still felt comfortable with, in the fact that it has completed its---passed its approval by NHTSA enough to that bar that's set for all (inaudible) devices.

Q Okay.

A Aside from those criteria, no I honestly cannot think of other areas.

I think maybe cost of parts. There were some unknowns about maybe ongoing cost of parts. We weren't exactly sure, we were kind of basing it off I think historical data, having worked with CMI, the State working with CMI for so many years and how they maintained their costs, prices, you know. They've never been a company that every year has tremendous increases in their cost for parts and things to that nature. I think that would cover some of the ones that stick out in my mind.

Q When I read through that Georgia study and I was looking at the calibration check results table, I noticed that Georgia's laboratory testing, the 9000 had the highest percentage coefficient of variance when testing eight different vapor concentrations, grams per 210 liters, sometimes more than one hundred percent difference with the other instruments. Did your team also find that?

A No. Not to my recollection. We don't have---we used the instruments in a setting that was going to be similar to how it was going to be used in the field, as far as in a wet simulator versus dry gas. You know, we saw a good accuracy and precision when we ran those tests, and those tests that have accurate precision lasted for many, many hours. Stability tests, you know one hundred, two hundred, four hundred in a row. So no, we didn't find that kind of stuff.

Q I noticed in the Georgia laboratory testing of---and the category was temperature influence results, there was a footnote that stated "INT. All samples on the Intoxilyzer 9000 yielded an interferent warning." Did you also find that to be true?

A All samples tested on the I-9000 yielded an interferent? No.

MS. HUESER: Could I ask defense counsel to reference where in the report?

MR. PIROSKO: Yes. I don't have the page number but the---it was under quote "Temperature Influence Results" and it was a footnote.

THE COURT: Counsel, the document is huge, so he can direct so the DA can at least confer. I don't think he's able to figure out where you're at as well.

MR. PIROSKO: Unfortunately, I try to always put the page numbers down and for those two, I did not.

THE COURT: So Mr. Groff, you are understanding though his questions and the context of, without having to see it in that document?

A I am. I'm understanding and I'm you know, taking his word for that's what this report says at that page, so I understand what it is he's asking and you know, what Georgia found in their experiment versus what we found in our experiments.

THE COURT: Okay. Thank you.

Q I'll skip a couple of those because I don't have the exact cite, but I do want to ask one. I noticed in the Georgia study that when they were reporting results for quote "mouth alcohol detection in drinking subject results" that was the category, mouth alcohol detection in drinking subject results, a competitor had one hundred percent mouth alcohol detections and the I-9000 had only sixty-four percent mouth alcohol detection. Did you find similar problems?

A We did not.

Q And the reason why not is because you didn't test this on actual subjects?

A We did mouth alcohol experiments. I did an experiment personally related to mouth alcohol. And it was---that experiment was based off of scientifically peer reviewed literature from the experiments they conducted for a long time. And if you'd like me to elaborate, I'd be happy to.

Q But in Georgia's study they essentially found that one-third of the I-9000 test results, there was a problem with the mouth alcohol. You didn't find anything close to that?

A No. Because the experiments that we were conducting, and unless I go through and really pick apart how they did that, you know it can be very much taken out of context or skewed. We tested these instruments in the same manner or similar manner that they were going to be used in the field. So on mouth alcohol experiment we didn't---we have a twenty minute depravation period to mitigate mouth alcohol, that's one of the cornerstones. If they were finding that the instrument was taking readings, and all of them will take readings in a mouth alcohol experiment, but if it goes on to say after the twenty minute depravation period then mouth alcohol is mitigated, I don't know. I mean I can go in here and pick this apart, and pick this apart, and try to answer this more accurately but we did mouth alcohol experiments, ones within the same manner that we used to validate these instruments, and also an extreme one based off of the literature and the studies that have been done in the past where you (inaudible) saturate your mouth with had the alcohol and see how long it takes until goes away.

Q All states have a depravation period, don't they?

A They do.

Q And so what you're saying is because of our twenty minutes we

don't have that problem, but Georgia has a depravation period.

A They do.

Q And so Georgia came up with mouth alcohol problems in a third of the tests run on the Intoxilyzer 9000, and if---

MS. HUESER: I'm going to object as misleading because the test results he's looking at were two minutes, or three minutes, or one minute after the exposure to the mouth alcohol. They are not after a depravation period such as would be done in the field.

THE COURT: So do you have a page number, Ms. Hueser?

MS. HUESER: I'm looking at page one-oh-six of one twenty and I believe that's what defense counsel is referring to, and you can see in the tests it says "Time elapsed in minutes, two minutes or three point five minute." So I think to suggest that Georgia has a depravation period and they had these problems is misleading in that obviously they didn't do the depravation period for the mouth alcohol tests.

THE COURT: Mr. Groff, can you reference that page number and look at that issue?

A Yes, Your Honor. Sixty-four percent, yes, I'm on that page and---

THE COURT: And I'm sorry, what was the page?

A It's one-oh-six of one twenty.

THE COURT: Thank you. And is that the same that you're looking at Mr. Pirosko?

MR. PIROSKO: It probably is.

THE COURT: Okay.

MR. PIROSKO: I don't know for sure. I'll concede that that's

probably correct.

THE COURT: So there wasn't a twenty minute depravation period in the studies for the Georgia mouth alcohol?

MR. PIROSKO: Correct.

THE COURT: Okay. Thanks.

Q One of the points that I'm trying to also make, Mr. Groff, is the only way that you would be able to go back and look at that is if you had that type of data?

A But we have that kind of data.

Q No.

A For the evaluation? Yes.

Q The only way that you can go back and tell me whether or not Georgia did this correctly is to be able to look at a study like that, correct?

A Sure. Yes. That's correct.

Q But no one can do that with your evaluation?

A During our evaluation, no.

Q Was there any statistical analysis done with any of your data?

A (Pause) Yes. Basic statistical analysis, yes.

Q What was that statistical analysis and who did it and what were their qualifications?

A What, who and how are they qualified? What, would have been percentages, failure of percentages, how many times we do a test, how many times it will fall outside of a certain tolerance. I don't know who did it. That would have been either myself or one of my staff. And what are their qualifications? Their training on the instrumentation, their experience, their knowledge. I mean

we've gone through my qualifications, so---

Q No. Their qualifications. I'm sorry. Their qualifications with regard to doing statistical analysis.

A This wasn't that type of statistical---this is basic statistical analysis. I ran a test ten times, it failed twice, that's a twenty percent failure rate. I ran a test one thousand times and it failed twenty times, that's a point two percent. You know, I mean it's that kind of analysis. It's not---yes. And I'm doing this by memory as well.

Q What happens if you ran a test eight times---you ran a test ten times but two of those were at sixty degrees and eight of them were at sixty-five degrees, and one of each was a failure, then what's the statistical analysis? A little bit more complicated?

A I'm not even exactly sure what you're talking about with degrees and (inaudible). I don't understand the context of this question.

Q In order to do a statistical analysis you have to be comparing apples and apples, and oranges and oranges, correct?

A Sure.

Q If you weren't tracking things like humidity and temperature and things like that, you may not be comparing apples and apples, and oranges and oranges, correct?

A Well I don't know if the temperature and humidity on some statistical analysis is a variable that's going to impact your statistics unless you're looking at the differences in statistics between the temperatures and the humidity of that particular setting, and it's a variable.

Q I'm satisfied with your answer that I don't know. This breath

testing, it's essentially a, for lack of a better term, a system, in that there is both hardware and software, correct?

A Correct.

Q And both are important?

A Correct.

Q To make sure that each is running properly. Did your evaluation---we've talked about you evaluating the hardware, let's talk about you evaluating the software. What type of evaluation did you do on the software?

A The software was evaluated as far as its ease of use.

Q As far as what?

A Ease of use.

Q Mm-hmm.

A Expandability to function the various functions it has. It helped us to identify how it could be expanded or how it could be used. The evaluation of the software of the performance of the instrument that is used, which is commonly referred to as the source code, is verifying a performance of the instrument based off the manufacturer's claims. We didn't decompile a source code. We did not obtain the ones and zeros and the proprietary code, but what we did do is verify that if we add---if we tested with a known sample we're expecting a known result. That's part of verifying the performance of the instrument. So we evaluated software in its expandability, its connectivity, the database that goes with it, if there was one that was available or not, and its ability to accurately measure.

Q Do you know how to write computer software?

A No, I do not.

Q Do you know if I handed you some source code, could you decipher it for me?

A I said I could not. No.

Q The source code first became available back in 2010 or 2011 in regard to CMI, correct?

A Perhaps, yes.

Q Okay. (pause) Is it---describe it whichever way you want, is it fair to say that sort of like the hardware is the body and the software is the brains to this?

A I suppose you could put it that way. Sure.

Q Okay. And so you really didn't do any in depth validation of this instrument, you just relied on each vendor's claim?

A No. I disagree with that statement, or that question.

Q During your evaluation did you detect any bugs in the software?

A For how it performed and---

Q Any bugs?

A (Pause) During the evaluation---I'm going to say no.

Q Okay.

A The instrument was able to measure, and it would measure alcohol. No.

Q Is it fair---is this a fair statement that software could detect a bad piece of hardware but hardware can't detect a bad piece of software?

A (Pause) Maybe. Maybe. I suppose.

Q When you were doing your evaluation and the instruments seemed to be operating properly, I'm assuming that you thought that everything was okay

with them?

A (Pause) Yes. It was reporting results, taking measurements. It was---

Q When you were doing---

A ---running tests.

Q When you were doing your evaluation, if you assumed that the instrument was operating properly, did you also assume there must not be any problems with the software?

A Yes.

Q Okay. Would you agree that in reality, it's as important if not more important to evaluate and validate the software than the hardware?

A (Pause)

Q As important or more important?

A Yes and no.

Q Could you elaborate?

A Please. Thank you. When you're doing an evaluation, when you're validating an instrument, it takes a combination of both the hardware and the software working together that's going to allow to take a measurement and provide a result. And so to put more emphasis on the hardware versus the software when in combination if either one of them fails it's not going to be able to do the end result, which is take a measurement and provide an accurate result. And so when evaluating an instrument or subsequently afterwards validating an instrument, you are constantly challenging those two things that are working together to see if you get an accurate or precise measurement. By using controls of known concentrations you're expecting to get a known result

and if it's outside of that result then that's an indication that there may be a problem with the hardware of the software. And until we troubleshoot and identify the source of it you don't really know. It could be a software issue, it could be a hardware issue, it could be both, but what you're doing is you're evaluating the end product. And that process that occurs when you're evaluating---well first off, we've spent a lot of time talking about how we evaluated these things, and that was for a procurement process. How we validate these instruments after the procurement process where the results that are generated are the evidence, the results where the departments had to verify the performance of every one of these instruments before a test is run on a subject. That's what is important. That is what has to be done on an ongoing basis.

If we---there is no laboratory anywhere that gets the source code to run on a chemistry analyzer, a $100,000 chemistry analyzer that tells you what your cholesterol is or tells you if you have cancer or not, those laboratories don't get the source code. They verify the claims of the manufacturer. They follow the instructions from the manufacturer to calibrate that instrument. They run quality control material with every test to make sure, with every run, to make sure that the unknown, which is my blood sample to tell me what my cholesterol is, or my blood sample to tell me whether I have cancer or not, is an accurate and reliable result based off of the known that are put with it. They don't decompile the source code. They would never get the source code. Source code is a unique argument only for breath alcohol testing. We don't see these arguments in capital punishment cases. We don't see these arguments in other equipment used in other laboratories. It seems to be unique only for breath alcohol testing.

Q You made the statement that what's important is evaluating the end product or end result, correct?

A Correct.

Q If I had a child and I asked that child to do a math problem and I knew the answer was six, and the child hands me back some information and it says it equals six, is that all I should be concerned about? The end product?

A Was the result accurate? That's what you have to ask yourself.

Q It was a six.

A You know, my young children are going through and they're learning the new math, and when they do their math problem and I do the math problem based on the way I was taught how to do math, I come up with my answer of six. They do their math problem and that's their (inaudible) source code, and they come up with an answer of six. The bottom line is, is that that answer was accurate. It was correct.

Q The answer---

A That's what has to be evaluated.

Q The answer was correct. The answer was supposed to be six and that's what they gave me. The answer was correct and accurate. They may not have gotten there the right way, they may not understand the problem, there may be bugs in their formulation, do they get a hundred?

A So that would---

THE COURT: Okay. I'm going to stop you both right here.

A Thank you.

THE COURT: Mr. Pirosko, if you have any more questions that would be relevant for the Court's purposes today, you've got about forty minutes

or so, so please use your time wisely.

Q Mr. Groff, what are Intoxilyzer 9000 worksheets?

A Worksheets?

Q Yes.

A Certification worksheets? Is that what you're referring to?

Q Yes. Please.

A Yes. There are certification worksheets.

Q Okay. Trying to speed this up, I've asked and a couple of other defense attorneys have asked for the Intoxilyzer 9000 worksheets and the department has produced some. Is that fair?

A It depends on the request. If they ask for all, we give all.

Q Okay. (pause) These worksheets are generated when you validate an instrument, certify it, recertify it, or it comes in for repair?

A That's correct.

Q And these worksheets essentially have the serial number on them?

A A serial number?

Q Yes. For the instrument.

A Oh, the worksheet will record information relevant.

Q Serial number, date?

A Right. Exactly.

Q It has an I.D. code?

A It does. That's generated from the database.

Q And again for simplicity's sake, that's sort of like a Bates stamp number?

A It is. This has been explained to you personally---

Q Yes.
A ---in numerous cases, so you know exactly what that is.
Q Mm-hmm.
A So it's just an I.D. number, a stamp that's put on these worksheets from the database itself.
Q No two worksheets, unless there is a photocopy, but no two worksheets have the same I.D. number?
A No. No.
Q Is that a correct statement?
A I believe so. Yes.
Q Okay. And so these worksheets essentially, many of them were generated after your evaluation and after your validation, correct?
A These worksheets were generated---are part of our process of our validation process. When we calibrate and adjust the instruments, following that protocol, the worksheet is used for the verification, certification of the instruments. Basically that's an internal document that we use that tracks that those procedures that we have in place are being followed and documented and those critical values that need to be recorded are recorded. So yes, we use one of those when we work on an instrument or when we calibrate it, when we verify it or certify it.
MR. PIROSKO: Your Honor, if I may approach?
THE COURT: You can. (pause) Thank you.
Q Mr. Groff, I'm going to suggest to you that as a result of one of---I think this was Tim Bussy's (phonetic) request for documents, for worksheets, these were the worksheets that were produced and these were all the

worksheets that were produced. And I believe that these are probably all the worksheets that have ever been produced by the department to any defense attorney. Maybe on a specific case that I don't know, some defense attorney said "Hey, I've got this case in Boulder. Send me the three worksheets." But as far as a group, these were the documents that were produced, and I took each of those documents and essentially put them on a spreadsheet, and those documents are in that folder if you need to reference any of them. And what I want to focus in on are these two columns, G and H mostly. And I'll kind of lay out where I want to go with this so I don't have to ask a whole series of questions to get us there. When an instrument comes in and you determine that it has a software problem and you do a software update… are you with me so far?

A Mm-hmm. Yes.

Q Does the department of health do that software update or is that something that CMI does?

A It could be either.

Q Okay. When either of those entities does the software update, is it an across the board software update such that it's done however, telephonically or whatever, and how many instruments do we have in Colorado?

A We have two hundred.

Q So when there's a software update, do all two hundred instruments get the exact same update?

A Yes.

Q Alright. I'm thinking that that book contains all the ones that I received as of maybe a year ago or something.

A This is---

Q And so this is probably within the first year of all of these two hundred instruments or one hundred sixty-five, however many were---

A If these are the ones that you received for your George case in Boulder, these were provided to you at the end of April.

Q No. No, they weren't that case because I think those were provided to Mr. Bussy probably about six months before that, and then he just sent them to me. But I think, and I don't know but I'm going to just suggest that these were probably about the first twelve to fifteen months or so of worksheets on these instruments after they were essentially first put in the field in Colorado. And I know you can---I'm just guessing, but one of the things that I was concerned about and I know I've raised this to you before and there's some explanation, is that---and I have my computer if you need to manipulate this at all, I have this on my computer such that column D is that I.D. number which is the unique number for these worksheets, and they go sequentially, correct?

A They do.

Q Okay. So today if back at the department of health we were on the number fifteen hundred, then the next one would to be generated would be fifteen-oh-one, fifteen-oh-two?

A Correct. Sure. It's a sequential number that's (inaudible) generated by the access database.

Q Yes. And I wish I had run this with column D being a different way such that these were all---we could see the large gaps. I know that we've talked about this before and that I was missing somewhere around the first two hundred and eighty numbers and you were saying that might have been when we were, for lack of a better term, playing around with the machine to see if it was working

correctly.

A Well we had to develop a database in order to be able to track these instruments.

Q But there's an explanation. What I'm trying to say is there's an explanation---

A Right.

Q ---that I'm accepting from you.

A Right.

Q That somewhere around the first two hundred and eighty or three hundred, there's an explanation why they weren't there?

A Sure.

Q Okay. And I think that I had somewhere up to like twelve hundred or fifteen hundred I.D. numbers, but there were a large missing block, some were individual, some not. One of the---I could tell you one of the missing ones is the 381 machine which was the Weld County machine. But what I'm trying to say is, and get to is, I'm going to talk about some of the software problems that this instrument was having and because of the fact that I know for a fact that I don't have the majority of these, there may be more software problems than are here, but if we can look at columns G and H.

THE COURT: Can I ask a question?

MR. PIROSKO: Yes.

THE COURT: What's the number in D representative of? These numbers in column D, what does that number represent?

Q Mr. Groff---

A Yes. Sure.

THE COURT: Yes. What is that? I mean I'm looking at it right here but I just want to know what does it mean?

A This number right here, Your Honor, when we create one of these worksheets, our database, which is assigned the next sequential number for this (inaudible) worksheet.

MR. PIROSKO: It's like a Bates stamp.

THE COURT: So every time work is done on any particular machine it gets a new worksheet?

A Correct.

THE COURT: And a unique number? So there's only one of those numbers in your entire system for that particular instance?

A Correct. Yes.

THE COURT: Okay. Okay.

MR. PIROSKO: You can flip to any one of these pages and it's going to have a different I.D. number.

THE COURT: Alright. So can I also ask a question. The column A, is that the serial number for the particular Intoxilyzer?

A It is.

THE COURT: It is. Okay. Thank you. That was my question. Alright.

A If you look at line two, that's the description.

THE COURT: Okay. Thank you. Thank you. Alright. Mr. Pirosko, go ahead, sir.

Q Mr. Groff, globally this is where I'm trying to go. Because of the fact that the department of health didn't evaluate the software, and I mean a

good evaluation of this software, once these instruments were put into the field we start to see that they're coming back because they have different problems, and the department is determining through its troubleshooting, or sending it back to the factory that it's a software problem. And I'm not exactly sure so I didn't note, there are several in here that have to deal with… if we look at row number fifty-six, it says "IRPCM Fail". Now I didn't mark that as a software problem and I don't know if it is or not but there is a lot of different IRPCM issues that come up, and so I just tried to highlight the ones that were obvious software problems. And these weren't all the same types of software problems, so what I'm assuming is that like starting at row number nine in column H, it says "Run stability tests, update instrument software." And from what you testified before I'm assuming that what happened was all two hundred instruments in Colorado had to be updated. Whether or not they were showing that problem, you still updated them to make sure that it was taken care of.

A So what we have to make sure is that all of the instruments are on the same software version, just like you get an update or a patch for any---for your computer from Windows, you know, update your Java, update whatever. It's the same sort of process, run stability tests, update instrument software. That was instrument number 214, that's one of our training instruments.

Q What are you looking at?

A The one that you referenced, line nine---I'm sorry, line nine, column H, "Run stability tests, update---"

Q Okay.

A "---instrument software." That was done in November. You know, we were still under warranty with these instruments. If we needed to send them

back to do the---have some work done, we'd send them back. If it came back and we needed to update the software to our version we were at, we would update that. That's what this is denoted. The IRPCM failure, that's a board. It's not a software issue, it's a board that had a failure. So---

Q Okay. I need to---when I was reading through some of the other transcripts, is one of the issues that you used to have with the 5000 EN is essentially you couldn't talk to all the machines at the same time. Is that a fair statement?

A We have---it's analog modem, we have to kind of do it in a sequential order.

Q Okay. And so when the 5000 EN needed an update, again I'm not computer literate, you essentially had to develop a chip, and when an instrument came in you stuck that chip in the instrument and that instrument got updated?

A Correct. That was one way.

Q And if it was an issue that you wanted to globally update all of the 5000 ENs, essentially what you had to do was wait for that instrument either to come in for a repair, or you had to go out into the field, or wait for it to come in for its annual recertification?

A That's correct.

Q And so if in February I-5000 EN number two came in and you updated it, it may be possible for many of the other instruments in the state not to be updated for several months until they came back in for their recertification?

A That's accurate.

Q And one of the things that you were looking at when you were doing your evaluation was to be able to globally access all of the instruments that

you were purchasing such that if you needed a software update, you just tell CMI they need this problem (sic) because this instrument in row number nine, instrument number 214, which is in column A, the last three digits, the 214 instrument has this problem and so you know what, we need to be even across the board, so do the software update, send the message electronically to all the instruments, and we're all in---if that's the first update, we're in software version 1.1. And the next time an instrument comes in like in row number twenty, and it needs a software update, we do the same thing and CMI sends a message to all the instruments and we're at 1.2. Is that accurate or am I off?

A You're off.

Q In what way?

A Well one, CMI doesn't do the update. Just like before, CMI develops the software. They sell the software to us and we perform the updates. If we need to update software then we can use our (inaudible) database from what we communicate with, push it out. If we're not able to communicate with an instrument, because it's analog, if we're having difficulties communicating with that instrument, then it's not simultaneous. It's not all of them get done at the exact same time. There could still be that bit of lag or stagger. In the first year, instruments were sent back to the manufacturer. If there was a problem, we weren't going to spend our time and energy fixing it because they were in the warranty. So they'd make the repairs, it came back and it needed to be updated to whatever current software version there was at that point. So you know, these records reflect what it was that was done to that instrument and when it was done, and then of course that gets recorded on the maintenance log.

THE COURT: So can I ask a question? So does the I-9000 not

have a global ability to be updated everything at the same time? It does or it does not have that ability?

A Yes and no, Your Honor.

THE COURT: Which part is the yes?

A Yes is that we can update all of these instruments to make sure they're on the same versions. No, that we can't do it simultaneously.

THE COURT: So is it somewhere---

A We have to do it one at a time with dial-up old school modem.

THE COURT: But do you do that or do you wait for there to be an issue with that Intoxilyzer before it comes in and then you make that adjustment?

A We have a software update, they all go out at the same time. It's all done as quickly as possible to get all of the instruments updated.

THE COURT: But it's not simultaneously at the same time?

A It's not immediately at the same time.

Q Like within a week?

A Yes.

Q All the instruments are going to have 1.2?

A Exactly.

Q Okay.

A Unless there's one in---sitting on the shelf that needs repair, maybe it's going to be two weeks later or three weeks later until we get a part to fix it and then we'll update it at that point. That kind of thing.

Q Okay. Let's kind of like give---go to the outside, not extreme but outside measure. So if an instrument needs to go to update 1.3, is it fair to say that probably in a month all two hundred machines are going to be carrying

update 1.3?

A If the instrument is in our possession, yes. I think that's fair.

Q But I thought you do this telephonically?

A We do but not all two hundred instruments are deployed statewide. We have instruments that we use for trainers. We have instruments that are back at the manufacturer that are---we're continually developing our software. I mean, we don't always have all two hundred at the same time hooked up to modems throughout the state. We have about one hundred and sixty-five instruments---

Q Okay. If---

A ---throughout the state.

Q If we refer to those one hundred and sixty-five as field units, is that a fair terminology?

A Sure.

Q And so my question being again, if an instrument needs update number 1.3, is it fair to say that in most instances, within a month all the field instruments will be carrying 1.3?

A That's fair.

Q And I want to clarify something else. You said that CMI does not do these updates?

A Well they develop the software, we push them to the instruments.

Q Okay. And so again, just so we're on the same page, if we need to fix the instrument in row number nine, and the current version in most of the field instruments is 1.2, and we need a 1.3, is the way that this works the department contacts CMI, CMI writes the code, CMI sends that back to you and the

department of health disburses it?

A One of the software updates needed, yes.

Q Is that---are we at least on---

A Yes.

Q Am I---

A And I can give an example of that.

Q Go ahead.

A Our division director, we have Dr. Laura Gillim-Ross, and her name appears on our certificates. Prior to her was Dave Butcher, his name appeared on our certificates. That was a software change. That was something that we had to push to the instrument so that our current lab director would appear on certificates. So that's one example.

Q Going back, and I'm just going to use it because it's the first one here in this row number nine, an instrument had an issue. It doesn't matter what the instrument was or what issue it was, but an instrument had an issue and that issue was detected. Is it possible that that instrument had that issue and it went undetected for a period of time?

A I would say it's not really possible---

Q It's not?

A ---to go undetected.

Q Okay. I need to take a tangent here. You had an issue with the Weld County machine, correct?

A Correct.

Q You and I were involved in litigation last week. Jeff Groff is being sued by Tim Bussy, my co-counsel in this case, and it had to do with a core

request about the information on the Weld County machine. Is that basically---

A It was---yes. It was related to the names of the subjects who were affected, actually.

Q I understand but the basic issue in that, with that problem with that instrument is that a piece of data wasn't entered in properly when that machine was put in the field. Is that correct?

A That's correct.

Q And that machine was used and that was in April of 2013, correct?

A That's when it went into service.

Q I have the pleadings if you need them. April of 2013, on or about, there was a corrective action report generated because of that problem, correct?

A There was.

Q And the initial---what the corrective action report said was the way that that problem was detected was a defense attorney contacted CMI and said "Hey, I think there's an issue here." CMI then contacts the department of health and says "Hey, we think we have an issue here." And so there was an investigation into the issue and a corrective action report was produced.

A That sums it up. Yes.

Q During that year, and the misstep was put in place in April of 2013, CMI contacted the department thirteen months later in May of 2014, and that's when the investigation started and subsequent corrective action plan, correct?

A That's correct.

Q You were in court last week when Mr. Barnhill testified and said "I know that's what the corrective action plan says but that's not what happened." He actually did the annual re-inspection of that machine a month before CMI was

contacted by the defense attorney, and Mr. Barnhill who was one of the evaluators of the 9000, Mr. Barnhill says when he was doing the facility update and he was doing the instrument update, he noticed the problem and he just fixed it.

A Correct.

Q Okay. And so when I asked you is it possible that on this---getting back now just as that example, I asked you in this present case on this row number nine, is it possible that this instrument was having problems---oh, let me back up. During that Weld County case, during those thirteen, twelve or thirteen months, that machine continued to be used by law enforcement in drunk driving breath cases?

A Correct.

Q The machine didn't catch the problem and no law enforcement officer for twelve to thirteen months caught that problem?

A Well you---

Q Simplify.

A Now this is where your dates are off.

Q It what?

A You're mischaracterizing this.

Q Okay. Go ahead.

A So the issue was, extended from basically August 30th to be exact until January 21st to be exact, and thirty-three subject tests were performed. Those thirty-three were the ones that were impacted.

THE COURT: And I'm sorry, August 30th of?

MR. PIROSKO: Thirteen.

A Of 2013.

THE COURT: Until January---

A Until January 21st of 2014.

THE COURT: Okay. Thank you.

A Is when there were thirty-three subjects tested in this period of time that were impacted. And it was an error that was made on the department. There was a value that was needed to be entered. It would stop the test and provide an exception message if the CAL Check, the quality control CAL Checks or either the tolerance would stop the test and not report a result. In this case we had failed to---this instrument failed to enter the value so it knew what that threshold was and to stop the test when it fell outside of that tolerance. So it was identified during the annual facility inspection in April, on April 4th to be exact, by Mike Barnhill, one of our staff.

THE COURT: April 4th, two thousand?

A Fourteen.

THE COURT: Thank you.

A Where he entered the value, letting the instrument know that it's a 0.10 solution that is used where it's CAL Checks, when that value was entered then it knows what the range is, that it's supposed to be a ninety to one-ten tolerance. But if that value wasn't originally entered it would still set at the default zero, so it didn't stop testing what the tolerance was.

MR. PIROSKO: Should the Court prefer, I have those pleadings. If the Court wanted me to---

THE COURT: Well just a follow-up question.

MR. PIROSKO: Yes.

THE COURT: So the tests that were conducted during that time period, was it a series of tests that continued to produce error messages consistently, or were there tests that you were confident were being conducted accurately?

A That's a very good question---the million dollar question. So it's both. The instrument's ability to accurately measure alcohol was not impacted. The instrument's ability to stop the test when the calibration checks fell out of tolerance, that's what was impacted. As that solution gets used over time, it will naturally deplete. It will taper off. It starts out at a 0.100 and over time it will deplete. It depleted to a point where it started giving results that were below that low threshold of a 0.090. On all thirty-three individual subject tests, the CAL Check, the quality control check fell below the ninety. And whenever that occurs, these instruments by design are designed to stop the test and not report a result. It reports an exception that says CAL Check out of tolerance.

THE COURT: So how does that affect the Defendant?

A They, as I understand it, most of these cases were in Weld County. Weld County went back and looked at those cases. I think there are two or three cases that they're reassessing whether or not the---if it goes to weight versus admissibility. The instrument's ability to accurately measure was not impacted, it just didn't stop the test when the solution got worn out as it's designed to do. It's just a safeguard that's put in, and it was failed to be put in and hence, it completed those results. And as a part of our corrective action, looking into the scope and the magnitude of it, we found it was just one instrument where this was the issue. And we like to take the conservative approach, best practices approach, and when I say we, the department, and we didn't endorse those

results. Lab practice dictates if your quality control fails, you can't have confidence in the result. You know, it's breath testing, you can't go back and retest. So that was the approach that we took that we can't endorse these three because quality control did not pass as it was designed.

But of course the follow-up question is would the instrument actually accurately measure? And the answer to that was yes, and we have evidence to show that yes, well it did actually measure accurately. Because once that solution was changed on the 21st of January, or the 22nd of January I believe, brand new solution was put in and it started measuring 0.100 again because it had fresh solution in it. So we were able to verify that the instrument's calibration was not at issue, it's just it didn't stop the test when the solution got (inaudible) like it's designed to.

THE COURT: So is that sort of a, kind of a preliminary warning that it's time to change the solution, and you won't get an ineffective test but if you don't within a certain time period you will eventually not have---

A You won't be able to complete the test.

THE COURT: Okay.

A And so yes, the instrument is designed to give, it's like a check engine light. There's a little pop up message that says the solution is starting to---it's time to change the solution, contact an instructor. And an operator may---they have to acknowledge that and they'll check---and they may tell the instructor the next day, they may not, and they can complete their test. And if they complete their test and the result from the CAL Check is in, they'll get a result. If the CAL Check is out, if it falls below that, then we'll stop the test and report CAL Check out of tolerance.

THE COURT: Alright.

A But the only way for it to do that is the department entering that 0.100.

THE COURT: Thank you.

A And this instrument, we failed that step.

MR. PIROSKO: Your Honor, may I approach?

THE COURT: You can.

Q Mr. Groff, I'm handing you Defendant's Exhibit D. Is that the corrective action report from Weld County?

A That's correct.

Q Did you author that?

A Parts of it, yes.

Q Okay. Did you sign-off on it?

A Sign off on it?

Q In some way?

A I'm thinking with this incident, there were many sign-offs on this one.

Q Did you check for accuracy?

A I did.

Q And was it accurate?

A Pretty accurate.

MR. PIROSKO: Your Honor, I move for the admission of Defendant's D.

THE COURT: And what is the relevance of that for the Court here?

MR. PIROSKO: The relevance, Your Honor, is that Mr. Groff's credibility is at issue. It's at issue in every case. This document, Mr. Groff just admitted that in fact Mr. Barnhill testified under oath, this corrective action was not under oath. Mr. Barnhill testified under oath that in fact this corrective action was inaccurate. This corrective action says that this problem was detected because CMI contacted the department of health. The truth is that one of the evaluators in this case, evaluators and valuators (sic) of the 9000 actually found this problem, didn't document it, didn't report it to anyone. Mr. Groff didn't check that for accuracy either. Just like all the stuff here, this is an example of why the department of health is not credible.

THE COURT: So this is---

MS. HUESER: He's relying on testimony from someone who is not here to testify to try to impeach---it's just---

MR. PIROSKO: Mr. Groff was the advisory witness---

MS. HUESER: ---there's no foundation for it, Your Honor.

MR. PIROSKO: ---in that case.

MS. HUESER: He could call Mr. Barnhill if had wanted to, Your Honor. He's clearly aware of him and what his testimony would be. He didn't do that.

THE COURT: Can I look at that document, sir?

A Of course.

THE COURT: Thank you. And Mr. Pirosko, I think you're getting a little off base here.

MR. PIROSKO: I understand.

THE COURT: I understand you have the right to certainly let the

Court know whether or not there is impeachment evidence out there regarding this witness. I think he's explained. Unless you have more questions to him about his role in all this, I think he's explained his role. I don't need to have more information on another party that's not present that hasn't had an opportunity to explain their participation in the process.

MR. PIROSKO: I wasn't trying to re-litigate the Weld County---

THE COURT: Well even impeach a witness that's not on the stand that hasn't testified and that I'm not judging his credibility; I am judging this individual's credibility. So I think we're kind of getting off base here. I do understand the point you're trying to make. I can appreciate this charge but I think this is outside the scope.

MR. PIROSKO: I'm asking that it be part of the record.

THE COURT: Okay. So I will not admit Defense Exhibit D. It will remain part of the record.

Q The point that I was trying to make, Mr. Groff, and Your Honor, and I'll try to sum it up so that I don't have to ask so many questions, is I was asking you Mr. Groff, if there was a possibility that one of these instruments could have a problem that went undetected like in row number nine, and whether or not it was a problem that an instrument would have a problem that went undetected by the software and went undetected by the operators, and you said no, that's not likely. And yet the Weld County case, we had that exact same situation go on for a year and yet you said that's not possible.

A Is that a question?

Q Yes.

A Okay. So for clarification, what you asked, you specifically asked

row nine, could that have gone undetected? And I looked at what was reported here---

Q That's not what I said.

A That is exactly what you said.

THE COURT: Okay, folks. Let's not argue.

MR. PIROSKO: I'll rephrase.

THE COURT: Go ahead.

MR. PIROSKO: I'll rephrase.

THE COURT: Yes, go ahead and answer the question he's going to pose to you now. Okay?

Q I'll rephrase the question because I believe after I said that I said I want to clarify that I'm not talking about the specific instrument or the specific problem in row number nine. The question had to do with---

THE COURT: Mr. Pirosko, just re-ask the question and he'll answer it. Re-ask the question.

Q Is it possible that one of the 9000s that's in the field can have a problem that goes undetected for a period of time, whether it's undetected by the software or undetected by the department of health or undetected by the operators?

A Then my answer would have to be yes.

Q Okay. This is where I want to go, obviously, and again I don't know the exact date range, but this appears to be a list of some of the software problems that the first version of the 9000 that was installed in the United States, where you didn't essentially look at the source code or ask anyone to independently look at the source code, you validated the hardware---evaluated

the hardware, put these instruments into place, they're out there for a year. All of a sudden we start to see hey, you know what? Row number nine may be version 1.1, row number twenty may be version 1.2, row number sixty-four may or may not be version 1.3. And so we have what limited worksheets that we were given for what essentially is the first year that these instruments were put in place, we got a lot of software books, and these are the ones that we know about. Is it possible that there are problems with these instruments out there right now that the software hasn't picked up, the operators haven't picked up and the department of health and CMI haven't picked up?

A Could that be possible? (pause) It could be possible. It could be possible. I can't say it's impossible.

Q Sure.

A I don't think that would be fair to say.

Q And you took CMI's word that in fact their software that you bought worked properly? The first version, the beta version that was put out in the United States, you didn't test it. You took the manufacturer's word on it, the manufacturer that's in business to make money. You paid $1,700,000. And when you start to give us limited documentation of the defense---

MS. HUESER: I'm going to object. Argumentative, Your Honor.

THE COURT: Just ask a question, Mr. Pirosko. You can break that down into several questions if you want to, but ask a question.

Q We don't know if from the time that you started evaluating these instruments if there were software problems that you didn't pick up, correct?

A We don't know if there are software problems you didn't pick up, correct?

Q Thank you.

A We don't know---I'm not sure if I answered that question. I'm not sure how to even answer that question. Who is we? And what do you not know?

Q You and your---

A We get the software, we test the software to make sure it operates to our specifications before we release it. Now we can be as thorough as we can be, and if we learn something along the way, well we should have checked this instead of that, and learn from that and move forward and put preventative measures in place, that's what we do, that's what we're expected to do. But to insinuate that we don't---that we just take their word for it and didn't evaluate the software during the validation, that's completely incorrect.

Q Do you know what a hypothesis is?

A Yes. You asked me that question about a hundred times.

Q With a hypothesis, essentially we hypothesize that in fact you get the software from CMI. The hypothesis is, is the software works correctly.

A That's an assumption. That would be an assumption.

Q Okay.

A We would be assuming it's working correctly. To validate it, we have to test it to make sure it does work correctly.

Q Stick with me for just a second. There's an assumption or a hypothesis that this thing works properly. Isn't it a scientist's job when you're trying to evaluate or valuate (sic), to try to disprove that assumption or hypothesis? We need to look to see whether or not there are bugs in this software. And you didn't do that. As long as you didn't come up with a problem,

you just assumed or hypothesized that there were no problems.

A That's incorrect.

Q Alright. Correct me.

A You're saying that I did not do something. That's where you're incorrect. Every one of these instruments when they're validated, the software in every one of these instruments is checked, it's validated to ensure that it's performing properly. You know, does that make us infallible? Does that make the instruments infallible? The answer to that is no. No, we're not infallible. However, we do validate these instruments. We validate the software, we validate the performance of them, and that's an ongoing process. It doesn't end. Didn't occur with the evaluation and we never did it after that, but we do that every time there's a change to the software, we do that on an annual basis with the software, we run tests on these instruments to make sure everything is printing the way it's supposed to, that it's giving results that we expect to get. So we're testing the hardware, we're testing the source code, we're testing the firmware. So I completely disagree with how you're mischaracterizing this. We do this on an ongoing basis. We document it and we provide them with every subject test results, so… in full transparency. So I don't understand how you can make these allegations. I'm sorry.

THE COURT: Mr. Pirosko, you have five minutes to wrap up.

Q What specifically did you or your team do, and use whatever term you want, during the evaluation process to try to disprove the assumption or the hypothesis that this software worked properly?

A We test the software, we test the hardware.

Q What did you do specifically? Software---

THE COURT: I'm going to find that's been asked and answered several times. I understand the process that they went through throughout the evaluation process to validate the instrument.

MR. PIROSKO: Okay.

Q Given the number of software updates… (pause) Is there a software update log?

A There is.

Q And what is it called and where is it?

A We have it in our records and it's a listing of the various versions, what was included in those versions.

Q And does it say what was changed and when?

A Yes.

Q And if I needed to ask for that, what would I ask for?

A Just ask for a list of the software versions of the I-9000.

Q Okay.

A That is tracked.

Q Do you happen to know if there are additional---there were additional software problems that aren't listed here that required updates on that defense exhibit, the Excel spreadsheet?

A No. This is a listing of roughly two hundred of them. It goes up---you quoted fifteen hundred.

Q No. That was a number that I just guessed at.

A I've got six hundred and thirteen. We have two hundred instruments. Every time we do something on the instrument, when we calibrate it, repair it, certify it, one of those sheets is recorded. It could be---yes, so all

three activities, one activity, two activities would have been recorded on those. We have two hundred instruments, we initially certified, created one of those worksheets for each two hundred when we initially put them in the field. They've been in the field long enough now that we've gone back out and recertified these instruments. So there's been---we know that there's four hundred, or close to it. I'm just kind of ballparking here. Some have had repairs. So we can't have more than five hundred of these things in total (inaudible) count for every instrument.

Q And if I send you a list of my missing I.D. numbers?

A It's not based off these I.D. numbers and I have explained this to you in other cases. You know what the I.D. number means. That I.D. number is just a date stamp. When we developed that database, we used it for tracking, we used it for everything. And because we burned one of those numbers doesn't mean that there's some hidden document. It means that---it's only going to print a certification worksheet when work has been done and completed for that instrument.

Q Let me rephrase the question. If you'd like, I can readjust this spreadsheet such that it goes chronologically by the I.D. numbers that I have. If I give that to you are you willing to produce any of the printed ones---

MS. HUESER: Objection. This is not---

THE COURT: Yes. Counsel, you can ask for that in another method other than this hearing. This is simply to---

MR. PIROSKO: Thank you.

THE COURT: ---to go through the process of the validation. Alright. And for the People, do you want to re-direct the witness?

MS. HUESER: No, Your Honor. I don't think we need additional information.

THE COURT: Alright. Thank you, sir. You're finished.

MR. GROFF: No questions, Your Honor?

THE COURT: No. I don't have any other questions. Thank you.

MR. GROFF: Thank you. It's been a long day.

THE COURT: So Mr. Pirosko---

MR. GROFF: I appreciate your time.

THE COURT: No problem. I did A, B and C for you. I did not D, it will be part of the record. Alright. So we have the other issue folks, of the motions that were filed subsequent to the motions hearing. I looked at them.

MS. HUESER: Your Honor, may I just make a very brief record?

THE COURT: About this today?

MS. HUESER: About the Intoxilyzer part. Your Honor, I would encourage the Court to look at Defendant's Exhibit B and note that in that case that Georgia did determine that the Intoxilyzer 9000, in summary---

THE COURT: Counsel, you know what? I'm not listening to closing arguments or anything else. I just listened to the defense part of the case, so I'm going to review the documents. Obviously I'll review the transcript as soon as it gets produced. I'll review my notes, I'll come to some conclusion as to the evidence and my thought processes. But what I want to talk about now--- do we need to do anything else with Mr. Groff at all at this point?

MS. HUESER: Not with Mr. Groff, Your Honor. I would formally move to admit the video that was submitted to the Court though, so that it's just part of the record. I mean we have the transcript but---

THE COURT: Okay. Okay. And I have a copy of the disc. So---

MR. PIROSKO: The only, because the Court mentioned transcript, the last transcript, the defense and CDAC split the cost. I'm asking if the---I don't know if CDAC is still involved in this or not. Are they still a party?

MS. HUESER: They are not.

MR. PIROSKO: And is the district attorney's office willing to pay fifty percent of that?

MS. HUESER: I cannot commit to that.

THE COURT: Can you talk to your---

MS. HUESER: I can ask (inaudible) but I have no authority to authorize paying for a transcript.

THE COURT: Okay.

MS. HUESER: I just don't.

MR. PIROSKO: Well… I don't know that I necessarily need the transcript in this case. I'm willing to pony up my part, and so I'd ask that---

MS. HUESER: I simply---

MR. PIROSKO: I understand.

MS. HUESER: I honestly don't have the authority.

THE COURT: Okay. Why don't you check with the powers that be in your office. The transcript would be very helpful to the Court, no doubt. And what happens is usually if one or the other parties produces the transcript, then the Court is able to get a copy. Just because the technicalities in the science, etcetera, it's easier for me to go back and listen to that and make sense of everything that's been testified to, so I just have a better idea of the testimony. So Ms. Hueser, if you would check with that? Contact Mr. Pirosko. Mr. Pirosko,

if you're going to have an issue funding the whole thing, you can contact the Court. I don't know that I can order anybody to actually produce that transcript. I'm just telling you it would be a lot more helpful to me to understand and make a better decision.

The motions hearing, I got both the defense requests for the Court to reconsider. I got a response from the People, and then I got just yesterday the reply from the defense. My thought process at this point folks, is it would have been a lot more helpful to the Court if I had the second officer in. If we're going to go over the issue of whether or not there was an actual consent by the defendant to those roadsides, the only thing the original transcript told me was that the cover officer watched, he listened to the officer ask for consent, and he heard the defendant state that he would. It did not appear that any of that was coercive or involuntary or forced. But by the same token, I don't know why your officer wasn't here. I am going to reset that matter. Bring in the other officer. That would be most helpful to the Court to understand how the roadsides were conducted, what the roadsides produced and how that consent was obtained by the defendant.

So we're going to set another motions hearing prior to trial, hopefully with enough time that you folks can still get a transfer (sic) without wanting to continue---a transcript, without having to continue the trial.

MR. PIROSKO: Just so we're on the same boat, I'm assuming that we need more time, and if the Court wants more time to look at stuff and the parties too, my client has authorized me should we get to that point, to waive.

THE COURT: Okay. I appreciate that, Mr. Pirosko. We're going to try to work with our schedules so that we can get the motions done timely. If

we can't and we get into a bind, then I can appreciate that your client would waive speedy and we can reset. So I don't know, do we have anything at the beginning of January? (pause) So January 9th at 2:30, does that work on everyone's calendar?

MR. PIROSKO: It does not. I'm in Jeffco.

THE COURT: What does your morning look like, Mr. Pirosko?

MR. PIROSKO: The morning on the 9th is fine.

THE CLERK: January 9th at 10:30?

MR. PIROSKO: The 9th at 10:30, that's fine.

THE COURT: January 9th at 10:30. And I guess the other thing is folks, when we started this whole sort of transparency for the I-9000, the CDAC was on board and the whole idea was we were going to make this transport (sic) apparent. I issued an order that said none of the transcripts could be produced to the defense bar or anybody else involved until we were finished. I think we are finished today. I think it would be not the intent of the Court that we never get the other part of the transcript for everything that happened today, that it not be part of the Court's record. So I would hope that you could come to some kind of an agreement as to how that gets paid for so it can be produced. Because that, I believe was the intent of all the parties when we started.

MR. PIROSKO: Yes. And I'm stating right now, I'm willing to pay fifty percent.

THE COURT: Okay. Ms. Hueser, just talk to Mr. Yannis (phonetic). Let him know what the idea was when we entered into, that the Court I think has been more than generous with its time to get the information out there to avoid this from happening in more than every district court that this comes up.

You know, I think if the defense bar has access to this and it can be helpful to them, then I think it's a joint effort hopefully that the People can cooperate with. Because my intent was we get the transcript of the entire thing. I thought today would be videotaped as well, but at least the transcript should be part of the record. Alright.

MR. PIROSKO: The only question I have is the Court waive my client's appearance today. I understand that we're going to have a hearing on the 9th. For the purposes of that hearing only, I'm willing to stipulate to I.D. Would the Court waive my client's appearance at that hearing?

THE COURT: Is there anything else that the DA would need the defendant to be present for?

MS. HUESER: Not if he wants to waive his right---

THE COURT: Okay.

MS. HUESER: ---to be present at a motions hearing.

MR. PIROSKO: I have that authority.

THE COURT: Okay. So your client cannot be present. There will be a stipulation to I.D. The DA is on notice to bring in the police officer that conducted the roadsides and obtained the consent to do that, and that made the decision to arrest.

MR. PIROSKO: And the issue is the consent to---

THE COURT: Well you brought up the issue that the consent wasn't voluntarily given and there wasn't under the statute, the factors weren't considered by the Court. And also again, the issue is to whether there was probable cause to request the express consent. So that officer needs to be present. Alright. Thanks, folks. Have a good rest of your day and weekend.

MR. PIROSKO: And everyone have a good holiday.

MS. HUESER: And Your Honor, is the Court planning to issue a written ruling on the Intoxilyzer motions?

THE COURT: You know, I'm going to look at everything and decide.

MS. HUESER: Okay.

THE COURT: But I believe we're done with that part. And I think we went between you folks at the beginning because there were a series of motions, defense motions filed that taking this process and the Court making a determination as to the validation after listening to everything was going to take care of the majority of those motions.

MR. PIROSKO: Well one result of this whole thing is you are now the smartest judge in the state.

THE COURT: The most informed.

MR. PIROSKO: I appreciate the fact, I've asked for a hearing like this for a long time on a lot of things and you are the first judge that has said "Let's just look at it." I personally appreciate that.

THE COURT: Thank you. I appreciate that.

MS. HUESER: Thank you, Your Honor. Have a good weekend.

THE COURT: You folks, too.

(Whereupon, the proceedings were concluded.)

CERTIFICATE

The above and foregoing is a complete transcription of the electronic recording taken at the time and place above set forth.

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Rebecca Stoeffler

January 27, 2015