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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JOHN DAVID ROUSE and
ELIZABETH G. YOSKIN
Petitioners,

vs.

CASE NO. 16-2579RX

DEPARTMENT OF LAW ENFORCEMENT
Respondent.

_____ /

IN RE: HEARING
(VOLUME I, PAGES 1-176)

BEFORE: HONORABLE LAWRENCE STEVENSON

DATE: June 16, 2016

TIME: Commenced: 10:51 a.m.
Concluded: 4:15 p.m.

LOCATION: The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399

REPORTED BY: CLAVETTE A. DONNELL, RPR
Notary Public in and for
State of Florida at Large

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PROCEEDINGS

1
2 THE COURT: All right. I call this hearing to
3 order. We're here in Tallahassee for final hearing in
4 case John David Rouse and Elizabeth G. Yoskin,
5 Y-O-S-K-I-N-G, petitioners, vs. Department of Law
6 Enforcement, DOAH Case No. 16-2579RX whether Florida
7 Administrative Code Rule 11D-8.002(1) constitutes an
8 invalid exercise of delegated legislative authority.
9 Lawrence Stevenson, administrative law judge, has been
10 assigned to hear the case. And let's just get
11 appearances entered for counsel representing the
12 petitioners.

13 MR. STRAILE: Yes, sir. My name is Christian
14 Straile. Just for the record, Your Honor, Ms. Yoskin,
15 Your Honor, her name is Elizabeth G. Yoskin.

16 THE COURT: Yoskin. I was looking at the style
17 saying Yoskin, Y-O-S-K-I-N.

18 MR. STRAILE: Yes, sir. I thought you added a G,
19 which is her middle initial.

20 THE COURT: One had in on the joint pre-hearing
21 stipulation.

22 MR. STRAILE: Christian Straile.

23 THE COURT: And for the Department.

24 MS. JOHNSON: On behalf of the Department Ann Marie
25 Johnson.

1 THE COURT: We have had this discussion off the
2 record. But on the record, the Department intends to
3 order a transcript of this proceeding; is that correct?

4 MS. JOHNSON: We do, Your Honor.

5 THE COURT: A few preliminaries I generally go over
6 first is whether a rule change -- a settlement
7 negotiation, it could happen. I suppose the parties had
8 discussions about settlement. Do you think any such
9 discussion would be of avail?

10 MS. JOHNSON: No, Your Honor.

11 THE COURT: No. There was the handling of exhibits.
12 I know from the prehearing stip, there was quite a few
13 exhibits that have been objected to. Anything we could
14 stipulate into the record or is it best to wait and put
15 them all in through witnesses? I don't have a
16 preference. I don't want to take a lot of time going
17 through them if there's not a --

18 MS. JOHNSON: Judge, on one of the Respondent's
19 exhibits that the Petitioner objected to, I have no
20 problem with eliminating that exhibit, which was Exhibit
21 No. 14.

22 THE COURT: That letter. Okay.

23 MS. JOHNSON: Correct. Which was a letter.

24 THE COURT: Is that correct, Mr. Straile?

25 MR. STRAILE: I'm sorry. I am looking at my --

1 THE COURT: If you're more comfortable waiting, I
2 don't mean to put you on the spot here to stipulate to 38
3 exhibits.

4 MR. STRAILE: I believe I just did object to the one
5 letter, Your Honor, which was --

6 THE COURT: Fourteen.

7 MR. STRAILE: Yes. Right. So, if they're not going
8 to use that, than that's actually fine. I didn't have an
9 objection to any of the other -- well, I think we
10 discussed some of the exhibits were to be used as
11 possible impeachment or rebuttal and not substantive.
12 So, we'll deal with those as we get to them, if Your
13 Honor doesn't mind.

14 THE COURT: That's fine. And that sounds like that
15 may be the way to go, then, kind of on the record.
16 There's only one objection, but they may not all be
17 necessary. So, we'll just leave it at that. I have read
18 the pre-joint hearing stip. I'm not aware -- there's no
19 pending motions; is that correct?

20 MS. JOHNSON: That's correct.

21 MR. STRAILE: That's correct.

22 THE COURT: That pretty much takes care of any
23 preliminaries. I have room for folks here. Is the rule
24 going to be invoked?

25 MR. STRAILE: Yes, sir.

1 MS. JOHNSON: Well, Judge, the two witnesses I
2 listed are expert witnesses. So, I ask that they be
3 allowed to sit in on the proceedings.

4 MR. STRAILE: I mean, so are mine, so.

5 THE COURT: I don't know that. Usually it is our
6 practice to let the experts sit in so they can hear --
7 hear what they are responding to.

8 MR. STRAILE: Let's let everybody sit in.

9 THE COURT: Okay. That's fine with me.

10 That takes care of any -- if there's no other
11 housekeeping or business things, I think we're down to
12 opening statements, if the parties have them or we can
13 certainly go straight into taking testimony.

14 Mr. Straile, I'll leave it to you.

15 MR. STRAILE: Yes, Your Honor. Can I remain seated,
16 Your Honor?

17 THE COURT: Absolutely.

18 MR. STRAILE: As you can see, I have some binders.
19 I may stand up and mover around a little bit trying to
20 keep myself organized. But essentially we're challenging
21 11-D8.002(1) the definition of acceptable range. Okay.
22 It reads currently -- and I'm just referring to the rule
23 itself. The results of alcohol reference solutions and
24 dry gas standard analysis, which fall within the
25 following rages of each alcohol vapor concentration and

1 then it lists the numbers, which essentially amount to
2 what is a narrow range, if you will, of the analysis of
3 dry gas standards that has a .005, also known as
4 5 percent, and the -- that term "acceptable range"
5 permeates the rules. It's used through all the forms and
6 in the inspection at the agency level with the local law
7 enforcement.

8 I don't presume to know Your Honor's experience.
9 So, I'll maybe give a little background. We're talking
10 about DUI and a breath sample that is collected.
11 Essentially there's the Implied Consent law in Florida
12 that if somebody is lawfully arrested, they must submit
13 to or provide a sample of their breath. And the
14 legislature has delegated to the Florida Department of
15 law enforcement the ability to create rules to make sure
16 that the testing is accurate, reliable. And when the
17 department of health had it, it was also to protect the
18 people from health hazards because we have hundreds of
19 people blowing into the same tube. So, that's what the
20 regulations are intended to do.

21 And it is our contention that subparagraph one is an
22 invalid exercise of delegated legislative authority in
23 what happens. And I'm not -- essentially this, Your
24 Honor, will hear that this error rate was developed and
25 it was studied and created and was scientifically valid.

1 It's our contention that doesn't mean that it must
2 be in the rules if there's new information or other
3 information at the Department that should lead it to have
4 at least some discussion in keeping it, re-promulgating
5 it, or re-promulgating it by form or anything like that.
6 There should have been something done and nothing was.

7 I believe your Honor will hear that the rule was
8 developed in the late '60s, early '70s. And, like I
9 said, it's been the rule for a long time. The reason
10 that is important, Your Honor, is that if a machine --
11 they are tested annually at the Department for what was
12 referred to as the annual or the Department inspection.
13 So, when I say Department or annual, that's the same
14 thing. It's like saying tissue or Kleenex. And the
15 agency is the local law enforcement. They are supposed
16 to run their checks monthly to make sure the machines are
17 calibrated and what not.

18 If the machine has a result of the analysis of the
19 dry gas standard that is outside of the acceptable range,
20 then the machine is supposed to be taken offline,
21 recalibrated and/or sent off to the Department or a
22 repair facility to find out why the machine will not come
23 within this error range. So, in other words, if you're
24 outside, the machine is no longer valid for evidentiary
25 use in the state of Florida.

1 So, if this net, if you will -- I refer to it as a
2 net. And it's our contention that this rule should have
3 been looked at, should have been addressed, should have
4 been discussed, and possibly should have been -- they
5 should have adopted a more narrower range of .003 or
6 3 percent. Now, in my petition I said to the Court that
7 the -- if you look at the numbers three and five, just to
8 wack off the decimals and keep it easier to
9 conceptualize, three is 40 percent smaller than five but
10 five is 67 percent or two-thirds greater than three. So,
11 in other words, one could say if it is true, what we
12 contend is true, that the State of Florida has
13 essentially allowed a 67 percent greater error rate to
14 incarcerate Floridians.

15 Now, what's at stake here really is the
16 admissibility of the breath. If I succeed, then the
17 State can still enter the breath through traditional
18 laying predicate and proving it. It's going to be a
19 little bit more difficult, but they can still do it.
20 It's not excluded. It just doesn't walk in under Implied
21 Consent. Essentially it's a checklist or a way for us to
22 determine that if all of these things were followed, the
23 breathe comes in and it is able to be entered. If not,
24 then they have to be able to prove the reliability
25 through traditional predicates.

1 Like I said, what's at stake here, Judge, is the
2 liberty interest of all Floridians. This rule and the
3 Implied Consent and the breath test, these things are
4 used in criminal courts to take away the liberty of
5 people. It's always been my contention that the liberty
6 interest is the very most important interest in the
7 world. Because without your liberty interest, you cannot
8 pursue any other interest of yours or any other happiness
9 that you happen to want to pursue. If you're
10 incarcerated, you can't do whatever it is that you like
11 to do.

12 By making this error range wider than we believe it
13 should be, they are essentially using machines that
14 should be sent off for repair, but the breath is still
15 coming in under Implied Consent and using -- therefore,
16 able to incarcerate Floridians. And when these rule are
17 followed, a lot of times people will just enter a plea
18 and go to jail. They really -- maybe they won't hire
19 experts to come and challenge and maybe their
20 lawyers won't do everything they are supposed to do
21 looking for errors. But when the machine is outside the
22 error rate, it has to be -- it has to be taken offline
23 and should not be used.

24 So, there's a big deal. If your error range is
25 67 percent greater than it should be, then you are

1 essentially using this evidence against people when the
2 machine should be repaired instead. The rule itself, the
3 error rate, if you will, the numbers have stayed the
4 same. The words around it have moved and changed a
5 little bit throughout the time from when the Department,
6 HRS, Health and Rehabilitative Services had it until now.
7 And it's always been explained as, like I said, .005 or
8 5 percent.

9 I just want to -- the -- it is our contention that
10 even some of the documents provided by the State in their
11 exhibits, Your Honor, will show that this more
12 narrow error range that is -- was before them during the
13 approval process of the Intoxilyzer 8000, they knew about
14 it in 2002. There was no public discussion as to why
15 we're keeping this. We believe that the -- one of
16 selling points was that it was more -- a more accurate
17 machine. They -- we believe that some of their
18 procedures will show that they are actually following
19 there more narrow range during their annuals.

20 And there -- a lot of these rules in 11D-8 were kept
21 probably beyond their time. There was a major overall in
22 the summer of 2015 where the rules were amended to remove
23 any kind of language for the Intoxilyzer 5000, which is
24 the machine that we used in Florida prior to the
25 Intoxilyzer 8000. The machines used the same method to

1 test the breath, infrared light spectrometry, but they
2 have different ways of using that method. So, you could
3 hammer in a nail with a ball -- small little hammer, tack
4 hammer, or you could use a sledge hammer. Different
5 instruments to do the same thing plowing in a nail. You
6 can have a dial scale where you put your produce or your
7 meat at the grocery on a dial or they could have a
8 digital scale. And this error range that's been around
9 for over 40 years at this point has been in place, and
10 the technology has changed drastically from the time
11 where a cell phone would occupy a big space on the bottom
12 of your floorboard to where we now all have computers in
13 our hands that are more powerful some of the things that
14 they were using to shoot rockets into space at the time
15 the rule was developed.

16 So, it is our contention, therefore, that this rule
17 should have been looked at during the approval process
18 when the specs for the Intoxilyzer 8000 came in. It
19 should have been looked at when the intoxilyzer came
20 online. And it should have been looked at and considered
21 during the summer of 2015 rules purge, if you recall. I
22 refer to it as a rules purge because essentially it is my
23 belief that the intention was to remove the 5000 rules.

24 Now, this error range was also in effect, Your
25 Honor, for the Intoximeter 300, which was the machine

1 that was used prior to the Intoxilyzer 5000. This error
2 range has been here over several machines, and it was
3 developed as a general standard that could be applicable
4 to all machines.

5 However, if you are using a machine that is capable
6 and it is sold to Florida as being more accurate because
7 it has this more capability to enter the more narrow,
8 67 percent more narrow error range, then there should be
9 some consideration as to whether a rule that has general
10 applicability to every product on the conforming products
11 list maybe should be addressed for the specific machine
12 that we are using in Florida. In other words, the error
13 range was developed as a general applicability to
14 everything. All the conforming products need to fall
15 within this range.

16 Well, this one is capable of bringing in the net to
17 a smaller, much -- significantly smaller percentage and
18 therefore it would lead to some of the results -- some of
19 the breath tests not being admissible or some of the
20 machines being repaired and it is our contention that
21 it's extremely important because, as I said, it permeates
22 the rule. Acceptable range is everywhere in the forms.
23 And that with a more narrow net, we can be assured when
24 incarcerating someone that the law has been followed,
25 their constitutional rights have been given to them, due

1 process and all of that. And it's important that when
2 we're incarcerating people, we make sure that we're doing
3 it correctly.

4 I'm a criminal defense attorney. Most of my
5 cases plead out. They don't all go to trial. So, a lot
6 of people come in and admit. But for those who don't,
7 this is very important because some of the machines
8 should have been taken offline if they were doing them
9 more on their narrow range. And I believe that our
10 witnesses, all the witnesses here today will testify
11 what -- obviously, the State witnesses aren't going to
12 agree that they should have adopted the rule. I don't
13 know, they probably won't agree that they should have
14 considered the rule. But I believe that what I just said
15 will be entered into evidence through the exhibits and
16 the witnesses here today, Your Honor.

17 THE COURT: Okay. Ms. Johnson?

18 MS. JOHNSON: Judge, the Petition alleges that
19 8002(1) is an invalid exercise of delegated legislative
20 authority and that it is arbitrary and capricious. The
21 evidence will show that the rule was supported by logic
22 and necessary fact and it's not capricious because it's
23 adopted with thought and reason and is rational.

24 The rule is based on standards accepted within the
25 scientific community. Counsel misstated the actual

1 definition of the rule that -- the actual definition of
2 accepted range in rule accounts for a .005 or five
3 percent, whichever is greater.

4 The term acceptable range is used in forms
5 promulgated, included by promulgation within the rules
6 for agency inspections and department inspections, which
7 are basically preventative maintenance for the
8 instrument. There's no need to change the definition of
9 acceptable range when you're moving from one instrument
10 to another because infrared alcohol testing hasn't
11 changed in more than 20 years. The accuracy of the
12 instrument alone, as a stand-alone item hasn't changed
13 between the 5000 to the 8000. So, there's no need to
14 make changes to the acceptable definition of acceptable
15 range when the technology hasn't changed with infrared
16 spectroscopy and the actual instrument's accuracy as a
17 stand-alone item hasn't changed.

18 And actually narrowing the acceptable range would
19 have a negative affect on defendants. If you currently,
20 hypothetically, a defendant blows a .103 with a plus or
21 minus .005 or 5 percent, that defendant, we could say,
22 definitely could be as low as .98. If we narrow that
23 range to a .003 or 3 percent, which not only would it be
24 not accepted within the scientific community, not a
25 standard set forth by the scientific community, but now

1 you would be saying that that defendant couldn't be any
2 lower than a .100, it started out as a .103. So, that
3 would have a detrimental affect on defendants.

4 The department is confident that at the
5 conclusion -- that the evidence will show that the rule
6 is supported by logic and necessary fact and is adopted
7 with thought and reason and is rational.

8 THE COURT: Call your first witness, Mr. Straile.

9 MR. STRAILE: I would call Laura Barfield.

10

11 Whereupon,

12

LAURA BARFIELD

13 was called as a witness, having been first duly sworn, was
14 examined and testified as follows:

15

DIRECT EXAMINATION

16 BY MR. STRAILE:

17 Q Good morning.

18 A Good morning.

19 Q Can you state your name for the record, please?

20 A Laura Barfield.

21 Q And can you tell the Court about your education,
22 please?

23 A I hold a Bachelor of Science in biochemistry I
24 received from Florida State University in August of 1994.

25 Q Have you had any other on-the-job training as it

1 pertains to breath testing or --

2 A I have training in the area of forensic toxicology
3 including blood and breath alcohol toxicology and the
4 toxicology of drugs of abuse. I received that from FDLE and
5 am certified by the Department of Law Enforcement in blood
6 alcohol toxicology and forensic toxicology. Training included
7 a two-and-a-half-year training program broke into two phases
8 that I successfully completed, incorporated extensive reading
9 assignments, laboratory practicals, written evaluations, oral
10 evaluations. And that would be the secondary basis of my
11 training.

12 Q Have you ever testified as an expert on the
13 Intoxilyzer 8000 and/or the rules in the State of Florida?

14 A Yes, I have.

15 Q How many times would you say?

16 A I don't know specifically of those categories.
17 Qualified as an expert or rendered opinions in courts
18 throughout Florida including federal court, courts in New
19 York, courts in Utah over 725 times, including those
20 particular categories.

21 Q Okay. Thank you. And are you currently employed?

22 A Yes. I own my own company.

23 Q And what do you -- what is your current employment?

24 A I am the owner and consultant of Forensic toxicology
25 Consulting Services. It's a company I began in May of 2013.

1 Q Okay. Now, you're being paid to be here, right?

2 A Well, I'm being paid for my time to be here, yes.

3 Q Okay. And what -- can you tell the Court before you
4 started the consulting business, what was your prior
5 employment right before that?

6 A I was the alcohol testing program manager with the
7 Florida Department of Law Enforcement.

8 Q What does that mean?

9 A I was responsible for the management and daily
10 oversight of the alcohol testing program which -- or the
11 members of the alcohol testing program. I was responsible for
12 creation and revision of Chapter 11D-8, which were the
13 rules governing blood and breath alcohol analysis. I created
14 and revised curriculum used to train and permit breath test
15 operators, agency inspectors, breath test instructors in the
16 state of Florida. I permitted all blood analysts to conduct
17 blood alcohol testing in accordance with rule and law. I
18 approved alcohol reference solutions for use in evidentiary
19 breath test instruments in the state of Florida by analyzing
20 various lots of the solutions for accuracy and reliability
21 using gas chromatography, prepared stock solutions that are
22 used to check the breath test instruments monthly and yearly,
23 also use gas chromatography to analyze those. I testified all
24 over the state of Florida in reference to the rules governing
25 blood and breath alcohol analysis. Those would be my main

1 duties.

2 Q Okay. And, so, fair to say, you were in charge of
3 alcohol testing in Florida then?

4 A Yes.

5 Q From what time to what time?

6 A July of 2001 through -- well, I remain employed
7 until May of 2013, but essentially through the end of
8 March 2013.

9 Q Okay. You were using like accrued vacation time?
10 Is that what the difference is between March and May?

11 A Yes. I submitted my letter of resignation the end
12 of March 2013, and then had six weeks of paid leave where I
13 continued to work for the Department of Law Enforcement by
14 testifying in court.

15 Q Okay. Now, are you familiar with the -- you're
16 familiar, then, with chapter 11D-8, the Implied Consent
17 program?

18 A Yes.

19 Q I think part of your duties were to create these
20 rules, correct?

21 A Create or revise, yes.

22 Q Okay. I'm sorry if you said this already, but you
23 started as the ATP -- ATP alcohol testing program manager in
24 what year?

25 A I was the manager in 2001.

1 Q What machine was being used in 2001?

2 A The Intoxilyzer 5000 series.

3 Q Okay. What -- how many models of the 5000 were
4 available from -- excuse me. Let me retract that for a
5 second. First of all, the manufacturer of the 5000 is?

6 A It was CMI incorporate.

7 Q Okay. And, so, how many different models of the
8 Intoxilyzer 5000 can you recall that CMI had?

9 A At that time they would have had four, I believe.

10 Q Now, we're talking about four different
11 models, correct?

12 A Yes.

13 Q And these models, there was -- I'm assuming there
14 was some differences in them?

15 A Yes.

16 Q Can you tell us about the differences in the
17 models as you recall? I know I'm asking you about 15 years
18 ago.

19 A There was the 64 series and then the 66 series. The
20 difference between those two was a recirculation feature for
21 the simulators that you used to check the calibration of the
22 instrument. There were probably other differences, but that
23 was the main one. There was a 68 series. That one, I'm not
24 positive of its difference between the 66 and the 68. But
25 then there was also the 66 series EN, and that one was even

1 more improved. There was a 68 series that had five
2 filters associated with it rather than three. So, the
3 technology over time with Intoxilyzer 5000 advanced.

4 Q What and models can you -- were used or approved for
5 use in Florida?

6 A The 64 series and the 66 series.

7 Q So, did Florida ever use the EN series?

8 A They did not.

9 Q And do you know why not?

10 A Because it was decided that that technology would be
11 fast becoming obsolete and that the Intoxilyzer 8000 was
12 available or soon to be available and that was a better option
13 to seek at the time.

14 Q Why was it better?

15 A It was a much newer device than the Intoxilyzer 5000
16 EN and would have even better technology, better capabilities
17 over the Intoxilyzer 5000. A simple one being the Intoxilyzer
18 8000 was mobile versus the Intoxilyzer 5000. Even the EN
19 truly isn't mobile. You can make it mobile, but it's not --
20 it's not truly a portable instrument.

21 Q Okay. What are some of the differences in the --
22 what's the method of breath testing that these machines use?

23 A All that we have been discussing all use infrared
24 spectroscopy or commonly referred to as infrared light
25 absorption.

1 Q Okay. And what is that?

2 A That's when a molecule of interest or all molecules
3 absorb infrared light at specific wavelengths of light. So,
4 when you direct light at a sample, the molecule, for example,
5 the alcohol molecule will absorb specific wavelengths of
6 infrared light in a unique and consistent way. Based on the
7 absorption, the amount of absorption that occurs and the
8 amount of transmittance that results after absorbance,
9 meaning the amount of light detected, is then measured and
10 that measurement is correlated to a response from the
11 calibration of the instrument. And the amount of alcohol in
12 that unknown sample can then be determined.

13 Q So, we're you using laymen's terms here. We're
14 using light wavelengths to measure the molecular bonds; is
15 that correct?

16 A Well, the light -- the molecular bond in a molecule
17 are what absorb the specific wavelengths of light.

18 Q So, the molecular bond absorbs the light. And based
19 on what comes out, what's not absorbed --

20 A Correct.

21 Q -- in other words, that's what we're measuring. So,
22 essentially, fair to say, that we're measuring the light that
23 remains after absorption as it passes through a molecular
24 bond.

25 A Correct. That's essentially what happens, yes.

1 Q Okay. So, the -- you were in the room and you heard
2 my opening statement, right?

3 A Yes.

4 Q Okay. Now -- so, you understand that part of my
5 argument is that this rule acceptable range should have been
6 looked at and considered at some point when we moved between
7 the 5000 and 8000?

8 A Yes.

9 Q Okay. What is the -- so, both of these machines
10 measure the light that remains after absorption as it passes
11 through a molecular bond?

12 A Yes.

13 Q And -- but they have different ways of measuring
14 that; is that correct?

15 A Yes.

16 Q All right. So, explain the different ways -- the
17 differences that it's measured from the 5000 to the 8000?

18 A The Intoxilyzer 5000 had a wheel in it. And the
19 wheel would spin. The wheel contained three different
20 filters: 3.39 micrometers, 3.48 micrometers, and 3.80
21 micrometers. Those were the wavelengths that this instrument,
22 the 5000, would look at, look at the bonds -- would be
23 absorbing wavelengths at those numbers. And based on the
24 response, you would get a result. With the Intoxilyzer 8000,
25 you have two filters. One at 3.4 and one at 9.4. I think

1 it's 9.376 and 3.476 are the actual numbers. But for
2 simplicity, we'll say 3.4 and 9.3. It's looking at those
3 wavelengths of light instead of the ones that the 5000 looked
4 at.

5 Another difference is the light source in the
6 Intoxilyzer 5000 exuded or emitted light of all wavelengths.
7 The Intoxilyzer 8000 emits or actually pulses infrared light
8 at various wavelengths within the infrared spectrum. The
9 Intoxilyzer 8000 has two detectors to detect the light that's
10 not absorbed by the molecule. They are independent. So, you
11 have kind of a two-channel system. There's a specific
12 detector for the three channel, the three microchannel and a
13 specific detector for the nine microchannel. The Intoxilyzer
14 8000 has one detector. And the filter wheel --

15 Q You mean the 5000?

16 A Five thousand. Excuse me. The Intoxilyzer 8000 has
17 two detectors; the Intoxilyzer 5000 has one detector. The
18 wheel would turn around, spin at a certain speed. And the one
19 detector would have to measure each of the light coming
20 through from each of those filters.

21 The Intoxilyzer 8000, all of the components that
22 we're talking about from the light source, the sample chamber
23 that holds the sample and the detector are all connected. So,
24 there's no room for disbursement of light inside the case of
25 the instrument. The intoxilyzer 5000, the light source was

1 separate and had to be focused into a sample chamber, and then
2 the light had to be refocused out of the sample chamber to the
3 detector as it's passes through -- the light passes through
4 the wheel. Those are some of the analytical
5 differences between the two.

6 Q Okay. So, if I could summarize, basically, the 5000
7 you had potential light dispersion?

8 A You could.

9 Q You had a spinning wheel to filter the light?

10 A Yes.

11 Q And it, basically, measured the molecule at the one,
12 as we called it, the three channel?

13 A Yes.

14 Q The one measurement?

15 A Correct.

16 Q And then -- but the 8000 measures at the three
17 channel, three point whatever you said, and at the nine
18 channel nine point whatever?

19 A Correct.

20 Q But for simplicity it measures the three channel and
21 the nine channel and the light does not disperse?

22 A Correct.

23 Q Okay. So -- now, you were present then for the
24 approval process and transition and the change from the 5000
25 to the 8000?

1 A Yes.

2 Q Can you tell us kind of why the decision was made to
3 change from the 5000 to the 8000?

4 A Well, ultimately the decision was made because
5 Florida needed to change instruments. The Intoxilyzer 5000,
6 the instruments that were being used, the parts were becoming
7 increasingly difficult to obtain and there was mention by the
8 manufacturer that they were, basically, phasing out that
9 instrument. It was becoming obsolete from a technological
10 standpoint. So, the thought was let's -- we need to move to
11 something. And, so, we began researching what were the latest
12 and greater instruments from the different manufacturers at
13 that time. And we did a field testing of those various
14 devices, informal testing, in order to gain data, gather data
15 in an effort to choose the best instruments that was out there
16 for the state of Florida.

17 Q Okay. And, so, basically it came down to the 8000
18 was the latest and greatest?

19 A Well, ultimately it came down to the Intoxilyzer
20 8000, which is manufactured by CMI, and the Dräger 7110, which
21 is manufactured by Dräger a different breath test instrument
22 manufacturer. And those findings from the field testing were
23 presented to -- I guess it's as independent as it could be at
24 that time, but the breast test instrument subcommittee. It
25 was a group within the Institute of Police Technology and

1 Management that helped direct and guide policy procedure for
2 breath testing and DUI in the state of Florida. And we
3 presented the information to them. And they recommended, the
4 members of the breath test instrumentation committee
5 recommended that Florida go with the Intoxilyzer 8000. So,
6 it's kind of a combination of FDLE deciding and some
7 independent people deciding at that point in time.

8 Q Was the 8000 ever sold as a more accurate machine?
9 Was there like a selling point that CMI --

10 A I can recall that language being used in the sense
11 that it measures at the three micron and the nine micron. It
12 had better accuracy standards. And because of the analytical
13 things that I mentioned prior, it was a better, more accurate
14 instrument than the Intoxilyzer 5000. But they had to be
15 careful, CMI had to be careful not to say that the 5000 wasn't
16 accurate. It's just this one was a little bit better because
17 it had better technology.

18 Q Okay. And, so, during the approval process there's
19 some changes to the rules to implement the 8000; is that
20 correct?

21 A Well, those were two separate independent things.
22 The approval process, part of it is incorporating it by
23 reference and rule the Intoxilyzer 8000. But there were
24 things that went on prior to rule promulgation in addition to
25 rule promulgation that also occurred in order to approve the

1 instrument. But, ultimately, the rules had to be revised to
2 include it.

3 Q Okay. Now, this -- we're talking about here the
4 acceptable range. Okay. It's expressed -- the one currently
5 is expressed how? Like, how do you say it?

6 A Well, it defines the various alcohol reference
7 solutions that the State will use during the Agency and
8 Department inspections, and it will define its -- the range of
9 acceptable for each of those concentrations. There are three
10 different concentrations that are used. And it
11 implies through the numbers presented that the acceptable
12 range is .005 or 5 percent for the solutions only.

13 Q So, in other words, the machine is -- what we're
14 talking about calibration of the machine?

15 A Verification of the calibration of an instrument.

16 Q Okay. So, if the machine can't come within that
17 range what happens?

18 A You are to remove the instrument from service, take
19 corrective action. Ultimately, you're not authorized to use
20 the instrument until such time as the results are within
21 acceptable range. Depending on which stage of the inspection
22 process you're at, the instrument will need to remain out of
23 service if it's not passing those acceptable range standards.

24 Q So what we're doing is we're plugging a known value
25 into the machine and seeing what the machine comes up with?

1 A Correct.

2 Q And that's supposed to validate or -- the
3 calibration of the machine?

4 A Yes.

5 Q The -- was this -- are you familiar with the alcohol
6 testing program procedures manual?

7 A Yes.

8 Q Okay. When -- and what is that?

9 A It's actually a manual that I created when I first
10 became the manager back in -- first drafted in 2001. It's
11 been revised since then. It outlined the procedures and
12 policies that the members of the alcohol testing program will
13 follow when doing certain tasks.

14 Q Like what tasks?

15 A Well, there's administrative tasks that are in it.
16 There's inspection task that are in it. There's blood
17 proficiency or blood permit tasks that are in it as well. So,
18 it depends on -- the task depends on what we're talking about.

19 Q Okay. And does it contain kind of the procedures
20 that will be used to verify the calibration?

21 A Yes.

22 Q Okay. And is there an error rate in that manual?

23 A Yes.

24 Q And what is the error rate that's used in the
25 manual?

1 A When verifying the calibration upon receipt of an
2 instrument, it would be .003 or 3 percent for the same
3 standards that are defined in the acceptable range in the
4 rule.

5 Q Okay. And -- I'm sorry. Say that again.

6 A It is .003 or 3 percent, whichever is larger, for
7 the same concentrations of standards that are defined within
8 the acceptable range definition. By that I mean, within that
9 definition, it says for the .05 standard the definition then
10 cites a range that's .005 or 5 percent, whichever is larger.
11 But within the manual, it is for that same .005 -- 05
12 standard, it defines a .003 acceptable range.

13 Q Okay. Now, if I were to -- would you be able to
14 identify the manual if I showed it -- if I showed you?

15 A Yes.

16 MR. STRAILE: Your Honor, may I approach?

17 THE COURT: Sure.

18 MR. STRAILE: Your Honor, I just realized that I
19 didn't staple these exhibits because they are voluminous.
20 So, as far as entering them in -- and I was planning on
21 giving the binder --

22 THE COURT: That's fine.

23 BY MR. STRAILE:

24 Q Is this -- do you recognize that?

25 A Yes, I do.

1 Q How do you recognize it?

2 A This is the alcohol testing program procedures
3 manual, and it's the 2011 version because it had -- that's the
4 revision dates within each of the procedures. The most
5 current one was May 2011. It's broken down into different
6 sections, as I was previously describing, and it has an
7 introduction and administrative section which would be
8 referred to as Section 1; breath testing inspection, Section
9 2; a blood testing section, Section 3; an administrative
10 proceeding section, Section 4.

11 Q Okay. So, what we're talking about here, breath
12 testing would be under Section 2?

13 A Yes.

14 Q And the error range -- so, we're not talking about
15 blood testing here, right?

16 A Correct.

17 Q And then the -- all right. That should be under
18 what heading?

19 A It is under Section 2.19, Instrument Quality Control
20 Check Procedures.

21 MR. STRAILE: Your Honor, I would move to enter the
22 2011 policy -- procedures manual -- program procedures
23 manual into evidence.

24 MS. JOHNSON: I have no objection. It's also listed
25 as State's 12 -- I mean, Department's 12.

1 THE COURT: Okay. This is Petitioner's 3. In the
2 previous stip it was marked -- indicated it was 3.

3 MR. STRAILE: Yes, sir.

4 THE COURT: Okay. We'll show Petition's 3 admitted
5 with the understanding that it's also Respondent's 12.

6 (Petitioner's Exhibit 3 admitted into evidence.)

7 MS. JOHNSON: And it was also stipulated to in the
8 prehearing stipulation.

9 BY MR. STRAILE:

10 Q Now, you created this? Is that what you said?

11 A Yes.

12 Q And it is to be used at the Department?

13 A Yes, it's used by FDLE.

14 Q Is that for the annual inspections?

15 A Yes.

16 Q And, so, if the Department inspector is following
17 the procedures manual, they will make sure that the machine is
18 calibrated to the three standard instead of the five standard?

19 A Yes.

20 Q But that never made it into a rule, correct?

21 A That's correct.

22 Q Okay. So, the rule says something different than
23 the procedure manual does?

24 A The three standard is not in the rules at all. It
25 is an additional step that is used by the Department, if I'm

1 understanding your question correctly.

2 Q I think so. So, it's -- in other words, do they do
3 the five first and then the three first and then --

4 A They'll do the three first, which is not part of the
5 rule and then they do the five later on.

6 Q Okay. So, they'll do the three and then they'll do
7 the five. Then that then qualifies it for evidentiary use?
8 Well --

9 A For all intents and purposes, yes. There's a couple
10 of extra steps they have to do before it can be used for
11 evidence. But from the Department perspective at that point
12 in time, yes.

13 Q For this narrow issue?

14 A Yes.

15 Q For this narrow issue at least?

16 A Yes.

17 Q If ever I say that qualifies, I know there's other
18 steps that have to be taken, but we're just -- we're focused
19 on this one little narrow issue. So, just pretend that I
20 prefaced my questions for this issue.

21 A Okay.

22 THE COURT: They do the five because the rule
23 says five?

24 THE WITNESS: Yes.

25 THE COURT: Because it seems like if it passed the

1 three it would pass the five, right?

2 THE WITNESS: It should.

3 THE COURT: But they have to do both.

4 THE WITNESS: It should, but the data shows that
5 that's not always true either, so. Yes, that is correct.
6 They do the three, then they do the five.

7 BY MR. STRAILE:

8 Q What is supposed to happen according to the
9 procedures manual of the Department if the machine can't make
10 the three standard?

11 A It has to be calibrated. The calibration within the
12 instrument is changed, it is adjusted, and a new one is
13 created.

14 Q So, essentially the Department makes sure it meets
15 the three standard first?

16 A Yes.

17 Q And if after calibration it still doesn't meet the
18 three standard, now what?

19 A They may repeat the calibration depending on the
20 circumstances affecting the calibration, or it may need to go
21 to the -- an authorized repair facility for repair or the
22 Department may be able to fix it themselves.

23 Q Is the Department an authorized repair facility?

24 A They used to be. Actually now in accordance with
25 the new revision, they are not an authorized repair facility.

1 But they are allowed to do maintenance. So, I think it's
2 questionable.

3 Q Okay. So, basically, in this manual we're looking
4 at what page?

5 A In this manual page 29, the policy 2.19 on page 28,
6 but the information that we're talking about is on page 29.

7 Q Now, it doesn't actually say to the three or the
8 3 percent, does it?

9 A No, it does not. That would be implied as the
10 acceptable ranges in the rule. If you look at the numbers,
11 you will see it's .003 or 3 percent.

12 Q So, for example, there's a table here with the
13 different known values that -- where we test the machine,
14 correct?

15 A Correct.

16 Q And 5, 8 and -- .05, .08, and .20 right?

17 A Correct.

18 Q And, essentially, you have then a low and a high
19 limit then, right?

20 A Yes.

21 Q And what you're saying to the Court is it's implied
22 because why?

23 A Well, the numbers -- for example, if you look at
24 the .05 target concentration, the acceptable range from that
25 target is minus .003, which is the .047, or from that target

1 plus .003, which is a .053. And that's how you can say it's
2 plus or minus 3 percent -- .003 or 3 percent, whichever is
3 greater. If you look at the .20, that's where you get the
4 3 percent because the range is bigger than .003 from that
5 target of .20.

6 Q Okay. But according to the rule of subparagraph --
7 002(1), those numbers would change how?

8 A For example, the .05 target concentration, that
9 standard, the range would be the low of 0.055 -- no. Excuse
10 me, 0.045 to a high of 0.055.

11 Q Okay. So, if the Department inspectors are doing
12 this in house, was there ever a discussion of changing the
13 rule since you're doing it anyway?

14 A Well, yes, there was before this was even created.

15 Q Okay. And was there any discussion and, like,
16 public notice of any discussions that were done? Or was this
17 kind of round table within the Department?

18 A Well, the discussions were round table discussions
19 that occurred at or near the time of rule preparation.
20 There's rule drafting and then there's the rule making
21 section. But there was a concern that the accuracy standard
22 for the new instrument we would be going to was different than
23 the one we were using. So, there was discussion among
24 members of the alcohol testing program regarding that.

25 Q Okay. Now -- and when you say there was discussion

1 among the members, do you remember what members were talking
2 about it ten years ago?

3 A Roger Skipper was there, Matt Malhiot was there,
4 Dawn Serest, Dwight Hackey, Warren Sangar. I think that's it.

5 Q Okay.

6 A I don't think John Cooper was still employed at that
7 time.

8 Q This is -- we're talking about 2002 or --

9 A That would have been 2001, 2002, somewhere around
10 there, yes.

11 Q You left the ATP in 2013, correct?

12 A Correct.

13 Q So, you didn't have anything to do with the
14 procedures manual as it was edited in 2014; is that right?

15 A That's correct.

16 Q Have you ever seen that before?

17 A Yes.

18 Q Do you know Dr. Kirkland?

19 A I know of him. I don't know him personally.

20 Q What about Mr. Patrick Murphy?

21 A I know, Mr. Murphy, yes. I hired Mr. Murphy.

22 Q When?

23 A I want to say 2008.

24 Q Was that your sole decision or there was a group of
25 people in that?

1 A There was a group of people.

2 Q Okay. If you would, do me a favor and flip to the
3 next tab in that binder that you have, which would be Tab 10.

4 MR. STRAILE: Your Honor, I would like to move this
5 in evidence. It's also listed as a state -- state
6 exhibit. Would there be any objection at this point to
7 entering it now or --

8 MS. JOHNSON: This is not a state exhibit.

9 MR. STRAILE: It's not?

10 MS. JOHNSON: No. And we are the Department, not
11 the State.

12 MR. STRAILE: I'm sorry.

13 MS. JOHNSON: And I would object to it, Judge.
14 There's a lack of foundation and it's irrelevant.

15 THE COURT: Petitioner's 10?

16 MR. STRAILE: This would be Petitioner's 4.

17 THE COURT: Four. Okay. The 2014 manual?

18 MR. STRAILE: The 2014 manual.

19 MS. JOHNSON: You said ten. That's creating --

20 MR. STRAILE: I said Tab 10 in the binder, which she
21 has.

22 MS. JOHNSON: Oh, I'm sorry.

23 MR. STRAILE: I apologize.

24 MS. JOHNSON: So, that's the standard operating
25 procedures for 2014?

1 MR. STRAILE: Correct.

2 MS. JOHNSON: I have no objection to that. That's
3 also listed as a department exhibit.

4 MR. STRAILE: That's what I thought.

5 THE COURT: It's your 13, I think.

6 MS. JOHNSON: Correct.

7 THE COURT: Okay. Yeah. We'll show that admitted,
8 Petitioner's 4.

9 (Petitioner's Exhibit 4 admitted into evidence.)

10 BY MR. STRAILE:

11 Q So, have you read this before?

12 A Yes.

13 Q You are familiar with it?

14 A Yes.

15 Q Okay. If you would, the -- Section 2.2 in the
16 policy procedures manual?

17 A Okay.

18 Q Which ends up being on point -- on page five, excuse
19 me. It's actually page five of both exhibits. This is where
20 we're talking about the department inspection, right?

21 A Yes.

22 Q So, this section it references both the rules and
23 the Section 2.19?

24 A It does.

25 Q Okay. Is that -- is that where -- is that where it

1 sets out the procedure to do the three first and then the
2 five?

3 A Yes. It states, "Ensure the instrument quality
4 control check procedure, procedure 2.19, have been conducted
5 prior to beginning the Department inspection.

6 Q Okay. But the three error range, that's not in the
7 rule anywhere or in the forms, is it?

8 A No.

9 Q What's in the forms?

10 A Only what we are calling the five standard here.

11 Q Okay. And that's what's defined as acceptable range
12 in 8.002(1)?

13 A Yes.

14 Q So, going back to Section 2.19 now of the procedures
15 manual of 2014, starts on page 28. Did they keep the --
16 what's the error rate now in 2014 in the procedures manual?

17 A Beginning on page 29, it lists the acceptable ranges
18 for the stability check procedures which remain .003 or
19 3 percent or what we are commonly calling here the three
20 standard.

21 Q I'm just trying to make it simple.

22 A I agree.

23 Q You remove decimals. Three and five essentially
24 what we are talking about. And this, again, same procedure.
25 If it doesn't meet the three, it's got to be recalibrated or

1 sent to a repair facility?

2 A Correct.

3 Q Now -- but 11 -- the acceptable range in the rule
4 still remains at five?

5 A Yes.

6 Q Even after the republishing or editing or whatever
7 they did in 2014?

8 A Yes. They also added another requirement for the
9 values in addition to the three standard. They also have the
10 inspectors look at the .08 solution and the .08 dry gas and
11 that also must fall within .003 of each other as an
12 additional -- an additional calibration -- excuse me, check
13 standard dealing with that process as well.

14 Q So, basically, we're talking about known values of
15 what's referred to as wet liquid?

16 A Uh-huh.

17 Q And gas, which is not liquid?

18 A Correct.

19 Q Dry and wet essentially?

20 A Yes.

21 Q And, so, would it be fair to say that they are
22 calibrating the machine first at the three based on the
23 manual?

24 A Well, they are checking it for calibration, the
25 accuracy of the calibration at three.

1 Q Was this the procedure while you were head of -- the
2 program manager at ATP?

3 A This was implemented while I was there, yes.

4 Q Now, you heard mention of the -- what I refer to as
5 the 5000 rules purge in 2015. Did you have anything to do
6 with that process?

7 A No.

8 Q The -- are you aware or can you talk about how the
9 five standard .005 or 5 percent, how that came into being and
10 when?

11 A It was in the rules when I took over the program.
12 It is based on the accuracy standards of the instruments that
13 were --

14 MS. JOHNSON: Objection, Judge. She doesn't have
15 personal knowledge. She just said it was in the
16 rules before she started. So, she can't say what it
17 was -- what the original decision was based on if it was
18 already there when she --

19 THE COURT: I'm going to let you inquire into.

20 MR. STRAILE: Yeah. That wasn't my question.

21 BY MR. STRAILE:

22 Q My question was, how that error standard was
23 developed? Do you have knowledge of how it was developed and
24 when?

25 A Yes.

1 Q Okay. And not -- just let us know.

2 A It's based on the accuracy standards of the
3 instruments in place over time. Breath testing instruments,
4 their standards were .005 or 5 percent. That was included in
5 the rules, and it was maintained in the rules when I began
6 with the alcohol testing program, because that was the
7 accuracy standards of the instruments available or in use at
8 the time.

9 Q Do you know where that standard came from?

10 A Well, when you're analyzing known solutions, you're
11 not going to get the exact number purported by that solution
12 when you repeatedly measure it. Just like when you weigh
13 yourself, you're not going to get the same number over and
14 over again. You're going to have a little bit of variability.
15 So, the question becomes what is an acceptable variability for
16 the accuracy of this particular standard. And the scientific
17 community, the breath testing community at that time accepted
18 .005 or 5 percent, whichever is greater. And it goes along
19 with other analytical testing community. The gas
20 chromatography community you would use that same range for
21 some of the standards that you analyze with that as well when
22 you're quantitating --

23 Q So, the community, do you know when this error range
24 was studied to become acceptable?

25 A No. That was -- that would have been well back in

1 the '70s maybe where the accuracy standards were defined. The
2 research that I have done held that standard to be from
3 instruments prior to the Intoxilyzer 5000 as well.

4 Q So, the Intoximeter 300 that we used before the
5 5000, same range?

6 A Yes.

7 Q And whatever we were using in the '80s and '70s,
8 same range?

9 A I think 4011 had the same range and I believe even
10 the Breathalyzer had the same range.

11 Q Did those machines also use infrared spectrometry?

12 A Yes.

13 Q I'm going to ask you to turn to Tab 13 of the
14 binder, which is Number 7.

15 MR. STRAILE: I don't have the objection list
16 memorized?

17 MS. JOHNSON: What is the exhibit?

18 MR. STRAILE: Seven.

19 MS. JOHNSON: Number 7 on your notice of filing?

20 MR. STRAILE: Yes, ma'am.

21 THE COURT: I think there was a relevancy objection
22 to it in the prehearing stip.

23 MR. STRAILE: Well, I would say it's relevant
24 because of the information contained therein.

25 MS. JOHNSON: And I would object that it's

1 irrelevant because it's regarding a 1999 rule. We can
2 only consider the 2015 rule in this proceeding. What
3 happened prior to the 2015 rule is also irrelevant and it
4 doesn't address any of the issues in the petition.

5 MR. STRAILE: Part of the argument, Your Honor, is
6 that the acceptable range was developed in the '70s for
7 technology at the time. And, therefore, the history of
8 the rule and how it was considered, how it changed is
9 relevant. And what was considered back in 1999 is
10 relevant today because part of the argument, Your Honor,
11 is that this should have been relooked at based on the
12 new technology and the passage of time.

13 THE COURT: I'll overrule the objection.

14 MR. STRAILE: Okay. Good. So, I would move that
15 into evidence then, Your Honor.

16 THE COURT: We need to get it identified, and let's
17 go through that much. I'm going to have to break, too.
18 We're right at 12. Let's go ahead and deal with the
19 exhibit and then --

20 MS. JOHNSON: Judge, I would object to it's lack of
21 foundation.

22 THE COURT: That's what I was getting at. I mean,
23 we haven't even identified it yet other than as Number 7.

24 MR. STRAILE: Okay.

25 THE COURT: I mean, there's no authenticity

1 objection, is there? I'm assuming it's probably
2 something he got from your agency.

3 MS. JOHNSON: Correct. He got it from our agency,
4 but there's still a lack of foundation. It involves
5 something that this witness was not involved in, and this
6 is --

7 THE COURT: Your intention, Mr. Straile, is you
8 weren't going to use her to identify it or any -- you
9 were just going to ask her about --

10 MR. STRAILE: Yes, sir. And, Your Honor, most of my
11 documents I receive through a public records request,
12 PR15-648, was given to me by Mr. Murphy who is present.
13 And if we want to wait until then or I'll call him next
14 or -- not next or whatever, I can lay the foundation
15 through Mr. Murphy.

16 THE COURT: Let's do that then. So, we've got
17 the -- we've got it identified, but I'll certainly let
18 you inquire of this witness in regards to it.

19 MS. JOHNSON: And, Judge, it's Dr. Murphy, and he's
20 not listed as a Petitioner's witness.

21 MR. STRAILE: Then I'll wait for the State to call
22 him or however --

23 MS. JOHNSON: Department.

24 MR. STRAILE: Department. Excuse me.

25 THE COURT: I can tell you -- and I'm probably going

1 to let this stuff in. I mean, it sounds like it's
2 relevant to his argument. I always, if I'm going to err,
3 I'm going to err on the side of letting it in and letting
4 him pursue his theory whether it ultimately matters or
5 not. But if Mr. Murphy is going to be testifying, I'll
6 give you --

7 MS. JOHNSON: He may not, Judge. That's my point.
8 He's not a Petitioner's witness. He's a Respondent's
9 witness. And based only the testimony of the other
10 Respondent's witnesses, I may not call Dr. Murphy.

11 THE COURT: If she doesn't call Dr. Murphy, we'll
12 revisit this question of the admissibility of 7.

13 MR. STRAILE: Okay. I'd ask the Court not to
14 release him from his subpoena.

15 MS. JOHNSON: He's not under subpoena, Judge.

16 THE COURT: Let's take a lunch break now. I'm going
17 to be in trouble if I don't get down the hall pretty
18 quickly. They are waiting on me. I only need 45
19 minutes, but y'all may need a full hour. Do you want to
20 just reconvene at 1:00?

21 MR. STRAILE: Whatever you say judge.

22 THE COURT: Let's shoot for 12:45 then. We won't
23 start without you.

24 (Hearing recessed for lunch at 12:03 p.m.)

25 MR. STRAILE: Did you say we were back on the

1 record?

2 THE COURT: Sure. Whenever you are ready.

3 MR. STRAILE: Oh, I'm sorry, Judge.

4 THE COURT: You were waiting on me, and I thought I
5 was waiting on you.

6 MR. STRAILE: I apologize.

7 THE COURT: No, that's fine.

8 BY MR. STRAILE:

9 Q Ms. Barfield, we were in my binder. You have a copy
10 up there. Tab 13, which is my Number 7 on the list, are you
11 familiar with that document?

12 A Yes.

13 Q When did you -- let me back up for a second. When
14 did you start being involved with breathe testing in the state
15 of Florida?

16 A With the alcohol testing program?

17 Q With just breath testing -- well, was it with the
18 ATP or somebody else?

19 A Well, as part of my training in blood alcohol
20 toxicology, I had breath alcohol toxicology training as well.
21 I obtained a breath test operator permit. So, I was involved
22 in breast testing at that point in time. But with the alcohol
23 testing program, in March of 2000.

24 Q Okay. And this document, do you recognize it?

25 A Yes.

1 Q How do you recognize it?

2 A I reviewed this document as part of my duties as a
3 senior crime lab analyst with the alcohol testing program. I
4 was responsible for the approval of alcohol reference
5 solutions. This document dealt with the rule promulgation of
6 alcohol reference solutions. And as a manager, I reviewed it.
7 As far as rule drafting and revising you need the history.
8 You need to understand the changes in the past in order to
9 move into the future. So I reviewed it as part of that as
10 well.

11 Q Does it appear to be an accurate copy of what you
12 remember reviewing while you're at the ATP?

13 A Thesis incorporated, yes. I believe there probably
14 was some actual -- here it is. The rules would be underlined
15 and crossed through. I do see that now. But, yes, this does
16 appear to be the documentation that I would have reviewed.

17 Q Okay. Now, this -- and this contained an error rate
18 within it? Hold on.

19 MR. STRAILE: Your Honor, I move this document now
20 into evidence. I believe she's laid the proper
21 foundation.

22 MS. JOHNSON: I still object. She hasn't laid the
23 proper foundation. This isn't her document and she
24 wasn't present when this document was constructed.

25 THE COURT: I'll note the object. I'll show

1 Petitioner's 7 admitted.

2 (Petitioner's Exhibit 7 admitted into evidence.)

3 BY MR. STRAILE:

4 Q There is an error rate contained in this document?

5 A Yes. Within pages of this particular document, yes.

6 Q And what is the error rate for this -- approving
7 these sources, this alcohol reference source?

8 A .003 or 3 percent.

9 Q Okay. And this was in a promulgation of another
10 rule, correct?

11 MS. JOHNSON: I'm sorry. Judge, if we can just
12 point out where in the document he is referring to?

13 MR. STRAILE: It's where it says draft at the top is
14 page one, two, three, four, five, the sixth page. It
15 says draft at the top. Got it?

16 BY MR. STRAILE:

17 Q And there at the bottom, that's the error rate,
18 correct.

19 A Of the page that you were referring to that
20 says draft, it's Number 6 within the exhibit, yes.

21 MS. JOHNSON: Judge, I would also object. This is
22 referring to a different rule. This is talking to the
23 approval of alcohol reference solution lot numbers. This
24 doesn't involve 8.002(1). This is 8.003(5).

25 THE COURT: Inquire -- go ahead. I think he said as

1 much, but I'm just going to let him try to tie it in.

2 BY MR. STRAILE:

3 Q And, again, this was with 8.003(5) and the proposed
4 draft in here on what would be page seven of this document
5 also has an error rate which is?

6 A Page seven?

7 Q Well, it actually says page two at the bottom, but
8 it's not seven. It's the ninth page where the proposed rule.

9 A Yes. This would be the ninth page. It talks about
10 definitions -- on the eighth page it talks about definitions
11 and then on the ninth page it continues with the plus or minus
12 3 percent of the target ethanol concentration, if that would
13 be what you're asking about.

14 Q Yes, ma'am.

15 MS. JOHNSON: Judge, I continue to object. This
16 isn't the error rate or acceptable range as defined in
17 8.002(1). This is a completely different context. This
18 is talking about --

19 THE COURT: If it doesn't get tied in -- if he
20 doesn't tie it to this rule, then your relevance
21 objection may overcome my ruling.

22 BY MR. STRAILE:

23 Q Ms. Barfield, you are familiar with 11D-8 as a
24 whole, correct?

25 A Yes.

1 Q And if you would turn to page -- excuse me, Tab 8 in
2 my binder, which is Number 5 exhibit?

3 A Tab 8?

4 Q Yes, ma'am, Tab 8. Tab 8 of the binder is Number 5
5 on the list. The Tab 2 exhibit basically.

6 MS. JOHNSON: Judge, I believe I objected to this in
7 the stipulation because I couldn't identify what document
8 this is. I don't know whether this is a compilation of
9 all 11D-8s or is it the current 11D-8. He just listed it
10 on the notice of filing as file entitled 11D-8 on Disk 1
11 of 3. I checked Disk 1 of 3. There isn't a file that's
12 just labeled 11D-8.

13 MR. STRAILE: Well, that -- maybe I put the wrong
14 disk on the cite, but that's where I got this from.

15 THE COURT: That's where you got -- I mean, you got
16 the type -- there was a file called 11D-8 that you --

17 MR. STRAILE: Yes, sir. I mean, I have the disks.
18 I can check later.

19 MS. JOHNSON: Judge, I'm just curious as to what the
20 actual document is, because I couldn't -- like I said, I
21 couldn't identify it by reference to the disks.

22 MR. STRAILE: Okay. Well, Your Honor, if I could
23 check the disk briefly.

24 THE COURT: Sure. Sure.

25 MR. STRAILE: And I will admit that I'm a human

1 being. I could have miscited.

2 (Pause.)

3 MR. STRAILE: Well, Your Honor, it appears that I
4 did miscite this thing. There is actually not a file on
5 the PR15648 that I can see that is entitled just 11D-8.

6 THE COURT: Maybe identify where this came from.

7 MR. STRAILE: Your Honor --

8 THE COURT: I mean, is there like a compilation?

9 MR. STRAILE: Well, it's also got -- I mean, I
10 recognize the cover page as being one that I used in
11 another hearing where basically, according to my notes, I
12 printed Chapter 11D-8 on December 9, 2015. And the last
13 revision on this version that I'm looking at is July 29th
14 of 2015. So, I believe that this is 11D-8 as it was on
15 December 29, (sic) 2015. So, it's 11D-8 being the
16 implied consent program, Your Honor. It is published.
17 It can be looked up.

18 THE COURT: Okay. Again, that's all this is? It's
19 just the text in the rule?

20 MR. STRAILE: Yes, sir.

21 THE COURT: Okay. I was assuming this was some kind
22 of rule making file or something. I don't have it in
23 front of me. So, I --

24 MS. JOHNSON: That's fine, Judge. If it's just Rule
25 11D-8, the 2015 version that's also State's --

1 MR. STRAILE: That's what it looks like to me.

2 THE COURT: Okay. Well, that's fine.

3 MR. STRAILE: Which state is it?

4 MS. JOHNSON: It's State's Exhibit No. 1, which is
5 stipulated to.

6 THE COURT: It's Respondent's 1.

7 MS. JOHNSON: Yeah. I said state again. I
8 apologize to the Department.

9 MR. STRAILE: Now I get to call you State, too.

10 MS. JOHNSON: Too many years as a prosecutor.

11 MR. STRAILE: All right. So, I believe it to be the
12 same, Judge, that it is the same 11D-8 that is State's 1.

13 THE COURT: Okay. That's fine.

14 BY MR. STRAILE:

15 Q So, I would ask you if you could to go to
16 11D-8.003(5).

17 MS. JOHNSON: Judge, again, I would object to this
18 line of questioning because 8.003(5) is not alleged in
19 the petition.

20 THE COURT: Again, I'm going to give him some leeway
21 if he can tie this in logically. I'm assuming there's
22 some overarching argument that's --

23 MR. STRAILE: Your Honor, in my opening statement --

24 THE COURT: -- pending here.

25 MR. STRAILE: -- I said that the rule acceptable

1 range permeates -- excuse me, the definition permeates
2 the rules.

3 THE COURT: Okay. If that's where we're going,
4 that's fine.

5 BY MR. STRAILE:

6 Q So, 11D-8.003(5) as amended, can you read the as
7 amended that had you have there, the last date?

8 A 11D-8.003(5) the last revision date is July 29,
9 2015.

10 Q Okay. And here in Subsection 2A, what is the
11 definition of the error rate now?

12 A 2A all results -- all analysis results shall fall
13 within the alcohol reference solution acceptable range.

14 Q Okay. Is that the same definition we're talking
15 about here?

16 A That would be the definition listed in 11D-8.002(1),
17 which is what we have been talking about.

18 Q Okay. So, you -- you were not involved in that in
19 2015, correct?

20 A That is correct.

21 Q And if you would continue in the binder to Tab 18,
22 which would probably be my 15.

23 MS. JOHNSON: What is the exhibit number?

24 MR. STRAILE: That's actually 12. Excuse me.

25 MS. JOHNSON: Judge, I would object to this on

1 relevance and lack of foundation as well. This is
2 opinions offered for a rule for 1999. It wasn't a
3 document that was prepared by this witness.

4 THE COURT: We'll note that, but he hasn't moved it
5 yet. Let's see if he's got any questions for the witness
6 before he moves it.

7 BY MR. STRAILE:

8 Q Ms. Barfield, are you familiar with this document?

9 A Yes.

10 Q How are you familiar with this document.

11 A I reviewed this as part of rule promulgations. It
12 is in the package that I had to provide as a public record
13 when requested when I was a program manager. I reviewed this
14 as part of the historical knowledge of the program in further
15 creating, revising rules. And that's how I would be familiar
16 with it.

17 Q Okay. Is part of your duties as program manager at
18 ATP was -- were you like the custodian of records?

19 A Yes.

20 Q So, you were responsible for maintaining this?

21 A Yes.

22 Q And you reviewed this as you responded to public
23 records requests?

24 A Yes.

25 Q And does it appear to be an accurate copy of what

1 you remember from your time with FDLE?

2 A Yes.

3 MR. STRAILE: Your Honor, with that, I would move
4 that into evidence.

5 MS. JOHNSON: Same objection, Judge. Lack of
6 foundation. This is a document that was prepared by
7 someone that is not a witness to these proceedings. Just
8 because this witness reviewed it, doesn't mean that the
9 proper foundation has been laid.

10 MR. STRAILE: Your Honor, her job was to maintain
11 these records.

12 THE COURT: Again, I'll overrule the objection. It
13 is an Agency document. I'll give you leeway. We're
14 making an historic -- drawing an historic timeline here.
15 So, I'm going to be a little more liberal in granting
16 the --

17 (Petitioner's Exhibit 12 admitted into evidence.)

18 BY MR. STRAILE:

19 Q On the second page of that document in paragraph
20 four it talks about the 66 model. What is the 66 model?

21 A The intoxilyzer 5000 66 model.

22 Q Okay. And what was its -- what was -- according to
23 this, what was --

24 MS. JOHNSON: I'm sorry, Judge, I --

25 MR. STRAILE: Page 2 paragraph 4.

1 MS. JOHNSON: Paragraph 4 is completely different
2 from what I -- okay. I'm sorry, Judge. I apologize.

3 BY MR. STRAILE:

4 Q What's your recollection as to the accuracy
5 capabilities of the model -- Intoxilyzer 5000 Model 66?

6 A .005 or 5 percent, whichever is greater.

7 Q And does this document also say that?

8 A Yes.

9 Q And you believe that's accurate for the Model 66?

10 A Yes.

11 Q And that was the Intoxilyzer 5000 Model 66, was that
12 the one you testified earlier used in Florida?

13 A Yes.

14 Q Okay. So, are you -- as part of the transition to
15 the 8000, did you receive training or educational classes on
16 the 8000?

17 A Yes.

18 Q And who put those on?

19 A The manufacturer, CMI Incorporated.

20 Q Okay. And -- so, if you would please turn to --
21 we're going to talk about Tab 37 and 38 of that binder, which
22 would be Exhibits 31 and 32. Do you -- this one first we're
23 talking about under Tab 37, do you recognize that?

24 A Yes.

25 Q Okay. And what is that?

1 A This is a copy of the training material, a
2 particular page of the training material that was provided
3 during training that occurred with CMI and members of the
4 alcohol testing program in Tampa in 2004.

5 Q Okay. And does it appear to be an accurate
6 representation of the materials that were at the FDLE and the
7 training that CMI gave you?

8 A Yes.

9 Q And as part of your former position as the program
10 manger, was it your responsibility to maintain this document?

11 A Yes.

12 Q Is that how you have knowledge of it?

13 A Well, yes. Plus I actually received a copy that I
14 used while I was being trained. So, I have that intimate
15 knowledge of the training material as well.

16 MR. STRAILE: Your Honor, with that, I'd move Number
17 31, the Intoxilyzer 8000 spreadsheet as I called it, into
18 evidence.

19 MS. JOHNSON: I'd object, Judge. This document is
20 one page out of at least 14 others that preceded this.
21 This isn't the entire document. And she's not the
22 custodian of records for this document. She just stated
23 it's -- it says right on it it's a copyright of CMI.
24 There's no one from CMI here to testify. There's no
25 foundation for this.

1 THE COURT: I'll overrule it. I'll show 31
2 admitted.

3 (Petitioner's Exhibit 31 admitted into evidence.)

4 BY MR. STRAILE:

5 Q Now, this one page, what is on this?

6 A It says specs physical/environmental.

7 Q Okay. And what are they trying to tell you about
8 the machine here?

9 A What they're talking about is the range that it will
10 measure alcohol concentration that -- the Intoxilyzer 8000,
11 excuse me, will measure alcohol at its accuracy standard, its
12 precision standard, what it's dimensions are, the case of the
13 instrument, how much it weighs, what its operating and storage
14 temperatures are, the barometric pressure capability --
15 readings capability, and the effects of -- or any effect of
16 humidity on the instrument.

17 MS. JOHNSON: Judge, I'm going to object again.

18 There's nothing on there that states that this has to do
19 with the 8000. The actual document itself does not
20 anywhere on it state what instrument this has to deal
21 with. So, I would object on relevancy.

22 MR. STRAILE: Your Honor, the witness testified that
23 she was provided this document by CMI in conjunction with
24 their Intoxilyzer 8000 training, that it was maintained
25 as part of the FDLE records for that purpose.

1 THE COURT: Based on the overall testimony, I'll
2 overrule the objection.

3 BY MR. STRAILE:

4 Q So, let's stick with what we're talking about here,
5 the accuracy and the acceptable range. What is CMI teaching
6 FDLE as to what their acceptable -- or, excuse me, their
7 accuracy is?

8 A The accuracy standard is stated as plus or minus
9 3 percent or plus or minus .003, whichever is higher.

10 Q Okay. Do you remember when you first took this
11 class or were taught on this slide show?

12 A It was in 2004 in Tampa.

13 Q Okay.

14 A I don't remember which month it was, but I know that
15 we were in class in Tampa.

16 Q Okay. And you said in 2004?

17 A Yes.

18 Q Okay. Turn to the next tab, which is Tab 38 of the
19 binder, which would be my 32, the FDLE Intoxilyzer Training
20 Class Outline. Do you recognize this document?

21 A Yes.

22 Q Okay. How do you recognize it?

23 A This is the training material that was provided
24 during -- in the 2002 training on the Intoxilyzer 8000 that
25 was conducted, I believe, in Tallahassee this one was.

1 Q Okay. And was this something that was given to you
2 as part of the CMI training of FDLE on the Intox --

3 A Yes. These were the training materials provided and
4 then they'd be -- these are actually pictures of slides that
5 were put up on the board that we actually followed with these
6 paper items as they went through the training with the slides
7 on the screen.

8 Q Slide show, they gave you a printed version?

9 A Correct.

10 Q Okay. Does it appear to be accurate as you remember
11 it?

12 A Yes.

13 Q Is this also a document that, as your role as ATP
14 program manager, you were responsible for maintaining for the
15 FDLE?

16 A Yes.

17 Q Also a document you sent out pursuant to public
18 records requests?

19 A Yes.

20 Q So. You're familiar with this document?

21 A Yes.

22 Q And it appears to be as accurate as it was in the
23 FDLE records from when you left.

24 A Yes.

25 MR. STRAILE: Your Honor, with that, I'd move 32

1 into evidence.

2 MS. JOHNSON: Same objection, Judge. She's not the
3 custodian of records and he hasn't laid proper
4 foundation.

5 THE COURT: I'll note the objection, but I will show
6 33 admitted.

7 (Petitioner's Exhibit 33 admitted into evidence.)

8 BY MR. STRAILE:

9 Q If you would, there are a lot of slides here. We'll
10 just go to page 8, if you would.

11 A Okay.

12 Q So, on page 8, is it mentioning accuracy standards?

13 A Yes.

14 Q And what is CMI telling FDLE?

15 A Look on the second slide of the page,
16 physical/environmental statistics left hand column there's the
17 second bullet accuracy plus or minus 3 percent or plus or
18 minus .003, whichever a higher.

19 Q Okay. So, is it fair to say this term acceptable
20 range is pretty much whenever an agency or department
21 inspection on the forms -- you're familiar with the forms of
22 the FDLE?

23 A Yes.

24 Q In fact, you were responsible for creating some of
25 them?

1 A Yes.

2 Q And if they were not amended since 2013, likely you
3 really created them?

4 A Correct.

5 Q Were you responsible for creating the forms that
6 were going to be used for the Intoxilyzer 8000?

7 A Yes.

8 Q And you did that as part of your job function?

9 A I did that with other members of the alcohol testing
10 program and a legal advisor. But, yes, ultimately it was my
11 responsibility.

12 Q Okay. And who were the people involved in that, if
13 you remember?

14 A It would have been the department inspectors, my
15 legal advisor, myself. Department inspectors at that time
16 would have been Roger Skipper, Dawn Serest, Matt Malhiot,
17 Warren Sangar, Dwight Hackney.

18 Q Okay.

19 A And Stef Naff I think was in training during that
20 time.

21 Q Okay. So, the forms use acceptable range as defined
22 in the Rule 8.002(1)?

23 A Correct.

24 Q At the same time or going into 2011, right, you
25 created the procedure manual?

1 A I revised the procedure manual. It already existed,
2 but I did revise it.

3 Q It existed in 2011?

4 A Well, yeah, there was a manual prior to 2011.
5 There's a 2011 revision that we were talking about prior,
6 earlier, earlier this morning.

7 Q Okay. So, that one that we were talking about
8 earlier this morning, the 2011 version, also had as part of
9 the procedure in the Department inspections the three standard
10 instead of the five standard?

11 A Yes.

12 Q And, so, a Department inspector, even though the
13 form says acceptable range is defined by the rule, first they
14 do the three and then the five?

15 A Correct.

16 Q And the agencies, though, they do the five standard
17 all the time, right, in the forms?

18 A Correct.

19 Q So, basically, the forms exist for use in the field
20 and the rule exists for use in the field. And we're using
21 more -- a much wider net, if you would, or error rate of the
22 five instead of the three?

23 A Yes.

24 Q Okay. Would you agree with me that five is
25 67 percent greater than three?

1 A If I follow your calculations, yes.

2 Q Basically, three is plus two is five, right?

3 A Yes.

4 Q And two is two-thirds of three?

5 MS. JOHNSON: Leading. Objection.

6 THE COURT: We can give her a pencil and paper and
7 let her figure it out, but I'll overrule.

8 BY MR. STRAILE:

9 Q All right. So, was there -- so, basically, in 2011
10 we're making sure the machine is calibrated to the three
11 standard at the Department level. And then when we ship it
12 back to the Agency, it's allowed to go out to the five
13 standard?

14 A Well, basically, yes. I mean, you check it with the
15 three standard. Then the Department applies the five standard
16 by the rule and then it gets out to the agency that uses the
17 five standard. The Department is using two different
18 standards. One is a rule; one is not a rule. And then the
19 Agency is using a five standard, which is a rule.

20 Q Okay. Well -- so, is it fair to say that these
21 documents that we have been discussing when they were given to
22 the FDLE and CMI trained the FDLE personnel with these
23 documents?

24 A Yes.

25 Q So, basically, if you took the CMI training, you

1 should have known that the three standard is what they are
2 saying their machine can do?

3 A Yes.

4 Q Okay. Now, the five standard, is it -- it's
5 basically applicable to every machine under the sun, is that a
6 fair statement, as long as it's on the list?

7 A Well, for the older generation instruments, it was
8 applicable. Your new generation instruments are having
9 smaller accuracy standards, tighter accuracy standards than
10 your older devices. That's what you're seeing across the
11 board with your instruments including the ones on the list.

12 Q Okay. So a lot of the instruments on the list
13 you're saying can meet a more narrow standard?

14 A Some of the instruments.

15 Q Some of them. Okay?

16 A The new technologies will have a -- are demonstrated
17 to have a tighter accuracy standard more along the lines of a
18 three that we're talking about with the Intoxilyzer 8000
19 versus your older technology instrument that have the
20 manufacturer defined accuracy standards of like the five
21 standard.

22 Q And when did the 8000 come online?

23 A It was implemented for evidentiary use on March 27,
24 2006.

25 Q And it was approved when?

1 A Well, the make and model of instrument was approved
2 in 2002, November 5, 2002, with the promulgation of the
3 instrument and the rule. However, software needed to be
4 approved as well. So, with each version of software, it kind
5 of gets -- not really reapproved but you have to have the
6 software evaluated for it to be an approved instrument. So,
7 there are different dates that that occurred after November 5,
8 2002.

9 Q Okay. So -- and when were the rules applicable, the
10 rules and forms applicable to the 8000, when do you recall
11 them first being promulgated?

12 A The March 27, 2006 version of Chapter 11D-8 was the
13 first time that the rules and forms and instruments were all
14 used.

15 Q Now, the rules related to the 5000, they were kept
16 in, the rules of 11D-8, yes?

17 A Yes.

18 Q Okay. Why?

19 A The changeover from the -- for the entire state from
20 the Intoxilyzer 5000 to the Intoxilyzer 8000 happened in a
21 day. March 26, 2006 we were using the Intoxilyzer 5000.
22 Beginning March 27, 2006 the entire state switched over to the
23 Intoxilyzer 8000. Therefore, the Intoxilyzer 5000 had to be
24 left in the rule to cover that time span. But in addition, in
25 case there were any issues in the complete statewide

1 conversion, the state, for safety reasons, the Intoxilyzer
2 5000 was kept in the rule in case we needed to go back to it.
3 That's the main reason.

4 Q Okay. Was that ever discussed in a public hearing?

5 A Well, there was no -- public hearings were
6 announced, but public hearings were never had as far as during
7 the promulgation process. No one requested one. No one came
8 for one. So, for all intents and purposes, although one was
9 advertised, one was never held.

10 Q So, no one in the public ever -- did they have any
11 way of knowing this more narrow standard was applicable to
12 this machine, the 8000?

13 A No.

14 Q Okay. So, no one would have known, then, to raise
15 an objection?

16 A Correct.

17 Q Was this -- the information that the machine could
18 do a three instead of a five, was it ever noticed for hearing
19 or announced for hearing or anything like that where someone
20 could say, hey, let's discuss this?

21 A No.

22 Q It was discussed inside the Department, basically?

23 A Yes.

24 Q Okay. In the 2011 procedures manual, you revised
25 that, was there -- was there a -- what kind of was the

1 catalyst for the revision?

2 A That manual was revised partly because of the
3 centralization of all of the members of the alcohol testing
4 program to Tallahassee location. Prior to that, I had six
5 department inspectors. They're the people that would go to
6 the agencies and check the instruments at the agency. They
7 were located in various cities throughout the state, six
8 different -- well, five different locations. Two of my people
9 in Orlando were housed in one location, but one went north and
10 one went south as far as responsibility. They all had an
11 assigned area of coverage.

12 And back in 2008 budgetary constraints for the
13 entire state became a huge issue. The alcohol testing program
14 was put on a cut list as part of a program that would be
15 eliminated from FDLE, from the statute from -- from
16 everywhere, I guess. So, I was asked to come up with ways to
17 cut costs. And one of the things that was determined that we
18 would centralize all the services. We would have to have less
19 equipment. And we could actually -- that was the driving
20 force, which was budget. But we could actually increase the
21 quality of the processes that we were doing. I would have
22 better regulation over and management over the members of the
23 program. And, so, that's -- that was the driving force. It
24 was centralization.

25 Q Okay. Now -- so, basically, you knew that the

1 machine could meet this more narrow standard at the time, at
2 2011. We'll centralize everything. What was the -- was there
3 ever a discussion around that time about changing the rule?

4 A Well, of course. I mean, the rule -- there had been
5 discussion about changing the rule from 2008 until I left in
6 2013. But beginning January 1 of 2011 all rule promulgations
7 were put on hold by the governor. And that was under
8 executive order. And although there were executive orders
9 issued subsequent to that, there existed this -- I forget the
10 name of it, but a group that reviewed every state agency rule,
11 made you identify its statutory location, you know, did it
12 cause an impact to the people that it was involved with. You
13 had to answer all of these questions. So, there was a long
14 process where we still could not revise rules. I wasn't
15 authorized to begin rule revision until the beginning of 2013,
16 February of 2013. And that's when the process was started for
17 that, so.

18 Q The process was started for what?

19 A The beginning process for drafting a change to the
20 rule.

21 Q This rule that we're discussing?

22 A Well, the entire rule chapter, yes. But it would
23 involve -- it would involve this particular rule sections that
24 we are talking about.

25 Q Okay. So, in the beginning of 2013, was there

1 discussion internally about changing this particular rule
2 we're discussing today?

3 A No, not in particular, not in that first meeting,
4 no. I had a lot of rules that I was going to change, and I
5 talked about a lot of concepts with a group of people. We
6 were work shopping it. And I don't believe this particular
7 rule section was actually discussed, but my intents were to
8 have more communication with the people in the group. In
9 fact, I had a list of things that I was supposed to send to
10 them based on discussions that we had. And it was the very
11 beginning of the process.

12 Q Was this on your list of stuff today?

13 A Yes. Well, actually -- yes. I would have changed
14 this rule section because I wanted to implement different
15 standards. I needed to increase the range of concentrations
16 that the instrument is being -- that are being used to check
17 the instrument. So, I was looking at .3, .4. So, I would
18 have had to change this rule section for that alone. Meaning,
19 the definition of 002(1).

20 Q Okay. And, so -- and then you, basically, you --
21 you then left the FDLE, and it was --

22 A Yes.

23 Q Okay. And you don't know what happened after 2013?
24 You left on March 2013?

25 A I resigned on March 29, 2013, but I was employed

1 through May 24, 2013 on leave, but I still testified in court
2 for FDLE.

3 Q But you were no longer --

4 A Part of any regulation or anything like that within
5 the program.

6 Q Okay. So, this particular rule going from five to
7 three was discussed internally at the FDLE?

8 A Yes. But way back in 2000 -- before the 2002
9 revision.

10 Q Okay. But the broader error rate was left in place?

11 A Yes. Because of the Intoxilyzer 5000 being
12 maintained and its requirements being maintained in the rule,
13 it was decided to leave that standard in, gather data on the
14 .08 alcohol reference solution, the wet bath that you called
15 it versus the .08 dry gas standard. And then show that it
16 meets that standard. And then when the Intoxilyzer 5000
17 information was removed from the rule, to change the standard
18 then.

19 Q Okay. So, kind of a let's-wait-and-see approach?

20 A Kind of more gather the data to show the accuracy
21 standard is, in fact, that and move from there. So that --
22 there was discussion about courts and challenges and things
23 like that and the changeover confusing everyone and it
24 happening all at once and the fact that the 5000 was still in
25 the rules and its standard is a greater standard and --

1 Q By greater you mean larger?

2 A Larger, yes. A larger standard. And, so, it was
3 just decided by the legal advisor at the time Mr. Madrical
4 that the best thing to do is to leave the larger standard,
5 gather the data and use that data then to make the change to
6 go along with the 8000 accuracy standard set by the
7 manufacturer.

8 Q So, essentially, it sounds like what you're
9 saying is the intention was to change this rule?

10 A Yes.

11 Q And it never happened?

12 A The intent was to change it sooner -- well, it never
13 happened. You're correct. But the intent wasn't to wait
14 until forever. The intent was to change it within a couple of
15 years and that didn't happen.

16 Q And did you end up gathering and reviewing the data,
17 though?

18 A I know that I've looked at the data since then. I
19 don't particularly -- I don't have that information right now,
20 though. The FDLE could do that quickly by looking at their
21 control test readings and early readings that are maintained.

22 Q So, in your review of the data or data, did
23 Intoxilyzer 8000, was it capable of meeting this more narrow
24 range?

25 A Yes.

1 Q And during the approval process, was, you know,
2 eventually after the software and other stuff fixed, did it
3 meet the standard that CMI advertised?

4 A Yes.

5 Q Did you ever -- as part of your duties as program
6 manager of ATP, did CMI ever give you a document entitled
7 Intoxilyzer 8000 instrument specification?

8 A Yes.

9 Q And --

10 MR. STRAILE: And, Your Honor, that I believe is
11 State's 24 -- no, State's 20 -- Department 20.

12 BY MR. STRAILE:

13 Q You said you've seen that document before?

14 A Yes.

15 Q Does that appear to be -- do you recognize that
16 document that I just handed you?

17 A Yes, I do.

18 Q How do you recognize it?

19 A This is the seven-page document provided to me by
20 CMI when I was going through the approval process of the
21 Intoxilyzer 8000. It's final revision dated October 2000, and
22 it is the Intoxilyzer 8000 instrument specification. I call
23 it a summary.

24 Q Okay.

25 MS. JOHNSON: Judge, we stipulated to it in the

1 pre-stipulation agreement, and it's my exhibit. So, I
2 will stipulate to it. He doesn't need to lay a
3 foundation.

4 MR. STRAILE: Okay. I'll move State's 20 into
5 evidence.

6 THE COURT: We'll show Respondent's 20 as admitted.

7 (Respondent's Exhibit 20 admitted into evidence.)

8 BY MR. STRAILE:

9 Q And then does it also discuss the accuracy of the
10 machine?

11 A Yes, it does.

12 Q We've seen slides and we've seen presentation.
13 Where is the accuracy of the machine according to CMI in this
14 document?

15 A It's listed on page two under performance. Accuracy
16 is plus or minus 3 percent or plus or minus .003 grams per 210
17 liters, whichever is greater.

18 Q Thank you. So, if the intent was to the change the
19 rule, can you tell us why it was -- between 2006 and 2011 when
20 the executive order stopped you, what in that five-year
21 period, why wasn't the rule readdressed?

22 A Other than the fact that we did draft some
23 rules during that time and then the budget in 2008, that
24 particular, I call it a crisis because it impacted our program
25 quite significantly and took a lot of my time in trying to --

1 and other members' time in trying to figure out ways to reduce
2 the budget and keep our jobs and then losing members in 2010.
3 I had to start training four people while maintaining the
4 responsibility over the entire state with two inspectors and
5 then one of them left. So, two people maintaining the entire
6 state while other people were training. Just a quagmire of
7 all of these events, that probably was involved in it.

8 Q So, basically, the rules were not revised during
9 that time?

10 A Correct.

11 Q Now -- so, there was a proposed rule, basically,
12 you're saying that never went into effect?

13 A Yes.

14 Q Okay. That was -- was it withdrawn or what
15 happened?

16 A It was withdrawn by the commissioner prior to
17 becoming effective.

18 Q Do you know why?

19 A Too many questions from the cabinet with reference
20 to breath volume.

21 Q Okay. Breath volume was an issue at one point?

22 A Breath volume is a huge issue.

23 Q Okay. So, basically, then -- then is it your
24 testimony that this was on the to do list but never got done?

25 A Yes.

1 Q Now, this is -- this error rate that we're talking
2 about, that's when they -- the agency or the local law
3 enforcement, they are the ones who, on a monthly basis, have
4 to make sure the machine is calibrated, this is the standard.
5 They are using the five instead of the three?

6 A Yes.

7 Q So, basically, the only time the three standard is
8 used is prior to department inspection pursuant to the manual?

9 A Yes.

10 Q And the manual was used partly because of the rule
11 halt?

12 A Well, mainly you always -- in the scientific
13 community you always write a procedure for the thing that
14 you're going to do. That's the main reason for it. Then the
15 public -- the public knows what's being done. Whether or not
16 it needs to be a rule is defined by Statute 120 and you have
17 to also follow that, too, which legal advice would be sought
18 as far as that goes.

19 Q And at the time of -- your legal advice was, hold on
20 a second, wait a couple of years?

21 A Because the 5000 remained in the rule, that was the
22 decision -- the best decision to be made at that point in time
23 and then gather data as well which -- because all of the
24 results were being uploaded into a central database so we
25 could gather data very easily.

1 Q For the 5000 -- excuse me, the 8000?

2 A For the 8000, not for the 5000. That was one of the
3 changes, the big change that happened when we went from the
4 5000 to the 8000 was public access to all of the data on the
5 instrument.

6 Q This procedures manual, though, was it accessible to
7 the public or was it published on the Internet or --

8 A I don't believe the procedure manual is on the
9 Internet, but it would be available upon request if someone
10 asked for it.

11 Q Someone would have to know it exists in order to ask
12 for it, though?

13 A That's true.

14 Q Okay. This is the -- is your function basically
15 running the laboratory, creating procedures manual for how
16 people are supposed to do things in the lab?

17 A Yes. So you have a standardization for your
18 processes.

19 Q Okay. Now, did you ever communicate your intent to
20 change this rule to your successor?

21 A No. I didn't know who my successor was.

22 Q Okay. Did you find out eventually?

23 A Of course I found out eventually.

24 Q Did you ever say, hey, look at this rule?

25 A No. But the notes are all there. All of my notes

1 are in the office.

2 Q Was there ever -- who was that person who came after
3 you?

4 A It ended up being Patrick Murphy who I hired as a
5 department inspector.

6 Q Okay. He was the program manager for the alcohol
7 testing program that came directly after you?

8 A Yes.

9 Q To your recollection, was he ever involved in any of
10 these discussions about the three to five standard?

11 A No. He was not employed with the alcohol testing
12 program at that time.

13 Q Okay. If this -- if this rule were changed from
14 five to three, presumably that would impact breath testing
15 across the state, yes? I mean, it would apply to breath
16 testing across the street?

17 A It would apply -- yes. It would apply to the entire
18 state, yes.

19 Q And what would some of the impact be changing from
20 the five to the three?

21 A Well, you would hope that the change would lead to
22 better confidence in the accuracy, reliability of your test
23 results that are then being used for evidence in court.
24 That's ultimately what the responsibility of alcohol testing
25 program is.

1 Q To insure the accuracy and reliability?

2 A Correct, of the results obtained from the
3 devices that they approve.

4 Q And other than accuracy, we're presuming that maybe
5 if a machine is being calibrated at five at the Agency, it was
6 now required to be calibrated to three, presumably there would
7 be some machines in there that are out of -- what we call out
8 of the tolerance?

9 A Of course.

10 Q And, so, the Agency would have to do more
11 recalibration of the machine?

12 A Possibly it would. Actually with the current way
13 things are procedurally happening, it would actually result in
14 the alcohol testing program, the Department, receiving the
15 devices possibly, in this example, more often and doing the
16 calibration. So, it could result in maintaining calibrations
17 more often of an instrument.

18 Q Okay. Would that be a better way to ensure accuracy
19 and reliability?

20 A Yes. From an overall quality insurance perspective,
21 of course.

22 Q And, of course, if a machine is out of the
23 tolerance, meaning it's over the error range, whether it be
24 three or five, if the machine is over it, no longer use it,
25 correct?

1 A Until such time as the message is addressed and
2 corrective action is taken that fixes that problem.

3 Q And what's the impact on the breath results and
4 breath tests, the subjects tests of the machine that was out
5 of tolerance, what is the impact on those samples, the breath
6 test samples?

7 A Those would probably not be able to be used for
8 evidence. I would imagine a judge would find them
9 inadmissible because of an accuracy or reliability issue and,
10 therefore, they would not be used --

11 MS. JOHNSON: Objection, Judge: Calls for a legal
12 conclusion.

13 THE COURT: I'm going to assume she's testifying
14 from -- based on her experience as the head of the
15 program and not necessarily as an attorney. I mean,
16 she's obviously saw a lot of this stuff go on. So, I'll
17 overrule it on that basis.

18 BY MR. STRAILE:

19 Q Your understanding is if the machine is out of
20 tolerance, we take it out of evidentiary use; is that correct?

21 A Yes.

22 Q And then some of the samples cannot come in under
23 implied consent?

24 A That's usually what happens when such an example
25 occurs, yes.

1 Q Okay. So, it would certainly impact some cases in
2 the state of Florida?

3 A Of course.

4 Q Now, in your review of the data of the 8000 -- I
5 think I may have asked this already -- did you find out it was
6 capable of maintaining the three standard?

7 A From what I had reviewed at that time, yes.

8 Q Okay. When you reviewed the data, did you also
9 have, like, statistical analysis of how many machines were out
10 of the tolerance and that kind of thing?

11 A Yes. I would create a monthly report called a
12 statistical summary that included that information.

13 Q I know you can't remember every month what the
14 statistical number was, but can you give a range based on your
15 recollection and compiling and reviewing that data from the
16 State, how many, expressed as a percentage, the machines would
17 be out of the tolerance?

18 A Oh, I don't remember. Most of them were in
19 tolerance from looking -- these were the controlled tests.
20 These weren't from the inspection. These are during subject
21 tests. Most of the controlled test readings were within
22 tolerance, but there were instances every month where there
23 were out of tolerance readings.

24 Q During the subject test --

25 A Yes.

1 Q -- there's another check of the machine?

2 A Yes, called a control test.

3 Q And that control test also has to follow the
4 acceptable range, correct?

5 A Correct.

6 Q As defined by this rule?

7 A Yes.

8 Q So, basically, now it's .005 or 5 percent?

9 A For the controlled test, it would be .005. That was
10 the one that would apply.

11 Q And if the definition of acceptable range were to
12 change, would that change the control test as well?

13 A Yes. You would have a tighter standard on your
14 control test values. Thus, increasing the reliability on your
15 subject test.

16 Q So, we're using this definition on a control test of
17 every subject that provides a sample?

18 A Yes.

19 Q Now, addressing the error range, did you ever advise
20 or talk about with the various state attorneys that because of
21 the error range, they could not charge somebody in they blew
22 like a -- if the result was like a .085 or something like that
23 or 84, because theoretically the error range could be that
24 they're actually a 79 and back out the error range, did you
25 ever say to the state attorney, hey, don't charge anybody

1 for --

2 A No. Applying -- if I'm understanding your question,
3 applying the 005 or 5 percent to actual breath test results?

4 Q Yes, ma'am.

5 A No, you don't -- that's not what the -- that's not
6 what the acceptable range is about. It has nothing to do with
7 subject test results, nothing to do with it.

8 Q But it does with control test in the middle of
9 test of the subject.

10 A Well, there's a control test before and after your
11 subject samples. So control test brackets, the evidence you
12 get from the subject, the two different breath samples.

13 Q So, let's start with presumably the machine is
14 calibrated monthly to the error rate, correct?

15 A It's verified, the calibration is verified, yes.

16 Q Okay. And it is put into evidentiary use?

17 A Yes.

18 Q And then a subject comes in. Does the control test
19 happen first?

20 A Yes.

21 Q And then the subject provides a sample?

22 A Yes.

23 Q And then presumably the machine draws a blank?

24 A Well, there's blanks all in there, but yes.

25 Q And then another sample and then a check, or is it

1 check, sample?

2 A No. It's another subject sample after a wait
3 period. And then -- so, it's controlled test. Just in
4 speaking control test subject -- control test, subject sample
5 one. A little bait of a wait period, about two minutes.
6 Subject sample two, and then a controlled test.

7 Q And using the definition of acceptable range?

8 A Right. For the control test only. The subject
9 samples have to agree with each other within .02. But there's
10 never the application of acceptable range or 005 or 5 percent
11 applied to subject breath samples.

12 MR. STRAILE: If I can have one moment, Your Honor?

13 THE COURT: Sure.

14 BY MR. STRAILE:

15 Q The procedure manual that we've been discussing, do
16 the agencies, the local law enforcement, do they follow it at
17 all?

18 A No.

19 Q Anyone out there -- okay. If the rule were to
20 change, could they use the new standard?

21 A The agency --

22 MS. JOHNSON: Objection: Speculation.

23 THE COURT: Overruled.

24 A The agencies use the new standard? If the rule were
25 changed, the agency would have to follow the new standard.

1 Q Okay. Would it -- and what would be, for example,
2 the difference plugging in the known value, would there be any
3 change in the procedure other than what the result of the
4 analysis is?

5 A Well, it would be -- the only change would be what
6 would be acceptable for a satisfactory inspection when
7 checking the accuracy of the instrument. You will have
8 tightened the standard. Therefore, the numbers that they were
9 looking for would change. It would be a smaller range,
10 slightly smaller range. And you're increasing the accuracy
11 and reliability of your process, overall process for breath
12 testing in Florida.

13 Q The manual, itself, that's your internal lab
14 procedures, that's not a rule, is it?

15 A Correct.

16 Q Okay. Has it ever been referenced in the rules to
17 your knowledge?

18 A No.

19 MR. STRAILE: I don't have any further questions,
20 Your Honor. I tender the witness.

21 THE COURT: Do you need a break, Ms. Barfield,
22 before Cross?

23 THE WITNESS: I'm fine.

24 THE COURT: Okay. Cross.

25 CROSS-EXAMINATION

1 BY MS. JOHNSON:

2 Q Ms. Barfield, what were the circumstances of your
3 departure from FDLE?

4 A I was called in on March 29, 2013 and was allow
5 today resign. I was told that there was -- the commissioner
6 had decided there would be a change in leadership, that they
7 wanted to go in a new direction, and that they no longer --
8 the commissioner no longer wanted me to be the manager. In
9 accordance with a select except employee, I was employed at
10 the will of an agency head, and I didn't really have to even
11 be given a reason.

12 Q So, you were asked to resign in lieu of termination,
13 correct?

14 A I resigned. I submitted a letter of resignation
15 based on the conversation we had during that meeting.

16 Q Were you told that if you didn't resign that you
17 were going to be terminated?

18 A No, not really. I was --

19 Q Define not really.

20 A I was told I was going to be terminated and then
21 they said, oh, no, but we're going to let you resign. So, it
22 was reverse of what you just said.

23 Q Why were you told you were going to be terminated?

24 A Because the commissioner wanted to go in a new
25 direction and they wanted new leadership.

1 Q Did you later learn that there were additional
2 reasons?

3 MR. STRAILE: Objection to relevance, Your Honor.

4 THE COURT: Overruled.

5 BY MS. JOHNSON:

6 Q Did you later learn that there were additional the
7 reasons why you were going to be terminated?

8 A No. I was never told there were additional reason.

9 Q Did you -- that wasn't the question I asked you.
10 Did you later learn that there were additional reasons?

11 A No. I never -- I never learned nor was I told there
12 were reasons other than what they told me during that meeting.

13 Q Did you later learn that you were under
14 investigation at the time of your termination for misuse of
15 state funds?

16 A I wasn't terminated. I resigned, and I did not
17 misuse state funds, and that's not what I was under
18 investigation for. I knew there was an investigation.
19 However, after I resigned, I was still employed. I was still
20 testifying for FDLE. I was then given the report, the final
21 report that contained misinformation regarding an allegation
22 of misuse of state resource; meaning, my vehicle. But I was
23 not given the report before the meeting in March, and I even
24 specifically asked during the meeting in March if it was
25 related to that and I was told no. So, therefore, that would

1 not be considered part of the reason why I resigned from FDLE.

2 Q Did you file a -- you did indeed file a rebuttal
3 investigation -- a rebuttal report to the internal
4 affairs investigation; correct?

5 A I don't know if it was actually filed. Because it's
6 never provided upon records request, so. I prepared one. I
7 don't know if it was actually filed in my personnel file.

8 Q You prepared a rebuttal report and submitted it to
9 FDLE, correct?

10 A Yes. I did do that. I rebutted ever
11 mischaracterization that was in the report because it was, in
12 fact, incorrect. And they -- I based it on the evidence that
13 they had in front of them as well.

14 MS. JOHNSON: And, Judge, this is the document that
15 I'm referring to are stipulated to. They are State --
16 Department 32 and 33.

17 BY MS. JOHNSON:

18 Q So, it's safe to say you didn't have any plans to
19 leave FDLE in March of 2013?

20 A Not in March of 2013. I did had and had expressed
21 the fact that I would probably leave after I finished the rule
22 promulgation that I was working on. I had been the manager
23 for 13 years. I was tired.

24 Q But you had no immediate plans as of March 29th --

25 A No.

1 Q -- of 2013 to leave FDLE?

2 A No, of course not.

3 Q Have you ever been found by the court to not be a
4 credible witness?

5 A I don't know. I don't know if that's actually the
6 terminology used. I know there's a couple of rulings out
7 there that had misapplied what I said, but I don't know if
8 they actually used that language.

9 Q Do you recall testifying in Duval County in the
10 State v. Ball?

11 MR. STRAILE: Your Honor, I'd object to this line of
12 questioning and the -- what's relevant is her credibility
13 in what she is doing here today and whether she's being
14 truthful in reviewing these documents, most of which were
15 provided pursuant to a public records request. And her
16 credibility here is for you to determine based on the
17 evidence that's presented here. Whatever was presented
18 to a different fact finder, we don't -- could have been
19 completely different, different circumstances. What was
20 known or done, it's irrelevant to what she's doing here
21 today. She answered the question that she was -- that
22 she did learn of an investigation. She did rebut the
23 investigation, that it was there, all of those things
24 that are -- she's answered these questions already and
25 she's answered them -- she hasn't denied the existence of

1 the investigation. So, I think that this line of
2 questioning is gone beyond the scope of what is the
3 relevancy here today.

4 MS. JOHNSON: Judge, it goes to show bias. And
5 these court orders were already stipulated to by the
6 petitioner.

7 MR. STRAILE: Well --

8 THE COURT: Bias. I'll overrule. I'll let you
9 inquire.

10 BY MS. JOHNSON:

11 Q Do you recall testifying in Duval County in December
12 of 2015 in the State v. Ball?

13 A I don't specifically remember the case. I do
14 remember testifying in Jacksonville sometime in 2015.

15 Q Do you recall testifying in a separate case in
16 Jacksonville 2016 in the State v. Chupp?

17 A No. That was for both the same day. It was a mass
18 hearing where I testified in Jacksonville.

19 Q Were you aware that orders we issued in both of
20 those cases?

21 A I later found out they were. They weren't provided
22 to me. From the hearing, they weren't provided to me.

23 Q Were you aware that the court in both cases found
24 your testimony to be utterly devoid of any credibility?

25 A If that's the language in the order, I can't

1 discredit it. But I don't feel that that's what happened
2 during the hearing.

3 Q Have you ever been tendered as an expert witness and
4 failed to be found as an expert witness?

5 A No.

6 Q Are you familiar with testifying in State v. Goodman
7 in Palm Beach County in, I believe it was, September of 2014?

8 A Yes.

9 Q And were you aware in that case that you were not
10 qualified as an expert witness?

11 A That is not -- that an incorrect statement. Under
12 certain portions of what were being discussed, because there
13 was no research to support my statements, that particular
14 portion of the testimony was not going to be allowed to be
15 used for evidence during the trial. That's what was found.
16 There were other things that I discussed in that case where I
17 was found to be completely credible and that I was allowed to
18 provide opinions for.

19 Q So, pursuant to do a Dalbert objection by the State
20 in the State v. Goodman, you were allowed to testify as an
21 expert witness in the trial?

22 A I didn't testify as an expert witness in the trial.
23 I wasn't even asked to testify in the trial.

24 Q You were responsible for creating and revising
25 Chapter 11D-8 for a period of 12 years, correct?

1 A It was more like almost 13 years.

2 Q Okay. So, you were responsible for the creation,
3 revision of the rule that was promulgated in 2002, correct?

4 A Yes.

5 Q And you were responsible for the creation and
6 revision of the rule that was revised in 2004, correct?

7 A Yes.

8 Q And in 2006, correct?

9 A Yes.

10 Q And you submitted and withdrew -- FDLE withdrew
11 rules in 2008, correct?

12 A Yes.

13 Q Then you worked on a revision in 2013, correct?

14 A I was working on a revision from 2008 through 2013.

15 Q So, that was at least five times that you worked on
16 revising the rule, correct? 2002, 2004 --

17 A If you're talking formal revision, I guess the
18 last -- I guess the last one I did really start that in
19 February. That would be more like formal revision. But yes,
20 I guess five times, yeah. Six times really because I helped
21 with the 2001 revision of the rule, too.

22 Q Okay. So, six times you were involved in the rule
23 revision for various components of 11D-8, correct?

24 A Yes.

25 Q And not once did you attempt to make any revisions

1 to 8.002, correct? 8.002(1), correct?

2 A I'm sure I revised 8.002(1) within that time frame
3 because I'm the one that, I believe, that revised the
4 definition for the target concentration. I can't remember
5 specifically, though.

6 Q Okay. If I showed you the actual rules, would that
7 refresh your recollection?

8 A Sure.

9 MR. STRAILE: Which one are you referring to.

10 MS. JOHNSON: State's 26, 27, 28, 29, and 30 would
11 be 2001, 2002, 2004, 2006, and 2008.

12 MR. STRAILE: I'm sorry. Which one are you showing
13 her?

14 MS. JOHNSON: 2001 through 2008.

15 MR. STRAILE: 2001 through 2008.

16 MS. JOHNSON: I was going to start with 2001.

17 MR. STRAILE: So, 26, 27, 28, 29, and 30.

18 MS. JOHNSON: Correct. Which, Judge, again, these
19 have already been stipulated to.

20 THE COURT: Right.

21 BY MS. JOHNSON:

22 Q I'm showing you what's been admitted under
23 stipulation as Chapter 11D-8 for 2001. Can you tell me what
24 you changed in 8.002(1)?

25 A You haven't provided the draft underline --

1 Q No. I'm talking about the actual rule.

2 A I can't tell you what's been changed because this
3 rule doesn't have the underline or strike through copy.

4 Q Okay.

5 A This is the fully promulgated. It doesn't say
6 what's been changed.

7 Q Comparison to -- this would be Department stipulated
8 Exhibit No. 25, which is the 1999 version of the rules. Can
9 you tell me what you changed from 1999 to 2001?

10 A 11D-8.002(1) was changed.

11 Q What are the changes made to 8.002(1) from 1999 to
12 what you revised in 2001?

13 A Well, in 1999, paren one, acceptable range shall
14 mean the observed value must fall within the following ranges
15 at each alcohol target concentration. .05 grams per 210 liter
16 range is .045 to .055. .08 grams per 210 liter range is .075
17 to .085 grams per 210 liters .20 grams per 210 liter range is
18 .190 to .210.

19 In 2001, it was changed to say acceptable range
20 means the result of inspections which fall within the
21 following ranges at each alcohol vapor concentration. That
22 part right there was changed. The numbers for the .50, .08,
23 and the .20 stay the same. I added, or the alcohol reference
24 solution gas chromatograph results which fall within the
25 following ranges .0605 grams per 100 milliliter range is .0586

1 to .0623. .0968 grams per 100 milliliter range is .0938 to
2 .990 -- .0997. .2420 grams per 100 milliliter range is .2347
3 to .2492. So, I did make changes to that particular
4 definition.

5 Q Okay. If I can have the 1999 back. The next
6 revision would have been in 2002, correct?

7 A Yes.

8 Q I'm showing you the 2002 version of the rules. Show
9 me what changes were made to the acceptable range for 2002?

10 A Definition one for acceptable range in 2001 says,
11 means the result of inspections which fall within the
12 following ranges at each alcohol vapor concentration. I
13 listed the numbers before.

14 Q So --

15 A In 2002, it says --

16 Q I'm sorry. So, the numbers between 2002, 2001 and
17 2002 did not change, correct?

18 A That's correct. But the definition changed.
19 Because now it says acceptable range means the result of
20 agency or department inspections and dry gas standard analyses
21 which fall within the following ranges at each alcohol vapor
22 concentration. So, I, again, did make a change to that
23 definition.

24 Q The next rule revision would have been 2004,
25 correct?

1 A Yes.

2 Q What changes did you make to the acceptable range in
3 2004?

4 A The definition changed from, again, I made another
5 change, acceptable range in 2002 starts out means the results
6 of agency or department inspections in dry gas standard
7 analyses which falls within the following ranges at each
8 alcohol vapor concentration and lists the ranges that we
9 discussed.

10 Q In 2004 the numbers haven't change?

11 A No, but the definition changed, which is what your
12 question was.

13 Q Correct.

14 A The definition now reads, in 2004 acceptable range,
15 the result of alcohol reference solution and dry gas standard
16 analyses which fall within the following ranges at each
17 alcohol vapor concentration and it goes through the numbers
18 that I have previously read.

19 Q If I can have the 2002 back. So, the next rule
20 revision was 2006, correct?

21 A Yes.

22 Q Can you tell me what challenges you made to the
23 definition of acceptable range in 2006?

24 A There isn't a change in 2006 to the wording at all.

25 Q Can I have 2004 back? The proposed rules in 2008,

1 correct?

2 A There were proposed rules in 2008. There are no
3 rules for 2008, though.

4 Q Can you tell me what changes you made to the
5 acceptable range for 2008?

6 A There's no changes in the preposed rules that were
7 withdrawn.

8 Q Okay. I can take both of those back. You discussed
9 considering a change in 2013, correct?

10 A Yes. I started on that, yes. I have lots of rule
11 draft notices, but the beginning of the draft --

12 Q The -- I'm sorry.

13 A The beginning of the drafting process in February of
14 2013 was started with one meeting.

15 Q And that meeting took place on January 30th of 2013,
16 correct?

17 A I thought it was in February.

18 Q That was in St. Augustine?

19 A Yes. So, it was January 30th instead of February.

20 Q The Golf World Village Resort or something to that
21 affect, correct?

22 A I believe so, yes.

23 Q Was the definition of 8.002(1) on the agenda for
24 things that you were going to change in that rule?

25 A I don't remember.

1 Q If I show you the agenda, would that refresh your
2 recollection?

3 MR. STRAILE: I'm going to object. Is that listed
4 on the documents?

5 MS. JOHNSON: It is not. But she just said she
6 didn't recall and I'm asking her if it would refresh her
7 recollection to see a copy of the agenda. I'm not moving
8 it into evidence.

9 MR. STRAILE: Can I see it before you show it to
10 her?

11 MS. JOHNSON: Sure.

12 BY MS. JOHNSON:

13 Q Does that refresh your recollection?

14 A Sure.

15 Q Was 8.002(1) on the agenda for the things that you
16 wanted to discuss changing in 2013?

17 A That wasn't on -- well, it wasn't specifically
18 listed on that agenda nor did I make it through the entire
19 agenda at that meeting.

20 Q Did you provide copies of that meeting of the rules
21 that you were interested in changing?

22 A I don't remember if I did or not.

23 Q If I showed you the document, would that refresh
24 your recollection?

25 A It's possible, but I don't know if those were

1 necessarily even discussed during that time.

2 Q Was 8.002(1) one of the rules that you provided that
3 you wanted the members to consider revising?

4 A Not -- it doesn't appear at that time from looking
5 at the documents, but it wasn't on the agenda. So, I wouldn't
6 expect it to be.

7 Q Do you recall whether or not that was -- that
8 changing 8.002(1) was ever discussed at the meeting?

9 A No. We didn't discuss half the stuff you just
10 showed me at the meeting. We didn't even get to it. I don't
11 particularly remember discussing it at that meeting. That
12 doesn't mean it wouldn't have been ultimately discussed. It
13 wasn't the only meeting we were going to have.

14 Q When was -- when was the -- your proposed change to
15 8.002(1) ever discussed prior to 2002?

16 A Prior to 2002, with legal advisor and the department
17 inspectors as I previously testified to.

18 Q And where was that documented?

19 A The legal advisor documented it.

20 Q You said it's -- you always write procedures for
21 things that you're going to do scientifically, correct?

22 A I said it's a good -- it's good laboratory practice
23 to write the procedures that you're going to follow for
24 standardization purposes. I believe that's what I said.

25 Q But what you said on Direct was you always write

1 procedures for things that you were going to do
2 scientifically?

3 A I don't believe I ever was asked a question where we
4 were talking about what I do. We were talking about what was
5 done. Procedures were written. I said it was a good
6 laboratory practice. And we went through the procedure that
7 was in the manual. I don't believe we ever talked about me
8 and what I -- what I do.

9 Q Do you take notes on revisions that you prepared to
10 change in the rule?

11 A I had a whole file cabinet when I left FDLE of my
12 proposed revisions and references that I wanted to incorporate
13 concepts from. It was all there. I don't have it now. They
14 have it there.

15 Q So, where in the, say, 11 years between 2001 when
16 the instrument was approved and 2013 did you document that you
17 intended to change 8.002(1)?

18 A I don't know. It's in the notes that you have.

19 Q So, you don't have any documentation that you
20 attempted to change 8.002(1) in five versions of rule that you
21 revised?

22 A The notes that I'm talking about were after those
23 versions that you were just talking about. These were notes
24 that I took and concepts that were evolving from 2008 to 2013
25 when I left and were still in the process when I left. I

1 don't have all of my notes from that. I have some notes,
2 copies of notes, but the notes were all left.

3 Q So, you're testifying that between 2008 and 2013
4 that you intended to change 8.002(1)?

5 A I intended to change the entire rule. I intended to
6 change breath testing and the entire concept in the state of
7 Florida.

8 Q With regard to just 8.002(1).

9 A Excuse me?

10 Q With just -- in regard to 8.002(1) --

11 A As I previously testified, in order to implement the
12 things that I wanted to do going automated with the inspection
13 process and with having a larger range of check during these
14 inspections, I would have had to have revised that rule,
15 because I would have included -- if anything, I would have
16 included a standard at a .3 or a .4 that would have had to be
17 added to the rule.

18 Q Where did you document that you intend to change
19 8.002(1)?

20 A There's notes on a dry gas standard manifold that I
21 had been working with a manufacturer to create and implement
22 that would be used to house the standards from a concentration
23 of a zero to either a .3 or a .4. There's notes on that.
24 There's notes from grant funding that that was what I was
25 working on. In order to do that, you have to revise that

1 rule. So, there's all kinds of documents that would go to
2 that, to needing a change to that rule section.

3 Q Are you in possession of any documents?

4 A FDLE is in possession of my documents. I did not
5 bring them with me.

6 Q Between 2008 and 2013, did you discuss with ATP
7 employees, department inspectors, support staff, whoever that
8 you intended to change that rule?

9 A I was talking with department inspectors about
10 changing the concentration which would require changing of
11 that rule.

12 Q And was Dr. Murphy one of those people that you
13 discussed that with?

14 A I would assume he was because he was there when I
15 was developing the dry gas standard manifold and the processes
16 and testing the standards to see if they were stable and stuff
17 like that. If he wasn't involved, then I don't know where he
18 was. There's notes and testing results, there's data. If you
19 guys don't have that stuff, then you've gotten rid of it
20 because it was there when I left.

21 Q When you're talking about the standard operating
22 procedures and the more narrow .003, 3 percent, that's in
23 regard to quality control check procedures only, correct?

24 A Correct. That's what -- I read the title of the
25 procedure, and it did say quality control check procedures,

1 instrument quality control check procedure is what it said.

2 Q And quality control checks are used to determine
3 whether an instrument needs maintenance, correct, or needs to
4 be calibrated, correct?

5 A One of the things that it would do, yes. Not the
6 only thing it would do. But, yes, that would be one of the
7 things it would do.

8 Q What is the purpose of a quality control check test?

9 A Well, it's for overall good quality assurance for a
10 global process to do a check of the instrument. It can be
11 preventative maintenance. It can be used to base whether an
12 instrument needs a calibration. It can be used to base
13 whether an instrument might need a repair. It has lots of
14 functions not just singular.

15 Q But that 3 percent, plus or minus .003, that's not
16 used for department inspection or agency inspection, correct?

17 A That's correct. It's done before a department
18 inspection.

19 Q Now, you keep talking about the -- or you were
20 talking on Direct about the instrument specifications and
21 outlines from CMI with their recommendation of accuracy of
22 3 percent or .003, correct?

23 A Incorrect. It's not a recommendation. It's their
24 training material. It's their advertised and published
25 accuracy standards. It's not a recommendation. Nowhere on it

1 does it say recommendation.

2 Q Okay. So, that's their accuracy specification for
3 the instrument only, correct?

4 A For the analytical capabilities of that instrument,
5 of the Intoxilyzer 8000, yes.

6 Q Okay. Isn't it true that the acceptable range
7 includes not only the instrument specifications but also the
8 accuracy of the items used in the test, say, simulators, plus
9 the environment, plus the uncertainty of the standards,
10 correct?

11 A That's correct. And that's incorporated by CMI into
12 that value as well. They have to do it -- they have to do it
13 the same way. FDLE doesn't do it differently. You calculate
14 your accuracy standard taking into account the measurement and
15 certainly of all devices that you use. So, CMI had to do that
16 as well. It's already in there.

17 Q But CMI makes state specifications for just their
18 instrument, not external standard, external equipment,
19 environment. That's in a controlled environment, correct?

20 A But in order to establish their accuracy standard,
21 they have to make measurements using external devices taking
22 into account the environment the instrument is used in. That
23 all has to be factored into their specification for accuracy
24 as well. So, that's already taken into account in that
25 standard value, those type items are.

1 Q But their environment that they're using at CMI is
2 in a controlled lab, correct?

3 A I'm sure that that could be challenged. I would say
4 it's in an indoor facility.

5 Q But it's a controlled environment, is it not?

6 A It's controlled just as an indoor jail, a room
7 within a jail, or a room within a lab, or a room within a
8 police agency.

9 Q So, CMI doesn't have a lab where they do their
10 testing?

11 A They have a room where they do their testing, yes.
12 They have a room where they do their calibrations. Those
13 rooms are two separate rooms. But it's no different than
14 testing it at an agency.

15 Q So, you're saying --

16 A It's an indoor environment, just like --

17 Q Jail, wherever the Intoxilyzer is housed at a jail,
18 it's going to be the same environmental conditions as the lab
19 at CMI?

20 A It should be. It shouldn't be so different.
21 Otherwise, that needs to be taken into account when using the
22 device. You don't change the accuracy standard of an
23 instrument because it's going to be used in a messy room. You
24 need to account for that, control that, limit it, and then use
25 the device.

1 Q We're talking about rule making. It's starting in
2 2011, the governor issued a moratorium on rule change?

3 A Yes.

4 Q You could still do emergency rule making, correct?

5 A That is incorrect.

6 Q You could not do emergency rule making?

7 A The governor allowed no rule making. I was told by
8 my agency supervisors that there would be no rule making, and
9 I didn't begin the actual rule making process until I was
10 authorized by my agency.

11 Q Okay. But your statement that you couldn't make
12 rules was coming, not from the governor's moratorium, was
13 coming from what you were told by FDLE, correct?

14 A I was told by FDLE because of the governor's
15 moratorium on rule making, no rule making was going to happen
16 until further notice. That's what I was told.

17 Q You also stated on Direct that when discussing
18 changing 8.002(1), after discussing it with legal counsel, you
19 were told that you had to gather data. When did you gather
20 the data?

21 A The data was gathered from the first approval
22 process through today data is being gathered. When I
23 implemented the instrument, the Intoxilyzer 8000, one of the
24 new changes was an electronic communication from a remote
25 facility, meaning Tallahassee. I could communicate with any

1 instrument in the state. I could also upload data or
2 transfer, say, software down to an instrument. So, that
3 communication was established for the first time in Florida.
4 Therefore, all of the results from an instrument that's being
5 used for evidence and being regulated by the Alcohol Testing
6 Program, all that data comes to Tallahassee and is stored in a
7 database and is accessible at any point in time by the
8 program. It happens even now.

9 Q So, you had gathered data starting in 2001 to
10 support your changing 8.002(1), correct?

11 A That's not the reason the data is being gathered.
12 That was the reason the legal advisor said that we would --
13 because of the 5000 still being in the rule and it having a
14 different -- a larger, the five specification, that we would
15 leave everything as a five because that instrument was still
16 staying in the rule. We would gather data to prove to the
17 public that it meets the standard and then -- not waiting
18 until 2015 to change the rule, obviously. It was supposed to
19 happen before then -- change the rule when we removed the
20 5000, had the data to support the statement for shortening or
21 tightening the accuracy standard. That was what was discussed
22 and that was what was decided.

23 Q So, in 2006 it was decided you would gather the data
24 to support changing 8.002(1).

25 A Before 2002, before the instrument, the Intoxilyzer

1 8000 make and model was first approved by incorporation into
2 11D-8 on November 5, 2002, all of those discussions and
3 decisions was done before that rule became effective. Because
4 the concern was the two different accuracy standards and what
5 to do about it and in keeping the Intoxilyzer 5000 in the
6 rule. Had we removed the 5000 from the rule, it would have
7 been quite easy. It would have just changed the new standard.

8 Q Okay. So, if you didn't change it in 2006 because
9 you had to keep the 2005, then when you proposed the rules in
10 2008 you had all the data to support changing 8.002(1), you
11 didn't attempt to change 8.002(1). Why not?

12 A An 2008 version didn't become effective. And I
13 would have had to, even if the governor -- even if the
14 commission hadn't withdrawn it, I would have had to withdraw
15 it -- withdraw it. Because --

16 Q That wasn't the question I asked. The question I
17 asked was, you were prepared to change the rule. You filed
18 the notice of proposed rule. You had the data to back up
19 changing 8.002(1). That wasn't in the notice of proposed
20 rule, was it.

21 A That wasn't -- I don't believe that was the intent
22 of changing that rule, but I don't believe it was noticed in
23 that rule, no.

24 Q So, you could have changed it but you opted not to?

25 A I don't know if i could have at that point in time.

1 Q But you just said you had the data to back up
2 changing it.

3 A I had the data, but that wasn't the only thing that
4 was being done during that rule revision. That wasn't the
5 purpose of that rule revision at that time.

6 Q Are you familiar with the recommendations of the
7 federal register and the conforming products list as to what
8 they specify as an acceptable range?

9 A Yeah.

10 Q Isn't it true that their acceptable range is .005 or
11 5 percent, whichever is greater?

12 A I would have to refresh my recollection to get the
13 exact numbers, but yeah. I know they have an acceptable
14 range.

15 MS. JOHNSON: Judge, at this time I'd like to show
16 the witness what's been admitted by stipulation as
17 Respondent's 7, 8, 9, 10, and 11.

18 MR. STRAILE: Seven, 8, 9, 10, and 11 the --

19 MS. JOHNSON: Correct, the federal register.

20 MR. STRAILE: Federal registers. Okay.

21 BY MS. JOHNSON:

22 Q This is the federal register from 1997 with the
23 model specifications for calibrating units for breath alcohol
24 testers.

25 A This is for simulators. It doesn't apply.

1 Q Okay. The 2007, same thing, model specifications,
2 calibrating units for breath alcohol testers. That doesn't
3 reference alcohol reference solutions?

4 MR. STRAILE: Which exhibit are you on now?

5 A This isn't going to apply because these aren't the
6 procedures. Let's see.

7 THE COURT: I think we're on eight now.

8 MS. JOHNSON: Seven and eight are both model
9 specifications.

10 A Actually the 1997 one says the specifications are
11 plus or minus .002 of the standard error.

12 Q For the simulator alone, correct? That's in
13 addition to the instrument accuracy and addition to the
14 uncertainty measurement for the actual solution, correct?

15 A No. That's not what it's talking about at all.

16 Q Let me ask you about -- in order to approve an
17 instrument in the state of Florida it has to be on the
18 conforming products list, correct?

19 A Yes.

20 Q So, the Intoxilyzer 8000 was on the conforming
21 products list, correct?

22 A Yes.

23 Q And the conforming products list, in order to be on
24 the conforming products list, it has to meet -- the instrument
25 has to meet certain specifications, correct?

1 A Yes.

2 Q And those specifications are for an acceptable range
3 of .005 or 5 percent, correct?

4 A I'm not finding that.

5 Q Okay.

6 A I'm not finding that requirement. I just read you
7 what --

8 Q Right. I'm just saying, if an instrument is
9 included on the conforming products list that means it has an
10 acceptable range of .005 or 5 percent, correct?

11 A No. That's not what this says.

12 Q I'm not asking you if that's what that says. You
13 can put that away. I'm asking you if an instrument is on the
14 conforming products list it must meet an acceptable range of
15 .005 or 5 percent to be included on the conforming products
16 list, correct?

17 A It has to meet the federal government specification,
18 whatever is defined in their procedures. That's not what I'm
19 reading --

20 Q The federal government specification is .005 or 5
21 percent, correct?

22 A I haven't read that. It's not -- that specification
23 is not listed in these documents.

24 Q I didn't ask if they were listed in the documents.

25 A But these are supposedly the procedures that you

1 just put in front of me.

2 Q Set those aside. I'm asking you in order for an
3 instrument to be on the conforming products list, it has to
4 meet federal guidelines, correct?

5 A Yes.

6 Q And the federal guidelines are .005 or 5 percent is
7 an acceptable range, correct?

8 A I don't remember as I previously said. That's
9 what -- those were supposed to refresh my recollection on what
10 they say.

11 Q That was a completely different question. If I show
12 you the National Highway Traffic Safety Administration testing
13 of the Intoxilyzer 8000, would that refresh your recollection
14 on what the acceptable range is under federal guidelines?

15 A No. Because that's not the procedure. Those are
16 results from analyses.

17 Q The NHTSA standards are results of analyses?

18 A There is a set of procedures that the instrument
19 will be subject -- a series of tests the instrument will be
20 subjected to when the federal government is testing it. There
21 are written procedures, they should say what you are saying.
22 That's what I need to look at.

23 Q Would that be the NHTSA testing of the Intoxilyzer
24 8000?

25 A I don't think so, but --

1 Q Well, what test -- what testing --

2 A It's in the federal register. It's a set of
3 procedures. They have been promulgated in the federal
4 register. The federal register is essentially the Florida
5 Administrative Code for the federal people. And it's a set of
6 procedures, they were set up in 1993. And then
7 instruments were subjected to and there was a new standard
8 later, but not -- I don't think it's -- to my knowledge, it
9 wasn't been revised. The actual testing progress hasn't been
10 revised to account for these new technological instruments.
11 So, I just -- I can't the question until I actually look at
12 the procedure. I don't know what the answer to that because I
13 can't recall.

14 Q But you don't know where the procedure is?

15 A It's a published -- in the federal register set of
16 procedures.

17 Q Okay. Well, the federal register is tens of
18 thousands of pages. You don't know where in the federal
19 register these procedures are, do you?

20 A I know I can get them off line.

21 Q Does the National Highway Traffic Safety
22 Administration do testing for instruments to be included on
23 the conforming products list?

24 A Yes.

25 Q Okay. Does the NHTSA guidelines dictate an

1 acceptable range of .005 or 5 percent?

2 A Without reviewing the actual testing procedure
3 that's outlined by the federal government, I cannot recall
4 what their standard is. I just read one that said plus or
5 minus .002 of standard error, which would not conform with
6 .005 or 5 percent.

7 Q If I show you a document from NHTSA stating the
8 standard error is plus or minus .005 or 5 percent, whichever
9 is greater, would that refresh your recollection?

10 A If it's the procedure that they have to follow that
11 outlined all of their requirements, it will.

12 Q This is Respondent's 17. Is that the NHTSA testing
13 for the Intoxilyzer 8000?

14 A This particular document cannot be used to ascertain
15 because I don't know if they were doing the subject breath
16 testing or the known standard testing with the requirement
17 that is highlighted. This isn't the evaluation of the
18 Intoxilyzer 8000 for when it was put on the conforming
19 products list. This is an evaluation of 2011. There was a
20 evaluation in 2001 that would actually be the actual
21 specification during that testing that we would need to
22 review.

23 Q So, NHTSA testing from 2011 that says that the
24 standard error rate is plus or minus .005 or 5 percent, you're
25 saying you don't know whether or not in 2001 that it was the

1 same?

2 A I don't know if that's the testing results. There
3 is a requirement in the specification for testing of actual
4 human breath using a specifically designed apparatus. It has
5 a larger variability than the testing results allowed when you
6 use reference sample devices with the alcohol reference
7 solution, similar to what we use in Florida. I cannot
8 ascertain from the document if that particular standard that
9 was highlighted on that page is discussing human testing or
10 the results from simulated testing. So, just because it says
11 it doesn't mean that it's the standard that is applicable to
12 what we're talking about here today.

13 Q Are you familiar with the International Organization
14 of Legal Metrology, OIML?

15 A Yes.

16 Q Are you familiar with their recommendations?

17 A I'm familiar with them. I don't have them
18 memorized.

19 Q Are you aware that they recommend .005 or 5 percent?

20 A I don't know what their recommendation is
21 specifically, no.

22 Q Do you keep up-to-date with publications regarding
23 analytical toxicology?

24 A I try to, yes.

25 Q Are you aware of --

1 MS. JOHNSON: One second, Judge.

2 Q -- articles in the Journal of Analytical Toxicology
3 regarding measurement uncertainty for the Intoxilyzer 8000
4 instrument?

5 A Not specifically for the Intoxilyzer 8000, but for
6 measurement uncertainty for breath testing.

7 Q Are you aware that multiple publi -- multiple
8 articles in the Journal of Analytical Toxicology recommend
9 .005 or 5 percent?

10 A You would have to show me what you're talking about.
11 They could be referring to that on something other than what
12 we're speaking about. An application of measurement
13 uncertainly is completely different than application of your
14 acceptable range for a specific standard. We could be talking
15 about apples and oranges.

16 Q The measurement uncertainly for vaporless ethanol
17 concentration analyzed by the Intoxilyzer 8000 instrument and
18 recommendation of .005 or 5 percent, that's different than
19 what we're talking about?

20 A It could potentially be, yes. I'm not just going to
21 blanket answer that to accept what you're reading --

22 Q I'm asking you --

23 A -- without --

24 Q -- if you're familiar with these. You say you keep
25 up with current scientific publications.

1 A I'm not specifically familiar with that particular
2 one, no.

3 MS. JOHNSON: And, Judge, these I'm referring to are
4 admitted by stipulation of Respondent's 35 and 43.

5 MR. STRAILE: Excuse me, 35 and 43?

6 MS. JOHNSON: Correct.

7 MR. STRAILE: Isn't the OIML, is that 16?

8 MS. JOHNSON: Sixteen, correct. And the NHTSA is
9 17.

10 BY MS. JOHNSON:

11 Q You just said that the acceptable range is an
12 uncertainty. If it's not an uncertainty measurement, then
13 what is it?

14 A Measurement of uncertainty can involve your
15 acceptable range, but measurement uncertainty is not, as what
16 we're speaking about in a particular rule, measurement
17 uncertainty. Measurement uncertainty is a combination of all
18 of the uncertainty in your entire testing process. It will
19 include the uncertainty of, say, the temperature of your
20 simulator which is the device you have to use to introduce a
21 vapor into the instrument. So, it's a device that you use
22 during the testing process. The measurement uncertainty of
23 the solutions themselves, you would incorporate that value.
24 You would incorporate the results and the standard deviation
25 of the analyses of known concentration.

1 Let's say you analyze a particular solution ten
2 times and you get a standard deviation. You're going to
3 incorporate that standard deviation into the formula. So.
4 You incorporate a bunch of different standard deviations from
5 different aspects of the entire testing process. Through it
6 into a huge, giant, very complicated formula that involves
7 squaring standard deviations and square roots and dividing,
8 just all kinds of things, but then you come up with the
9 measurement uncertainty of your testing process, and that is
10 measurement uncertainty. Acceptable range is just a piece of
11 what is measurement uncertainty. And it simply defines what
12 you're going to accept as being okay in your testing process
13 for that specific test.

14 Q Okay. You just said acceptable range is a piece of
15 measurement uncertainty?

16 A Sure.

17 Q But you're saying the instrument, the manufacture
18 specifications regarding the instruments should be with the
19 acceptable ranges. But the acceptable range definition
20 doesn't say anything about instrument accuracy. It talks
21 about the dry gas solutions and alcohol reference -- I mean,
22 dry gas standards and alcohol reference solutions.

23 A It's the accuracy standard for those particular
24 tests. You were going to say, I'm putting in a .08, you tell
25 me what you -- you tell me what you're getting when you

1 analyze it. The instrument producing an 07. Well, it's
2 supposed to be getting an 08, but it's giving me an 07.
3 That's not good. But if it's within my prescribed,
4 pre-prescribed range of acceptable, then I can say, okay,
5 you're good enough. And that's what acceptable range has to
6 deal with it. It's an accuracy standard, a piece of which you
7 take as far as measurement uncertainty which what was the
8 other part of your question. You're taking a standard
9 deviation of your known standard measurement. Let's say you
10 make ten measurements and then you calculate the standard
11 deviation, that piece of your acceptable range process then
12 gets plugged into your measurement uncertainty calculation.
13 So, it's a function of that in that respect. That's what I
14 mean by that.

15 Q But the acceptable range under 8.002(1) is for
16 alcohol reference solution and dry gas standards, you said for
17 those tests only?

18 A Uh-huh.

19 Q So, why should we adopt the accuracy specification
20 of the instrument alone for the acceptable range for dry gas
21 solutions and alcohol reference standards?

22 A Because the person making the device has established
23 the capability of their device. And when measuring known
24 concentrations, you should be knowing that that the instrument
25 meets that specification instead of making up your own.

1 Q But they are giving specifications on what the
2 instrument is capable of?

3 A Correct.

4 Q They are not including what the uncertainty is with
5 the actual dry gas standard and the alcohol reference
6 solution, correct?

7 A I previously testified about that. They had to
8 include those as a function of their accuracy standard as well
9 when establishing it. They have to take into account their
10 testing process when defining their accuracy standard that
11 other people are then going to use. That part is included in
12 their process. It has to be.

13 Q Where is that dictated that that parts is included
14 in their process? They are just stating what they expect the
15 instrument to perform, not with the addition of environmental
16 factors, with the addition of the alcohol reference solution,
17 with the additional dry gas standards. They are just saying
18 what the instrument is -- their specifications for the
19 instrument is, say, plus or minus 3 percent?

20 A They are telling their consumer if you buy my
21 product and you put a .05 in it, you're going to get a .05
22 plus or minus .003. That's what that standard and that
23 statement has said. That's what the consumer should expect
24 because that's the capability of the instrument. Therefore,
25 the consumer in applying good science should then incorporate

1 that range into their range of acceptable. That should be
2 part of the testing process and that was one of the reasons
3 for the concern when we went to it with a different standard.
4 The manufacturer is already telling the consumer, hey, my
5 instrument can do this and this is what we expect out of it.
6 They established that standard and their device should meet
7 that standard.

8 Q But there's no where that says that CMI is saying
9 that this is what their accuracy specification means, correct?

10 A CMI has specifically stated in their confidential
11 instrument specification document for the Intoxilyzer 8000
12 that this instrument is capable of analyzing a sample from a
13 zero to a .6 in concentration with an accuracy standard of
14 .003 or 3 percent, whichever is higher. That's what that
15 document states. That is their -- that is the company's
16 statement for that particular device.

17 Q And they are talking about this is for an accuracy
18 of breath test?

19 A Sure.

20 Q Which is an unknown sample, correct?

21 A Correct. Because the device is to be used for
22 breath testing. So, that accuracy standard is applicable to
23 breath testing.

24 Q CMI doesn't know or can't mandate the uncertainty of
25 external components, correct?

1 A Well, CMI can't mandate anything in the state of
2 Florida.

3 Q They can't specify what the uncertainties are for
4 external components, correct?

5 MR. STRAILE: I object, Your Honor. What external
6 components are we talking about. Also --

7 MS. JOHNSON: I'll rephrase, Judge.

8 BY MS. JOHNSON:

9 Q CMI can't make specifications of uncertainty on
10 things like simulators, correct? Those are external
11 components, right?

12 A I would have to answer your question no. But you
13 have said CMI can't mandate uncertainty, which we're not
14 talking about uncertainty and we're not talking about a
15 simulator. We're talking about a manufacturer specification
16 for the accuracy of -- what they expect to happen with that
17 device when it's used in the breath testing community. The
18 breath testing community uses dry gas standards or alcohol
19 reference solutions in order to check that device. That's the
20 only way you can check it. So, that has to be a function of
21 their accuracy standard. It's incorporated into that process
22 when they make a statement.

23 Q But simulators can vary from simulator to simulator
24 regarding their uncertainty, correct?

25 A If you're talking about simulators, of course.

1 Q So, CMI can't make a guarantee that that number
2 is -- that the number for the simulators are included in their
3 accuracy statement?

4 A If that's the case, they shouldn't make an accuracy
5 statement. I disagree with your statement. But if that were
6 true, then they shouldn't make an accuracy statement.

7 Q But you have to have a simulator in order to use an
8 alcohol reference solution, correct?

9 A Yes. Which is why that function or that element
10 that you're discussing is incorporated into their accuracy
11 standards. They couldn't get the standard without using a
12 simulator or a dry gas standard the same way that the consumer
13 is going to use the device. It has to be a function of their
14 accuracy standard. I have said that now four times.

15 Q I understand that, but I don't understand how you
16 can say that that's a -- an uncertainty measurement or a
17 uncertainty standard, whatever, for a simulator can be
18 incorporated into what CMI's accuracy statement is when CMI
19 wouldn't know what the accuracy is of the simulator to include
20 that.

21 MR. STRAILE: Objection, Your Honor. There is not a
22 question there. She's, basically, made a statement.

23 THE COURT: It's sort of asked and answered. I
24 mean, at this point, I don't think you're going to get
25 her to change her answer.

1 MS. JOHNSON: Can I have one minute, Judge?

2 THE COURT: Sure.

3 MS. JOHNSON: Judge, I have no further questions at
4 this time.

5 MR. STRAILE: If I could Redirect just a little bit,
6 Your Honor.

7 THE COURT: Sure. Any idea how long. We just want
8 to take a break soon.

9 MR. STRAILE: Yes, sir. Just a few minutes. I need
10 a bathroom break soon, too, Your Honor.

11 REDIRECT EXAMINATION

12 BY MR. STRAILE:

13 Q Ms. Barfield, you left the FDLE, all your
14 notes stayed there in some file cabinet?

15 A Yes.

16 Q Did you ever have access to those again?

17 A No.

18 Q Okay. There was a lot made here. Let's go back to
19 the beginning. We're talking about acceptable range.

20 A Correct.

21 Q And that is we're plugging in a known value or
22 supposedly known value of .08 or whatever, and the acceptable
23 rang is basically the machine can be off or it's an error
24 rate, in other words, buy either three or five depending on
25 which standard you're using. So, .005, for example, can then

1 be a .045 or .055 if you're using the five standard. Okay?

2 A Correct.

3 Q Minusing the five and plussing the five. Or you can
4 minus and plus or plus/minus the three and get a .47,
5 .53 error range when you're plugging in a known value; is that
6 correct?

7 A .047 and .053, yes.

8 Q Okay. Thank you. So, basically what the acceptable
9 range is is the range of error on the machine in testing a
10 known value?

11 A It's a limit that you're going to accept as being
12 okay when testing a known value. If it's outside of that
13 limit, it's not okay.

14 Q Okay. You say limit. I say error range.
15 Acceptable range, the range of error or limit?

16 A Yes.

17 Q Okay. So, now let's get back to environment. CMI
18 has a place where they test these machines before they put
19 them out, right?

20 A Yes.

21 Q They call it a lab?

22 A I don't specifically remember.

23 Q Okay. Now, a little bit was made about the
24 environment of the machine. If you would turn to Tab 8 in my
25 binder, which was 11D-8 --

1 MR. STRAILE: Which was previously admitted, Your
2 Honor, the latest version.

3 Q -- and go to rule 11D-8.007, please.

4 A Okay.

5 Q Okay. What is the purpose of this rule?

6 A These are the requirements for the actual breath
7 test and the instruments, the facility that they should be
8 kept in, the 20-minute observation period requirement, the
9 fact that the instrument should be kept secure and dry and
10 clean, and the -- it outlines the actual procedures that must
11 be followed when conducting the breath test.

12 Q Well, let's stick with environment here for a
13 second.

14 A Okay.

15 Q So, basically, you're saying this rule, does it
16 purport to somewhat control the environment?

17 A Yes.

18 Q Okay. Now, let's pretend for a second that the
19 federal register says that the acceptable range of error or
20 the acceptable range is indeed .0 -- plus or minus .005 or 5
21 percent?

22 A Okay.

23 Q Then, basically, in order to be on the list,
24 whatever machine we're talking about, not just it -- does that
25 apply to just the 8000 or does that apply to every machine out

1 there?

2 A It applies to every instrument for breath testing
3 both mobile and nonmobile. So, it would also apply to PBT,
4 portable breath testers, things like that.

5 Q Now, the -- in 2008, I believe you testified that
6 there was a focus or a goal or directive in the rule changes
7 and that was go save money or lose your job, basically?

8 A Well, 2008, that's when that started, yes.

9 Q So, the focus was on something different?

10 A Yes.

11 Q That was the concern, that was your directive?

12 A Definitely something different, yes.

13 Q Was that a directive?

14 A Yes.

15 Q From your commissioners or --

16 A My chain of command.

17 Q Okay.

18 A That would include the commissioner.

19 Q Okay. So, you were basically following directives
20 at that point?

21 A Yes.

22 Q If you now turn to the next tab, Tab 9, which is the
23 2011 policy and procedures manual, which is also discussed a
24 little bit. The first page past the table of contents.

25 A The introduction?

1 Q Yes, ma'am.

2 A Okay.

3 Q It has a purpose for the manual?

4 A Yes.

5 Q What is that?

6 A The purpose of the manual is to document the
7 procedures of the Florida Department of Law Enforcement
8 Alcohol Testing Program. It is not intended to supercede.
9 And when in conflict, it's subordinate to information of
10 processes in Florida Statute, Florida Administrative Code, or
11 Florida Department of Law Enforcement policy and procedures.

12 Q Okay. Was it still the purpose of this manual that
13 the Department had an internal acceptable range of three
14 instead of five in Section 2.19?

15 A Yes, it's -- it was an internal requirement, yes.

16 Q Okay. So, the Department inspectors, they were
17 supposed to follow the procedures in this manual?

18 A Yes.

19 Q They were supposed to make sure that the machine had
20 results of analysis of this known value between the three
21 standard?

22 A Yes.

23 Q And if instead they said, you know what, I know that
24 the manual is there, but I'm going to follow the rule which
25 gives me this bigger range of five, they would have been

1 acting against the internal procedures of the Department at
2 that time, right?

3 A Yes.

4 Q Would have been maybe -- would there be any
5 consequences to that?

6 A Possibly.

7 Q Now, you talked about the change of concentration,
8 okay, during Cross. Can you briefly explain what this change
9 of concentration is that was coming down the pike?

10 A Okay. The rule and we have talked about it, the
11 rule specifies acceptable range for a .05 solution, a .08
12 solution or dry gas standard, and a .20. So, the highest
13 concentration would be .2. Well, the instrument is calibrated
14 to a .4. And we never run controls or standards at a
15 concentration that high to validate the entire calibration of
16 instrument, which is what you're supposed to do in the testing
17 community. So, my thought was to incorporate a higher
18 standard somewhere around a .3 or .4. And that was kind of
19 questionable because the stability of it, of a dry gas
20 standard at that concentration was in question. Because we
21 were also looking at the stability and how long it could be
22 used. And -- but to incorporate a new or -- either an
23 additional -- or it would have been additional. We still want
24 to do the .2 and then we either test .3 or .5. So, I would
25 have been adding at a minimum. The reference to a .3, for

1 example standard, and it's acceptable range, I would have had
2 to have amended that particular definition.

3 Q So, in other words, right now we're plugging in
4 known values of simulators at .05, .08, and .2. And you're
5 going to add another known value?

6 A At a minimum yes.

7 Q Or maybe two?

8 A Maybe two.

9 Q Okay. So, we're not talking about changes in the
10 acceptable range at that point. We're you're talking about
11 adding a known value test or simulator?

12 A Correct. The question before me was would I have --
13 there was no indication I was changing that definition. I'm
14 simply stating that definition would have been changed because
15 I would be, at a minimum, I would be adding a concentration to
16 it.

17 Q Okay.

18 A So, I would have been changing that definition.

19 Q Okay. Great. So, you also testified -- so, let's
20 go with what we can agree on. The federal register and the
21 conforming products list, their definition of acceptable range
22 applies to every machine on that list?

23 A Yes.

24 Q Now, we're talking about what we use here in
25 Florida, right?

1 A Yes.

2 Q Okay. And we use the Intoxilyzer 8000, right?

3 A Correct.

4 Q And the manufacturer has told us, we can do better
5 than that. We can do better than the federal government
6 standards. Is that what you're saying?

7 A Well, that's what their accuracy standard states.
8 It's a smaller, tighter standard, .003 or 3 percent, a better
9 standard. I guess, that is the best way to say it.

10 MR. STRAILE: Give me one moment, Your Honor.

11 THE COURT: Sure.

12 MR. STRAILE: I'm looking for State's 20, what was
13 the Intoxilyzer 8000 instrument specification.

14 BY MR. STRAILE:

15 Q So, on the Intoxilyzer 8000 instrument specification
16 where they're bragging about their performance, their accuracy
17 on this particular machine that we use in this state which is
18 the three standard and not the five?

19 A Correct.

20 Q Okay. So, basically, the standard that can apply to
21 every machine on the list, we use it -- we use one particular
22 machine here in Florida?

23 A Yes.

24 MR. STRAILE: I don't have any further questions,
25 Your Honor.

1 THE COURT: Anything further?

2 MS. JOHNSON: I just have very few follow up.

3 RECROSS-EXAMINATION

4 BY MS. JOHNSON:

5 Q Wouldn't changing or narrowing the acceptable
6 standard require a software change? If you narrowed it the
7 .003 or 3 percent, the definition, would that require a
8 software change?

9 A Technically yes. But you could do it without it. I
10 mean, the instrument is set up to identify .005, because
11 that's the way it was originally set up to do it. But that --
12 well, it would be easier if you did do a software change, put
13 it that way. It would identify it on its own. If you made
14 the change without changing the software, it's not going to
15 identify things when they are out of range because if you --
16 you narrowed that range, you have changed that had range.

17 Q Did you ever discuss changing that aspect of the
18 software with CMI?

19 A I discussed and secured federal grant funding to
20 change the software because that was going -- it was required
21 to be a component of the changes that I want to implement.

22 Q The conversations you had with CMI regarding the
23 software changes, did you specifically address that you wanted
24 to change 8.002 -- the acceptable range?

25 A We hadn't gotten to specific discussion on software

1 because of the fact that the dry gas manifolds had not been
2 secured. So, I wasn't prepared to discuss specific software
3 change at that time. I did let them know that I had secured
4 grant funding for a software change and the general
5 things that we would be looking at doing just to kind of keep
6 them in the loop because it was going to be a new process, but
7 not specifically that, no, at that time.

8 Q The proposed changes that you wanted to make in
9 2013, you wanted to make changes to the instrument
10 qualification and method validation procedures, right?
11 Correct?

12 A I don't know if it would have stayed that name. I
13 think that might have been the name on a draft. I think that
14 might have been a little too complex, was my thought. But I
15 did draft up something that said that, yeah.

16 Q Okay. You talked about adding another
17 concentration, known concentration like a .04, I think you
18 said?

19 A A .4, a .3 or .4. It's a very high concentration.

20 Q When you drafted this document back in 2013, you
21 didn't make any changes to the acceptable range for the
22 concentration, did you?

23 A That document wasn't drafted in 2013. That document
24 was drafted much earlier. That's a very early thought. It
25 was simply something that I had thought out and put the major

1 consents on a page. I don't believe I, specifically,
2 addressed ranges yet or true concentrations yet, but it was my
3 thoughts at that time. It was not drafted in 2013.

4 Q If it was drafted in 2008 in preparation of the of
5 proposed --

6 MR. STRAILE: Objection: It's outside the scope of
7 redirect, Your Honor.

8 MS. JOHNSON: Will she talked about adding the known
9 concentration.

10 THE COURT: Overruled.

11 A It was not drafted in preparation for the 08 rule
12 change, no.

13 Q But it was drafted in 2008, correct?

14 A No. I think it might have been drafted -- the
15 thought processes might have started in 2007. So, it may have
16 been drafted in 2007, maybe early 2009, though. I'm not sure.
17 It was well before 2013.

18 Q And it was well after you had originally talked
19 about allegedly changing 8.002(1), correct?

20 A No. All of that was -- that would all have to come
21 together. What you have at the draft at a certain point in
22 time, it didn't incorporate all of the thought processes yet.
23 It was an extremely rough draft that talks about incorporating
24 concepts, instrument qualifications, verification --
25 validation, operation, and there's one other one. I had done

1 some research into that and I wanted to incorporate those
2 topics. So, what you have is a draft of a document with my
3 thoughts at a certain point in time that's not finalized. It
4 says draft on it too, I believe.

5 Q Okay. But the acceptable range that you defined for
6 those additional standards that you wanted for .005 or
7 5 percent, right?

8 A They may be listed at that at some point in time.
9 That doesn't mean I wouldn't have changed them and corrected
10 them?

11 MS. JOHNSON: I have no further questions, Judge.

12 MR. STRAILE: One question, Your Honor, I think.

13 FURTHER REDIRECT

14 BY MR. STRAILE:

15 Q When you're following the procedure manual, do you
16 change the software?

17 A No.

18 Q So, it's based on the department inspector that has
19 to catch the range themselves?

20 A No -- well, yeah. On that particular testing
21 process, it's not pre-prescribed. It is simply testing --
22 doing a controlled -- repetitive, controlled test getting
23 three numbers, but it's not going into the actual inspection
24 processes of the instrument. So, it does not have preset or
25 predefined values that it's looking for.

1 Q Okay. But you don't have to change -- you didn't
2 change the software to narrow the range in the procedures
3 manual?

4 A No. No.

5 Q That's what I need to know. Thank you.

6 THE COURT: Thank you, Ms. Barfield. We'll take
7 about a five-minute recess.

8 (Court in recess.)

9 THE COURT: Call your next witness.

10 MR. STRAILE: Matt Malhiot.

11 THE COURT: And we'll have to break at 4:30
12 regardless.

13

14 Whereupon,

15

MATTHEW MALHIOT

16 was called as a witness, having been first duly sworn, was
17 examined and testified as follows:

18

DIRECT EXAMINATION

19 BY MR. STRAILE:

20 Q Would you state your name for the record?

21 A Matthew E. Malhiot, M-A-L-H-I-O-T, and it's
22 phonetically spelled M-Y-I-T, Myit.

23 Q Can you briefly describe your background, education,
24 training, and experience as it qualifies you to be here today?

25 A Certainly. In 2002 I started at the Florida

1 Department of Law Enforcement Alcohol Testing Program as a
2 department inspector. During the entire first year of my
3 employment was a training period where I completed breath test
4 operator, breath test agency inspector, and the breath test
5 department inspector training program, which encompasses being
6 assigned a forensic toxicologist and training officer,
7 attending school at Indiana University, attending courses at
8 the Southern Association of Forensic Scientists, and also
9 completing written exams, physical proficiency testing, and
10 oral boards to be certified as a department inspector. I was
11 also a member of the Department of Law Enforcement Alcohol
12 Testing Program during the entire development of the
13 Intoxilyzer 8000 and implementation. I completed three
14 specific courses with the manufacturer CMI Incorporated on the
15 Intoxilyzer 8000 to include operation, calibration, advance
16 repairs, electronics, and those types of courses. I also have
17 hold a Bachelor of Science in criminal justice administration
18 course work in anatomy, physiology, criminalistics, and the
19 basic sciences. I've had a lot of other extensive training.
20 Completed many symposiums and conferences and continue my
21 education in reading peer-reviewed material.

22 Q So, 2002 is when you joined the FDLE?

23 A I did.

24 Q Did you have experience in breath testing prior to
25 that?

1 A Yes. I was with the Cascade County Sheriff's Office
2 in Montana and was certified by the Montana Division of
3 Forensic Science in breath testing, senior operator, and
4 technician. At the time, Montana used the Intoxilyzer 5000
5 also a CMI product.

6 Q Do you know which model?

7 A Montana was the 66 and the EN.

8 Q Was the EN ever used in Florida?

9 A It was not.

10 Q Do you remember if it was ever considered to be used
11 in Florida?

12 A It was. During the evaluation process where the
13 8000, the 5000EN, the Dräger instrument, and I believe the
14 Data Master were four of the five instruments that were
15 evaluated. But one of the prerequisites and one of the wish
16 list items for the new instrument for Florida was portability.
17 And the 5000EN did not meet the portability requirement.

18 Q Okay. You have been sitting in the hearing room for
19 the entire time of the testimony and opening statements?

20 A I have.

21 Q So, I'll try to be brief as we go through these
22 documents. Are you familiar -- you're familiar with the
23 Intoxilyzer 8000. Let me ask it this way. Did CMI ever
24 publish or inform the FDLE of their accuracy or acceptable
25 range that this machine could meet?

1 A On numerous occasions. When we first looked at the
2 Intoxilyzer 8000 for evaluation for use in the state, one of
3 the requirements is that they have to give us certain
4 documents and one of the documents was the instrument
5 specifications. Because our evaluation would make sure that
6 the instrument meet the specifications as advertised by the
7 manufacturer. Also, during the formal training
8 courses completed with the manufacturer, we had handouts,
9 student manuals, and oral presentations with the specification
10 specifically outlined in those training document.

11 Q What does CMI say that their machine is capable of
12 doing?

13 A .003 or 3 percent, whichever is greater.

14 Q And did you attend the training sessions where these
15 slide presentations were shown?

16 A Yes.

17 Q And these -- have you reviewed the FDLE Intoxilyzer
18 8000 training class outline, which is No. 32, which has
19 already been admitted into evidence. Are you familiar with
20 that training class outline?

21 A I have to see the document. I don't have any
22 documents in front of me. I don't know what 32 is.

23 Q Sorry. Sorry. It's the Intoxilyzer 8000 training
24 class outline?

25 A Yes. I'm familiar with this. In fact, I attended

1 this course. But, yes, I'm familiar with it.

2 Q Was that a handout that CMI provided?

3 A It was.

4 Q And it was the same slides that they showed you on
5 the big screen?

6 A It was.

7 Q And the acceptable ranges that they have there
8 published is the three standard instead of the five standard?

9 A It is.

10 MS. JOHNSON: Judge, I'd object to the form of the
11 question. That's not what the previous testimony was.
12 It wasn't defining the acceptable range. It's the
13 accuracy of the instrument.

14 THE COURT: Sustained to that extent. I mean, the
15 phrasing.

16 BY MR. STRAILE:

17 Q All right. Sir, is the -- what does the accuracy
18 mean in this context?

19 A Well, accuracy, instrument of accuracy is what the
20 CMI published and that is acceptable range of the instrument
21 with a known standard.

22 Q So, the accuracy is the acceptable range?

23 A They are interchangeable in that context.

24 Q Okay. So, let's talk about the federal registry and
25 their standard. Do you know what that is?

1 A I seen it many times. There's a federal registry
2 and then there's also a portion in the federal registry where
3 it's the procedures that must be met and followed to publish
4 the named instrument as approved under federal registry. So,
5 it's two separate parts. But, yes, I'm familiar with both.

6 Q And their acceptable range is the five standard?

7 A .005 or 5 percent, whichever is greater; that is
8 correct.

9 Q Okay. Does that apply only to the 8000, or does it
10 apply to every instrument?

11 A It applies to any instrument that is submitted to
12 the federal government and Dolby (phonetic) lab is the one
13 that does the testing. They musts meet -- any instrument must
14 meet that standard. It is not 8000 specific or any specific
15 model requirement.

16 Q Do all the machines on the conforming products list,
17 do they use infrared spectrometry?

18 A No, they don't.

19 Q So, there are other methods on those --

20 A There's other methodologies. Generally, the old,
21 old instruments have a different -- like the Breathalyzer has
22 a different, but most of them are either infrared spectroscopy
23 or fuel cell technology, electrochemical or a combination of
24 the two.

25 Q So, that's -- would it be fair to say that's

1 generally -- that's a general standard that ever machine
2 that's going to be used in the United States has to meet?

3 A If it's going to be published on the federal
4 registry as approved, all instruments, irrelevant of
5 methodology or manufacturer, have to meet that standard.

6 Q Okay. But some machines are presumable capable of
7 doing better than that?

8 A Correct. Specifically, the 8000 was advertised more
9 specificity for the ethanol molecule and other things, but
10 yes.

11 Q Okay. And the differences between the 5000 and the
12 8000, could you briefly go over those again for the Court?

13 A Well, Ms. Barfield went over them briefly. Both
14 infrared spectroscopy, the Intoxilyzer 5000 used in Florida
15 was a three-filter instrument. Those three filters are
16 mounted on a wheel that spins it approximately 2100
17 resolutions a minute. And it's very much like the old 1960 V8
18 engine. You have a timing light and the computer knows which
19 filter is in front of the detector as it spins. So, one
20 detector measures all three filters. On the 8000, there's two
21 detectors with a filter in front of each. There's no spinning
22 wheel. Each one independently analyzes simultaneously versus
23 a timing in a filter. That's one of the big differences.

24 The infrared light source on the 5000 is just a
25 projector lamp just like we see on a Power Point projector.

1 It's very similar. On the 8000 is a pulsating infrared light
2 source which pulsates infrared light. If you'll look at it
3 while it's being energized, you'll just see the glow of the
4 filament. You won't see light because it's beyond the human
5 ability to see the infrared light itself. It's portable. It
6 has data collection. It has much more computer power, the
7 8000.

8 The 5000 was developed in the '70s, and we'd
9 jokingly say that its computer power is the same as the old
10 Atari game system our kid used to use or we used to use. But
11 the 8000 has a lot more computer power, a lot more data
12 storage capability, a lot more ability to remotely access the
13 instrument, and it's a portable instrument. A police officer
14 can plug it into his cigarette lighter of a patrol car. With
15 a 5000, we jokingly refer to it as a boat anchor. It's a very
16 heavy desktop model machine.

17 Q Okay. So, you heard Ms. Barfield testify. Did she
18 accurately describe the differences then?

19 A She did.

20 Q Is there any other differences that you would like
21 to add?

22 A Well, there's other differences that aren't
23 relevant. I mean, the keyboard is detachable and it
24 magnetically closed. It has a carrying handle. It has two
25 lines on the display instead of one line. It has an internal

1 printer that's like a casual register receipt versus a print
2 card. It has a modem built in so data can be transferred.
3 Those are the major differences. The other one is a magnetic
4 card reader.

5 What Florida does is when an individual is arrested
6 for DUI, they take the driver's license and swipe it just like
7 you swipe a debit card at the store and it imports all of the
8 driver's license number, name, and all of that data. So,
9 there's a lot more computer power for the machine versus the
10 5000.

11 Q Okay. Now, you mentioned it has like a time -- the
12 5000 has a timing wheel?

13 A The filters were mounted on a wheel that spun and
14 the way the detector knew which filter was in front of it was
15 timing, just like the timing of an engine. The wheel, if you
16 take it out, it's actually got a timing notch in it. So, the
17 machine software will know which filter is in front of the
18 detector at which time. So it only had one detector but three
19 filters.

20 Q So, kind of like the -- adjusting the timing belt on
21 an older car?

22 A Exactly.

23 Q So, to continue with the car example, the 5000 is
24 like a 1970 diesel engine and the 8000 would be more like a --

25 A Fuel-injected Ferrari.

1 Q Or like an electric car maybe?

2 A Well. No. I would say they are both internal
3 combustion engines. So, the are both infrared spectroscopy.

4 Q Now, you're familiar also with the procedures
5 manual?

6 A I am.

7 Q And, so, what -- what is the process in the
8 Department? Did you follow the procedures manual when you
9 were there?

10 A I did.

11 Q And, so, basically, if a machine failed to come into
12 the three standard, what would happen?

13 A Well, the three standard didn't -- wasn't
14 implemented until after I had left FDLE. When I was at FDLE,
15 that three standard was not in the procedures manual. The
16 three standard is what's known as a stability check, a
17 courtesy check.

18 MS. JOHNSON: Objection, Judge. He just stated that
19 this was not in place when he was there. So, I would
20 object to him testifying about how it's used and what
21 it's used for.

22 THE COURT: You need to explore the basis of his
23 knowledge of the three standard before we get into that.

24 BY MR. STRAILE:

25 Q Tell us about the basis of you knowledge of the

1 three standard?

2 A Currently I'm the proprietor of Forensic Alcohol
3 Consulting and Training, and I review and audit breath tests
4 in the state of Florida hundreds of times a month, review the
5 manual, understand the manual. When I was there, we were
6 writing the manual, not that portion. I have discussed it
7 with the program before. I'm very familiar with the
8 procedures, and I've done every one of them independently on
9 instruments.

10 Q Okay. So, practically, speaking, then, your
11 understanding if the machine fails the three standard, what
12 happens?

13 A First is they determine the cause of the failure.
14 Is it the simulator? Is it the solution? Is it the machine,
15 or is it the procedure? If it's the machine and it can't be
16 fixed, they have to ship it or at the time, sometimes they
17 replace things or a gasket, external maintenance. But if it's
18 a problem with the machine, a physical part broken, they have
19 to send it to CMI or an authorized repair facility. And it
20 would be sent back and they would do the three standard again.
21 If it passes the three standard, the stability test at the
22 three standard, then they will go onto their Department
23 inspection procedure, which is part of the rule.

24 Q So, they do the three first and then the five?

25 A Correct.

1 Q And these machines are owned by who?

2 A Each agency owns their own instruments. Some
3 states, the State owns them all. In Florida, each agency,
4 like Tallahassee Police Department will own their own, Leon
5 County will own their own. In fact, FSU police had their own.
6 I don't know if they still do. But each local law enforcement
7 agency owns their own. FDLE has, I think, about a dozen of
8 them for training and loaning. Community colleges have some.
9 State police, the highway patrol will have some. But normally
10 the agency owns their own.

11 Q So, when this machine fails the three standard and
12 is sent off for repair, who is responsible for that bill?

13 A If it's not under warranty, the agency that owns it
14 will be billed for the repair.

15 Q Okay. And if this was a rule -- if this new three
16 standard was a rule and the machine then failed the three
17 standard at the agency level, what is the agency supposed to
18 do?

19 A Well, the same thing that FDLE would do. Just like
20 if it failed the five standard now. Determine the cause
21 first. Is it the solution, the simulator, the machine, or the
22 procedure? And depending on what they determine the cause
23 they can repeat it once under the current requirements of the
24 inspection process. If it continues to fail, then they have
25 to notify the Department. But if it's determined that it's a

1 machine problem, it may need to be sent to a repair facility.

2 Q So, practically speaking, they'd be paying for that
3 bill as well?

4 A Correct.

5 Q So, if it fails at the Department, they are supposed
6 to -- the owner is liable for the repair. If it fails at the
7 agency, the owner is liable for the repair?

8 A Correct.

9 Q So, same thing pretty much as far money out of their
10 pocket?

11 A Correct. If the rule is changed. Currently right
12 now, there's no rule on the three standard, but they are still
13 responsible for the repair.

14 Q The Department is doing it any way?

15 A The three standard?

16 Q Yes, sir.

17 A Yes. The Department, it's maintained in their
18 internal policies and procedures manual, but it's not a -- the
19 instrument could comply with the rule, but still not meet the
20 three standard.

21 Q Okay. Now, this -- the definition of acceptable
22 range, is it fair to say that it's incorporated in the
23 forms that the FDLE has promulgated?

24 A Yes, the inspection process forms, yes. And the
25 breath test forms, yes.

1 Q Okay. Were you ever part of any discussions of
2 changing the rule to the three standard?

3 A Yes.

4 Q Please tell the Court about that?

5 A Well, during the process between 2000 and 2006 and
6 then after, there was discussion on rule changes as far as
7 20-minute observation, vast changing of the rule because we
8 were changing instruments. We even discussed going from a
9 monthly inspection to a quarterly inspection, dropping the
10 calibration requirements and the acceptable range down to
11 .003. Because part of the inspection process is to make sure
12 the machine meets manufacturer specifications. But we didn't
13 drop it down because timing and everything, as the line across
14 shows, and data collection.

15 Part of the problem is we wanted to make sure before
16 it was implemented how much more failures are we going to
17 have? Is the machine going to sustain this three? So, we
18 wanted at least two years of data from 2006 to 2008. We were
19 running about 26,000 breath tests. So, that's 50,000 breath
20 tests times two control tests each. That's a 100,000. That's
21 great data point for statistical analysis of the reliability
22 of the 03 versus the 05 standard.

23 So, then 2008 came along and big budget crunches,
24 cut money everywhere and anywhere. We were literally doing
25 research and development on how to do away with our own jobs.

1 That's how bad it was in 2008 for a while.

2 Q Okay. And was the rule change -- again, when did
3 you leave FDLE?

4 A 2010, September 2010.

5 Q So, between 2008 and 2010, was the rule change that
6 we're discussing was that discussed with --

7 A Yes. In fact, I did research on dry gas analysis.
8 Because part of the change and philosophy was changed to
9 happily cut costs to the taxpayer ultimately. That was the
10 directive, downward directive. How can we save money? So, we
11 were researching instead of having the agency do an agency
12 inspection every month, how can we automatic that. We'll go
13 by dry gas canisters and let it do it by itself so there
14 wouldn't be humans involved. We moved all the Department
15 inspectors from the field up to Tallahassee. At the time, we
16 did an analysis and found out that Department inspectors spent
17 25 to 30 percent of their time driving from A to Z in the car
18 driving. So, we worked a four-day workweek. So, that's one
19 day a week, we were on the road and only working on
20 machines three days. So, that was kind of the driving force
21 to move everybody to Tallahassee. So, inspectors could spend
22 40 hours a week working on machines and not 12 hours a week
23 driving around, plus the fuel savings. So, there was a lot of
24 massive changes that were driven to save money.

25 Q So, the Department inspections used to occur at the

1 Agency?

2 A They did.

3 Q And then, now, they were centralized where they --
4 the machines were shipped up to Tallahassee?

5 A Correct.

6 Q And only Department or annual inspections occurred
7 in Tallahassee?

8 A Correct. Now, there are rare occasions where a
9 Department inspector will be dispatched to a specific agency
10 to do it. But the general policy is that they are done here
11 in Tallahassee now and have been since 2010.

12 Q Okay. So, the directive was to save money. But you
13 just testified that if it fails the procedure manual, it's
14 shipped off for repair?

15 A If they determine that failure is caused by the
16 machine.

17 Q Okay.

18 A If they determine that, hey, it was a loose gasket
19 and they can fix it, that's fine.

20 Q So, the Department is supposed to determine what
21 caused it such as the machine?

22 A Correct.

23 Q And the agencies also supposed to do that same
24 thing, determine what caused it?

25 A On their 05 standard, yes.

1 Q Okay. So, I mean, we -- we could pick any standard
2 we wanted theoretically, right?

3 A Theoretically.

4 Q So, we're testing the accuracy of the machine here,
5 correct?

6 A Correct.

7 Q So, if we said we're going to make the standard
8 .007 and then we could say the machine passed that test and
9 it's accurate to that standard?

10 A Correct.

11 Q Or we could say .01 and the machine passes the test,
12 it's accurate to that standard?

13 A It would be a lot less machines passing, but you
14 could theoretically do that, yes.

15 Q Okay. So, what we're talking about here is the
16 definition of what we're willing to accept?

17 A Acceptable range.

18 Q Okay. Do you -- did you in the -- in the
19 discussion -- let me. I'm sorry. Before I move on, let's for
20 a second -- the error in the procedure manual the 03 or the
21 Department or the Agency at the 05, if the machine is
22 determined that it's machine error, it gets sent off to a
23 repair facility?

24 A If a maintenance procedure can't fix it. If it has
25 to be opened up and there's a broken part inside, yes.

1 Q Okay. So, let's stick with that. So, basically,
2 we're trying -- if it missing the standard that we've chosen,
3 first we got to make sure to check it out. And if it ends up
4 being the machine -- if it can be fixed there or recalibrated,
5 that's what's done?

6 A That's the first step, yes.

7 Q And, also, that's the first step of the agency?

8 A Correct. Well, the agency will not calibrate it.
9 They will troubleshoot and try and determine cause. If they
10 can't determine cause, they will call the FDLE and say,
11 Inspector, here's my problem. There may be some
12 troubleshooting over the phone or they may be directed to do
13 certain tasks or they may be directed to box it up and ship
14 it.

15 Q At the end of the day if it's the machine, it's
16 going to a repair facility?

17 A Or up to FDLE, yes.

18 Q Okay. So, if it were to fail the 03 standard
19 pursuant to the procedures manual, it goes to repair facility
20 and the Agency is responsible for that payment?

21 A Yes.

22 Q And, so, if that standard were to be adopted in the
23 field and the machine failed that same standard, the result
24 would be the same. The Agency is on the hook for the repair?

25 A If it's determined that a repair is needed, yes.

1 Q So, under either -- either -- no matter where the
2 machine ends up getting sent off to a repair facility from,
3 the Department or the Agency, the Agency is on the hook for
4 the repair bill?

5 A Correct. They own the instrument.

6 Q So, changing the -- changing the standard at the
7 Agency level since we're already doing it at the Department,
8 is it fair to say it wouldn't have much of an impact on the
9 Agency as far as practically speaking?

10 A No. It's going to be the rare occasion where it
11 does meet the standard in the field and then fails at FDLE.
12 So, those that are failing at FDLE probably are not
13 passing the standard in the field now. So, it's not a huge
14 difference.

15 Q So, FDLE is using a more narrow range?

16 A Correct.

17 Q But at the end of the day when the machine gets sent
18 off for repair, it's the Agency that's responsible?

19 A It is.

20 Q So, whether that machine is sent off from the
21 Department or the machine ends up being sent off from the
22 Agency to a repair facility, either way the Agency is on the
23 hook?

24 A They are.

25 Q So, basically, what is the difference as far as the

1 money out of their pocket in those two scenarios?

2 A Well, there's no difference in the money out of
3 their pocket. The difference is right now they are paying
4 for -- potentially paying for a repair that the machine
5 doesn't -- isn't in violation of rule. We don't know if it
6 meet the rule because we are implementing a policy at FDLE
7 that says 03. So, it could pass the 05 standard, but still
8 end up going to a repair facility and cost the Agency when
9 there's no rule violation.

10 Q Okay. So, right know presumably in order to even
11 get to a Department inspection, it's got to pass the 03
12 standard, the three standard before it gets to the five
13 standard?

14 A Correct.

15 Q So, theoretically, in order to get to the five
16 standard, it has already passed the three standard?

17 A Correct.

18 Q So, presumably you would hope that if you just did a
19 three standard, it would pass a five standard?

20 A I'm sure most of the time it does. There's other
21 procedures and other testing that once it passes the three
22 standard, it's a more vigorous testing. But, generally, the
23 three standard is going to predict the outcome of the five
24 standard.

25 Q Okay. So, then this machine passes the three

1 standard at the Department and then it passes, presumably, the
2 five standard at the Department, it then gets shipped back to
3 the Agency, right?

4 A Correct.

5 Q But the agency is not using the three standard?

6 A Correct.

7 Q They are instead using the five standard?

8 A They are.

9 Q So, we have a possibility where this machine lands
10 back at the agency, and the very next month could be right at
11 the five standard and still be implemented to incarcerate
12 Floridians?

13 A Still remain in service until the following year
14 when the Department gets it back for its annual inspection.

15 Q So, for a whole year, it could be -- we could have a
16 situation theoretically where a machine failed a Department
17 inspection but is -- excuse me, failed a pre-inspection
18 pursuant the manual?

19 A Correct.

20 Q And still be used for an entire year?

21 A Correct.

22 Q I think I've already asked this, but let me just go
23 ahead and make sure. As far as Ms. Barfield's testimony, the
24 differences, we have -- we have a three-channel micron test.
25 We have a nine-channel micron test; where as, the 5000 was

1 only testing at the three.

2 A Different levels at the three micron. Different
3 ends of the infrared spectroscopy. The three -- if you take
4 an infrared fingerprint of alcohol, the 5000 looked at the
5 three micron level. The 8000 looked at the three and the nine
6 micron level. So, it's two different areas of the fingerprint
7 that it's looking at. But yes.

8 Q So, does that mean that the 8000 is more accurate
9 then?

10 A It's advertised as better specificity. Nobody will
11 say it's more accurate because then everybody will dog the
12 older instrument as less accurate. But it's advertised as
13 better specificity for the ethanol molecule. And simply by
14 their publication of the three standard versus the five
15 standard on the old instrument, they are kind of admitting
16 it's more accurate.

17 Q Okay. And you're familiar with their documents on
18 the 5000?

19 A I am.

20 Q And what was the acceptable range on the 5000?

21 A For the 64 model and 66 model used in Florida, it
22 was five percent or .005, whichever is greater.

23 Q Okay. So, basically, as you said CMI, in publishing
24 these documents and giving them out, they're basically telling
25 us it should be doing to three standard?

1 A Well, we, as the State or the customer, should make
2 sure the machine meets the manufacturer's specification, which
3 is the three standard.

4 Q Okay. What is your understanding of why the three
5 standard was not implemented between 2006 and 2010 when you
6 left?

7 A There was no new rule published. I was a part of
8 the rule promulgation, but I don't remember exactly what was
9 in the 2008 draft that never made it. I don't remember the
10 exact specifications of that rule.

11 Q Okay. And between 2002 when you joined the FDLE and
12 2006 we're still using the 5000, correct?

13 A Correct. The 8000 wasn't implemented until March of
14 '06.

15 Q So, the rules that come before it in '01, '02, '04,
16 and '06, those were for the 5000?

17 A 5000, and they did have the 8000 incorporated, yes.

18 Q What -- the reason that -- what is the reason that,
19 if you know, why there wasn't a different acceptable range for
20 the 8000 incorporated in the rule in 2006 when it came up?

21 MS. JOHNSON: Objection, Judge. It's beyond his
22 personal knowledge. He wasn't involved in the revision.

23 MR. STRAILE: I just asked him if he knows.

24 MS. JOHNSON: Right. But that was Ms. Barfield's
25 responsibility, as she stated.

1 MR. STRAILE: She also stated it was discussed by
2 all the Department inspectors in a group workshop.

3 MS. JOHNSON: But the question he asked was
4 whether -- why it wasn't -- why something wasn't included
5 in the rule. That's not his decision to make why
6 something wasn't included in rule.

7 THE COURT: He can still know why it wasn't. I'll
8 overrule it. He may not be the author.

9 A I was part of the committee and we had rule meetings
10 and discussions for three specific reasons. One, because the
11 5000 was still in there and they didn't want to create
12 confusion with two separate standards. Two, we wanted to
13 collect data for data points for validation of the three
14 standard versus the five standard and actual use in the field
15 and the recommendation of the legal counsel.

16 Q Was that -- did you ever take part in analyzing the
17 data that was collected between '06 and '08?

18 A I reviewed it, but I didn't specifically review it
19 specifically for that three versus five. I reviewed tons of
20 dry gas standards. And as a matter of fact, they were graphed
21 every month. But I didn't specifically do an analytical
22 evaluation of the three versus the five standard.

23 Q After you -- since you left the FDLE, you said you
24 analyzed or audit the machines data?

25 A Correct.

1 Q Is that part of your consulting services?

2 A Yes.

3 Q And, so, you've done that consistently since 2010
4 until today?

5 A I have.

6 Q And have you, since that time, looked for this
7 particular issue and what issues would be out of tolerance?

8 A I have.

9 Q Okay. And what is -- what is the results of your
10 analysis?

11 A I did not do a specific number count because it's
12 400-something instruments. But it is not uncommon to see a
13 control test or calibration check at the Agency inspection
14 level where it would fail the three standard but meet the five
15 standard. I couldn't give the Court a percentage, but it's
16 not uncommon.

17 Q Okay.

18 MR. STRAILE: One moment, Your Honor, while I check
19 the objections here really quick.

20 THE COURT: Sure.

21 BY MR. STRAILE:

22 Q Okay. So, if you would, I'm going to address 16,
23 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 which are the
24 rules -- excuse me, which are the forms and were not objected
25 to.

1 MS. JOHNSON: These are Petitioner's exhibits or
2 Respondent's exhibits?

3 MR. STRAILE: Petitioner's exhibits.

4 MS. JOHNSON: I didn't have a chance to respond to
5 them because that notice of filing was done after the
6 prehearing stipulation.

7 MR. STRAILE: Okay.

8 MS. JOHNSON: So, I do have objections to them.

9 MR. STRAILE: Okay. Fair enough.

10 MS. JOHNSON: I can tell you I don't object to 23,
11 26, 27, or 28, which are the forms that are currently in
12 use. But 23, 26, 27, 28, which are the Department
13 inspection procedures, Agency inspection procedures,
14 Agency inspection report.

15 MR. STRAILE: So, you don't object to Form 36?

16 MS. JOHNSON: Correct. Or 34. No. Wait a minute.
17 Thirty-six, 39, 40, and 41 I do not object to.

18 THE COURT: Thirty-six, 39, 40, and 41?

19 MS. JOHNSON: Thirty-six, 39, 40, and 41, correct,
20 Judge.

21 MR. STRAILE: So, Your Honor, at this time I would
22 move the ones that are not objected to into evidence.

23 THE COURT: Okay. I've got 23, 26, 27, 28, 36, 39,
24 40, and 41. Those are not objected to, right?

25 MS. JOHNSON: No.

1 MR. STRAILE: Twenty-three.

2 MS. JOHNSON: Number 23, which is Form 36. Number
3 23, which is Form 36. Oh, is that what you read? And
4 then 26 is Form 39.

5 THE COURT: I was just going by the numbers you --
6 you said the numbers. See, I don't have this in front of
7 me. So, I'm --

8 MS. JOHNSON: Okay. Let me rephrase it.

9 THE COURT: Give me the exhibit numbers.

10 MS. JOHNSON: Petitioner's Exhibit No. 23, which is
11 form 36.

12 THE COURT: Okay.

13 MS. JOHNSON: I do not object to that.

14 THE COURT: I see what you're saying. So, Exhibit
15 Numbers 23, 26, 27, and 28 you don't object to?

16 MS. JOHNSON: Correct.

17 THE COURT: And the corresponding numbers --

18 MS. JOHNSON: Form number are 36, 39, 40, 41.

19 THE COURT: I got you. Okay. So, we'll show those
20 four admitted: 23, 26, 27, and 28.

21 (Petitioner's Exhibits 23, 26, 27, and 28 admitted
22 into evidence.)

23 BY MR. STRAILE:

24 Q Okay. Now, Mr. Malhiot, I assure you I'll never
25 have my binder put together like that again?

1 A I'm following. I'm on the current forms.

2 Q All right. So, we're talking about with Form 36
3 would be Tab 29.

4 A Got it.

5 Q And this is the current Department inspection
6 procedures, correct?

7 A Correct.

8 Q And this is, basically, the Department after the --
9 after the three pursuant to the procedures manual, we then
10 move to Form 36 Department Inspection Procedures?

11 A Correct.

12 Q And then that -- here we don't define numbers. We
13 just say acceptable range, correct?

14 A Yes. The results of each analysis must be within
15 the acceptable range.

16 MR. STRAILE: Did you object to Form 37?

17 MS. JOHNSON: Correct. Because that's a breath test
18 procedure.

19 MR. STRAILE: Okay.

20 BY MR. STRAILE:

21 Q So, if you would, go to Tab 30, which is Number 24?

22 A What is the form number?

23 Q Thirty-seven, Tab 30.

24 A Yes.

25 Q Okay. Do you recognize that document?

1 A Form 37, yes.

2 Q Okay.

3 MS. JOHNSON: Judge -- never mind. Sorry.

4 Withdrawn.

5 BY MR. STRAILE:

6 Q You recognize that document?

7 A I do.

8 Q How do you recognize it?

9 A It's the breath test operator procedures when I was
10 there and helped develop the form.

11 Q Is that form referenced in the rules?

12 A Yes.

13 Q And it's what is supposed to be used at the Agency
14 level?

15 A Correct. Breath test operator uses this form as
16 their checklist.

17 Q Okay. And it's been promulgated by the FDLE?

18 A It has.

19 MR. STRAILE: Your Honor, I would like to move this
20 form into evidence, Form 37.

21 MS. JOHNSON: I would object. It's irrelevant.

22 It's a breath test procedure, doesn't anywhere in here
23 have anything to do with the acceptable range as defined
24 in 8.002(1).

25 MR. STRAILE: Completely incorrect. Completely

1 incorrect, Your Honor. It absolutely does have
2 everything to do with acceptable range. It doesn't
3 express acceptable -- I believe that that's incorrect,
4 Your Honor. There is a allusion or a reference to the
5 acceptable range in this document. As Ms. Barfield
6 testified to, the procedures that they are supposed to
7 follow, this is the procedure they are supposed to
8 follow. She's already testified to it. I just didn't
9 admit the form when she testified.

10 MS. JOHNSON: Additionally, Judge, he hasn't laid a
11 proper foundation. This witness is not a custodian of
12 records. This is not his document.

13 THE COURT: I'll show 24 admitted. It's an FDLE
14 form.

15 (Petitioner's Exhibit 24 admitted into evidence.)

16 BY MR. STRAILE:

17 Q Sir, this is the -- this is what we are supposed to
18 do when we are actually testing the subject, correct?

19 A Correct.

20 Q And I said -- my position is that the acceptable
21 range is, in fact, in this document?

22 A Well, the words "acceptable range" don't appear, but
23 the control test and the target tolerances are specifically
24 laid out in the from. Because when we designed the form, we
25 wanted to be inclusive. So, the breath test operator didn't

1 have to refer back to the rule to find out what the acceptable
2 range was. It's just printed right on the form. And it's
3 printed in two places. Ms. Barfield testified that a control
4 test is before and after. And it specifically says, control
5 test: The results must be between .075 and .085 inclusive.
6 And that statement is twice on this form for both control
7 tests.

8 Q So, basically, it's the five standard?

9 A Correct.

10 Q And this is the control test?

11 A Correct.

12 Q And the control test is supposedly testing a known
13 value?

14 A Correct.

15 Q And that known value would be?

16 A .080 dry gas.

17 Q Okay. So, essentially the error rate is there in
18 the control test?

19 A Correct, on the form.

20 Q Okay. So, the acceptable range, while it doesn't
21 say acceptable range, it --

22 A It spells it out.

23 Q -- spells out what the result would be if you did
24 the math?

25 A Correct.

1 Q Okay. So -- and this is actually used when we're
2 testing people?

3 A This is the procedures form, operation procedures
4 for a breath test.

5 Q So, while a person has been arrested is submitting a
6 test?

7 A Correct.

8 MR. STRAILE: You objected to Form 38, right?

9 MS. JOHNSON: Yes.

10 MR. STRAILE: Okay. I'm not going to use it.

11 BY MR. STRAILE:

12 Q All right. Going down to Exhibit No. 26, which for
13 you, sir, is Tab 32.

14 A Form 39?

15 Q Yes, sir.

16 A Got it.

17 Q All right. What is -- do you recognize this form?

18 A I do.

19 Q Did you have influence in creating it?

20 A Yes.

21 Q And that was part of your job while you were at the
22 FDLE?

23 A Yes. I was part of the team that developed these
24 forms.

25 Q Okay. Now, this is -- this is the procedure for

1 what?

2 A The Agency inspector or the monthly inspection done
3 at the Agency by the Agency inspector.

4 Q Okay. Now, this one doesn't use numbers to
5 reference the rule, but it actually uses the words, right?

6 A Correct.

7 Q This is an example of where acceptable range shows
8 up in the form?

9 A Correct. And it says the result of each analysis
10 must be within the acceptable range, and that is .05, 0820,
11 and 08 dry gas.

12 Q Okay. Turning now to Tab 37, which is Number 31 on
13 the exhibit list, which has previously been admitted.

14 A Form?

15 Q The spec sheet.

16 A What tab?

17 Q Thirty-seven.

18 A Yes.

19 Q This doesn't say acceptable range either; is that
20 correct?

21 A No. It uses the word accuracy.

22 Q And you testified before these words are
23 interchangeable?

24 A In this context, yes.

25 Q Okay. So, this is where -- is this one of the

1 documents you're using to refer to CMI's specifications for
2 their machine?

3 A Yes. This was also from a training session.

4 Q Okay. We already went through the slides. And
5 these forms -- you're familiar with the 11D-8?

6 A I am.

7 Q And these forms are referenced in 11D-9 as a way
8 that they are supposed to do the procedures, correct?

9 A The specific numbered forms we discussed, yes.
10 Obviously the CMI manual slides were not. But, yes the form
11 numbers for the FDLE, for the Agency inspection, for the
12 Department inspection and operator procedure are all
13 referenced by rule.

14 Q Why is it -- well, let's talk about your involvement
15 in the discussion in changing the rule to the three standard.
16 Can you describe those for the Court?

17 A Well, they were staff meetings is where we discussed
18 rule changes, and I particularly remember discussing the
19 purpose is to ensure the instrument meets the manufacturer
20 specifications we should adopt the manufacturer
21 specifications. And after discussion, it was tabled until
22 after we had data. And to my recollection, it never came back
23 up again because of other priorities and other things going
24 on.

25 Q Do you believe that eventually if the data was

1 analyzed it was the intent and proved to be the machine could
2 perform to that standard that the rule was going to be
3 changed?

4 A That was my understanding. And if the rule
5 committee was developed again, I would have recommended it.

6 Q Why?

7 A Well, because it's the standard to the manufacturer
8 and it's a tighter standard and it's -- more is better. The
9 more scientifically reliable, the better it is for the driving
10 public.

11 Q Okay. Was it -- is it your belief that it was
12 required to be changed?

13 A No.

14 Q Okay. But it's your belief that it should have been
15 changed?

16 A Yes.

17 Q Was -- to your knowledge, were any of these
18 discussions about the rule, the potential change -- fair to
19 say FDLE knew there was some information there that they might
20 ought to consider?

21 A Well, we knew what the manufacture specifications s
22 were, yes.

23 Q Okay. And knowing that information, was that ever
24 brought to the public's attention to your knowledge?

25 A Not to my knowledge.

1 Q Okay. Did you ever -- it sounds like you and
2 Mr. Murphy were not at the FDLE at the same time?

3 A Oh, no, we were. As a matter of fact, when he was
4 first employed, I was his training officer to help him achieve
5 department inspector status. So, yes, we had overlap. I was
6 not there when he took over as program manager. I had left
7 prior to that.

8 Q Okay. To your recollection -- so, he was in
9 training at that time?

10 A He was.

11 Q So, he was not involved in the discussions of the
12 rules?

13 A I don't think there was rules discussions or
14 committees going on when he was in training and first started.
15 I don't recall. I can't say he wasn't. My recollection is
16 there was no rules committees or ongoing rule development or
17 workshops or anything at that time.

18 Q So, if there were no workshops, he was not involved?

19 A Couldn't be.

20 Q Right. So, these discussions predated his time at
21 the FDLE?

22 A My recollection of the meetings were
23 pre-implementation of the 8000, 2004, 5, 6, that time frame.

24 Q Okay.

25 MR. STRAILE: I'll tender the witness.

1 THE WITNESS: And I don't want to screw up
2 scheduling and I understand the court reporter, but I
3 have to be back in Atlanta tonight. So, I'm not saying
4 rush or anything. If worse comes to worse, I have to --

5 MS. JOHNSON: I only have ten minutes left of the
6 court reporter.

7 THE WITNESS: I won't stop your Cross.

8 THE COURT: We're going to have to stop at 4:30.
9 You absolutely can't be here tomorrow? I know we didn't
10 plan on you being her tomorrow.

11 THE WITNESS: I know. Well obviously she's entitled
12 to cross-examine me. And I can't say I can't be here
13 tomorrow. She's entitled to it. Otherwise, all my
14 direct is not admissible. I can't say I can't be here,
15 Your Honor. I mean, I have to be.

16 MR. STRAILE: Your Honor, do we have the capability
17 of using Skype here. I see this TV here. I'm on the
18 wifi here.

19 MS. JOHNSON: I would object to that. He was here
20 in person for the Direct. He needs to be here for Cross.

21 THE COURT: I tend to agree. And Skype can be
22 squirrely and not very reliable.

23 MR. STRAILE: Just trying.

24 THE COURT: No. I understand. I think we're going
25 to need you here.

1 THE WITNESS: I understand, Your Honor.

2 THE COURT: How long do you think your cross is
3 going to be?

4 MS. JOHNSON: I honestly don't have any idea, Judge.
5 I would say at least 30 minutes at an absolute minimum.

6 THE COURT: Yeah. Can you just like push your
7 flight -- I mean, we can get you out -- if we can
8 guarantee to get you out of here by --

9 THE WITNESS: I understand that, Your Honor.

10 THE COURT: -- 10 or 11 tomorrow.

11 THE WITNESS: I understand. I'll be here tomorrow.

12 THE COURT: Maybe we should just stand in recess
13 instead of starting now for --

14 MS. JOHNSON: That's what I prefer, Judge.

15 THE COURT: -- five or ten minutes. Start at 9 --
16 what would be better for you?

17 THE WITNESS: Whatever time the court orders. I'll
18 be here at 9:00.

19 THE COURT: Okay. We'll say 9:00 then. Stand in
20 recess until 9.

21 (Proceeding concluded at 4:15 p.m.)

22 (Transcript continues in Volume II.)

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CERTIFICATE

STATE OF FLORIDA:

COUNTY OF LEON:

I, CLAVETTE A. DONNELL, Registered Professional Reporter, do hereby certify that the foregoing proceedings were taken before me at the time and place therein designated; that my shorthand notes were thereafter translated under my supervision; and the foregoing pages are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee, attorney or counsel of any of the parties, nor relative or employee of such attorney or counsel, or financially interested in the foregoing action.

DATED this 7th day of July, 2016.

CLAVETTE A. DONNELL, RPR
NOTARY PUBLIC IN AND FOR
THE STATE OF FLORIDA
TALLAHASSEE, FLORIDA 32317