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STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

HOA VUONG, on behalf of himself
and other Palm Beach County DUI
Defendants,

Petitioner(s),

vs. Case No: 12-3898RX

DEPARTMENT OF LAW ENFORCEMENT,

Respondent.

_____ /

FINAL HEARING
VOLUME I

DATE TAKEN: March 7th, 2013
TIME: 9:00-5:00 P.M. EST
PLACE: The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida
BEFORE: W.F. QUATTLEBAUM
Administrative Law Judge

This cause came on to be heard at the time and place
aforesaid, when and where the following proceedings
were reported by:

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2 THE COURT: This is a formal administrative
3 hearing in Division of Administrative Hearings
4 Case Number 12-3898RX. My name is Bill
5 Quattlebaum. I'm the Administrative Law Judge to
6 whom the case has been transferred.

7 Let's make appearances, beginning with
8 counsel for the petitioner, please.

9 MR. GABRIEL: Brian Gabriel.

10 THE COURT: Thank you. For the respondent?

11 MS. JOHNSON: Ann Marie Johnson for the
12 Florida Department of Law Enforcement.

13 THE COURT: Thank you. Any preliminary
14 matters to take up before we proceed?

15 MR. GABRIEL: I don't believe so, sir.

16 THE COURT: Respondent?

17 MS. JOHNSON: No.

18 THE COURT: Would you like to make an opening
19 statement?

20 MR. GABRIEL: No, sir.

21 THE COURT: Just for the record, I have a
22 prehearing stipulation that I think has a bunch of
23 stipulated facts in it, correct?

24 MR. GABRIEL: Correct, Judge.

25 THE COURT: I'm going to go ahead and admit

1 the pre-hearing stipulation as an Administrative
2 Law Judge's exhibit and adopt the facts that are
3 stipulated therein. Do you want to call your
4 first witness?

5 MR. GABRIEL: We call Matthew Malhiot.

6 (The witness is called.)

7 THE COURT: You may have a seat.

8 THE WITNESS: Thank you, Your Honor.

9 THE COURT: And when you're comfortable, if
10 you'd raise your right hand, please.

11 (Witness sworn.)

12 THE COURT: Thank you.

13 THE WITNESS: Thank you, Your Honor.

14 WHEREUPON,

15 MATTHEW MALHIOT

16 was called as a witness, and after having been first
17 duly sworn to tell the truth, was questioned and
18 testified as follows:

19 DIRECT EXAMINATION

20 BY MR. GABRIEL:

21 Q. State your name for the record, sir.

22 A. Matthew E. Malhiot, M-A-L-H-I-O-T.

23 Q. Where are you employed?

24 A. I am the proprietor of Forensic Alcohol
25 Consulting and Training, which is a limited liability

1 corporation based in Canton, Georgia.

2 Q. How long have you been employed there?

3 A. I started that business August/September
4 2010.

5 Q. Tell me a little bit about your background.

6 A. I've been in law enforcement, in DUI and
7 breath testing since 1979. I was an active duty Air
8 Force police officer for 20 years. During that 20
9 years, I was stationed in Montana where I started my
10 breath testing training and career with the Montana
11 Division of Forensic Science with the Intoxilyzer 5000
12 at the time. I was a breath test operator, a breath
13 test senior operator and a breath test technician
14 certified by the Division of Forensic Science in
15 Montana.

16 I also completed training with the National
17 Highway Traffic Safety Administration on standardized
18 field sobriety, standardized field sobriety instructor
19 and U.S. Department of Transportation instructor
20 facilitator.

21 MR. GABRIEL: May I approach, Judge?

22 THE COURT: Yes.

23 MR. GABRIEL: I'd like to move into
24 evidence -- it's been stipulated No. 86, it's his
25 CV.

1 (Petitioners' Exhibit No. 86 was admitted
2 into the record.)

3 THE WITNESS: I then retired from the Air
4 Force and was a reserve deputy with the Cascade
5 County Sheriff's Office responsible for their
6 breath testing program and maintenance and
7 operation of breath test instruments within the
8 sheriff's office, who also provided breath testing
9 equipment and services to the Great Falls city
10 police department, Montana Highway Patrol and,
11 again, the Air Force Base located there.

12 In 2001, I was hired by the Florida
13 Department of Law Enforcement Alcohol Testing
14 Program as a department inspector. I started in
15 January 2002. I completed the department
16 inspector training program. I was part of the
17 Florida Department of Law Enforcement when the
18 Intoxilyzer 8000 was being evaluated, researched,
19 developed and implemented in the state of Florida.

20 BY MR. GABRIEL:

21 Q. In the role as a department inspector for the
22 respondent, Florida Department of Law Enforcement, do
23 you oversee a large group of agency operators of the
24 breath testing instrument?

25 A. Yes.

1 Q. Approximately how many?

2 A. It started as 18 counties. I was assigned to
3 the Jacksonville region, responsible for 18 counties
4 in Northeast Florida. As personnel transitioned,
5 retired, left, the area has expanded, and at one
6 point, I was responsible for 36 counties, the entire
7 Panhandle area. And then as there were new employees
8 and new inspectors, it changed. So as many as 50
9 agencies, as little as 18 counties.

10 Q. A rough estimate of approximately how many
11 Intoxilyzer 8000 instruments were you overseeing the
12 proper operation and compliance with FDLE rules?

13 A. Generally 36, but up to 100.

14 Q. In order to become a department inspector,
15 you had to receive certain training and certification
16 from the Florida Department of Law Enforcement?

17 A. Yes.

18 Q. And did you receive any training additionally
19 from the manufacturer of the Intoxilyzer 8000, CMI?

20 A. Yes.

21 Q. Tell the Court a little bit about that.

22 A. CMI came down to Florida and conducted a
23 class on the Intoxilyzer 8000 operation, maintenance,
24 calibration and advanced electronics. We went -- all
25 of us went to CMI for an additional class on the

1 Intoxilyzer 8000, calibration, upkeep, theory,
2 principles behind it, specific operation of the
3 instrument, and we had interaction -- informal
4 training with the manufacturer on numerous occasions
5 between 2001 and 2006 when it was implemented as the
6 evidential instrument in Florida.

7 Q. Would it be true that through your training
8 and experience with the Florida Department of Law
9 Enforcement and other agencies as you have described,
10 that you have knowledge regarding the principles that
11 underlie the working of the Intoxilyzer 8000?

12 A. Yes.

13 Q. For the maintenance of the Intoxilyzer 8000?

14 A. Yes.

15 Q. For the inspection of the Intoxilyzer 8000?

16 A. Yes.

17 Q. For the calibration of the Intoxilyzer 8000?

18 A. Yes.

19 Q. For the repair of the Intoxilyzer 8000?

20 A. Yes.

21 Q. Can you think of any aspect of the
22 Intoxilyzer 8000 which you do not have a background on
23 and have been trained either by Florida Department of
24 Law Enforcement, other agencies, or the manufacturer
25 of that instrument?

1 A. Other than exact circuitry, this resistor,
2 the super-minute resistors and circuits on the circuit
3 board, no. But the overall operation, maintenance,
4 calibration, theory, principle, repair, thoroughly
5 knowledgeable of it.

6 Q. In your role now, have you testified as an
7 expert witness in the state of Florida before?

8 A. I have.

9 Q. Have you testified as an expert witness in
10 other states?

11 A. I have.

12 Q. What other states?

13 A. Georgia, Kansas, Washington D.C., and federal
14 courts.

15 Q. And was that testimony based upon the
16 Intoxilyzer 8000 as being the subject matter?

17 A. Some were, some were different Intoxilyzer
18 model instruments.

19 Q. The previous Intoxilyzer 5000?

20 A. The 5000, yes.

21 Q. And, again, all the questions I've asked you
22 regarding your training, experience and knowledge of
23 the working of the Intoxilyzer 8000, does the same
24 apply to the Intoxilyzer 5000?

25 A. Yes. I've completed the manufacturer's

1 course on that, completed -- when I started with
2 Florida, that was the evidential instrument between
3 2002 and 2006, Florida's primary breath test
4 instrument -- not only primary, but only, was the
5 5000.

6 Q. Right now, today, Florida Department of Law
7 Enforcement has two approved instruments for
8 evidentiary breath testing, those instruments being
9 the 8000 Intoxilyzer and the 5000 Intoxilyzer?

10 A. In accordance with the rule, they are both
11 approved instruments, yes.

12 MR. GABRIEL: Judge, I would like to tender
13 him as an expert regarding the Intoxilyzer 8000,
14 its operation, repair, the workings, the
15 principles behind it, the science behind it.

16 MS. JOHNSON: No objection.

17 THE COURT: He's accepted. And before you
18 ask your next question, I'm assuming there's a
19 transcript that's going to be ordered? Is that a
20 safe assumption?

21 MS. JOHNSON: Yes. Yes.

22 THE COURT: Thank you.

23 BY MR. GABRIEL:

24 Q. Sir, are you familiar with and were you
25 involved -- when you were employed with the

1 respondent, were you involved in rulemaking
2 procedures?

3 A. Yes. The rule process at the Alcohol Testing
4 Program was very much a team process. The program
5 manager, Laura Barfield, along with the staff, the
6 department inspectors, would develop the rule, the
7 draft rules, and the forms associated and promulgated
8 with that rule.

9 Q. Were you involved from the very beginning
10 with the Intoxilyzer 8000?

11 A. Not the very, very beginning. Prior to my
12 employment, there was an evaluation of numerous
13 manufacturers' instruments, the 8000, the Draeger
14 7110. There was a total of five instruments that were
15 evaluated. I came on board just prior to the final
16 determination to go forward with the 8000.

17 Q. The Intoxilyzer 8000, according to the
18 respondent's rules, became an approved evidentiary
19 breath testing device in 2002?

20 A. It was evaluated and completed the evaluation
21 process in 2002. The exact date of the rule that was
22 published I don't believe was 2002, but it may have
23 been. But the evaluation to make it the primary
24 instrument was in 2002, yes.

25 Q. One of the requirements that has always been

1 a requirement of the Florida Department of Law
2 Enforcement regarding getting a breath testing device
3 or instrument approved for evidentiary use in the
4 State of Florida has been that it has to be placed on
5 the conforming products list; is that correct?

6 A. That is correct.

7 Q. Do you know why that is?

8 A. Two reasons. The National Safety Council has
9 made it a recommendation at the federal level that
10 evidential breath test instruments in the United
11 States should be on the Conforming Products List. The
12 federal government does an evaluation of evidential
13 breath test instruments at a federal level and tells
14 the states these are ones that we've approved, and a
15 lot of times if federal grant dollars are being used,
16 that is a requirement.

17 Q. So when we begin with the Intoxilyzer 8000
18 history --

19 A. Yes.

20 Q. -- in order for it to be considered to be
21 used for evidentiary use by the respondent, it would
22 have to be on the Conforming Products List under the
23 Department of Transportation?

24 A. Before it's even evaluated for use in
25 Florida, step one of the evaluation procedure -- I

1 don't want to quote it and misquote it, but basically
2 step one is it has to be on the Conforming Products
3 List before we even start the evaluation for
4 consideration for use in Florida.

5 MR. GABRIEL: Judge, may I approach?

6 THE COURT: Yes.

7 MR. GABRIEL: I have moved into evidence the
8 Exhibit No. 7, the DOT testing from 2001.

9 BY MR. GABRIEL:

10 Q. In 2001 --

11 THE COURT: Any objection -- hold on. Any
12 objection?

13 MR. GABRIEL: No. 7.

14 MS. JOHNSON: No, Judge.

15 THE COURT: And just so the record's clear,
16 I'm admitting No. 7, also Petitioners' No. 86 is
17 admitted.

18 (Petitioners' Exhibit No. 7 was admitted into
19 the record.)

20 BY MR. GABRIEL:

21 Q. The Department of Transportation testing,
22 Exhibit No. 7, which has been moved into evidence, was
23 the testing by the Volpe Labs to see whether or not
24 that instrument would be placed on the Conforming
25 Products List?

1 A. The testing is -- ultimately. If it doesn't
2 meet the standards for evidential breath testing; if
3 it does meet the standards, then it's included on the
4 Conforming Products List.

5 Q. And in this case here with the Intoxilyzer
6 8000, when it was tested in -- from January to June
7 2001, it passed the test?

8 A. It met their standards, yes.

9 Q. And you've had the opportunity to review
10 Exhibit No. 7, the DOT testing from 2001?

11 A. I've -- yes.

12 Q. You're well familiar with it?

13 A. Yes.

14 Q. Can you tell the Court whether or not in that
15 exhibit, which is the report from the Department of
16 Transportation, whether or not there's ever any type
17 of reference to any type of air leaks in the
18 Intoxilyzer 8000 instrument?

19 A. No, there's no reference to air leaks in the
20 Intoxilyzer.

21 Q. Is there ever any type of reference
22 whatsoever to the need of compensating for air leaks
23 in the recirculation path of that instrument mentioned
24 in the DOT testing?

25 A. There is not.

1 Q. Is there ever any type of contention in the
2 DOT testing that there was a problem with the
3 connectors for the simulator?

4 A. No.

5 Q. Can you briefly explain to the Court what a
6 simulator is?

7 A. Yes. A simulator is a reference sample
8 device when you're going to calibrate or test or
9 determine accuracy against a known standard. The
10 simulator is a glass jar with a certified alcohol
11 reference solution. That reference solution is
12 heated, producing a vapor.

13 That vapor is certified to be different
14 values, but a specific value. That vapor is produced
15 by the simulator. The Intoxilyzer will pump that
16 vapor into it, measure the vapor, and hypothetically a
17 .08 vapor. Then the instrument will measure that
18 vapor and say, yes, it's .08, .081, within its
19 tolerances and acceptable accuracy standards.

20 So it's used in two specific areas: One, to
21 calibrate the instrument at the factory or at FDLE;
22 and two, to check its calibration against a known
23 standard.

24 Q. And, again, in regard to DOT testing, when
25 they did it, would it be a fair statement that they

1 tested the instrument at least 200 times?

2 A. Absolutely.

3 Q. As a result of that, your understanding is
4 that it was eventually placed on the Conforming
5 Products List?

6 A. Yes.

7 MR. GABRIEL: Judge, I would like to move
8 into evidence Plaintiffs' Exhibit -- or
9 Petitioners' Exhibit No. 8. and No. 9, which were
10 stipulated.

11 THE COURT: Do you want to identify them
12 separately, please? What's 8?

13 MR. GABRIEL: Exhibit No. 8 is a letter from
14 the Department of Transportation stating that they
15 intend to and will be approving the Intoxilyzer
16 8000 and placing it onto the Conforming Products
17 List. And No. 9 is the proof that it was approved
18 in 2002.

19 THE COURT: Admitted without objection?

20 MS. JOHNSON: No objection, Your Honor.

21 THE COURT: Thank you.

22 (Petitioners' Exhibit Nos. 8 and 9 were
23 admitted into the record.)

24 BY MR. GABRIEL:

25 Q. In 2002, FDLE did some field testing of

1 numerous different types of instruments. I believe
2 you were starting to describe that.

3 A. Late 2001 or early 2002. I started on -- as
4 a matter of fact, my training officer when I was first
5 employed was Mr. Roger Skipper, and he was the project
6 manager of the evaluation process, and he had all the
7 instruments in his lab at the time when I started and
8 was finishing up those evaluations. So it was late
9 2001, early 2002.

10 MR. GABRIEL: May I approach the witness,
11 Your Honor?

12 THE COURT: Yes.

13 MR. GABRIEL: I'm going to show you what's
14 been marked as Plaintiffs' Exhibit 10. See if you
15 recognize that report.

16 And, Judge, I would like to move that exhibit
17 into evidence. It's been stipulated. It is the
18 evaluation report, field study report from the
19 Florida Department of Law Enforcement in 2002.

20 MS. JOHNSON: No objection.

21 THE COURT: It's admitted.

22 (Petitioners' Exhibit No. 10 was admitted
23 into the record.)

24 THE WITNESS: Yes. In fact, the Power Point
25 slides that you have attached as part of this

1 exhibit Mr. Skipper and I worked on together to
2 create.

3 BY MR. GABRIEL:

4 Q. You were involved in that study?

5 A. Parts of it.

6 Q. And the purpose of that study was for the
7 Florida Department of Law Enforcement to evaluate and
8 to look at different breath testing devices to see
9 which one they may wish to chose to approve for
10 evidentiary use in Florida?

11 A. That is correct.

12 Q. Is that a fair statement?

13 A. That is correct.

14 Q. And, eventually, the recommendation by the
15 Florida Department of Law Enforcement as a result of
16 that study was picking the 8000, the Intoxilyzer 8000?

17 A. That was the ultimate outcome of that
18 evaluation, yes, or research or --

19 Q. Would you agree with me that during that
20 study in 2002, there were hundreds of tests done on
21 the Intoxilyzer 8000?

22 A. Yes.

23 Q. During those hundred tests, do you note any
24 time -- is it noted in that exhibit at any point in
25 time when there was a problem with the Intoxilyzer

1 8000 dealing with an air leak problem?

2 A. Not to my knowledge, no.

3 Q. Was there ever any problem documented in that
4 report dealing with a leak in the recirculation path
5 hooking the simulators?

6 A. No.

7 Q. Was there ever any type of notation in that
8 report of a problem with the connectors for the
9 simulator?

10 A. No.

11 Q. You were personally there?

12 A. For some of it, not all of it.

13 Q. Do you know whether or not you were working
14 on the 8000?

15 A. Yes.

16 Q. Working on the 8000, did you ever personally
17 see any problems with leaks or connectors?

18 A. Not at that time, no.

19 Q. Now, we talked a bit about the procedures by
20 the respondent in order to have the evidentiary breath
21 testing device approved for use in the State of
22 Florida?

23 A. Yes, sir.

24 Q. Those are in the Florida Department of Law
25 Enforcement rules and regulations?

1 A. They are, and on forms promulgated within and
2 referred to by the rules, yes.

3 Q. Form 34, correct?

4 A. Correct.

5 Q. Now, after the instrument was placed on the
6 Conforming Products List of DOT -- that's step one of
7 the process, correct?

8 A. That is.

9 Q. Step two of the process could be described as
10 what?

11 A. An evaluation of the instrument or a
12 completion of Form 34.

13 Q. And that would be an evaluation for the
14 purpose of approving it for evidentiary use?

15 A. Well, you can evaluate the instrument for
16 multiple reasons. That one particular evaluation
17 would have been for the approval process, yes.

18 Q. When you're evaluating for the approval
19 process, there is a need to comply with the
20 Administrative Procedures Act; would you agree with
21 that?

22 A. Yes.

23 MR. GABRIEL: I'm going to show you what has
24 been marked as Defense Exhibit No. 11. May I
25 approach the witness, Your Honor?

1 THE COURT: Yes.

2 MR. GABRIEL: For the record, Judge, I would
3 like to move in Defense -- excuse me, Petitioners'
4 Exhibit No. 11, which is the CMI 8000 evaluation
5 conducted on April 11th of 2002.

6 MS. JOHNSON: No objection.

7 THE COURT: It's admitted.

8 (Petitioners' Exhibit No. 11 was admitted
9 into the record.)

10 BY MR. GABRIEL:

11 Q. Sir, when you review that document, No. 11 --

12 A. Yes.

13 Q. -- that appears to be testing records from
14 the manufacturer, CMI, on the 8000, correct?

15 A. It is.

16 Q. And those tests occurred, I believe, a day or
17 two days before the instrument was shipped to Florida?
18 Or they occurred in the same month it's shipped to
19 Florida?

20 A. Yes. Yes. The exact ship date and receive
21 date I'm not aware of, but yes.

22 Q. And those are testing on Serial Number
23 80-00208 and 80-00209, correct?

24 A. Correct.

25 Q. Those are two instruments that you're

1 familiar with, correct?

2 A. Yes.

3 Q. That's a serial number of a particular 8000
4 instrument?

5 A. Yes.

6 Q. Those instruments were routinely sent to the
7 Florida Department of Law Enforcement when they needed
8 to do an evaluation?

9 A. Yes.

10 Q. In those tests, would you agree from the
11 records that there's approximately 800 simulator
12 solutions being run?

13 A. Yes. I have no reason to doubt there's
14 numerous runs and there -- three runs per copy, but
15 there's hundreds.

16 Q. You've seen that report before?

17 A. I have.

18 Q. And in that report conducted in April 11th of
19 2002, is there any type of notation whatsoever
20 regarding a problem with the Intoxilyzer 8000
21 centering around leaks?

22 A. No, there is not.

23 Q. Centering around leaks in the recirculation
24 path?

25 A. No, there is not.

1 Q. Centering around problems with the connectors
2 for the simulator?

3 A. No, there is not.

4 Q. Would you agree with me that one underlying
5 principle of the Florida Department of Law
6 Enforcement's rules and regulations regarding
7 evidentiary breath testing devices is that they've
8 established a procedure to which they inspect the
9 machine on a monthly and then on a yearly basis?

10 A. Yes. That's part of the rule requirements.

11 Q. And they have set up a protocol in the rule
12 that the machine, with the use of a simulator, needs
13 to be tested at different alcohol levels?

14 A. Different concentrations, yes.

15 Q. And that is to determine whether or not the
16 instrument is appearing to be working properly?

17 A. Accuracy of its analytical abilities, yes.

18 Q. And, again, in that report, Exhibit No. 11,
19 you're not seeing any type of problems regarding air
20 leaks?

21 A. No, there's no indication that there's air
22 leak problem.

23 Q. In any of the exhibits so far that I've shown
24 you, up to 2002, prior to the initial testing by the
25 Florida Department of Law Enforcement, have you seen

1 any notations whatsoever regarding the manufacturer
2 taking a drill out and drilling a hole into certain
3 valves in that instrument?

4 A. No, there's no indication in any documents
5 that I've seen so far or anything prior to that.

6 Q. What is the date of the top page on the
7 letter from Ms. Barfield, her report regarding this?

8 A. August 24th, 2006.

9 Q. Do you have personal knowledge regarding the
10 manufacturer's drilling of a hole into this
11 instrument?

12 A. I do.

13 Q. And did it occur prior to -- approximately
14 two years prior to that date?

15 A. Yes. It may have been exactly two years --
16 no, a little -- approximately two years.

17 Q. Eventually, those same two instruments the
18 next day were shipped to the Florida Department of Law
19 Enforcement?

20 A. The exact date they shipped them, I don't
21 know, but very shortly after the dates of this
22 testing, Florida Department of Law Enforcement
23 possessed the instruments.

24 MR. GABRIEL: I'm going to show you -- may I
25 approach?

1 THE COURT: Yes.

2 MR. GABRIEL: I'm going to show you what's
3 been marked as Plaintiffs' Exhibit No. 12.

4 THE COURT: Hand me 11.

5 (The witness complies.)

6 THE COURT: Thank you.

7 MR. GABRIEL: First of all, from that
8 report -- I'd like to move that into evidence,
9 Judge. It's been stipulated to, I believe.

10 MS. JOHNSON: No objection.

11 THE COURT: Petitioner's 12 is admitted.

12 (Petitioners' Exhibit No. 12 was admitted
13 into the record.)

14 BY MR. GABRIEL:

15 Q. In regard to that report, that appears to be
16 FDLE's report regarding an evaluation for the purpose
17 of approving the 8000, correct?

18 A. Correct. It was the first evaluation
19 conducted using Form 34.

20 Q. And it's been stipulated to that there were
21 certain problems with the instruments?

22 A. Yes.

23 Q. And software issues?

24 A. Yes.

25 Q. And the approval process did not get

1 completed to satisfaction?

2 A. That is correct.

3 Q. Now, these two machines that were being used
4 were, again, 80-00208 and 80-00209, correct?

5 A. 208 and -- yes.

6 Q. You've reviewed that report probably hundreds
7 of times, correct?

8 A. I have seen it many times, whether it's
9 hundreds or not -- but many, many times.

10 Q. You were actually involved in that testing?

11 A. Yes. I was part of the testing team
12 personnel there, yes.

13 Q. How many times did you see that
14 Intoxilyzer -- either of those two Intoxilyzer 8000s
15 during the testing have problems with leaks?

16 A. I don't recall any particular problems with
17 leaks at that time.

18 Q. And that report does not reflect that there
19 was ever any problems with the leaks?

20 A. No.

21 Q. It does not reflect in any way whatsoever
22 that there was a problem with leaks in the
23 recirculation path?

24 A. No.

25 Q. It does not report at all that there was ever

1 any problem with connectors to the simulators?

2 A. No. No.

3 Q. Is it a fair assumption that the report does
4 not contain notations of that nature because you never
5 observed those problems?

6 A. Not problems during the evaluation process,
7 no.

8 Q. Would it be a fair statement that after the
9 failure of those instruments, they were shipped back
10 to the manufacturer?

11 A. Yes.

12 Q. And, eventually, about a month later, they
13 were shipped back to Florida Department of Law
14 Enforcement?

15 A. Correct.

16 Q. And there was another evaluation, a Form 34
17 evaluation, pursuant to FDLE rules?

18 A. Yes.

19 Q. To -- with the purpose of approving the
20 Intoxilyzer 8000 as an evidentiary breath testing
21 device for use in the State of Florida?

22 A. Yes.

23 MR. GABRIEL: May I approach the witness?

24 THE COURT: Yes.

25 MR. GABRIEL: I'm going show you what's

1 marked as Petitioners' Exhibit No. 13. Judge, I
2 would like to move Exhibit No. 13 into evidence.

3 THE COURT: Any objection?

4 MR. GABRIEL: It's stipulated.

5 MS. JOHNSON: No objection.

6 THE COURT: It's admitted.

7 (Petitioners' Exhibit No. 13 was admitted
8 into the record.)

9 BY MR. GABRIEL:

10 Q. Is Petitioner Exhibit No. 13 the May 29, 2002
11 FDLE evaluation for the purpose of approval?

12 A. It is.

13 Q. That was run through the full gamut of the
14 APA?

15 A. I'm sorry?

16 Q. That was run through the full gamut of the
17 Administrative Procedures Act?

18 A. Yes. It was done in compliance with Form 34,
19 which went through the Administrative Procedures Act.

20 Q. And does the report make a notation, the
21 conclusion that the Intoxilyzer 8000 is an approved --
22 is an approved instrument for evidentiary -- for
23 evidentiary use in the State of Florida?

24 A. Yes.

25 Q. Now, were you present during this evaluation?

1 A. I was.

2 Q. See any problems with leaks?

3 A. No.

4 Q. Any problems with leaks in the recirculation
5 path?

6 A. No.

7 Q. Any problems with connectors?

8 A. No.

9 Q. Any problems with the need of having a hole
10 needing to be drilled into the instrument?

11 A. No.

12 Q. You didn't drill a hole in the instrument
13 during that study, did you?

14 A. We did not.

15 Q. Exhibit No. 13, can you tell the Court the
16 date on the top page -- the date the report was
17 written? Let me ask you that way.

18 A. February 10th, 2005.

19 Q. Again, that is after you were at the
20 manufacturer in 2004 when a hole was drilled into this
21 instrument, correct?

22 A. It is.

23 Q. And, again, a year or so later, there is
24 nothing in that report reflecting the fact of taking a
25 drill out and drilling a hole into that breath testing

1 instrument?

2 A. That's correct. It's not contained in this
3 report.

4 Q. In November of 2002, FDLE put to completion,
5 under the APA, that evaluation report and placed the
6 Intoxilyzer 8000 as an approved device for evidentiary
7 breath testing, correct?

8 A. In Rule 11D-8?

9 Q. Yes.

10 A. Yes.

11 MR. GABRIEL: May I approach, Judge?

12 THE COURT: Yes.

13 MR. GABRIEL: I'm going to show you what is
14 marked as Petitioners' Exhibit No. 14, and I'd
15 like to move that into evidence.

16 MS. JOHNSON: No objection.

17 THE COURT: It's admitted.

18 (Petitioners' Exhibit No. 14 was admitted
19 into the record.)

20 BY MR. GABRIEL:

21 Q. As I refer to it, those are the November 5th,
22 2002 FDLE rules, correct?

23 A. They are.

24 Q. Okay. Can you turn to Rule 11D-8.003?

25 A. Yes.

1 Q. You're familiar with that rule?

2 A. I am.

3 Q. Have you worked on it with Ms. Barfield and
4 other members of the Florida Department of Law
5 Enforcement?

6 A. In the development and compliance and -- yes.

7 Q. Would you agree with me that 11D-8.003, in
8 its 2002 version, contemplates what the Florida
9 Department of Law Enforcement needs to do for a
10 modified, previously-approved, breath testing device?

11 A. I don't know if it contemplates or if it's a
12 requirement that -- what they should do.

13 Q. Okay. The rules have a provision that will
14 allow that to occur?

15 A. Yes.

16 Q. Can you explain to the Court what that rule
17 states?

18 A. Well, at No. 5, it's the plain language of
19 the rule: "The manufacturer of the instrument that's
20 been previously approved by the department shall
21 notify the department in writing to make any
22 modifications or adding new options to such
23 instrument. The department shall evaluate such
24 modifications or options to an approved breath test
25 instrument and determine whether it affected the

1 instrument's method of analysis or analytical
2 reliability."

3 My interpretation is that a
4 previously-approved instrument that's in use or has
5 been approved, if the manufacturer changes, modifies,
6 they must notify FDLE in writing. FDLE will evaluate
7 that modification as to how it affects breath testing
8 on that instrument.

9 Q. That rule went into effect -- well, that rule
10 was in effect on 11/5/2002, the date of promulgation
11 of those rules?

12 A. That is the effective date of the rule, yes.

13 Q. And those rules stayed effective for a period
14 of time, that rule?

15 A. They did.

16 Q. Eventually, has the Florida Department of Law
17 Enforcement gutted that rule and removed that
18 requirement?

19 A. The requirement of notification from the
20 manufacturer was removed in the subsequent rule, yes.

21 Q. And in Form 34 of that rule?

22 A. Yes.

23 Q. And would you agree with me that Form 34 in
24 its 2002 version -- I don't think it's attached, but I
25 have a copy for you.

1 A. It is attached.

2 Q. -- had requirements that dealt with the
3 ability or how the Florida Department of Law
4 Enforcement is supposed to deal with a modification of
5 a previously-approved instrument?

6 A. Yes.

7 Q. Now, the 8000 -- Intoxilyzer 8000 became an
8 approved instrument in November 5th of 2002, correct?

9 A. In the promulgation and publication of this
10 rule, yes.

11 Q. And it states in that rule that it is
12 approved for evidentiary breath testing device?

13 A. Yes.

14 Q. After 2002, once it became approved, did you
15 ever learn of a substantial modification to that
16 instrument?

17 A. Yes. There was many modifications, some not
18 substantial, some substantial, yes.

19 Q. For the sake of the hearing, I want to really
20 deal with the substantial ones.

21 My understanding is back in August of 2004,
22 yourself and another department inspector, Roger
23 Skipper, were sent to Kentucky to the headquarters of
24 CMI, the manufacturer?

25 A. Yes.

1 Q. What was the purpose of that?

2 A. Well, he and I were not the only ones. All
3 of the program staff went up there for an Intoxilyzer
4 users' group, and that is a group of state
5 representatives from different states that use CMI
6 products, and it's a professional exchange of
7 information, education, training, on different issues
8 and things, CMI, the manufacturer of different models
9 of Intoxilyzers. It was a professional exchange of
10 information.

11 Mr. Skipper and I were asked to stay on an
12 additional week to work on software development, along
13 with the engineering division of CMI, to bring the
14 software needs of Florida, requirements of Florida as
15 the customer, and go back and forth with the
16 engineering division to ensure that the software met
17 the customer's needs, and FDLE and the State of
18 Florida being the customer. That was the intent and
19 purpose of our staying there.

20 Q. Let's go back to the first week.

21 A. Yes.

22 Q. You were there with Mr. Skipper. Were you
23 there with other department inspectors?

24 A. If I remember correctly, all the department
25 inspectors were there. That was one of the very rare

1 times that all of the department inspectors -- because
2 we were receiving additional training from the
3 manufacturer as a group.

4 Q. What about your boss; was your boss there?

5 A. Yes, she was there.

6 Q. And for the sake of the record, your boss --
7 when I'm referring to your boss, that would have been
8 who?

9 A. Laura Barfield.

10 Q. And did she stay the second week?

11 A. She did not.

12 Q. Did any of the other department inspectors
13 stay the second week?

14 A. No. Mr. Skipper and I were the only two to
15 stay.

16 Q. During the first week you were having this
17 seminar, so to say, on the Intoxilyzer 8000?

18 A. Well, there was training, there was a lot of
19 different things going on. It was not just purely the
20 8000. Many different CMI products had training and
21 seminars on, but we were more -- as a group, had
22 individual training from the manufacturer on the 8000.

23 Q. On that -- in regard to anything dealing with
24 the Intoxilyzer 8000, during that first week you were
25 in Kentucky, did you ever see of or have reported to

1 you a problem that dealt with air leaks of the
2 Intoxilyzer 8000?

3 A. No.

4 Q. A problem that dealt with leaks in the
5 recirculation path and the need to compensate them for
6 the Intoxilyzer 8000?

7 A. No.

8 Q. Did -- was it ever reported by CMI or did you
9 ever see any type of a problem with the connectors for
10 the simulator?

11 A. Not during that first week, no.

12 Q. During that first week, was there different
13 times where there was the actual operation of an
14 Intoxilyzer 8000?

15 A. We were doing individual evaluations. I
16 remember, in fact, simulators were hooked up to a
17 couple instruments backwards, and the instruments,
18 instead of vapor going in, liquid went in. So there
19 was individuals doing different things and different
20 individual projects with the 8000.

21 Q. As a result of that first week, at the end,
22 was there any type of conference, so to say, to
23 discuss issues that may have arisen that first week?

24 A. I don't know if there was a conference. I'm
25 sure there was feedback between the FDLE staff and the

1 CMI engineers and representatives. There was back and
2 forth the entire week on specific things as we moved
3 forward.

4 Q. As far as your knowledge, did you ever hear
5 of or see anything to deal with leaks, leaks in
6 recirculation path or problems with the connector?

7 A. No.

8 Q. Did CMI ever at that point in time, that
9 first week, ever describe to you the fact of a need to
10 drill holes into the Intoxilyzer 8000?

11 A. No.

12 Q. What happened the second week? You were
13 there with Mr. Skipper; you're doing software
14 changes -- I shouldn't say software changes -- you're
15 debugging the software --

16 A. Correct.

17 Q. -- to set it up specifically for the
18 requirements of the respondent?

19 A. Correct.

20 Q. In order to do that, do you have to run
21 simulators and do stimulator solutions through the
22 instrument?

23 A. Yes. The first -- we arrived at the
24 engineering -- we were physically in CMI's factory in
25 the engineering division. Mr. Brian Faulkner at the

1 time was the software engineer who was assigned to
2 Florida's software development. Ms. Becky Taylor was
3 assigned to assist us in the engineering
4 development -- in the engineering division on whatever
5 we needed in this debugging and development process.

6 We set up simulators. One of the
7 requirements for simulators is prior to use, you allow
8 them to warm up because you have to have a specific
9 temperature and stability of that temperature to get
10 the vapor concentration at the right --

11 Q. The idea of a simulator is that it warms the
12 alcohol vapor to a particular level that is then being
13 tested by the instrument, correct?

14 A. Kind of. The simulator heats the liquid, and
15 the vapor partitions or diffuses out of the liquid
16 into the head space of the simulator, and then --

17 Q. The air space?

18 A. The air space. And the intent is to measure
19 the vapor's concentration because it is at a specific
20 temperature, 34 degrees C, it partitions out at a
21 specific ratio and will produce a vapor result
22 measured by the instrument at the target value. So
23 the temperature -- simulators are very temperature
24 dependant.

25 Q. Now, when you were doing simulator testing

1 that second week in Kentucky, were you testing at the
2 normal levels that are used throughout the State of
3 Florida for monthly testing and for yearly testing?

4 A. Yes. And I believe at additional values, but
5 yes.

6 Q. The values used in the State of Florida are
7 what generally?

8 A. Specifically dependent if you're talking
9 about calibrating versus testing, but at the time, it
10 was testing. And it was 0-0-0, a zero reference, .05,
11 .08 and .20 were the values that were used at the time
12 for monthly and annual inspections.

13 Q. During -- when you started running the
14 inspections, explain to the Court what you observed.

15 A. After the simulators heated properly, we
16 would hook the simulator to the instrument, and the
17 first analyses that were done were two hundredths
18 below target value, meaning we were running .08
19 simulators and we were getting .02 -- .062, .061, two
20 hundredths of a gram below the target value.

21 Q. Now, in the State of Florida, the regulations
22 allow -- when you do a monthly testing with a
23 simulator, they allow the reading of the instrument to
24 have a range, and if it's within that range, it's
25 still acceptable, correct?

1 A. Correct.

2 Q. Were these readings anywhere near that range
3 of being acceptable?

4 A. No. They were below the acceptable
5 standards. The acceptable standards is .005 or five
6 percent, whichever is greater. So an .08 simulator,
7 for example, acceptable would be .075 to .085.

8 Q. And you weren't getting .075s, you were
9 getting close to like .061s, .062s?

10 A. Correct, two hundredths of a gram below the
11 target value.

12 Q. Did you attempt a simulator test with
13 solutions other than, let's say, the .08 and obtain
14 similar results?

15 A. Yes.

16 Q. What other simulator levels do you remember?

17 A. .20.

18 Q. And, again, you were getting considerably low
19 readings?

20 A. Yes, about .180, .181, .182. And that's
21 "point" 180, 182.

22 Q. Were you also getting any results that were
23 extremely high out of range?

24 A. I don't recall excessively high results
25 during that initial testing.

1 Q. Well, did this bring -- was this of some
2 surprise to you?

3 A. It was extremely surprising to both Mr.
4 Skipper and I. As I described and he described it,
5 it's a scratch-your-head moment, what's going on. So
6 we immediately started troubleshooting.

7 Q. Well, let me bring you back. You testified
8 that in Exhibit No. 7 there's approximately 200 tests
9 done and you didn't see this problem?

10 A. Correct.

11 Q. In Exhibit No. 10, there are approximately a
12 hundred tests -- simulator tests done, you didn't see
13 the problem?

14 A. Correct.

15 Q. Exhibit No. 11, there's approximately 800
16 tests done, you didn't see the problem?

17 A. Correct.

18 Q. Exhibit No. 12, 733 tests, you didn't see the
19 problem?

20 A. Correct.

21 Q. Exhibit No. 13, 460 tests, you didn't see the
22 problem?

23 A. Correct.

24 Q. You're at -- a whole week at the seminar with
25 CMI and you don't see the problem?

1 A. Correct.

2 Q. What happened?

3 A. That's the million dollar question.

4 Q. Tell me -- tell the Court the steps you went
5 through to try to answer this million dollar question.

6 A. The diagnosing of problems with breath
7 testing instruments is a process of elimination. It's
8 been described, and I've described it, that there can
9 only be three causes of a problem: One being the
10 instrument itself; two being the equipment you're
11 using, such as simulator hoses; or three, the
12 procedure you're using. So we immediately starting
13 eliminating causes.

14 Simulators, are they heated properly? We
15 verified the temperature of the simulator because if
16 you don't heat it enough -- if the temperature of the
17 simulator is low, the results will be low. That's the
18 first instinct when you have a low result is to check
19 the simulator, check the temperature. We checked --
20 verified the temperature.

21 Q. That simulator has a certified thermometer
22 used in it, correct?

23 A. Yes. And we went as far as to take that
24 thermometer out and use another, one of our laboratory
25 thermometers, to test it to make sure the thermometer

1 was right.

2 Q. It wasn't a problem with the simulator?

3 A. Was not a problem with the simulator; wasn't
4 a problem with the temperature.

5 The other cause is the hoses and seals within
6 the simulator. If you have an air leak and it's --
7 the value of the -- the vapor is being diluted by room
8 air because of a leak, it's going to reduce the
9 results. So we looked at that.

10 Q. Any problems with seals and leaks?

11 A. We did not see any problems with seals on the
12 instrument. We looked at the connectors --

13 Q. When you say -- let me back up.

14 A. Go ahead.

15 Q. When you say "instrument," you're talking the
16 simulator?

17 A. The simulator, yes. I'm sorry.

18 Q. Okay.

19 A. We then looked at -- there are hose
20 connections between the simulator and the Intoxilyzer,
21 and we looked at that.

22 Q. When you say "looked at that," what do you
23 mean?

24 A. We looked at, is there a leak there; is there
25 a better way of connecting them; is there some sort of

1 best practices. So the engineering division had
2 probably four or five different types of connectors,
3 and we interchanged the connectors through every
4 variety they had.

5 MR. GABRIEL: All right. Let me stop you a
6 second. Judge, may I approach?

7 THE COURT: Yes.

8 MR. GABRIEL: I'm going to show you what has
9 been marked as Petitioners' Exhibit No. 68. Refer
10 to page 4 of 7.

11 I'd like to move that into evidence, Judge.
12 I believe it was stipulated.

13 MS. JOHNSON: No objection.

14 THE COURT: Admitted.

15 (Petitioners' Exhibit No. 68 was admitted
16 into the record.)

17 BY MR. GABRIEL:

18 Q. First of all, what is that exhibit, No. 68?

19 A. Intoxilyzer 8000 instrument specifications.

20 Q. And it tells different specifications of the
21 Intoxilyzer 8000, correct?

22 A. It does.

23 Q. The date of it?

24 A. Yes.

25 Q. The date of that report? Or version, I

1 should say?

2 A. Version 1.1, October 23rd, 2000.

3 Q. Does it have a category dealing with the type
4 of connectors that the Intoxilyzer was using?

5 A. Yes.

6 Q. What does it state?

7 A. "Quick disconnect fittings located on the
8 right side of the instrument next to the calibration
9 port inlet, different sex."

10 Q. And below that -- or above that?

11 A. "Calibration port inlet, quick disconnect
12 fitting located on the right side of the instrument."

13 Q. Are those the fittings that we're talking
14 about here?

15 A. Those are the locations, yes, and the
16 fittings.

17 Q. And when you were up in Kentucky that second
18 week having this problem and now you're trying to
19 determine the answer to that million dollar question,
20 were there quick disconnects on that instrument?

21 A. There were quick disconnects, SureLock --
22 quick disconnects meaning they were pressure fittings
23 versus SureLocks.

24 Q. Okay.

25 A. So we changed those connectors -- four or

1 five different style of connectors were used during
2 our testing to determine if that was a problem.

3 Q. Prior to actually changing the connectors,
4 did you in any way try to test the connector that was
5 there originally to see if it was, in essence, a leak
6 problem?

7 A. We continued to test it, we changed o-rings,
8 but you couldn't physically -- in order to test the
9 connector, you would have to take it apart and put it
10 into a pressure gauge. So you couldn't test 100
11 percent so --

12 Q. You did not go to that extent?

13 A. We did not.

14 Q. Did you again attempt to do simulators with
15 those connectors, making sure that they were tight as
16 tight could be --

17 A. Yes.

18 Q. -- and still get the same low results?

19 A. Yes.

20 Q. Always low?

21 A. Always low.

22 Q. Eventually, you changed the connectors and
23 used a variety of different connectors?

24 A. We did.

25 Q. And each connector you're changing to, are

1 you again testing the instrument, or the simulator,
2 and getting an out-of-range, unreliable, low sample
3 testing?

4 A. Yes.

5 Q. What happened then?

6 A. Mr. Bill Schofield, who was the chief of
7 engineering at the time, was brought in because Becky
8 Taylor couldn't -- who was working in the engineering
9 division, and Roger Skipper and I, we could not come
10 up with the cause and potential fix.

11 Q. Prior to CMI getting involved, do you have
12 recollection of contacting your boss, or Mr. Skipper
13 contacting your boss?

14 A. Prior to? I don't recall. I can't say he
15 did or did not prior to.

16 Q. What happened then?

17 A. And when you said before CMI got involved,
18 CMI was involved the entire process. Bill Schofield,
19 the chief of engineering, was brought in later, but
20 Becky Taylor was involved during the entire
21 troubleshooting process.

22 Q. So you've gone through the elimination
23 process, in essence, of certain things that could be
24 the answer to this million dollar question?

25 A. Correct. Mr. Schofield was brought in and

1 physically shown what the problem was.

2 Q. Did you explain to -- did you or Mr. Skipper
3 explain to Mr. Schofield -- and he at the time was the
4 head of the engineering department?

5 A. He was chief of engineering or senior
6 engineer.

7 Q. Did you explain to him the steps that you had
8 gone through: Here's what happening; we checked this;
9 we checked the simulator; we checked the seals; we
10 changed connectors five different times; we've done
11 all this and we're still getting way, way, way low
12 results?

13 A. Yes. We told him, here's the problem, here's
14 what we've tried, A, B, C, D, E, F, G, whatever it
15 was, and solicited his input or guidance or
16 recommendations.

17 Q. And what were those recommendations?

18 A. He broke out a flow diagram of the
19 instrument's breath flow.

20 MR. GABRIEL: Hang on one second.

21 (Brief pause.)

22 MR. GABRIEL: May I approach?

23 THE COURT: Yes.

24 BY MR. GABRIEL:

25 Q. I'm going to show you what is marked as

1 Petitioners' Exhibit No. 16.

2 A. Thank you.

3 Q. See if you recognize those.

4 A. Yes.

5 Q. Are those the flow diagrams that Mr.
6 Schofield was showing you?

7 A. Yes.

8 MR. GABRIEL: I'd like to move those into
9 evidence.

10 MS. JOHNSON: No objection.

11 THE COURT: Admitted.

12 (Petitioners' Exhibit No. 16 was admitted
13 into the record.)

14 THE WITNESS: I'd like to clarify they are
15 the flow diagrams, but the ones he was showing us
16 were on poster-size paper, so --

17 BY MR. GABRIEL:

18 Q. Okay.

19 A. -- it was a lot more --

20 Q. Easier and clearer to read?

21 A. Yes.

22 Q. So the head of engineering, yourself, Mr.
23 Skipper, another department inspector -- and were
24 other CMI employees still involved in this process?

25 A. Becky Taylor was, yes.

1 Q. There's this brainstorming session going on.
2 What's the end result?

3 A. That if they'd drill a small hole in the
4 exhaust block check valve, it would bring the results
5 more in line with the target value.

6 MR. GABRIEL: May I approach?

7 THE COURT: Yes.

8 BY MR. GABRIEL:

9 Q. I'm going to show you what is marked as
10 Petitioners' Exhibit No. 15. Do you recognize those
11 photographs?

12 A. I do.

13 Q. Do you know what the inside of an Intoxilyzer
14 8000 looks like?

15 A. I'm very familiar with the inside of an
16 Intoxilyzer 8000, so yes.

17 Q. Does that photograph appear to be the
18 photograph of the exhaust port valve that we are
19 discussing in an Intoxilyzer 8000?

20 A. Yes, as it is mounted inside the Intoxilyzer
21 instrument, along with its other components, but yes.

22 Q. And you see other components in those
23 photographs that helps you come to that conclusion?

24 A. Yes.

25 Q. Does that photograph fairly and accurately

1 depict the exhaust port valve that we're going to be
2 talking so much about during this hearing inside the
3 Intoxilyzer 8000?

4 A. It does.

5 MR. GABRIEL: I'd like to move that into
6 evidence, Judge.

7 THE COURT: Any objection?

8 MS. JOHNSON: No objection.

9 THE COURT: It's admitted.

10 (Petitioners' Exhibit No. 15 was admitted
11 into the record.)

12 BY MR. GABRIEL:

13 Q. Explain to the Court, please, that -- those
14 photographs and where this exhaust port valve is and
15 what we've got going on here.

16 A. Well, the exhaust block has its cover taken
17 off of it, and if I could show Your Honor (indicating
18 to document), this rectangular object is Teflon
19 plastic. Four screws hold a sheet metal plate on the
20 top of that, and then on top of that is the sample
21 chamber. Those have all been removed. This round
22 object is the check valve, and it moves up and down.
23 In the upper right -- left-hand corner in about the
24 ten o'clock position, you can see a small hole has
25 been drilled in that check valve.

1 Q. The design of the Intoxilyzer 8000 is one
2 that you have these check valves to regulate the flow
3 of air, correct?

4 A. Yes, it --

5 Q. It regulates or directs the flow --

6 A. Directs the flow of air, I think is -- and
7 regulates, yes.

8 Q. At different points in time, as the diagrams
9 show us, there are -- there are different paths that
10 an air -- air will take?

11 A. Correct.

12 Q. And the air can be for several different
13 purposes. It can be for a person being tested?

14 A. A person blowing in an instrument to be
15 tested, yes.

16 Q. A defendant, so to say, blowing into a breath
17 testing instrument?

18 A. Yes.

19 Q. It can be for the department's inspectors or
20 the agency inspectors wanting to do an inspection
21 test, a monthly or a yearly inspection test, pursuant
22 to FDLE rules using a simulator?

23 A. Yes.

24 Q. The diagram calls that a wet bath, correct?

25 A. That is correct.

1 Q. Because you're using the simulator?

2 A. Correct.

3 Q. There's also a diagram that detects the air
4 flow for dry gas when we use -- when the department
5 uses dry gas versus wet gas to test the accuracy of
6 the instrument?

7 A. That is correct.

8 Q. In regard to the check valve that was
9 drilled, were you present when it was drilled that you
10 recall?

11 A. I don't know if I physically stood there and
12 watched Mr. Schofield drill it. I recall that I saw
13 him do it, but I -- I don't know for sure if I was
14 physically there when he had the drill in his hands.

15 Q. He was going through these diagrams and had
16 heard of all the steps that you two, yourself and Mr.
17 Skipper, had taken to try and eliminate the problem.
18 It didn't?

19 A. It did not.

20 Q. And so his ultimate conclusion was the need
21 to drill a hole?

22 A. Correct.

23 Q. What did you think of that at the time?

24 A. I was scratching my head, trying to figure
25 out how in the world that was going to fix the

1 problem.

2 Q. Did you ask Mr. Schofield that?

3 A. Yes, I -- we both did.

4 Q. Did you get a good answer?

5 A. I got a hypertechnical engineering answer
6 that I don't know at the time if I understood.

7 Q. Okay.

8 A. But he was the chief of engineering, so we
9 agreed with his analysis.

10 Q. Now, at that time you were doing this, you're
11 an employee of the Florida Department of Law
12 Enforcement, correct?

13 A. I was.

14 Q. So was Mr. Skipper, correct?

15 A. We were.

16 Q. Part of your role as being an employee of the
17 Florida Department of Law Enforcement in the role of a
18 department inspector is knowing the rules?

19 A. Yes.

20 Q. You knew the rules?

21 A. I did.

22 Q. Do you assume that Mr. Skipper knew the rules
23 from your interactions with him?

24 A. He was my training officer and was there
25 longer and my senior and probably knew them better

1 than I, but yes.

2 Q. At that time that a drill is taken out, we
3 know that that date is -- I believe eight -- in August
4 of 2004, correct, 8/13 or 8/19, I believe?

5 A. Right in that range, yes.

6 Q. At that time, the FDLE rules that were in
7 effect were the 11/5/2002 rules, correct?

8 A. Yes.

9 Q. For the sake of the record, those are the
10 rules that were moved in as No. 14?

11 A. Whatever exhibit, but yes.

12 Q. And pursuant to those rules, we have the
13 Intoxilyzer 8000, it was an approved instrument in
14 2002?

15 A. It was.

16 Q. For evidentiary use in the State of Florida?

17 A. Yes.

18 Q. Was not put in service though?

19 A. No, it was not being used at the time.

20 Q. But it was an approved evidentiary breath
21 testing device?

22 A. Yes.

23 Q. And since it's approved, we have now a
24 modification of a drilling of a hole, actually taking
25 a drill, taking the instrument apart and drilling a

1 hole in the valve?

2 A. That was taking place, yes.

3 Q. Under the rules as you understand them, is
4 that a modification?

5 A. Yes and no.

6 Q. Okay.

7 A. Yes, it's a modification to that research
8 instrument that we were doing. The minute they
9 decided that that was the appropriate fix and to do
10 all the instruments, then it became a modification.

11 Q. Under the rule that I'm talking about --

12 A. Under the rule that you're talking about,
13 yes.

14 Q. -- 11D-8.003, I believe it's paragraph 5?

15 A. Yes.

16 Q. Then it becomes an act that requires,
17 according to the rule, certain actions on behalf of
18 the manufacturer and the department?

19 A. It did.

20 Q. Let's talk first about the actions that are
21 required pursuant to those rules by the manufacturer.

22 A. Yes.

23 Q. It requires written notification prior to
24 taking the drill out, correct?

25 A. Prior to modifica- -- yes.

1 Q. And we know that notification never took
2 place, correct?

3 A. The written notification never took place.

4 MR. GABRIEL: May I approach the witness?

5 THE COURT: Yes.

6 MR. GABRIEL: I'll show you what has been
7 marked as Petitioners' Exhibit No. 18, see if you
8 recognize that. I'd like to move that into
9 evidence. I believe it has been stipulated to.

10 MS. JOHNSON: No objection.

11 THE COURT: It's admitted.

12 (Petitioners' Exhibit No. 18 was admitted
13 into the record.)

14 THE WITNESS: Yes, I'm familiar with this
15 document.

16 BY MR. GABRIEL:

17 Q. That appears to be an affidavit by the
18 engineering department, I believe it's Mr. Faulkner?

19 A. Yes, Brian Faulkner.

20 Q. From CMI that deals with this particular act
21 of notice and the drilling of the hole, correct?

22 A. Correct.

23 Q. And in the affidavit, CMI swears that they
24 did not notify the Florida Department of Law
25 Enforcement in writing?

1 A. That is correct.

2 Q. And they also swear under oath that they did
3 not in writing or otherwise notify the National
4 Highway Institute of Traffic Safety, NHTSA?

5 A. Correct.

6 Q. They also swear under oath that they did not
7 notify pursuant to DOT regulations OSAP?

8 MS. JOHNSON: Objection, Judge, to the
9 relevance to what CMI did to OSAP or DOT.

10 MR. GABRIEL: My response, Judge, would be
11 this: According to the petitioner -- the
12 respondent's rules, the first requirement is that
13 the Intoxilyzer or any breath testing instrument
14 has to be within compliance of DOT regulations and
15 be on the Conforming Products List.

16 So because that's the first requirement,
17 which we've gone through and I've gotten exhibits
18 in, it therefore makes compliance with those rules
19 an issue, because if you don't comply with those
20 rules, you do not have an instrument any longer on
21 the Conforming Products List, and you're not
22 meeting requirement number one for an approved
23 evidentiary breath testing device.

24 THE COURT: And this is a rule that
25 previously existed?

1 MR. GABRIEL: This is a rule that still
2 exists to this day and existed way back when -- it
3 is still long-standing.

4 THE COURT: Okay.

5 MS. JOHNSON: I would object, Judge. The
6 only requirement is that Florida choose an
7 instrument that is on the CPL at the time.
8 There's no -- there's nothing in the rules that
9 say that it has to remain on the CPL, that the
10 manufacturer is required to, you know, update the
11 DOT or anybody else with anything. Florida's only
12 requirement, per rule, is that it be on the CPL at
13 the time Florida promulgates the rule.

14 MR. GABRIEL: Judge, that's not what that
15 rules states.

16 THE COURT: What rule are we talking about?

17 MR. GABRIEL: That would be Exhibit No. 14, I
18 believe.

19 THE COURT: What does the rule say? What
20 does the rule say now?

21 MR. GABRIEL: The rule states now --

22 THE COURT: I mean, my authority in the case
23 is to determine the facial validity of existing
24 rules.

25 MR. GABRIEL: Correct. And my objection to

1 this is that -- and the ability to prove that is
2 that if their requirement today is that it has to
3 be on the Conforming Products List in order to do
4 an evaluation; if it is not, then if I'm showing
5 that, then they're not meeting that requirement.

6 And to say that their position is it only has
7 to be on the Conforming Products List for that one
8 day that we do an evaluation, I don't believe is
9 rational, and I don't believe it's supported by
10 the law.

11 MS. JOHNSON: And, Judge, there's nothing
12 that says that it has to be on the CPL in order to
13 do an evaluation. It says it has to be on the CPL
14 in order to be chosen for use in the State of
15 Florida.

16 MR. GABRIEL: To do an evaluation to be used
17 for approval on the --

18 THE COURT: What existing rule number are we
19 talking about?

20 MR. GABRIEL: All right.

21 THE WITNESS: If I can see that, Your Honor,
22 I will point it to you.

23 THE COURT: Those are the forms that I
24 printed out.

25 MS. JOHNSON: Judge, it would be 8.017, which

1 incorporates the forms, and it would be Form 34.

2 MR. GABRIEL: Right. Exhibit No. 92, I'm
3 trying to get it --

4 MS. JOHNSON: The very first line of Form 34
5 says, "Only breath test instruments listed on the
6 United States Department of Transportation
7 Conforming Products List of evidential breath
8 measuring devices will be evaluated."

9 MR. GABRIEL: So pre requirement number one
10 to start this evaluation process is that you be on
11 the CPL, Conforming Products List. If they're not
12 complying with the notice requirements of the CPL,
13 they're not on the list, Judge.

14 So, therefore, what we have is a period of
15 time where the instrument being used in the State
16 of Florida allegedly, by our position, is one
17 that's not properly approved in the State of
18 Florida. Allowing that to happen due to the
19 insufficiency of FDLE rules is why we're here
20 today.

21 THE COURT: But the CPL is a federal list?

22 MR. GABRIEL: It is.

23 THE COURT: I'll ask stupid questions because
24 y'all know all this stuff, and I don't know
25 anything.

1 MR. GABRIEL: But the State of Florida makes
2 conforming with the CPL, that federal part of it,
3 issue number one on their ability to have an
4 approved instrument.

5 THE COURT: But it was on the list.

6 MR. GABRIEL: It is on the list.

7 THE COURT: And it is still on the list.
8 It's been on the list all along?

9 MR. GABRIEL: Let me put it this way: The
10 original 8000 instrument is still on the list.
11 The 8000 with a hole in it is not. And that's why
12 we're here arguing about all that, and that's kind
13 of the crux of the case.

14 MS. JOHNSON: And it's the respondent's
15 position it's the same instrument; it's the same
16 make and model instrument, with or without a hole.

17 MR. GABRIEL: I know. I know.

18 THE COURT: I'm going to allow him to answer
19 the question. I'm not making a determination,
20 frankly, on the relevance of the question at this
21 point because I don't think I know enough to
22 determine whether it's relevant or not. But
23 you're allowed to answer the question if you can
24 recall the question.

25 BY MR. GABRIEL:

1 Q. Do you know whether or not, according to that
2 affidavit from CMI that they swear under oath that
3 there was not proper notification to the OSAP?

4 A. There was not notification, according to
5 Brian Faulkner.

6 If I could clarify because we get a little
7 bit confused with names, back in 2004 when I was
8 physically at CMI, Brian Faulkner was a software
9 engineer. Bill Schofield was the chief of
10 engineering. Bill Schofield has since retired, and
11 now Brian Faulkner in this affidavit is signing as
12 chief of engineering. So he has been promoted so that
13 we don't get confused with names --

14 Q. Okay.

15 A. -- and positions that they hold.

16 THE COURT: What is OSAP?

17 MR. GABRIEL: Office of Special -- hang on a
18 second and I will tell you, Judge. Office of
19 Special Alcohol Programs, I believe.

20 MS. JOHNSON: State, Office of State Alcohol
21 Programs, which is a defunct organization.

22 THE COURT: Thank you.

23 MR. GABRIEL: May I approach?

24 THE COURT: Yes.

25 MR. GABRIEL: Let me show you what has been

1 marked as Petitioners' Exhibit No. 17. I'd ask to
2 move that into evidence, Judge. It's been
3 stipulated to, I believe.

4 THE COURT: Any objection?

5 MS. JOHNSON: No objection.

6 THE COURT: It's admitted.

7 (Petitioners' Exhibit No. 17 was admitted
8 into the record.)

9 BY MR. GABRIEL:

10 Q. Have you seen those documents before, sir?

11 A. I have.

12 Q. They are engineering change notices from the
13 manufacturer?

14 A. They are.

15 Q. And they're relating to this issue --

16 A. They are.

17 Q. -- that we're talking about, the drilling of
18 a hole?

19 A. Yes.

20 Q. Did you see one of those back in August of
21 2004 when the hole was drilled?

22 A. I did not.

23 Q. When was the first time that you got to be
24 able to see that document?

25 A. I believe when litigation started about the

1 hole.

2 Q. And that was approximately six years later?

3 A. Yes.

4 Q. And would you agree with me that litigation
5 about this hole started when you gave testimony in
6 Sarasota County regarding the existence of the hole
7 being drilled?

8 A. To my knowledge, yes.

9 Q. To your knowledge, had anybody else ever let
10 that activity by the Florida Department of Law
11 Enforcement and the manufacturer, had anybody ever let
12 that be known to the public?

13 A. I had not testified prior to it. I can't
14 tell you what others may, but I think the first time
15 it was litigated or was mentioned was when I said
16 something.

17 Q. Now, when you were being -- troubleshooting
18 with the CMI employee in 2004 in Kentucky the second
19 week, did the manufacturer describe to you why he
20 thought that drilling a hole in that valve would fix
21 it?

22 A. He did.

23 Q. And I think your answer before I asked the
24 question was it was a rather -- it's not -- it was not
25 a response that you fully understood, partially due to

1 the fact that Mr. Schofield at the time is an engineer
2 and you're not?

3 A. Well, it was a very hypertechnical answer,
4 and he dummed it down a lot to help explain, but the
5 full explanation was very hypertechnical and the
6 dummed-down answer made a little more sense.

7 Q. Now, according to Mr. -- according to the
8 manufacturer in those engineering change notices, they
9 put the reason for drilling the hole as being the need
10 to compensate for leaks in the recirculation path?

11 A. Yes.

12 Q. Is that what you were seeing when you were
13 doing the testing and had all these problems? Was
14 that the million dollar question?

15 A. I don't know. It could have been, but I
16 don't know. We did not physically see leaks in the
17 recirculation path.

18 Q. Part of your troubleshooting, though, was
19 also to try to see whether or not there were leaks?
20 You were checking the simulator to see if the seals
21 were leaking and the hoses and the connectors?

22 A. Correct. We checked all the external. Part
23 of the recirculation path is internal of the
24 instrument. So when he writes a change order,
25 "recirculation path leaks," he could be speaking

1 simulator, o-rings, internal parts, anything during
2 that entire path.

3 Q. So you're up there that second week, you run
4 into this problem. Approximately how long do you
5 believe you were trouble-shooting with yourself, Mr.
6 Skipper and employees of CMI?

7 A. Hours.

8 Q. Ultimately, the conclusion comes "we need to
9 drill a hole"?

10 A. Correct.

11 Q. And do they drill a hole?

12 A. They do.

13 Q. Does the instrument then come back out to
14 yourself and Mr. Skipper to see whether or not the
15 hole works?

16 A. Well, the instrument was reassembled, and we
17 tried the same testing we tried in the morning, and
18 the results were within range and very close to target
19 value.

20 Q. So as soon as that hole was drilled, would it
21 be a fair statement that every simulator test you ran
22 after that during that process had results that would
23 be within compliance of FDLE rules?

24 A. I can't say every. The vast majority were.
25 It was an "ah-ha" moment, for lack of a better term.

1 As soon as we started testing again, the results were
2 right within target value.

3 Q. To your knowledge, do you know whether or not
4 there was ever any engineering change notices
5 regarding connectors of the Intoxilyzer?

6 A. I have seen none.

7 Q. And from the dates on Exhibit No. 17, it
8 looks like August 19th of 2004 -- or, excuse me,
9 August 18th, 2004, is when this occurred. Does that
10 date sound right?

11 A. Yes.

12 Q. Soon thereafter, is it a fair statement that
13 the Florida Department of Law Enforcement decided to
14 change their rules?

15 A. Yes. The new rule --

16 Q. 12/9 of 2004 is when it --

17 A. Came effective, yes.

18 Q. Part of the rule changes in 2004 dealt with
19 modifications, correct?

20 A. The procedures and steps to take in
21 modifications and notifications was changed in the
22 rule, yes.

23 MR. GABRIEL: May I approach?

24 THE COURT: Yes.

25 MR. GABRIEL: I'm going to show you what has

1 been marked as Petitioners' Exhibit No. 19. I'd
2 like to move that into evidence, Judge.

3 MS. JOHNSON: No objection.

4 THE COURT: It's admitted.

5 (Petitioners' Exhibit No. 19 was admitted
6 into the record.)

7 BY MR. GABRIEL:

8 Q. Those are the two thousand -- the December
9 9th, 2004, rules?

10 A. They are.

11 Q. Now, please turn to Section 11D-8.003, again,
12 the section of the rules that deals with approval of
13 instruments, correct?

14 A. Yes.

15 Q. It's entitled what?

16 A. "Approval of Breath Test Methods and
17 Instruments."

18 Q. Is it a fair statement that from the rule
19 to -- from the rule of 2002 to the rule of 2004, what
20 has been changed is taking out the requirement for the
21 need of written notice prior to making a modification
22 to an approved instrument?

23 A. Yes.

24 Q. It also takes out the standard to which when
25 there is an evaluation of a modification, you're going

1 to be looking at the method of analysis and you're
2 going to be looking at the analytical reliability of
3 the instrument considering that change?

4 A. Yes, that has been removed from this version
5 of the rule.

6 Q. Is it a fair statement that that version of
7 the rule, which still exists today, that there is no
8 standard whatsoever for dealing with modifications of
9 instruments?

10 A. Not as published in this rule.

11 Q. And in any other rule since that date, so, in
12 essence, present, do you know of any rule that sets up
13 a standard for which to deal with modification of
14 instruments?

15 A. I do not.

16 Q. The Florida Department of Law Enforcement
17 rules and regulations have for a long period of time
18 had in Section 11D-8.003, or the rule that deals with
19 approval of breath testing instruments, has always --
20 until that change right there in 2004, has always had
21 requirements that dealt with modifications of a
22 previously-approved instrument, correct?

23 A. Yes.

24 Q. For at least the last 20 years plus, they've
25 had those rules and requirements, correct?

1 MS. JOHNSON: Objection, asked and answered.

2 THE COURT: You can go ahead.

3 THE WITNESS: Yes, as far as I've known it,
4 every version of rule I've seen prior did have
5 that.

6 BY MR. GABRIEL:

7 Q. In your role with the Florida Department of
8 Law Enforcement when you were there, would it be a
9 fair statement that a portion of your activities dealt
10 with court challenges in criminal cases?

11 A. Testimony for the state or even defense, but,
12 yes, I provided expert testimony.

13 Q. And would it be a fair statement that a lot
14 of the issues that you were testifying about dealt
15 with modifications of an Intoxilyzer?

16 A. Yes.

17 Q. That being the predecessor, Intoxilyzer 5000?

18 A. Yes.

19 Q. And the Intoxilyzer 8000?

20 A. Yes.

21 Q. When the Florida Department of Law
22 Enforcement enacted these new rules taking out notice
23 and requirements of a standard for the reevaluation of
24 a previously-approved, modified instrument, did you
25 have discussions with personnel at Florida Department

1 of Law Enforcement about your feelings of that?

2 A. Prior to it happening?

3 Q. Yeah.

4 A. Yes, it was discussed.

5 Q. Tell me a little bit about what your opinion
6 was.

7 A. Well, as I testified earlier, the rule
8 process at Alcohol Testing was a team process. The
9 program manager and the department inspectors, the
10 general counsel at the time, we would have meetings
11 about rules and go over what we were going to add,
12 delete, change, and it was expressed that part of the
13 reason they were deleting it was a legal issue. The
14 Rule 11D-8 is binding on peoples in Florida and the
15 Florida Department of Law Enforcement and law
16 enforcement agencies, but was not binding on an
17 out-of-state corporation, CMI, Incorporated.

18 Q. That was the position by your supervisor?

19 A. That was the position and -- well, that was
20 the legal advice of the general counsel working for us
21 at the time.

22 Q. So do you know -- did that legal counsel ever
23 get into the fact that this long-standing rule
24 requiring written notification by a manufacturer, how
25 it all of a sudden became, quote/unquote, legally

1 improper in 2004?

2 A. Well, his recommendation and his
3 interpretation was that if you wanted to hold the
4 manufacturer binding to provide written notice, it
5 needs to be in a contract, not in a state
6 administrative rule.

7 Q. Florida Statute three --

8 A. The --

9 Q. Would you agree with me that Florida law
10 gives the Florida Department of Law Enforcement the
11 ability to enter into contracts --

12 A. It does.

13 Q. -- dealing with it?

14 A. It does.

15 Q. That is a promulgated -- that's a statutory
16 authority that is given to the Florida Department of
17 Law Enforcement, correct?

18 A. It was.

19 Q. And do you know during this discussion about
20 the change of rules whether or not that became an
21 alternative that was discussed?

22 A. It was not discussed as far as writing a
23 contract to replace what was being removed from the
24 rule. The other discussion specifically on that
25 written notification was the history of the

1 Intoxilyzer 5000 and the sporadic written
2 notifications we were getting on the previous
3 instrument and the difficulty of complying with that
4 requirement and holding CMI to comply with that
5 requirement of rule.

6 Q. So CMI, the manufacturer of the 5000 --
7 Intoxilyzer 5000 and the 8000, had shown a prior
8 history of not really complying very well with that?

9 A. There were changes on the 5000 that were not
10 notified in writing to FDLE, yes.

11 Q. Did the Florida Department of Law Enforcement
12 ever make any discussions during rulemaking regarding
13 how in the world are we going to put the public on
14 notice of these modifications of these instruments?

15 A. No. There was no discussion specifically
16 addressing that.

17 Q. To your understanding, does the Florida
18 Department -- excuse me -- does the Florida Department
19 of Law Enforcement rules and regulations as they exist
20 today have a notification requirement for
21 modification?

22 A. From the manufacturer to the state?

23 Q. Number one, from the manufacturer?

24 A. Not to my knowledge, no.

25 Q. Number two, from the state to the public?

1 A. No.

2 Q. Do you know why the Florida Department of Law
3 Enforcement, after it removed these requirements from
4 the existing rule, why there was no notification of
5 this hole being drilled in this instrument for
6 approximately six -- I think around six-and-a-half
7 years, even though the Florida Department of Law
8 Enforcement had done testing in 2002, 2004, 2005,
9 2005, 2006, 2006, 2007, why there was never any
10 notification?

11 A. There was never any written notification.
12 There was a -- by our physically being there --

13 Q. Right.

14 A. -- there was knowledge, but there was no
15 written notification between CMI and the Florida
16 Department of Law Enforcement. I don't know as to why
17 that was.

18 Q. Again, there was never any, that you know of,
19 written notification to the public?

20 A. No.

21 Q. The public wasn't put on notice that this
22 machine was a different machine now that it had the
23 hole drilled in it?

24 A. The public was not notified of the hole.

25 Q. After the rule was changed to where it exists

1 today to where no notification is required, is it a
2 fair statement that the Florida Department of Law
3 Enforcement continued doing evaluations on the
4 Intoxilyzer 8000?

5 A. Yes.

6 Q. Do you remember making any telephone contact
7 with your supervisor, Ms. Barfield, head of the
8 Alcohol Testing Program for the Florida Department of
9 Law Enforcement, during the events in Kentucky when
10 this hole was being drilled?

11 A. I remember standing next to Roger Skipper as
12 he spoke on the phone with her. I personally did not
13 make the call. Roger Skipper was the program manager
14 for the 8000 program, not for the alcohol testing, and
15 he made the phone call.

16 Q. Now, as you testified in the very beginning,
17 there have been a lot changes to the Intoxilyzer,
18 correct?

19 A. Yes.

20 Q. Not all of them could in any way be
21 questioned to affect the reliability or are of much
22 significance, so to say, some of them?

23 A. Some were superficial changes as to the case
24 and connectors and --

25 MR. GABRIEL: I will show you what has been

1 marked as Defense (sic) Exhibit No. 20, and I
2 would like to move that into evidence. It was
3 stipulated to.

4 MS. JOHNSON: No objection.

5 THE COURT: It's admitted.

6 (Petitioners' Exhibit No. 20 was admitted
7 into the record.)

8 BY MR. GABRIEL:

9 Q. That appears to be notification from CMI, the
10 manufacturer, to the Florida Department of Law
11 Enforcement, placed in writing, right?

12 A. Yes.

13 Q. And it seems to be notifying the Florida
14 Department of Law Enforcement of a change in the
15 printer, correct?

16 A. No.

17 Q. Okay.

18 A. This is a question in George Venturi's e-mail
19 and a question we had, and all of us had asked what
20 external printers are compatible with the 8000, if a
21 law enforcement agency wants to go out and buy a new
22 printer, what external printer models work with the
23 8000. And that's just an explanation --

24 Q. And there were some modifications to -- or I
25 should say, additions, not modifications -- additions

1 of additional printers that they were informing you?

2 A. Yes. Other than the one that came with the
3 instrument, yes.

4 MR. GABRIEL: Your Honor, may I approach?

5 THE COURT: Yes.

6 MR. GABRIEL: I would like to show you
7 Exhibit No. 21. Do you recognize that? I'd like
8 to move that into evidence, Judge. I believe it's
9 been stipulated to.

10 MS. JOHNSON: No objection.

11 THE WITNESS: Yes --

12 THE COURT: It's admitted.

13 THE WITNESS: -- I remember this.

14 (Petitioners' Exhibit No. 21 was admitted
15 into the record.)

16 BY MR. GABRIEL:

17 Q. Again, that happens to be CMI, the
18 manufacturer, putting in writing notification to the
19 Florida Department of Law Enforcement regarding the
20 use of silicone for certain electronic parts?

21 A. Yes.

22 Q. Do you know why the Florida -- do you know
23 why the manufacturer is putting things in writing now?

24 MS. JOHNSON: Objection as to what the
25 manufacturer -- speculation is my objection.

1 MR. GABRIEL: I will withdraw the question.

2 THE COURT: Thank you.

3 MR. GABRIEL: Let me show you what has been
4 marked as Plaintiff -- Petitioner's Exhibit No. 22
5 and ask you to take a look at that and see if you
6 recognize it. And I would like to move it into
7 evidence.

8 MS. JOHNSON: No objection.

9 THE COURT: Twenty-two is admitted.

10 (Petitioners' Exhibit No. 22 was admitted
11 into the record.)

12 THE WITNESS: Yes, I'm familiar with this
13 document.

14 BY MR. GABRIEL:

15 Q. That appears to be, again, the manufacturer
16 putting in writing notification to the Florida
17 Department of Law Enforcement, correct?

18 A. Yes.

19 Q. And they're telling the Florida Department of
20 Law Enforcement about modifications to the instrument?

21 A. They are.

22 Q. They are telling them about different hose
23 issues, feed issues, coil issues and case issues?

24 A. Correct.

25 MR. GABRIEL: Next I'd like to show you

1 Exhibit No. 23. I would like to move that into
2 evidence.

3 MS. JOHNSON: No objection.

4 THE COURT: It's admitted.

5 (Petitioners' Exhibit No. 23 was admitted
6 into the record.)

7 BY MR. GABRIEL:

8 Q. That appears, I believe, to be a letter
9 documenting revisions to the last letter stating that
10 here's a little more explanation even on these
11 changes?

12 A. Correct.

13 Q. And, again, that's notification from the
14 manufacturer to FDLE?

15 A. It is.

16 MR. GABRIEL: Next I'm going to show you
17 Exhibit 24. I would like to move that into
18 evidence. I believe it was stipulated to.

19 MS. JOHNSON: No objection.

20 THE COURT: It's admitted.

21 (Petitioners' Exhibit No. 24 was admitted
22 into the record.)

23 BY MR. GABRIEL:

24 Q. Sir, again, does this appear to be written
25 notification from the manufacturer to the Florida

1 Department of Law Enforcement of a case change to the
2 Intoxilyzer 8000?

3 A. Yes.

4 MR. GABRIEL: I'm going to show you Exhibit
5 No. 25. I would like to move that into evidence.
6 I believe it was stipulated.

7 MS. JOHNSON: No objection.

8 THE COURT: It's admitted.

9 (Petitioners' Exhibit No. 25 was admitted
10 into the record.)

11 BY MR. GABRIEL:

12 Q. Does that appear to be written notification
13 from the Florida Department of -- or written
14 notification from the manufacturer to the Florida
15 Department of Law Enforcement regarding issues of
16 software changes and calibration issues?

17 A. Yes.

18 MR. GABRIEL: Next let me show you No. 26.
19 I'd like to move that into evidence.

20 MS. JOHNSON: No objection.

21 THE COURT: Admitted.

22 (Petitioners' Exhibit No. 26 was admitted
23 into the record.)

24 BY MR. GABRIEL:

25 Q. I believe attached to No. 26 is two letters,

1 one dated 6/7 of '06 and one dated 4/26/06, that both
2 deal with modifications -- a notice from the
3 manufacturer to the Florida Department of Law
4 Enforcement that deal with changes to the magnetic
5 card reader of the Intoxilyzer 8000 instrument,
6 correct?

7 A. Yes.

8 MR. GABRIEL: Exhibit 27 appears to be --
9 Judge, I'd like to move this into evidence.

10 MS. JOHNSON: No objection.

11 THE COURT: Admitted.

12 (Petitioners' Exhibit No. 27 was admitted
13 into the record.)

14 BY MR. GABRIEL:

15 Q. Does that appear to be, again, the
16 manufacturer putting in writing notice to the Florida
17 Department of Law Enforcement regarding changes to the
18 system board of the Intoxilyzer 8000?

19 A. Yes.

20 MR. GABRIEL: Last, but not least, I'm going
21 to show you No. 28. I would like to move that
22 into evidence.

23 MS. JOHNSON: No objection.

24 THE COURT: Admitted.

25 (Petitioners' Exhibit No. 28 was admitted

1 into the record.)

2 BY MR. GABRIEL:

3 Q. That, again, appears to be written
4 notification from the manufacturer to the Florida
5 Department of Law Enforcement regarding changes in the
6 ring detector circuit?

7 A. Yes.

8 Q. In your opinion, sir -- we've gone through
9 changes dealing with a lot of different component
10 parts -- do any of those written notifications, those
11 changes, have the same punch, so to say, as a hole
12 being drilled into the instrument? Punch, I mean
13 significant, scientifically speaking.

14 A. Well, the change in the case, nothing. When
15 they're changing capacitors and detectors on the
16 circuit board, the exact extent of that, I don't know
17 what portion of the analytical bench they affected.
18 But in comparison to changing the case, external
19 printers, that has absolutely nothing to do with the
20 analytical instrumentation, so --

21 Q. And all of these changes, would you agree,
22 are occurring after the Florida Department of Law
23 Enforcement has made the decision to remove the
24 requirement of written notification?

25 A. Yes.

1 Q. Did that make sense to you that, all of a
2 sudden, the manufacturer seems to want to comply with
3 the rule even though the rule has been gutted?

4 MS. JOHNSON: Objection, speculation.

5 THE COURT: Sustained.

6 BY MR. GABRIEL:

7 Q. Do you know why there was compliance for the
8 rule that doesn't exist?

9 MS. JOHNSON: Objection, speculation.

10 THE COURT: It doesn't matter if they were
11 complying with a rule that doesn't exist. It
12 didn't exist. They weren't under any obligation
13 to do it. So I'm not sure what you want me to
14 infer by the fact that they did it.

15 MR. GABRIEL: Well, I think the fact that
16 it's -- that they're doing something that they are
17 not required to do is the -- is the fish that
18 stinks. All of a sudden, they change the rule,
19 and on the major significance of the issue of
20 science dealing with the hole being drilled into
21 an instrument, that is the one they didn't do, but
22 now they're doing it for every other one.

23 THE COURT: I understand your argument. I
24 don't understand how it relates to the
25 responsibility that I have in the case to

1 determine whether the existing rule is an invalid
2 exercise of delegated legislative authority. I
3 don't know that the -- aside from the fact that I
4 don't really know that the witness is qualified to
5 speak on why the manufacturer would be doing it, I
6 don't think it matters why the manufacturer did
7 it.

8 MR. GABRIEL: Okay.

9 BY MR. GABRIEL:

10 Q. Sir, were you involved in the evaluations
11 from 2005 through 2007, I believe, dealing with these
12 modifications?

13 A. To my recollection, most of them, yes.

14 Q. The Florida Department of Law Enforcement
15 made decisions to do instrument evaluations where they
16 would run a simulator test at different levels for
17 different numbers of them, correct?

18 A. That was part of the evaluation process, yes.

19 Q. A Form 34 evaluation?

20 A. Yes.

21 Q. And in those Form 34 evaluations -- you're
22 familiar with them?

23 A. I am.

24 Q. And, again, they were using instruments sent
25 by the manufacturer to Florida Department of Law

1 Enforcement?

2 A. Yes.

3 Q. And during those evaluations, is it true that
4 not at one point in time did the Florida Department of
5 Law Enforcement ever state in their evaluation that
6 the purpose of the evaluation was to look at this
7 issue of a hole being drilled into an instrument?

8 A. It was never part of the purpose statements
9 of any of the evaluations that I was a part of.

10 MR. GABRIEL: Judge, for the sake of the
11 record, and I am trying to speed this up, so to
12 say, I have Exhibits No. 29, 30, 31, 32, 33 and 34
13 that are the evaluations I'm speaking of. The
14 respondent, I believe, has agreed to stipulate to
15 those -- the introduction of those evaluations.

16 MS. JOHNSON: Correct, Your Honor.

17 MR. GABRIEL: I would like to move those into
18 evidence.

19 THE WITNESS: So this is 29 through 34?

20 MR. GABRIEL: Yes, sir.

21 THE COURT: They're admitted.

22 (Petitioners' Exhibit Nos. 29 through 34 were
23 admitted into the record.)

24 THE COURT: Thank you.

25 MR. GABRIEL: Thank you, sir.

1 BY MR. GABRIEL:

2 Q. Sir, in any of those evaluations from the
3 2005 evaluation down to the 2007 evaluation, at any
4 point in time as a result of a Form 34 evaluation
5 performed by the Florida Department of Law
6 Enforcement, do you know of any time where because of
7 the evaluation they said the Intoxilyzer 8000
8 instrumentation is no longer approved for evidentiary
9 use in the State of Florida?

10 A. No.

11 Q. The results of each and every one of those
12 exhibits I just moved into evidence, 29, 30, 31, 32,
13 33 and 34, all reflect the fact that the Intoxilyzer
14 8000 remains approved for evidentiary use in the State
15 of Florida?

16 A. That is correct.

17 Q. Were you employed with the Florida Department
18 of Law Enforcement in 2007?

19 A. I was.

20 MR. GABRIEL: May I approach?

21 THE COURT: Yes.

22 MR. GABRIEL: I'm going to show you what has
23 been marked as Exhibit No. 35.

24 MS. JOHNSON: No objection.

25 MR. GABRIEL: Thank you.

1 THE COURT: It's admitted.

2 (Petitioners' Exhibit No. 35 was admitted
3 into the record.)

4 BY MR. GABRIEL:

5 Q. That exhibit seems to be a report from the
6 Department of Transportation, Volpe Labs, correct?

7 A. It is.

8 Q. And that was the result of the states'
9 request of Volpe Labs for special testing of the
10 Intoxilyzer 8000 instrument?

11 A. It was.

12 Q. And can you explain to the Court why that
13 came about or how that came about?

14 THE COURT: Explain to me -- if you could
15 explain to me first what Volpe Labs --

16 MR. GABRIEL: Volpe Labs is the testing --
17 sorry.

18 THE COURT: Somebody.

19 THE WITNESS: Volpe Labs is the National
20 Highway Traffic Safety Administration's testing
21 laboratory that does evidential breath testing
22 evaluations for the National Conforming Products
23 List and U.S. Department of Transportation.

24 THE COURT: Thank you.

25 MR. GABRIEL: The testing branch of DOT, so

1 to say.

2 THE COURT: Federal DOT?

3 MR. GABRIEL: Yes.

4 THE COURT: Thank you.

5 BY MR. GABRIEL:

6 Q. How did this study come about being -- arise,
7 should I say?

8 A. It was requested by the Florida Department of
9 Law Enforcement to look at the instrument with the
10 Florida software versions installed on those
11 instruments.

12 Q. And that was dealing with software versions,
13 I believe, what, going from the 26th version to the
14 27th version?

15 A. Correct.

16 Q. Software -- I believe it's 8100.26 and .27?

17 A. That is correct.

18 Q. And when the Intoxilyzer first began being
19 used in State of Florida, it was put into service in,
20 I believe, March of 2006?

21 A. That is correct.

22 Q. Would you agree with me that sometime after
23 that, relatively soon after that, there became noted
24 certain anomalies or issues with the instrument
25 detecting the amount of volume and flagging a sample

1 being insufficient volume if the person blew at a
2 certain time period during the testing sequence?

3 A. Yes.

4 Q. Explain that better to the Court.

5 A. The instrument went in service in March of
6 '06 as an evidential instrument in the state. Shortly
7 thereafter, during the summer of '06, the Florida
8 Department of Law Enforcement became aware of a --
9 what appeared to be a problem with the instrument's
10 ability to measure volume and accept samples and flag
11 potential improper samples with error messages.

12 Q. Did the error messages have to do with
13 volume?

14 A. Yes.

15 Q. Is there a requirement under FDLE rules for a
16 certain amount of volume to -- in order to have a
17 sufficient -- scientifically sufficient sample and
18 test?

19 A. There is a minimum volume requirement for the
20 instrument of 1.1 liters must be blown into the
21 instrument in a single exhalation as a minimum
22 threshold for the sample to be accepted by the
23 instrument. That's one of the minimum sampling
24 requirements.

25 Q. And did it appear as if the instrument was

1 not properly noting that?

2 A. Correct. There was a -- after FDLE became
3 aware of it, we became aware of it, FDLE immediately
4 contacted the manufacturer and started looking at the
5 data to determine what was wrong, what was going on.
6 And it turned out to be a loophole in the software,
7 meaning there was a condition that was happening out
8 in the field that the software was not able to
9 compensate for or know what to do with.

10 And it had to do with the three-minute time
11 window a person was allowed to provide a breath
12 sample. It was one of the, "what if they start
13 blowing at 2:58 and blow past the three-minute time?"
14 And at the time, Version 26 software did not know how
15 to deal with that issue, and it gave improper volume
16 flags and volume measurements.

17 THE COURT: Can I ask a question just a
18 minute?

19 MR. GABRIEL: Sure.

20 THE COURT: You might need to dumb that down
21 even more for me. Three minutes -- somebody has
22 three minutes to exhale?

23 THE WITNESS: When a person -- when the
24 instrument says "provide sample now," the person
25 is to blow into the breath tube. That message on

1 the screen, "provide sample now," is a
2 three-minute time. You have three minutes to get
3 the breath sample.

4 THE COURT: Okay.

5 THE WITNESS: The officer -- the police
6 officer, arresting officer, has three minutes. At
7 the end of that three minutes, it will just time
8 out and go into an error blank and say they didn't
9 provide a sample or whatever the circumstances
10 were.

11 What was going on was a loophole in the
12 software. If the person started -- picked up the
13 breath tube and blew and started that exhalation
14 at two minutes and 58 seconds and continued to
15 blow past that three-minute window, the software
16 was kind of confused. "Well, I started getting a
17 sample, but it's past three minutes. What do I
18 do?" So the software did not know what to do and
19 it improperly measured breath volume.

20 So Version 27 software was hastily developed
21 by the manufacturer, tested by FDLE, and installed
22 in all the instruments in the state in September
23 of '06.

24 THE COURT: Thank you.

25 BY MR. GABRIEL:

1 Q. Now, taking it back to DOT to be retested was
2 why? Do you know why?

3 A. The two versions of the software?

4 Q. Well, the fact that back in 2007, we have an
5 approved instrument that's on the DOT list. Why in
6 the world would it go back to DOT?

7 A. The exact reason, I don't know why they sent
8 those particular instruments at that particular time
9 back to DOT.

10 Q. Do you have knowledge whether or not the
11 Florida Department of Law Enforcement at any time sent
12 DOT information regarding the hole being drilled and
13 asked for retesting due to that issue?

14 A. No. No.

15 Q. No, you don't have any information?

16 A. No, they did not.

17 Q. Now, according to the Intoxilyzer
18 manufacturer, we talked -- I talked just a minute ago
19 about it, there's a requirement for volume in order to
20 have a scientifically reliable result, correct?

21 A. In order for a minimum sample -- for the
22 instrument to accept it as a minimum sample, there are
23 criteria. One of that criteria is volume.

24 Q. What are the other parts of that criteria?

25 A. Time and what's known as slope. And slope is

1 best described as a software algorithm looking at
2 alcohol concentration.

3 Q. Do you know whether or not the Florida
4 Department of Law Enforcement has that same
5 requirement?

6 A. Today?

7 Q. Yes.

8 A. Yes.

9 Q. And that requirement is basically that a
10 minimum sample -- a sample, in order to be sufficient,
11 has to have a volume of 1.1 liters of air?

12 A. Has to have a minimum volume of 1.1 liters of
13 air, that is correct.

14 Q. Is it fair to describe a breath sample and
15 breath test as, in essence, having those initial
16 requirements that you just described dealing with
17 slope, volume, time?

18 A. A breath sample, those are the requirements.
19 A sample is one delivery of a sample to the
20 instrument. A breath test is made up of a minimum of
21 two samples.

22 Q. Okay.

23 A. So the sampling requirement has a minimum 1.1
24 liters, one second and slope met to be accepted as a
25 valid sample.

1 Q. Are all of those requirements essential to
2 have scientifically reliable breath testing?

3 A. Yes. That's why they're there. That's what
4 their intent is, to help ensure the reliability of the
5 sample.

6 Q. During -- according to FDLE rules that exist
7 today, during inspections, both on a monthly basis and
8 on a yearly basis, part of that requirement is that
9 the -- a breath inspector needs to make sure that the
10 Intoxilyzer is properly measuring time, that the clock
11 is working?

12 A. Yes. The realtime clock is -- whether it's
13 measuring time properly is part of the internal
14 diagnostic. What the inspector is doing is making
15 sure it has the right time.

16 Q. Okay. So every time it's being operated, the
17 machine itself, you're telling us, is, in essence,
18 verifying time?

19 A. Verifying the clock is working properly.

20 Q. Okay. Do FDLE rules and regulations have
21 another requirement that deals with slope just as you
22 described that the FDLE requirements in the rules deal
23 with time?

24 A. For the inspection process?

25 Q. Yes.

1 A. Yes.

2 Q. Okay. Explain to the Court how that is.

3 A. Part of the testing sequence is to test the
4 instrument's ability to determine if slope algorithm
5 of the software is met or not during a breath sample.
6 It's known as a mouth alcohol alcohol-free test.

7 An individual will conduct a procedure to
8 ensure that that algorithm in the software is
9 triggered or not triggered depending on the parameters
10 it is presented. So, yes, slope is tested with every
11 inspection.

12 Q. Are those parameters specified in the rule?

13 A. They are.

14 Q. That exists today?

15 A. That exists today.

16 Q. Is it a true statement that FDLE rules as
17 they exist today do not have requirements that deal
18 with volume?

19 A. No, there's no rule to test the volume
20 measurement or capacity or functionality.

21 Q. How can that -- if it's such an essential
22 part of having a reliable sample minimum requirement,
23 and therefore a minimum requirement of a sufficient
24 test, how can it not be checked? How can that be?

25 A. Well, two-part answer. Part one, the agency

1 inspectors who have the instruments at the local
2 agencies who do the monthly test, it would be beyond
3 their capacity to do that with the equipment they
4 have. It does take some special equipment to test the
5 instrument's flow or volume measurement.

6 FDLE, it could -- it's within their capacity,
7 it's within their capabilities during the annual
8 inspection. It could be in the rule. There's nothing
9 that prohibits it.

10 Q. Considering your background, do you believe
11 that the Florida Department of Law Enforcement rules
12 and regulations as they exist now are deficient for
13 not having requirements that deal with calibration of
14 volume/flow of air?

15 A. Well, the inspection process is two-fold.
16 Half of them are in the rules, half of them aren't.
17 There's no reason that more of those requirements for
18 calibration and volume and all those could not be part
19 of the rule and part of the singular inspection
20 procedure, but they're not.

21 Q. Calibration of a flow sensor, do you know
22 what I mean by that?

23 A. Yes.

24 Q. Explain to the Court what that is.

25 A. The calibration of the flow sensor -- the

1 flow sensor is a pressure transducer, and the analogy
2 to give is like a bathroom scale. The more weight or
3 pressure against it, the more resistance, the more
4 flow. It's an internal component of the instrument.

5 If you take pressure against the transducer
6 and multiply it over time, equals volume. So it
7 measures pressure of the blow, and over time
8 ultimately gives you a volume. Calibration of that
9 component can be done through giving that circuit or
10 that transducer a known standard of flow and adjusting
11 its measurement according to the known standards just
12 like you would calibrate its alcohol measurement.

13 THE COURT: Counselor, is this a good time to
14 take a break?

15 MR. GABRIEL: Yes, sir.

16 THE COURT: All right. Let's take 10
17 minutes.

18 (Break taken.)

19 BY MR. GABRIEL:

20 Q. Sir, you've testified that in your employment
21 with the respondent that you were familiar with the
22 operations and all -- pretty much all aspects of the
23 Intoxilyzer 8000. Are you also familiar with their
24 different guides and manuals?

25 A. Yes.

1 MR. GABRIEL: May I approach?

2 THE COURT: Yes.

3 BY MR. GABRIEL:

4 Q. I show you Exhibit No. 82. Do you recognize
5 that?

6 A. I do.

7 Q. Is that one of the guides that you were
8 familiarized with and used in your employment with the
9 Florida Department of Law Enforcement?

10 A. Yes.

11 Q. Is that an Intoxilyzer 8000 operations guide?

12 A. Yes.

13 Q. And does the -- does that exhibit, the
14 Intoxilyzer operator's guide, talk about or have
15 different provisions for calibration of the
16 Intoxilyzer?

17 MR. GABRIEL: May I approach?

18 THE COURT: Yes.

19 MR. GABRIEL: For the sake of the record,
20 it's page 9 of the exhibit. I would like to move
21 that into evidence. I think there may be an
22 objection. I don't know.

23 MS. JOHNSON: Correct, Judge. I object to
24 relevancy as to what this has to do with the issue
25 that the Court is deciding, how the Intoxilyzer

1 8000 -- CMI's Intoxilyzer 8000 manual is relevant
2 to the instant case.

3 MR. GABRIEL: Judge, I believe it's relevant.
4 It's proving a fact that is relevant for this
5 Court dealing with calibration as one of the
6 contested issues of the rule challenge that I have
7 before the Court, that there are no calibration
8 protocols, and this is a manual from 2002 showing
9 the protocols.

10 THE COURT: It's overruled. Eighty-two is
11 admitted.

12 (Petitioners' Exhibit No. 82 was admitted
13 into the record.)

14 THE WITNESS: It does have guidelines for
15 calibration of the instrument.

16 BY MR. GABRIEL:

17 Q. And it has guidelines for calibration both of
18 flow, air and volume, correct?

19 A. Correct.

20 Q. And it has calibrations for the optical
21 bench?

22 A. The exact step-by-step procedures are not in
23 this manual, but it does discuss that those
24 functionalities are available and how to access those
25 functionalities, yes.

1 Q. The Intoxilyzer is a computer-driven
2 instrument?

3 A. Yes.

4 Q. And that manual is describing some of the
5 steps computer-wise as far as you hit this button to
6 do this and to move into the calibration routine,
7 correct?

8 A. That is correct.

9 Q. The operation of the Intoxilyzer 8000 was set
10 up to be very user-friendly for police officers,
11 correct?

12 A. It was.

13 Q. And for operators?

14 A. Yes.

15 Q. And part of that calibration routine -- do
16 you know whether or not that calibration routine of
17 the Intoxilyzer from back in 2002, has it in any way
18 changed to the present?

19 A. No.

20 Q. And, again, it is a fair statement that there
21 is no requirement whatsoever under today's FDLE Rules
22 11D-8.003, all the rules, for the calibration of air
23 flow?

24 A. No, there's no rule requirement.

25 Q. And it's your opinion, if I understand

1 correctly, that air flow, volume, is an essential
2 requirement of any breath sample?

3 A. It is part of -- it is an essential
4 requirement, and it is part of the minimum sampling
5 requirements.

6 Q. Therefore, it's a -- scientifically speaking,
7 it's an essential requirement for any breath test?

8 A. Yes.

9 Q. And to be able to ensure accuracy and
10 reliability?

11 A. Yes.

12 Q. And, again, nowhere in FDLE rules is there a
13 requirement for calibration?

14 A. Of flow?

15 Q. Of flow.

16 A. Or calibration of the instrument?

17 Q. Period.

18 A. Correct.

19 Q. In your role as a department inspector with
20 the Florida Department of Law Enforcement, did you
21 ever have discussions with your supervisors and/or
22 fellow employees regarding the need for calibration of
23 the Intoxilyzer?

24 A. Yes.

25 Q. And did some of those issues revolve around

1 the need for calibration of the flow sensor to be able
2 to calibrate volume?

3 A. Yes.

4 Q. And did the Florida Department of Law
5 Enforcement actually take steps trying to be able to
6 do that?

7 A. Yes.

8 Q. Explain that to the Court.

9 A. Flow as a minimum requirement for
10 samplization of a breath sample, there was a component
11 of the instrument that measured, the pressure
12 transducer, that was not being checked, validated,
13 nothing. So there was discussion in FDLE at the time
14 that FDLE department inspectors should take steps to
15 check that component during the department inspection.

16 In fact, there were many options evaluated
17 and looked at to do that check or calibration. One
18 was if we're calibrating or going to check flow is to
19 test the instrument with a syringe, meaning a
20 calibrated syringe. It was huge. It was a
21 three-liter syringe.

22 And you would connect that to the breath tube
23 and deliver 1.5 liters of air to the instrument and
24 see if the instrument measured 1.5 liters, give or
25 take, 5 or 10 percent, whatever the tolerance was we

1 were going to allow.

2 Q. Was that being done due to the fact that
3 there were starting to be reported issues with volume
4 being properly reported?

5 A. That's what first brought it about, but it
6 was trying -- the intent was to be proactive and
7 measure it and check it and be able to confirm it was
8 working properly.

9 Q. Did that intent ever precede the report of
10 problems with volume though?

11 A. No.

12 Q. So is it a fair statement that generally
13 speaking in the scientific community dealing with the
14 Intoxilyzer and breath testing, that a lot of times
15 the scenario is there is alleged a problem with a
16 breath testing device, usually by the defense bar,
17 brought to the attention of FDLE, correct?

18 A. That was common.

19 Q. And FDLE, they then do different evaluations
20 or studies or determine whether or not there's
21 validity or not to a defense claim of a problem?

22 A. That was part of our duties. Kept us quite
23 busy.

24 Q. There were a lot of, quote/unquote, alleged
25 reported problems?

1 A. Not only with instrumentation, but the
2 science of breath testing.

3 Q. In regard to volume, it started being
4 reported pretty quickly into the Intoxilyzer 8000
5 being used in the State of Florida, an issue with
6 volume, right?

7 A. Within a few months.

8 Q. And was there a way that was determined by
9 the department for the department to be able to get a
10 signal that there's a problem with the instrument?
11 Was there any mechanism for that instrument to say
12 there's a problem going on here?

13 A. Yes.

14 Q. What was that?

15 A. Well, the instrument has a self-diagnostic
16 routine --

17 Q. Okay.

18 A. -- that checks certain components, certain
19 electronic functionalities of the instrument and
20 determines if those electronic components are within
21 parameters and pass or fail the diagnostic.

22 Q. Besides for the diagnostic, is there a way,
23 in particular, dealing with volume issues and pressure
24 issues?

25 A. Could you repeat the question?

1 Q. Was there a mechanism inside -- let me
2 rephrase the question.

3 Was there any type of mechanism of the
4 Intoxilyzer 8000 instrument that would signal an
5 operator that there's an issue dealing with volume?

6 A. Well -- whether it's measuring volume
7 properly or not?

8 Q. Correct.

9 A. No. Whether or not a subject provided an
10 adequate sample or met or didn't meet that 1.1 liter
11 threshold, there was an error message that could be
12 generated by the instrument, but there was no testing
13 or flagging of the pressure transducer's functionality
14 to the operator.

15 Q. Okay. Volume is said to be a key component,
16 correct?

17 A. Correct.

18 MR. GABRIEL: May I approach?

19 THE COURT: Yes.

20 BY MR. GABRIEL:

21 Q. Let me show you what has been marked as
22 Petitioner's Exhibit 60 and ask you to take a look at
23 it and see if you recognize that?

24 A. Yes, I recognize this.

25 Q. In regard to the issue addressed in that

1 exhibit, were you involved in discussions of it?

2 A. Yes, and discussions prior to this that drove
3 this concern of the prosecutors.

4 Q. And do you know who authored that letter?

5 A. Well, there's two letters here. One was
6 authored by the state's attorney's --

7 Q. Forget the state attorney one for now.

8 A. Yeah. The Florida Department of Law
9 Enforcement letter, although signed by Guy Tunnel, was
10 authored by Laura Barfield.

11 Q. And you know that because how?

12 A. I've heard her say it. I've read it. We've
13 discussed it.

14 MR. GABRIEL: Judge, I would like to move
15 that into evidence.

16 MS. JOHNSON: I would object, lack of proper
17 foundation.

18 THE COURT: Your objection goes to both of
19 them, both letters? There are two letters in
20 here.

21 MR. GABRIEL: And, Judge, just for the sake
22 of the record, I enclosed the state attorney
23 letter to kind of make it complete so I wasn't,
24 quote/unquote, giving one side, you know, the
25 answer versus the question of the state attorney.

1 If the Court wishes, I don't have a problem
2 removing the state attorney letter and enclosing
3 the letter from the respondent.

4 MS. JOHNSON: Yes, I would object to both.

5 THE COURT: I'm going to admit the letter
6 from the -- that's identified as coming from the
7 Florida Department of Law Enforcement. And that
8 was 60?

9 MR. GABRIEL: Yes, sir.

10 (Petitioners' Exhibit No. 60 was admitted
11 into the record.)

12 BY MR. GABRIEL:

13 Q. Sir, in Exhibit No. 60 just moved into
14 evidence, the letter from the Florida Department of
15 Law Enforcement makes a statement that, quote, Volume
16 is a key component in establishing reliability. Do
17 you agree with that?

18 A. Yes.

19 Q. "Where a breath sample does not meet minimum
20 volume requirements, the instrument cannot determine
21 if there are interferent or mouth alcohol present."

22 Do you agree with that?

23 A. I do.

24 Q. "And cannot ensure that deep lung air" --
25 excuse me -- "deep lung breath sample has been

1 obtained."

2 Do you agree with that?

3 A. I do.

4 Q. "All breath test subjects in Florida are
5 required to provide the minimum acceptable breath
6 sample for uniformity and consistency."

7 Do you agree with that?

8 A. I do.

9 Q. Scientifically, do you agree with all those
10 statements?

11 A. I do.

12 Q. "And where the breath sample is not reliable,
13 the quantitative result is not reliable."

14 Do you agree with that?

15 A. I do.

16 Q. "Therefore, while an Intoxilyzer 8000 is
17 capable of reporting numerical value for a sample
18 which does not meet minimum volume requirements, FDLE
19 ATP initially determined that only reliable breath
20 alcohol results would be numerically reported."

21 Did you agree with that decision?

22 A. Yes.

23 Q. Why?

24 A. Well, preceding that letter, in the
25 development of the 8000, it was discussed in the staff

1 that samples that were not valid samples would not
2 report numbers, just say "invalid sample." And the
3 analogy we discussed and gave is if you take a subject
4 to the hospital and get a blood sample and there's not
5 enough blood in the vial for the lab to evaluate,
6 they're going to send a notice back saying
7 "insufficient sample."

8 Same thought process behind the breath test.
9 If the instrument doesn't have enough breath volume to
10 adequately, properly measure quantitative analysis and
11 qualitative analysis for the ethanol, it was the
12 feeling of the staff that we would report insufficient
13 sample.

14 Q. Not a number?

15 A. Not a number. The discussion went back and
16 forth for years over that between 2002 and 2006 when
17 the instrument went online. The state attorney's
18 office, State Prosecuting Attorneys Association at the
19 time had a legal concern because the instrument was
20 physically capable of printing a number.

21 Q. When the volume requirements were not met?

22 A. Correct. The 5000 used to do that. And
23 their concern was that if we did away with the number
24 and didn't report it, didn't save it, didn't document
25 it, it could potentially be exculpatory, and there may

1 be exculpatory or Brady issues with not preserving and
2 reporting that number.

3 Q. Okay.

4 A. And that's -- the end result is that the
5 number is preserved. It is reported, and it's
6 reported with a statement that it's not necessarily a
7 reliable number, but here's the number.

8 Q. Now, explain to the Court what R-value is.

9 A. R-value is a numerical value assigned to the
10 electronics of the pressure transducer. It's stored
11 in the software.

12 Q. Again, when we talk about the pressure
13 transducer, that's going to be utilized to measure
14 volume?

15 A. Ultimately, it calculates -- it measures
16 pressure over time, which equals volume, so yes.

17 Q. The two are integrally related?

18 A. Yes.

19 Q. Does the Intoxilyzer 8000 from the beginning
20 when it came online, when it was developed way back in
21 2002, when it was first being approved, did it have
22 the ability for a breath operator or breath
23 maintenance person to be able to determine what the
24 R-value of the instrument was?

25 A. The R-value was available to persons --

1 department inspectors who had the appropriate password
2 to go in and look at R-value, yes.

3 Q. So, again, the instrument has a routine --
4 computer routine software in it that allows for the
5 right people with passwords to be able to see whether
6 or not that is functioning properly?

7 A. Whether the R-value was within parameters at
8 time of calibration at the manufacturer, yes.

9 Q. And if it is not within -- if it is not
10 within those parameters, what's the problem?

11 A. Well, you could have degradation of the
12 component itself, the physical hardware component, or
13 degradation of the electronic signal generated by that
14 component, thus improperly measuring volume.

15 Q. Did you learn of problems with R-values being
16 reported to government agencies?

17 A. I don't know what --

18 Q. If you don't understand my question, I'll
19 rephrase it.

20 A. I don't. I don't.

21 MR. GABRIEL: All right. May I approach?

22 THE COURT: Yes.

23 BY MR. GABRIEL:

24 Q. I'm going to show you what has been marked as
25 Petitioners' Exhibit No. 71 and ask you to take a look

1 at it and see if you recognize it?

2 A. Yes, I'm familiar with this.

3 Q. When you were employed with the Florida
4 Department of Law Enforcement, did it come to your
5 knowledge that there were problems with volume being
6 properly measured in the instrument and the R-value
7 being too low and that those issues were arising?

8 A. Yes.

9 Q. And that, in fact, it was coming about
10 through notification by another administrative agency,
11 the Department of Highway Safety?

12 A. Yes.

13 Q. And they were notifying -- eventually
14 notified the Florida Department of Law Enforcement?

15 A. Yes.

16 Q. And that's what that exhibit is?

17 A. Yes.

18 MR. GABRIEL: Judge, I would like to move
19 that into evidence.

20 MS. JOHNSON: Object on relevancy grounds.

21 THE COURT: It's overruled. It's admitted as
22 71 -- yes.

23 (Petitioners' Exhibit No. 71 was admitted
24 into the record.)

25 BY MR. GABRIEL:

1 Q. The problem with -- would it be a fair
2 statement that the problem with the R-values being too
3 low, that that was an indicator that the flow sensor,
4 pressure transducer, was not properly functioning and,
5 therefore, we didn't have proper calculation of
6 volume?

7 MS. JOHNSON: Objection, leading.

8 THE COURT: Sustained. Rephrase your
9 question, please.

10 MR. GABRIEL: Sure.

11 BY MR. GABRIEL:

12 Q. When the R-value is being reported too low,
13 what could an operator expect to see -- or inspector,
14 I should say, expect to see?

15 A. Well, an inspector would -- unless they're
16 doing a breath test, because that's where -- it would
17 be a breath test operator. Persons may have
18 difficulty blowing in the instrument. Persons may
19 have -- not be able to meet that minimum 1.1 because
20 it may be mismeasuring volume where, in fact, they
21 have delivered 1.1 liters, but the instrument is
22 mismeasuring the volume and not allowing them to say
23 yes, you've met that threshold.

24 Q. Is it a fair statement that with an
25 evidentiary breath testing result in Florida, that if

1 it's -- if the instrument registers under point one --
2 1.1 liters of breath, that it is reported as being
3 unreliable on the breath ticket?

4 A. Yes.

5 Q. And, obviously, if there's no other problems
6 and it's over 1.1 liters, it's being reflected on the
7 breath ticket as being a good breath test?

8 A. Providing there were no other error messages
9 associated with that breath sample.

10 Q. Now, in FDLE rules as they exist today, is
11 there any requirement for the proper verification or
12 calibration dealing with the pressure transducer and
13 the R-value?

14 A. No.

15 Q. This is -- to your knowledge, is the R-value
16 in the computer routine inside the Intoxilyzer, is
17 that one that is new or has been long-standing?

18 A. Long-standing.

19 Q. Do you have any knowledge, considering your
20 employment with the Florida Department of Law
21 Enforcement, regarding why that was not placed into
22 the rules?

23 MR. JONES: Objection, speculation.

24 MR. GABRIEL: I don't think it's speculation.

25 I'm trying to -- I'll rephrase the question as to

1 his knowledge. He was employed there.

2 THE COURT: It's overruled.

3 THE WITNESS: I have no idea why it wasn't in
4 the rule.

5 MR. GABRIEL: May I approach?

6 THE COURT: Yes.

7 MR. GABRIEL: I'm going to show you what has
8 been marked as Exhibit No. 72 and ask you to take
9 a look at that and see if you recognize that. I
10 would like to move that into evidence. I believe
11 it is stipulated.

12 MS. JOHNSON: Correct. I have no objection.

13 THE COURT: It's admitted.

14 (Petitioners' Exhibit No. 72 was admitted
15 into the record.)

16 BY MR. GABRIEL:

17 Q. Do you recognize that e-mail?

18 A. I do.

19 Q. It was sent to you?

20 A. Yes.

21 Q. It was also sent to the other -- five other
22 at the time --

23 A. I was one of --

24 Q. -- department inspectors?

25 A. -- multiple recipients, yes.

1 Q. I don't believe any of them are still working
2 there except --

3 A. None of them.

4 Q. That e-mail reflects the fact that
5 immediately after that report was given to the Florida
6 Department of Law Enforcement in Exhibit No. 71, we
7 have Ms. Barfield sending an e-mail to all the
8 department inspectors, correct?

9 A. Yes.

10 Q. Department inspectors are -- again, there
11 were at the time, I think, five of them?

12 A. Yes.

13 Q. And you have large geographical areas for the
14 state?

15 A. Correct.

16 Q. Each one of you?

17 A. Yes.

18 Q. And what was the directive by Ms. Barfield
19 telling the department inspectors to do?

20 A. To not record the R-value on the field notes
21 that we sent to Tallahassee during our inspection
22 process.

23 Q. Prior to that, were you instructed to report
24 R-values?

25 A. Report R-values either on field notes or we

1 were doing an Excel spreadsheet to report R-values.

2 Q. But you were, in essence, keeping records of
3 it and reporting it?

4 A. Yes.

5 Q. And putting that report, so to say, out to
6 the public?

7 A. It was public records. Any document we
8 created was public records, yes.

9 Q. Well, the Florida Department of Law
10 Enforcement for a long time, regarding the Alcohol
11 Testing Program, made up a website that every defense
12 attorney -- anybody can go to and start pulling up
13 records and not have to bother a records custodian
14 asking for a simple record?

15 A. Well, I don't know if it was actually a
16 bother. It was more of a customer service and reduced
17 the workload of that administrative person.

18 Q. And it additionally made something as simple
19 of, if I wish to look up a record, I don't need to
20 write a public records request. I can simply go
21 online, pull up the record, and hit the print button?

22 A. And do that and potentially save a few bucks.

23 Q. Yeah. Especially if you're ordering a lot of
24 them, right? Not that I have a lot of paper or
25 anything like that.

1 In regard to the requirement of the R-value
2 not being documented in these, quote/unquote, public
3 records of FDLE, did you find that alarming?

4 A. No.

5 Q. Why not?

6 A. It was being recorded for historical research
7 to look back over those R-values, but as far as not
8 recording it anymore, I didn't know the reason. I had
9 some assumptions, but I didn't know the exact reason.

10 Q. Now that we look at a -- now that we look at
11 the fact that you know the reason from the
12 correspondence going on prior, the previous exhibit,
13 71, do you have an opinion as to whether or not the
14 Florida Department of Law Enforcement should have in
15 their rules requirements regarding the proper
16 calibration of the flow sensor and volume issues?

17 A. Yes. The calibration and R-value and all of
18 that should be part of the rule.

19 Q. And, again, today, we have -- do we have
20 anything whatsoever in the rule regarding calibration
21 of the flow sensor/volume ability measurement
22 abilities?

23 A. No.

24 Q. Do you believe that the Florida Department of
25 Law Enforcement rules and regulations as of today

1 establish only one uniform criteria for the inspection
2 of the operator -- for the inspection of the
3 Intoxilyzer 8000?

4 A. No.

5 Q. There are a lot of different variants,
6 correct?

7 A. Correct.

8 Q. And department inspectors, which you were
9 one, there was differences in between you all?

10 A. There were subtle differences between the
11 inspectors, yes.

12 Q. The Intoxilyzer 8000, in order to be
13 evaluated for use in the State of Florida, initially
14 during the evaluation approval process, it needs to
15 come from the manufacturer as a certified, calibrated
16 instrument; is that correct?

17 A. Correct.

18 MR. GABRIEL: May I approach?

19 THE COURT: Yes.

20 BY MR. GABRIEL:

21 Q. I want to show you for the record
22 Petitioner's Exhibit No. 70.

23 Considering that FDLE rules at the time of
24 approval back in 2002 require an instrument that comes
25 for evaluation to be calibrated and a certificate

1 proving it, correct?

2 A. Yes.

3 Q. Considering that, do you think that the rules
4 today are insufficient because we don't have
5 calibration being a requirement of any FDLE rule
6 today?

7 A. I do.

8 Q. That document you have in front of you, which
9 standards do they use?

10 A. "National Highway Traffic Safety
11 Administration Standards, Devices for Measuring Breath
12 Alcohol."

13 Q. And I think those are on -- under the Federal
14 Registry?

15 A. Correct, and --

16 Q. Those are basically the DOT requirements?

17 A. Yes, it gives a cite.

18 MR. GABRIEL: Judge, I'd like to move that
19 into evidence.

20 MS. JOHNSON: I'd object again to relevancy.

21 THE COURT: And it's overruled, admitted.

22 (Petitioners' Exhibit No. 70 was admitted
23 into the record.)

24 MR. GABRIEL: Now, Judge, I believe you may
25 have Exhibit No. 68 there previously moved into

1 evidence.

2 THE COURT: Yes.

3 MR. GABRIEL: I wonder if I could steal it
4 from you for one second. Do you want me to go
5 through it?

6 THE COURT: No, it's all right. I don't mind
7 it. They're sort of in the order that you have --

8 MR. GABRIEL: Best-laid plans don't come
9 to --

10 THE COURT: I'm handing 68 to the witness.

11 BY MR. GABRIEL:

12 Q. Sir, referring to page 4 of Exhibit No. 68 in
13 evidence --

14 A. Yes, sir.

15 Q. -- the Intoxilyzer instrument specifications
16 start to talk about the flow sensor?

17 A. Breath flow sensor, yes.

18 Q. That's what we've been talking about?

19 A. Yes.

20 Q. And that's what is your opinion that we need
21 to have rules regarding proper calibration of that?

22 A. Along with calibration of the instrument, I
23 mean, not just this component, but all the
24 calibrations.

25 Q. Well, when we talk about calibration of the

1 components, do you think it's -- do you think you
2 should start with the most important components of a
3 scientifically reliable breath sample?

4 A. Well, you start with the flow sensor or start
5 with the analytical bench, and they're all equally as
6 important, its ability to analyze and accurately
7 measure; its ability to accurately measure the sample.

8 Q. Does page 4 of that exhibit, Exhibit No. 68
9 in evidence, reflect the fact that according to the
10 manufacturer, the Florida Department of Law
11 Enforcement is put on notice, so to say, that the flow
12 sensor being used here is not the most accurate piece
13 of equipment ever, that it has an accuracy rating of
14 plus or minus 10 percent?

15 A. Yes, it has a tolerance of plus or minus 10
16 percent.

17 Q. Now, in the world of breath testing, 10
18 percent is a pretty large range, so to say?

19 A. Other functionalities of the instruments have
20 much tighter accuracy or tolerances.

21 Q. Does the fact that the manufacturer states
22 its flow sensor has an accuracy rating of plus or
23 minus 10 percent in any way weigh in your opinion
24 regarding, scientifically, the need for having
25 calibration of that piece of equipment in the FDLE

1 rules?

2 A. Well, whether it's 5 percent, 10 percent or
3 20 percent accurate, it should still be in the rules
4 to be calibrated and checked.

5 Q. Do you believe it makes it even more of a
6 need considering its level of accuracy?

7 A. Its tolerance to measure does not affect its
8 need for calibration. I think it's just as important
9 as any other component.

10 Q. Okay.

11 A. And if I can explain?

12 Q. Go ahead.

13 A. The instrument is unlike a blood analyst
14 where there's a separate process to collect a sample
15 and then send to the lab and be analyzed. This
16 instrument collects the sample and does the
17 analyzation. So you have two steps. You have
18 samplization, which is the volume and the flow and all
19 of that, and then analyzation. So they're equally
20 important to be calibrated and proper functionality
21 and proper working for the ultimate scientific
22 reliability of the results.

23 Q. Can you have one without the other?

24 A. No. It's the old adage: Garbage in, garbage
25 out.

1 Q. And in this case here under this petition, is
2 it a fair statement that my attack is dealing more
3 really with the issue of the samplization versus the
4 analyzation dealing with issues of flow, volume?

5 A. Yes. Oh, yes, it deals with the samplization
6 versus the analyzation.

7 Q. Now, the Florida Department of Law
8 Enforcement in -- when did you leave?

9 A. 2010, August/September 2010.

10 Q. Were they in the process at that point in
11 time of trying to, that you know of, institute some
12 new internal procedures dealing with this issue of
13 calibration of flow?

14 A. Yes. They started -- before I departed, I
15 was part of that calibration and flow evaluation and
16 set-up of procedures to calibrate flow.

17 MR. GABRIEL: For the record, I'm going to
18 show you defense -- Petitioners' Exhibit 76 and
19 Petitioners' Exhibit 77. May I approach?

20 THE COURT: Yes.

21 MR. GABRIEL: Seventy-six, 77. I'd like to
22 move those into evidence. I believe there's no
23 objection?

24 MS. JOHNSON: Correct.

25 THE COURT: Can we identify for the record,

1 in addition to the previous stipulation, 76 is
2 identified as FDLE guidelines 2007?

3 MR. GABRIEL: Yes, sir. And --

4 THE COURT: Seventy-seven?

5 MR. GABRIEL: -- same thing, 2011.

6 THE COURT: Thank you. It's admitted without
7 objection.

8 (Petitioners' Exhibits 76 and 77 were
9 admitted into the record.)

10 BY MR. GABRIEL:

11 Q. You're familiar with those?

12 A. Yes.

13 Q. You were certainly familiar with 2007 --

14 A. Yes.

15 Q. -- guidelines under No. 76, Exhibit No. 76,
16 correct?

17 A. Yes.

18 Q. And would it be a fair statement that in
19 those guidelines, there's no protocols whatsoever
20 regarding calibration of the flow sensor?

21 A. That's correct.

22 Q. Or volume?

23 A. That's correct.

24 Q. But in 2011, it appears as if there are
25 some -- in Exhibit No. 77, it appears as if there are

1 some new guidelines regarding calibration of the flow
2 sensor?

3 A. Correct.

4 Q. And an outlying procedure for, quote/unquote,
5 verification that the flow sensor is working properly
6 and recording volume properly?

7 A. Correct.

8 Q. And if it is not, the steps that need to be
9 taken to recalibrate that instrument's flow sensor?

10 A. Correct.

11 Q. Were you involved in the discussions prior to
12 your departure of Florida Department of Law
13 Enforcement regarding those protocols?

14 A. Yes. Mr. Pat Murphy and I were working in
15 Tallahassee in 2010 and implemented procedures for
16 checking and calibrating flow and developing what
17 ultimately was published in this document.

18 Q. Ultimately, was there any discussion about
19 instead of putting this in an internal policy of the
20 Florida Department of Law Enforcement, about putting
21 it through the APA and putting it into a rule?

22 A. I don't recall any discussion.

23 Q. Why not? I mean, do you know whether or not
24 that issue came up at all?

25 A. There had been a long-term discussion over

1 the years that I was there that discussed the
2 difference between an internal procedure and a
3 promulgated rule, and --

4 Q. Tell me about that dialogue.

5 A. Well, that dialogue was what goes in an
6 internal procedures manual and what gets published in
7 rule. And that discussion was basically what FDLE
8 expected others to do was in the rule. And what we
9 did formally in the approval process was in rule, but
10 internal procedures within FDLE were published in
11 manual.

12 Q. And were not put through the rule?

13 A. They were not.

14 Q. They were not put through the APA?

15 A. They were not.

16 Q. Those procedures, would you agree, came about
17 due to certain problems being reported back in two
18 thousand -- end of 2009 and '10 is why those changes
19 started to come about again?

20 A. Well, I think -- you say the end of 2009,
21 2010. It may have been earlier than that. But, yes,
22 that's one of the reasons ultimately.

23 Q. Again, that seems to be a recurring issue
24 that, again, as I call it, a problem is noticed by the
25 defense bar and told to FDLE as alleged in motions

1 maybe or something of that nature, and that's what
2 happened here?

3 A. The flow was looked at over many years, but
4 initially it was brought up from the defense bar in
5 Version 26 software and times after that.

6 Q. Considering the dialogue you just explained
7 within FDLE about trying to create and keep a division
8 amongst internal policies and rules, does that change
9 your opinion in the need of having volume and
10 calibration of this instrument, particularly the flow
11 and the volume, placed into FDLE rules?

12 A. No. I think it should be there. I think
13 that's the appropriate place to put it. Why divide
14 those things?

15 Q. Did you have that voice way back when during
16 the discussions of FDLE?

17 A. There was open discussions as to where things
18 should be published. There was open discussions about
19 what is in rule, what is in policy.

20 Part of the other driving factor was it's ten
21 times easier to change an internal policy manual than
22 it is a rule when it comes time to make changes.

23 Q. Was it also in the discussion that it's ten
24 times easier to defend a policy than it is to defend a
25 rule violation in court, criminal court?

1 A. No, that wasn't part of the discussions.

2 Q. Would it be a fair statement, sir, that when
3 you were a department inspector with Florida
4 Department of Law Enforcement, that different
5 department inspectors had different ways in which they
6 record certain R-values?

7 A. Yes.

8 Q. Sometimes in field notes, sometimes in a
9 spreadsheet, sometimes not at all?

10 A. Yes.

11 Q. There was, again, not a uniformity at all in
12 the collection of that type of scientific data?

13 A. That's correct. There's -- different
14 inspectors did it different ways.

15 MR. GABRIEL: May I approach?

16 THE COURT: Yes.

17 BY MR. GABRIEL:

18 Q. Let me show you Petitioners' Exhibit No. 73
19 and ask you to take a look at it and see if you
20 recognize it?

21 Sir, does that appear to be an e-mail chain,
22 chain of e-mails, reflecting requests for R-value
23 records and whether or not the flow sheets regarding
24 them exist?

25 A. Yes.

1 MR. GABRIEL: Judge, I'd like to move that
2 into evidence.

3 MS. JOHNSON: Object to relevancy, Judge.

4 THE COURT: It's overruled and admitted.

5 (Petitioners' Exhibit No. 73 was admitted
6 into the record.)

7 BY MR. GABRIEL:

8 Q. Again, according to that exhibit, it appears
9 as if different department inspectors have different
10 policies, some of them are not even keeping a record
11 at all?

12 A. Correct.

13 Q. Scientifically speaking, when we're dealing
14 with the Florida Department of Law Enforcement Alcohol
15 Testing Program, in the scientific community, do you
16 find it bothersome that the Florida Department of Law
17 Enforcement does not have one uniform set of
18 requirements for keeping these types of records and
19 data, the underlying data?

20 A. As far as the R-value and the way different
21 inspectors -- it really didn't.

22 Q. Okay.

23 A. As far as calibration and those things not
24 being in rule and uniform, yes. But as far as
25 different ways of reporting things, different nuances

1 between inspectors, that really didn't bother me, and
2 those small nuances today don't necessarily give me
3 alarm.

4 Q. Do you know who Enforcement Electronics is?

5 A. Yes.

6 Q. Explain to the Court who Enforcement
7 Electronics is.

8 A. They are the single authorized service
9 center -- when I say "authorized," they are a CMI
10 authorized repair center for repair of the
11 instruments.

12 MR. GABRIEL: May I approach?

13 THE COURT: Yes.

14 BY MR. GABRIEL:

15 Q. I'm going to show you for the record what's
16 been marked as Petitioners' Exhibit No. 84 for
17 identification purposes, and ask you to take a look at
18 that and see if you recognize it?

19 A. Yes, I'm familiar with the document.

20 Q. Have you dealt with Enforcement Electronics,
21 the certified repair facility for FDLE's breath
22 testing devices, before?

23 A. I have.

24 Q. And when there is an issue -- is it a fair
25 statement that when there's an issue with an

1 Intoxilyzer 8000 or 5000 instrument, with a breath
2 testing device that's not simply fixable through
3 department inspectors or people with FDLE in
4 Tallahassee, that they will generally be shipped to
5 the repair facility?

6 A. Yes, either Enforcement Electronics or back
7 to CMI in Owensboro.

8 Q. Okay. And do you know whether or not the
9 repair facility is doing calibration of the
10 instrument?

11 A. Yes.

12 Q. Why is that? Why would you believe that?

13 A. Every time we get an instrument back from a
14 CMI repair facility, it has a new certificate of
15 calibration with it.

16 Q. And, again, similar to the previous
17 certificate of calibration that was moved into
18 evidence as Exhibit No. 70, that's under the federal
19 requirement, correct?

20 A. Yes.

21 MR. GABRIEL: Do you know -- Judge, I'd like
22 to move that into evidence as Exhibit No. --
23 whatever the number is.

24 THE COURT: Eighty-four. Any objection?

25 MS. JOHNSON: Yes. Again, I would object on

1 relevancy.

2 THE COURT: Thank you. It's admitted.

3 (Petitioners' Exhibit No. 84 was admitted
4 into the record.)

5 BY MR. GABRIEL:

6 Q. The authorized repair facility, according to
7 Exhibit No. 84, is putting down a procedure for
8 calibration of flow sensor, correct?

9 A. Correct.

10 Q. And they've got their, quote/unquote,
11 guidelines?

12 A. Correct.

13 Q. Do you know why it's different than Florida's
14 internal policy?

15 A. I don't know why it's different.

16 Q. Again, forget for a minute the fact that it's
17 not in the rules. Do you know, scientifically
18 speaking, whether or not it makes good scientific
19 sense to have different procedures for the internal
20 policies of FDLE and the authorized repair facility?

21 A. As far as the calibration of a specific
22 component --

23 Q. Yes.

24 A. -- CMI, the authorized repair facility and
25 FDLE should be following the same procedures. When we

1 developed the procedures for calibration and checking
2 of the flow sensor in the instrument at FDLE, the
3 guideline we used was the CMI's service manual, and
4 specifically step by step used that to develop the
5 procedure for Florida.

6 MR. GABRIEL: Okay. Judge, I think that's
7 all the questions I have. I may have some other
8 exhibits that I believe were stipulated in that I
9 would like to move into the record. I don't know
10 if I need to go through them, how the Court may
11 wish to proceed with that.

12 THE COURT: In terms of admitting those
13 exhibits, I would like to go through them just so
14 if I have any questions about what they are, I can
15 look through them. I'm not suggesting I know
16 enough about any of this to ask anything
17 intelligent, so you will just have to --

18 MR. GABRIEL: I understand. Can I quickly
19 try to run through those, and if there needs to be
20 some type of question or objections --

21 THE COURT: We can do that, and then do you
22 have substantial cross? I would assume that you
23 do.

24 MS. JOHNSON: Yes.

25 THE COURT: We'll take a lunch break after we

1 finish with these exhibits. Does that work for
2 everybody?

3 MR. GABRIEL: Sure.

4 THE COURT: Okay.

5 MR. GABRIEL: Judge, Exhibit No. 1, it is a
6 copy of Florida Statute 120.56. No. 2 is 120.52.
7 No. 3 is 316.1932.

8 THE COURT: Assuming no objection?

9 MS. JOHNSON: Correct.

10 MR. GABRIEL: No. 4 is the current version of
11 11D-8.00, et al, all the compliance set rules.

12 THE COURT: Again, no objection. So 1
13 through 4 are admitted.

14 (Petitioners' Exhibits 1 through 4 were
15 admitted into the record.)

16 MR. GABRIEL: Thirty-six is an affidavit from
17 Ed Conde. I don't believe there was objection to
18 that, but --

19 MS. JOHNSON: Correct, I have no objection.

20 MR. GABRIEL: And for the sake of the record,
21 Judge, Ed Conde is the person with -- the head
22 person of Volpe Labs that's with the DOT.

23 THE COURT: Thank you. Petitioners' 36 is
24 admitted.

25 (Petitioners' Exhibit No. 36 was admitted

1 into the record.)

2 MR. GABRIEL: Any objection to 37?

3 MS. JOHNSON: No.

4 THE COURT: Petitioners' 37 is admitted.

5 (Petitioners' Exhibit No. 37 was admitted
6 into the record.)

7 MR. GABRIEL: Any objection to Exhibit 38? I
8 believe you had one for relevancy?

9 MS. JOHNSON: I do.

10 MR. GABRIEL: Judge, Exhibit No. 38 is the
11 DOT guidelines that we've been talking about. So
12 when there's been reference to the Department of
13 Transportation guidelines, those are the actual
14 specific guidelines.

15 THE COURT: Is anybody going to be asking any
16 questions -- I don't know that I actually --

17 MR. GABRIEL: We did. Actually, there was
18 the objection -- there were several objections
19 dealing with the issue of DOT guidelines and
20 whether or not the federal government requirements
21 are what you're interpreting and that discussion.
22 Those are the actual guidelines.

23 So there's -- you know, I would like to move
24 them in for the sake of the record. I understand
25 what has been ruled upon previously. The Court

1 has allowed a lot of testimony through the
2 certificates of analysis -- or certificates of
3 compliance that DOT standards are the standards
4 that are being used, so I believe it's relevant to
5 have those standards specified.

6 THE COURT: They're admitted.

7 (Petitioners' Exhibit No. 38 was admitted
8 into the record.)

9 MR. GABRIEL: Judge, in regards to that last
10 exhibit that just got added, could I see that one
11 second?

12 I'm going to refer the Court to the last
13 section of that exhibit, Appendix B, and basically
14 the -- kind of the last paragraph for that whole
15 appendix, but really the last paragraph is going
16 to be the issue of how or why I'm trying to
17 introduce the next ten exhibits. That would be
18 Exhibits No. 40 through 50.

19 And for the Court, what those Exhibits 40
20 through 50 are, are publications of the Federal
21 Registry dealing with DOT and breath testing
22 devices, and I would like them introduced because
23 at no point in time during any of those
24 publications are they showing what is mentioned in
25 that last paragraph of a statement put into the

1 Federal Registry of why retesting of a modified
2 instrument is not required.

3 MS. JOHNSON: Judge, I'd object to relevancy.
4 This has to do with federal guidelines. It's not
5 what FDLE follows. It has nothing to do with FDLE
6 rules. These are federal rules and regulations,
7 that I believe are irrelevant to Florida state
8 rules.

9 MR. GABRIEL: She's kind of correct, Judge.
10 They are not the Florida rules. They're not what
11 we're challenging. But Florida rules require
12 compliance of it, so they make it a component by
13 using that as the underlying standard. I talked
14 about the certificate of calibration. Again, the
15 experts testified and the exhibits have showed,
16 it's under the federal standards. So, again, I'm
17 just trying to --

18 THE COURT: Right. You're arguing that the
19 machine, as it exists now, does not comply with
20 federal standards?

21 MR. GABRIEL: Correct.

22 THE COURT: But the state law just requires
23 that it be on the federal list?

24 MR. GABRIEL: Correct.

25 THE COURT: So it seems like somebody should

1 be challenging the machine with the feds?

2 MR. GABRIEL: It first has to be challenged
3 here.

4 THE COURT: Oh, okay.

5 MR. GABRIEL: My next trick.

6 THE COURT: I'm going to admit the
7 documents --

8 MS. JOHNSON: I have an objection to the
9 characterization that Florida requires us to
10 follow the federal rules. There's no requirements
11 that Florida follow the Federal Register.

12 THE COURT: And at this point, I don't
13 dispute anything anybody is saying. I don't know
14 your rules. I just got this case very shortly
15 before the hearing started. And rather than put
16 myself in a position when I go to write an order
17 of needing to look at something that I have
18 excluded at this point, I'm hesitant to do that.

19 So I'm not going to rule on the objection,
20 but for what those documents are worth, I'm going
21 to go ahead and admit them into the record of the
22 hearing. I think we're looking at 40 through --

23 MR. GABRIEL: Fifty.

24 THE COURT: -- 50. They may well not be
25 relevant, and if they're not, I won't be

1 addressing them in a final order, and you both
2 have the opportunity to argue those positions in
3 your proposed final orders.

4 You have 40?

5 MR. GABRIEL: I apologize.

6 THE COURT: That's all right. Forty through
7 50 are admitted for whatever value they wind up
8 having.

9 (Petitioners' Exhibits 40 through 50 were
10 admitted into the record.)

11 MR. GABRIEL: Judge, the next exhibit is No.
12 52. It's a copy of the Florida Department of Law
13 Enforcement rules and regulations from as far back
14 as 1997. I believe those state -- I believe the
15 respondent had an objection as to the relevancy.

16 The relevancy I would believe is that it's
17 showing the history of the rule and what has been
18 included in the rule. I know my petition is
19 dealing with the present rule, but, again, there's
20 been testimony regarding the fact that this rule
21 as far back 20 years ago has the same requirements
22 that I'm complaining are not in it now.

23 So I'm trying to show a full history that
24 that's been in the rule until that 2004 date when
25 the hole happened, and now all of a sudden, it's

1 absent.

2 MS. JOHNSON: I would object that we're only
3 considering the current rule, and all previous
4 versions of the rule would be irrelevant.

5 THE COURT: Right. I'll admit the document
6 because there's been testimony as to the history
7 of the rule, but whether something used to be in a
8 rule and isn't in a rule anymore is only a matter
9 of history. The only thing I have any authority
10 over in this case is whether the existing rule is
11 an invalid delegation --

12 MR. GABRIEL: Correct.

13 THE COURT: -- of legislative authority as
14 that term is defined in the definition --

15 MR. GABRIEL: And I understand. I just
16 believe that history may be enlightening to the
17 Court.

18 THE COURT: Well, it's been interesting, but
19 I'm not sure it will be helpful in writing the
20 order, but 52 is admitted.

21 (Petitioners' Exhibit No. 52 was admitted
22 into the record.)

23 MR. GABRIEL: Fifty-four is a court order,
24 the rulings, all of them, from I think it's
25 Collier County.

1 MS. JOHNSON: That's correct. There's six
2 county court judges.

3 MR. GABRIEL: All the ones you gave me?

4 MS. JOHNSON: And I believe it's 53. You
5 said 54.

6 MR. GABRIEL: Fifty-three, correct, 53.

7 MS. JOHNSON: Right. I thought you said 54.

8 MR. GABRIEL: I probably did. It's my fault.
9 I don't believe there's objections to that.

10 MS. JOHNSON: Correct.

11 THE COURT: Fifty-three?

12 MS. JOHNSON: Correct, I do not object to 53.

13 THE COURT: Okay. Fifty-three is admitted.

14 (Petitioners' Exhibit 53 was admitted into
15 the record.)

16 MR. GABRIEL: Fifty-eight is the Intoxilyzer
17 reference guide that's been testified to by my
18 expert. It's the Florida Department of Law
19 Enforcement's Intoxilyzer reference guide.
20 February 2006 is the date of it.

21 THE COURT: Any objections?

22 MS. JOHNSON: I do object, Judge. I don't
23 believe that was the version that was testified
24 about.

25 THE COURT: I don't recall him testifying

1 about this document, and he wasn't looking at it
2 when he did.

3 MR. GABRIEL: No. I can ask him a couple of
4 quick questions right now. I mean, it's the
5 Florida Department of Law Enforcement's operating
6 guide for the Intoxilyzer 8000.

7 THE COURT: You will need to ask him some
8 questions about this.

9 BY MR. GABRIEL:

10 Q. Sir, I'm going to show you what has been
11 marked as Exhibit No. 58. Take a look at that and see
12 if you are familiar with it, first of all.

13 A. Yes, I'm familiar with it.

14 Q. It's the Intoxilyzer operating guide and
15 manual from the Florida Department of Law Enforcement?

16 A. The only reason I checked is because you say
17 "manual." It's the "Intoxilyzer 8000 Reference Guide"
18 published by the Florida Department of Law
19 Enforcement.

20 Q. What's it for?

21 A. Operation and menu options for the
22 Intoxilyzer 8000 used in Florida today.

23 Q. Do you see a section in the FDLE version of
24 the Intoxilyzer guide that deals with calibration?

25 A. No. There's nothing about calibration in

1 this version.

2 MR. GABRIEL: Judge, I'd like to move that
3 into evidence.

4 THE COURT: Objection?

5 MS. JOHNSON: Yes, Judge, I would still
6 object. It's the 2006 version before the
7 instrument was even approved for evidentiary use
8 here in Florida. I don't know how that would be
9 relevant.

10 MR. GABRIEL: Judge, the instrument was
11 approved for evidentiary use, according to the
12 documents moved into evidence, in 2002, so it's
13 well after that. It may not have been put into
14 service until August of 2006.

15 MS. JOHNSON: I would disagree. I would
16 state that it was -- the make and model was
17 approved in the rule promulgation process in
18 November of 2002. 8.003 specifies that the
19 instrument cannot be used until the Intoxilyzer
20 8000 has been approved with software evaluated by
21 the department. Software was not evaluated by the
22 department. The instrument was not put into use
23 until March of 2006. So as an evidentiary
24 instrument, it was not placed into -- approved for
25 evidentiary use until the software was evaluated,

1 then it was placed into use during March of 2006.

2 MR. GABRIEL: Judge, we have in evidence
3 already the 2000 guide.

4 THE COURT: Is there a guide that's a
5 subsequent reference guide?

6 MR. GABRIEL: If there is, Judge, I will
7 stipulate to it. I would love to have a copy of
8 it.

9 MS. JOHNSON: I don't believe there is one,
10 Judge.

11 THE COURT: Okay. It's admitted.

12 (Petitioners' Exhibit No. 58 was admitted
13 into the record.)

14 MR. GABRIEL: Sixty-two, 63, 64 and 65 were
15 the course manuals. I don't believe you -- oh,
16 you did object, okay.

17 MS. JOHNSON: Yes, I object to their
18 relevance as well.

19 MR. GABRIEL: Judge, again, these are the
20 breath test operator course manual from FDLE and
21 the renewal course manual for a breath test
22 operator and the agency inspector material, along
23 with the renewal course for agency inspectors.

24 I believe they are relevant because, again,
25 they're establishing the requirement of having 1.1

1 liters of volume and the importance of it. So if
2 I'm challenging the sufficiency of FDLE rules
3 alleging that their scheme is not sufficient, I
4 need to establish that that requirement is in
5 their own manuals that they're teaching every
6 breath test operator and agency inspector is
7 stating that it is imperative.

8 MS. JOHNSON: I still don't see how they're
9 relevant to anything to do with flow calibration.
10 The breath test operator or agency inspector would
11 not perform calibrations. I don't understand how
12 they're relevant to the issue.

13 THE COURT: I'm going to admit them.

14 (Petitioners' Exhibits 62 through 65 were
15 admitted into the record.)

16 THE COURT: I assume you will have witnesses
17 who can testify as to why they're not relevant at
18 this point, but -- I figured you'd object to the
19 use of the word "scheme."

20 MS. JOHNSON: Well, that too.

21 MR. GABRIEL: Judge, I think that's it. I
22 have other witnesses for other exhibits, so I
23 think that that's it.

24 THE COURT: Okay. Go ahead and break for
25 lunch, and we'll be back at 1:15.

1 MR. GABRIEL: Thank you, sir.

2 (Lunch recess was taken.)

3 (Volume I ends and the proceedings are
4 continued in Volume II.)

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