STATE OF ILLINOIS)
) SS:
COUNTY OF DU PAGE)

IN THE CIRCUIT COURT OF DU PAGE COUNTY
FOR THE EIGHTEENTH JUDICIAL CIRCUIT OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff

vs.

KELLY CRAWFORD, et al,
Defendants.

No. 04 DT 2848

ORIGINAL

REPORT OF PROCEEDINGS had and testimony taken at the hearing of the above-entitled cause, before the Honorable **KENNETH TORLUEMKE**, Judge of said Court, recorded on the DuPage County computer based digital recording system, DuPage County, Illinois, transcribed by Mary A. Trezzo, CSR, RPR, commencing on the 9th day of December, A.D. 2005

MARY A. TREZZO, CSR, RPR
Official Court Reporter
Eighteenth Judicial Circuit of Illinois
#084-002924

PRESENT:

MR. JOSEPH E. BIRKETT,
State's Attorney of DuPage County,
By MR. BROOKS LOCKE,
Assistant State's Attorney,

Appeared on behalf of the People of the State of Illinois;

MS. LISA MADIGAN,
Attorney General of Illinois,
By Ms. DEBORAH SIMPSON and
MR. KHENG TRINH,
Assistant Attorneys General,

Appeared on behalf of the Illinois State Police;

MR. DONALD RAMSELL,

Appeared on behalf of the Defendants.

MARY A. TREZZO, CSR, RPR
Official Court Reporter
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MR. RAMSELL: Don Ramsell on behalf of the defendants. The transcript we gave you was missing page 113.

THE COURT: Okay, good. I have it right here.

MR. RAMSELL: Right.

THE COURT: For the record, if we can first of all, all state our names and then what capacity, what party we're representing please.

MR. LOCKE: Brooks Locke for the State.

MS. SIMPSON: Deborah Simpson for the Illinois State Police.

MR. TRINH: Kheng Trinh for the Illinois State Police.

MR. RAMSELL: Don Ramsell on behalf of the defendants.

THE COURT: All right. The matter is special set, this is a commencement of proceedings.

I believe for scheduling purposes we have Mr. Evans, is that correct, counsels?

MS. SIMPSON: Yes, your Honor, we do.

THE COURT: All right. Are you ready to proceed right into the questioning, all sides ready to proceed?

MR. RAMSELL: Yes.

MS. SIMPSON: Yes.

THE COURT: Good afternoon, Mr. Evans. Why don't you step up here. I'll swear you in, Mr. Evans. Then we can start the hearing.

(The oath was thereupon duly administered to the witness by the Clerk.)

THE COURT: All right. Just have a seat, be comfortable, Mr. Evans.

And then I believe is it cross, is that where we're at?

MS. SIMPSON: No, your Honor. I hadn't finished my direct yet.

THE COURT: You have not. All right, thank you, Ms. Simpson. You may proceed then if you're ready.

MS. SIMPSON: Thank you.

JOHN EVANS

called as a witness on behalf of the State herein, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION (resumed)

By: Ms. Simpson:

Q. I believe when we left off testifying, you had --

THE COURT: Well, we should have the witness state

his full name though first I guess.

MS. SIMPSON: I'm sorry.

THE COURT: Will you state your full name, spell your last name, Mr. Evans, for the record please.

THE WITNESS: John Q. Evans. E-v-a-n-s.

BY MS. SIMPSON:

Q. And you're employed by whom?

A. I'm employed by Intoximeters of St. Louis, Missouri, as technical director.

Q. I believe that the last time that you were testifying, we were working on the --

MS. SIMPSON: May I approach the witness, your Honor?

THE COURT: Yes, ma'am, you may.

MS. SIMPSON: Your Honor, this is McMurray Number 5, the exhibit that we were working from.

THE COURT: All right.

BY MS. SIMPSON:

Q. Are you familiar with that exhibit?

A. Yes.

Q. Or that document?

A. Yes.

Q. That is a printout from the Intox EC/IR, is that correct?

A. That's correct.

Q. And there are a number of columns that go across the top of the document, is that correct?

A. That's correct.

Q. Would you, beginning with the document on the left -- or the column on the left, explain what each of those, what information is contained in each of those boxes.

A. You look at the top row, this identifies what each of these compartments or field names are. It starts with the top left, which is test number. If you look below you see a test number starting 040 and ending with 262. It's a bit of a bad copy I'm afraid. That's a unique test number generated by each test.

Q. Could you explain how the test numbers are generated please.

A. It's a combination of slightly modified date format, with a sequential test number. So it becomes a unique test number for that day, for that test.

Q. So in the test number the date is actually recorded, as well as the number of the test?

A. Yes.

Q. Now when the test number itself is added on at the end, does it start fresh with number 1 each day?

A. No, it doesn't. It's a sequential, going up to 9,999 and then it writes three or four digits.

Q. So the first six numbers of that are the date?

A. First six numbers are the date and the last three 999 is the combination, possible combinations, 1 to 999.

Q. Does it go month, day, year, or is it set up somewhat different?

A. In this case generally it's year, month --

Q. It's year, month, day, is that correct?

MR. RAMSELL: Objection, leading.

THE COURT: Well, it is, especially since he's the expert. The objection is sustained.

Are you able to --

THE WITNESS: I can't read the text is so bad. But if my memory serves me right, it's a combination year, I think it's -- year, day, month. I could be wrong, but it's a combination of those, the two digits for each.

BY MS. SIMPSON:

Q. Okay. In the number or after that number, is there actually a date recorded also?

A. There's a start date, time.

Q. Okay. And what information is contained in

that?

A. So you have 2004, then you have April, which is the year '04 -- the month 04, and then you have the day of the month, which is 05. So what you have then is month, 04, then you have year -- year, month, the day. And then it's followed by the three sequential numbers.

Q. Okay. After that is the numbers that you were talking about actually, correct?

A. Yes, right.

Q. So the last three numbers would be what we would look at to see whether the entries in this document were consecutive?

A. Correct.

Q. Thank you. With respect to the next box, what information is contained there?

A. We're going left to right on the top?

Q. Moving to the right.

THE COURT: Do you have an extra for me, Ms. Simpson, so I can follow.

MS. SIMPSON: I'm sorry, I thought you had copies of all of them, Judge.

THE COURT: Well I may, but I didn't know in which order that we might be proceeding. So that would help

me. Do you have your extra for yourself?

MS. SIMPSON: Yes, we're covered, Judge.

THE COURT: Okay, thank you.

BY MS. SIMPSON:

Q. All right, so the next box contains what?

A. Just being the start date, time, okay. Then it's the subject name, which is the related subject, sex of the subject, then it's arresting officer. Then it's the blank, that is the blank check in the subject test sequence. And there's a check, if there's a check related with this particular test. Then it's blank, all four checks are followed by a blank. And then it's a subject, result, then test type. Now, that's the top line.

Bottom line, operator name, the officer who's operating the instrument, operator's ID related to that. License number that's associated with the subject's name. Date of birth, DOB. Arresting officer's ID, below arresting officer.

Then the time, when the blank was carried out, the time in which a check, if it was a check associated. Then the blank, time again. And then the subject, result, time. And then below test type is error, if there's an error associated with that

specific test in this report.

Q. Now that document will also, if you go down through the document, there are a number of entries as far as tests that were run, is that correct?

A. Yes, correct.

Q. As you get to about the middle of it there in June.

A. The front page?

Q. Yes. I think that's on the next page.

A. It's April through November on page 1 I have here. And there's, in June there's one test associated with June and that's on the 23rd of June, 2004. Test number 271.

Is this the one?

MS. SIMPSON: May I have a moment, Judge?

THE COURT: Yes.

MS. SIMPSON: May I approach the witness to look at the exhibit?

THE COURT: Yes, ma'am.

BY MS. SIMPSON:

Q. The report that you're looking at, is that the report that is generated when an individual asks for what's called a Shift F5 report?

A. No, this is not a Shift F5 report.

This is a report generated from Intoxnet. And this is the one that is specific to the, it's at the top here, Illinois protocol subject tests.

Shift F5 will produce a ticket tape typically on the same printer, on the same printer roll. And it's the instrument internal printout of its memory.

Q. This is something that's printed through the computer and the instrument?

A. This is printed by interfacing with a PC with Intoxnet to the serial port, there's a connector on the back of the instrument, and requesting the data. What happens is when you're using Intoxnet, it calls the instrument, downloads the data. And then from Intoxnet, all this data is downloaded to memory Intoxnet.

You then click on an option to print out a report. And one of the standard printout reports are subject tests. So when you select that, you will print out this report format of all the subject tests that have been carried out on that instrument and have been downloaded into the data base.

Q. The way to get this report is it's got to be downloaded into the data base and go through the different software than what's on the instrument

itself, correct?

A. Absolutely, yes, correct.

Q. Thank you.

THE COURT: Can I ask one question, Ms. Simpson?

MS. SIMPSON: Sure.

THE COURT: If I may, so I'm following Mr. Evans now.

Now if I got the actual F5 printout, would that include all the data that is on this?

THE WITNESS: Yes.

THE COURT: All right. So this would be, if you knew specifically what you wanted, you'd request it, then you could plug into the machine and retrieve just this data, right?

THE WITNESS: You could record just this as a report. Or you could go through Intoxnet to individual reports and just do a printout.

THE COURT: On those?

THE WITNESS: In the same format.

THE COURT: On those individual reports?

THE WITNESS: Yes, on those individual reports.

THE COURT: All right, fine.

MR. RAMSELL: Your Honor.

THE COURT: Yes, sir.

MR. RAMSELL: I don't mean to interrupt.

THE COURT: Yes, go ahead.

MR. RAMSELL: Can I ask a point of clarification right on that issue only?

THE COURT: Sure.

MR. RAMSELL: All right.

THE COURT: That's why I was asking Mr. Evans as well.

MR. RAMSELL: Okay. Because you said, would it include the subject test Shift F5.

THE COURT: Right. If you got the entire Shift F5 printout.

BY MR. RAMSELL:

Q. If you had an entire Shift F5 printout, would it include more than just the subject tests on that document? Or has that document been filtered to only give the subcategory from Shift F5 of subject tests?

A. Okay, it'll take a little bit of explaining, so if you bear with me, I'll try and explain it as best I can.

THE COURT: No, that's fine.

A. Shift F5 allows you to call out tests from memory under the headings of calibrations, quick tests or just subject tests only.

BY MR. RAMSELL:

Q. Okay. So let's say you put yes next to all the categories?

A. On the Shift F5 you cannot do that. You can have one of those options, otherwise you have to go back in and choose it, because it's a sequential option. You can say, the exact sequence is I think it's all calibrations, all accuracy checks, all quick tests and then all subject tests. And if you answer no to one, you go to the next one. You can't go back.

So once you, say you selected subject tests, it will only print out then, when you hit enter to confirm, it will only print out a string of the subject tests.

In the Intoxnet, you have a similar option in which you can select, I only want subject tests, I only want calibration. You can also print out everything, all tests that are on there as well.

But in this case, this one here we're looking at here is subject tests.

MR. RAMSELL: Okay. Can I just follow up?

BY MR. RAMSELL:

Q. So of the many items of data that can be received -- retrieved through Shift 5, whether one at a

time or otherwise, say there's five categories, what you've given the Judge is only one subcategory, subject tests only, is that what you're telling us?

A. I haven't been through all of this, so let me just quickly look. Actually, the first page is subject tests, okay. Then on page 3 you have accuracy checks and calibrations. So whoever generated these, I did not generate these.

Q. Right.

A. Generated these selected the two options that I can see. One is subject tests and then --

THE COURT: I see it.

A. -- and then if you go then to page 3.

THE COURT: But that's off the software through the port, right?

THE WITNESS: That's from the software in the PC itself.

THE COURT: Right.

THE WITNESS: From data downloaded from the port, from the memory of the instrument.

THE COURT: From the instrument itself, correct.

Could you do this separately? If I asked for F5, would I get -- and I wanted to limit the F5 information to the accuracy checks and the Illinois

protocol subject tests, is that a feasible request?

THE WITNESS: Not on the instrument. The instrument only offers you the option to pick one at a time. That means you go into Shift F5.

THE COURT: Okay.

THE WITNESS: Shift F5.

THE COURT: I heard that part. So you can't do it?

THE WITNESS: No. You'd have to go back and select the option for calibration checks.

THE COURT: So you have to do it twice?

THE WITNESS: Yes, that's right.

THE COURT: You have to do one printout first for one --

THE WITNESS: And then go back and do another one.

THE COURT: -- for one category that you're requesting?

THE WITNESS: Correct.

THE COURT: And then when you finish that, then the operator, or whoever is retrieving the information, has to go back, input a separate request for a separate category?

THE WITNESS: That's correct.

THE COURT: But you could do both or any number of requests if you had the software to go directly into

the PC, correct?

THE WITNESS: The software has access to the whole data base.

THE COURT: And you could command it to retrieve certain things?

THE WITNESS: Yes. Individual test records to all test records.

THE COURT: Sure, okay. All right, no I'm following you. Thank you, Mr. Evans.

THE WITNESS: Thank you.

THE COURT: Ms. Simpson, go ahead.

MS. SIMPSON: Thank you.

BY MS. SIMPSON:

Q. What information would you need to re-enter to move from getting the subject tests that you were just talking about to getting the calibration of the quick tests?

A. In the Shift F5 or in this?

Q. In the Shift F5 with this.

A. You would have to then press Shift F5 again and put the pass code in. And then you'd have to step through the options, it would offer you the options sequentially on the display.

One display would say, and I may have the

sequence slightly out, but the first display might say, all accuracy checks, yes, no. If you hit no, it would go then to calibrations, yes, no. If you hit no, then it would go to quick tests, yes, no. And then subject tests. It's a sequence typical of that.

Q. Approximately how long does it take to do that?

A. Well, it depends on the number of tests in record. If you have a large number subject tests in record, it can take quite some time. The instrument can hold a significant number of subject tests for instance. It would have to be an estimate.

The worse case it might take a minute or two to do all the subject tests. If there's only a few subject tests, then it would just take a matter of seconds. It would vary.

Q. To?

A. To download that information, print it out. The printout needs a discreet time to be drawn from memory, then print it out. So it would be, it would depend how much memory is in there and the range of what you want. If it's all the subject tests and it's an instrument that's almost full, it could take a few minutes.

Q. With this software are you allowed to put dates, like time frame dates?

A. You could put a range of dates.

Q. You would give it a beginning date and then an end date?

A. That is one of the options, yes.

THE COURT: And again now, Mr. Evans, you couldn't do that by just going Shift 5, you couldn't say, give me ten dates, right?

THE WITNESS: You could pick a range of start date and end date. So you could actually select it over a period of time. If you're just looking for --

THE COURT: One category?

THE WITNESS: One category, yes.

THE COURT: And then limit it to the number of days, the day of range that you want?

THE WITNESS: You select it.

THE COURT: Like if I wanted all accuracy checks for April and May only.

THE WITNESS: That's right.

THE COURT: I could do that?

THE WITNESS: You could, yes.

THE COURT: All right. Thank you.

BY MS. SIMPSON:

Q. I think it's page 3 is the next report. Could you explain to the court the information -- what type of report is that first of all?

A. Well, this is the report of the accuracy checks and calibrations.

Q. What is an accuracy check?

A. An accuracy check is when the instrument accuracy precision is measured against a known standard. That is you would introduce an ethanol standard, either a dry gas standard or a wet gas standard both work on this instrument. And it will take that reading and report what that instrument reads that ethanol standard as, what its value is.

Q. What's a calibration?

A. A calibration is when you, again you take a known standard and you adjust the instrument's readings to be equal to that known standard.

So, one, you'll check and it'll verify accuracy. The other you'll set it, the accuracy of the instrument. So one there is no adjustment, that's an accuracy check. The other calibration you are adjusted to that standard, the instrument's reading.

Q. What type of things would occur, could that occur that would cause you to need to recalibrate the

instrument?

A. Typically a calibration follows an accuracy check. An accuracy check is used to determine that the instrument is still within the accuracy of tolerance range that is acceptable for your administration, for your standard operating procedures.

If it's near or outside that range, you would then normally carry out a calibration, sometimes called recalibration, both being the same. You just use the same function key to start the calibration procedure.

So in the case of Illinois, I believe it's plus or minus .010 on the nominal value of the test standard. So, for instance, if you're using 080 standard, and it came anything from 071 to 089, you would not -- you don't have to do anything.

If, however, it was at the limit or over it, that is 070 or below, or 090 or above, then my understanding is that the state troopers would have to, the state technicians would recalibrate it.

Q. Is the calibration something that's done manually, or is it you push a button and the instrument does it itself?

A. You push a button and the instrument does itself. If you use the internal dry gas standard,

because internal dry gas standard is delivered automatically under the processor control.

In the case of a wet standard, depending on how the technician wanted to do it, he would either connect it to the rear of the instrument, in which case it would be automatic, that is an internal pump would drive air through the system and drive then the ethanol vapor into the instrument to calibrate from.

There's a third alternative where you introduce that same wet standard by blowing down the breath tube. So these are three common options which we offer on EC/IR for everyone basically.

Q. And I think you've testified previously, the State of Illinois uses a dry gas standard?

A. It uses dry gas standard. But wet gas standards have been used historically. But now they're transferring over to dry gas standards. Both I understand are accepted.

Q. The idea of recalibrating, is that similar to when you use a scale, you zero balance it before you weigh anything?

A. I'd say it's more similar to when you put an accurate 50 pound weight on it and adjusted it so the dial gauge showed 50 pound.

Q. So are you telling the instrument then to read this particular sample of gas as a .08 because that's what we know it is?

A. That's what you know it is. That's why you go for what we call a NIST traceable standard, which I believe Illinois are using. Manufacturers that are approved to NIST traceable reference materials that are good quality standards.

Q. There's also something called a certification check. What is that?

A. A certification check was placed in the system at the request of Illinois State. And it constitutes, the certification procedure calls for two accuracy checks in the sequence and then a zero sample, typically blown. Though I also understand that an air blank also is accepted.

And we created a certification check under the F3 option whereby if you selected this, it would automatically run two accuracy checks and then offer the breath alcohol technician to blow into the instrument and provide a zero sample. And these three actions constituted a full certification test under the procedures adopted by Illinois.

Q. The test where the officer blows in, is that

what they refer to as the quick test?

A. No. What happens here, the accuracy check is an option under the F3 function. Some officers, breath alcohol technicians select and use the accuracy check option, okay.

What happens then, that too is defaulted to run two accuracy checks, okay. However, you can select up to nine accuracy checks in that sequence, but it's defaulted too. They take the accuracy check, it runs these two standards, which is two-thirds of the requirements for certification, it prints out.

And then the officer goes to the quick test, which is F2, which is no data, to provide the zero breath sample, which is the third constitution part of that three part sequence. So that's why you will see sometimes an accuracy check with two results, followed by a quick test. And that is the breath alcohol technician, for whatever reason, and I can't explain why, not using the certification option but using the accuracy check option.

I suspect the reason is that when you go into that menu function, accuracy check, default F2 is the first one there, so it's just as simple to hit enter and start that sequence up to go through it. That's an

assumption.

Q. So it's a preference by the officer, there's either option?

A. Yes, on both my understanding --

MR. RAMSELL: Objection, leading.

A. -- meet the requirement.

THE COURT: Overruled.

BY MS. SIMPSON:

Q. When you request a printout -- let me withdraw that question. I don't want to do that yet.

Getting back to McMurray Exhibit No. 5, which you have in front of you. Starting on page 3 there's a number of tests. There's a column there that's marked target. What is that target column for?

A. Target, when an instrument is using a dry gas standard or wet gas standard, there's a target value. That is the value that you've entered when you installed that dry gas standard into the instrument. And that target value is the expected value that the instrument will compare its accuracy check against. It will look at that target value and say, am I within plus or minus 10 percent of this value. The breath alcohol technician will be observing that it comes within that tolerance.

Q. So by putting a number in that target column, are you then telling the instrument that this is what it should register, or are you telling the instrument to do its own test?

A. What you're doing when you install this dry gas standard, you will enter in the value of that dry gas standard at sea level, that's under the tank menu, tank data menu. And you'll also enter in, for instance, the expire date. And you can see there's EXP at the top there, that's the expiring date of that dry gas tank.

And then also associated with this there's a lot number. That is a number which identifies the manufacturing lot of that number. When you enter in your value of that dry gas, it's the value at sea level, which is marked on the gas tank.

The instrument then looks at that value and then also goes out and looks there's, in this case, this is dry gas, and all dry gases we're talking about here, okay, they're all dry gases. The dry gas, the ethanol value released from the dry gas tank is a variable of the ambient pressure that the instrument is set at, which is why it's important that we enter in the value of the dry gas tank at sea level.

The instrument has a pressure sensor. And when an instrument sees that a dry gas standard is being run, it will go to the memory of the instrument and the tank memory and say, what is the value of this gas tank at sea level. And it will then look to the pressure sensor and say, what is the pressure today. The software will identify the adjustment of that dry gas value and will call that the target value.

For instance, here in Illinois the dry gas tanks supply to Illinois State Police, how a nominal value is 0.082 at sea level. Of course, here in Illinois we are typically 500 foot above sea level. The difference in pressure would result in typically a lower than a 0.082 reading of ethanol in that tank, and therefore, 008, 080, 08082 is a very normal reading adjusted for pressure. And that's the target value that you're seeing here.

Q. On that particular exhibit there are a series of tests where the target is listed as .10. Do you see those?

A. There are two to the bottom -- three to the bottom I see.

Q. The individual who's conducting the tests, is his name in there?

A. Well --

THE COURT: No, I don't see a name.

A. No, there's no name.

Can I ask a question?

THE COURT: Yes, sir.

THE WITNESS: I believe this period of time, this instrument -- I'm not sure that this instrument could have been the Intoximeter has been worked on.

MS. SIMPSON: It was, Judge. And he testified --

MR. RAMSELL: Wait, Judge.

THE COURT: Yes, sir.

MS. SIMPSON: May I finish please?

THE COURT: Wait, wait.

MR. RAMSELL: I object.

THE COURT: Hold on now so we know. Wait, Mr. Evans, hold on. Back up one second. There's numerous lawyers and I'll hear the objections one at a time.

Ms. Simpson, first your response, and then I'll hear an objection. I'm not seeing another question.

MR. RAMSELL: Doesn't the objection start first?

THE COURT: No, Mr. Ramsell, she was not finished. So she's going to finish first and then I'll hear your

objection.

Ms. Simpson.

MS. SIMPSON: What I was going to indicate to the court is, this was an exhibit that counsel had used to do his direct with Ms. McMurray.

THE COURT: Right.

MS. SIMPSON: This exhibit had been given to Mr. Evans the last time we were in court and we had started working on this --

THE COURT: Okay, right.

MS. SIMPSON: -- particular one. There's also another sheet, which is number 3, which shows that it was the time that the instrument was in at Intoximeters being repaired. And he did testify to that the last time.

THE COURT: Right.

MS. SIMPSON: And then we had to stop, we didn't get beyond that.

THE COURT: Okay.

MS. SIMPSON: And since he didn't get in here, I didn't get an opportunity to tell him that I was going to show this back at him again.

THE WITNESS: I'm sorry, my memory --

THE COURT: No, that's all right, Mr. Evans. Just

hold off.

Mr. Ramsell.

MR. RAMSELL: My objection was, the witness asked a question of the lawyer and I was objecting because the lawyer was now, the lawyer was in the context of explaining something to you that you didn't question, looking at you, but feeding the answer as to how to help the witness answer the question. This is a conversation between the two of them.

Of course, since they were allowed to finish explaining it while looking at you to him, my objection is really meaningless at this point. I didn't think it was appropriate.

THE COURT: Well, no, it's not meaningless. But I'll answer it because the record should support it.

One, it is as Ms. Simpson has indicated, it's not a document prepared by the witness. We've had hearings that have been bifurcated over months and I don't find it unusual that a witness recalled in the middle of his testimony may be asking a question. If I thought the question was improper to Ms. Simpson or a dialogue was improper, I would strike it on my own. I wouldn't need an objection.

I'm following the witness, and I'm aware it's

not his document. And he's asking for a clarification. And I think since the scope of this hearing and the intent of this hearing is to allow each side to inquire without any real restrictions of all witnesses, yourself included, if I feel that it's out of bounds, I don't need that objection.

Notwithstanding that it's a dialogue type of question, which I find in this situation is appropriate so that the witness is brought back to speed where we're at, what subject matter is being discussed and whether or not especially since this is not Mr. Evans' document.

I myself, Mr. Ramsell, are having difficulty, especially after a month or 30 day intervals where we then recommence the testimony of complicated testimony by an expert. I don't find it, one, improper or inappropriate that Ms. Simpson is to some extent coaching the witness, because the witnesses, all the witnesses, your witnesses, her witnesses have not really been allowed to just testify all in one setting. And so when you got to resume a month later or 30 days, 20 days later or whatever, I don't think that that's at all improper. So I'll note the objection. And again if I think it's improper, I'll note that.

And I would also note that I suppose Ms. Simpson could have objected when I let you ask questions without even, you know, Ms. Simpson being through questioning her witness. Because your response was the same basically as Ms. Simpson, which is when I touched upon a matter which you thought was essential that I know, I properly I think allowed you to correct that with the witness for the basic intent of the hearing, which is to educate me. I'm the one that's going to decide it.

And she wasn't yelling or objecting when you, in the middle of her questioning, she hadn't even been done yet, allowed you to ask certain clarifications of the expert. And under normal scenario that would be objectionable. But for the very same reason, I felt that her questioning of the witness at that point was helpful, helpful to resolve some of the issues.

Likewise, I feel Ms. Simpson's dialogue with the witness at that point was equally not objectionable and helpful.

So I'll note the objection. Overruled.

Next question, Ms. Simpson.

MS. SIMPSON: Thank you, your Honor.

BY MS. SIMPSON:

Q. With respect to the target number of .10.

THE COURT: You should say, yes, Mr. Evans.

THE WITNESS: I'm sorry. Yes.

THE COURT: It doesn't translate well.

BY MS. SIMPSON:

Q. Do you know whether that particular target number came from the factory or from your business or from the Illinois State Police or from the police department? Is there a way to tell?

A. There's no absolute way to tell. But as far as I'm aware, they do not use .100 dry gas standards in Illinois state. I don't believe they have access.

THE COURT: Well, you could track it by the lot number if you had to, right?

THE WITNESS: Well actually if you look here, the lot number, if you look at the lot number for .08 is the same as the lot number for the .1.

THE COURT: Okay.

THE WITNESS: And the reason -- may I add an explanation?

THE COURT: Yes, sir.

THE WITNESS: The lot number and expiring date is entered in through what we call the tank menu, F10 tank menu. When a technician is running accuracy checks, he

won't change that, he will go into F3. And one of the options when you do an accuracy check in F3 is you can enter in the target, the nominal value of the gas tank in that option. So as he hits entered, accuracy check, yes, he confirms, it will then come up, dry, he will hit enter, confirm it. And there's a value.

And you will see then, underneath the word gas standard value you'll see a number. In this case when he did this, he would have seen 082. He would then highlighted those and change that to .100 because he knows that the accuracy check gas standard he has is a .100.

He would not have gone into and changed the lot number and expiring date. That would be something that is the role and responsibility for the breath alcohol technician when he reinstalls the instrument in Illinois. He should go into that tank menu and make sure that the gas tank he's using and its expiring date is the one that's entered in F10 tank menu.

THE COURT: So how did that happen then, Mr. Evans? How did that happen? How did the same lot number and everything appear and then it's changed from the target of .08 to 0.1.

THE WITNESS: Well what happened is when it comes

inside into Intoximeters, he, our technicians will go straight into the F3 menu and not go to the tank menu, will not change the tank menu.

THE COURT: Well, why would you do that? If all the prior standard targets for that lot were 0.08, are you now using a different canister?

THE WITNESS: Yes. We use the canisters which we have in our tech department.

THE COURT: Okay. So that is indicating to you, without any other information, that a different canister is being used?

THE WITNESS: Oh, yes, absolutely.

THE COURT: Right, okay. All right. Go ahead.

BY MS. SIMPSON:

Q. Do you remove the canister that's normally in the instrument that the police department has in there?

A. The police department, because the compressed gases are hazardous materials, it's very strictly understood that you must remove the dry gas cylinders before they can be transported by road or by air.

So our instructions to all our customers is that you must remove the gas cylinder and return the instrument to us without the gas cylinder, which is why we use our own gas cylinders. And then we remove that

gas cylinder prior to sending it to the police departments after repair and quality control.

And it's the responsibility of the breath alcohol technician, when he takes and places that instrument back into service, to insure that the accuracy check gas standard expiring date and lot number are correct to the one that he uses in his accuracy check or certification process.

Q. Is there a reason why you leave the numbers in for the police department, rather than putting your own test canister numbers in there?

A. No reason other than from the technician, when he's gone into F3, he would just use that, it's just the most direct sequence for a technician to do that. There is no reason not to. But it means you have to go through two sets of menus to get to the same sequence, which is what you are attempting to do is to run an accuracy check with your known standard.

Q. And is there a reason why at the factory or at Intoximeters they would use a .10 standard rather than a .08?

A. No reasons. I can tell you that we have a combination of .038, .082 and .1 gas canisters that we use for QC procedures. A technician will typically use

the one that is available to him at that moment in time. We within our department, our rules and procedures do not call for us to enter in or use the same gas standard as that state uses.

Q. There's no significance though with respect to using the higher number for testing?

A. No. It was the one that the technician had most likely taken out of the previous machine if it's being QCed and just put it in there, checked what value it was and then would have simply gone through the process.

Q. When an instrument comes in to be prepared or to be looked at by the factory, how many times typically will you run the standard check or the calibration check?

A. It depends on the reason for return of the instrument. If the instrument is being returned because it's showing inaccuracy or variable calibration results, and typically you would run several gas checks and alcohol standards using wet standards.

When you start repairing the instrument at the beginning to assess the reported fault, and then again once the repair is being implemented, identified and implemented, the technician would also run some checks

to insure that his repair has addressed the fault.

And then after that, it would be passed into the quality control area where another technician would carry out a sequence. We have a test procedure for quality control where we run a series of tests to verify, one, if the fault has been repaired; and two, that the instrument is accurate to the factory standards.

Q. And when you test it at that level, do you test it for more than the .10 standard?

A. Oh, yes, indeed. Our sequence is typically a .1 or a .082, and then typically around a .35. So we're looking to identify the linearity of the device so its got equal accuracy, it's at and around the legal limit, and then at or near the maximum read into the instrument.

Also, we would put in a mouth alcohol test as well, that is part of the sequence to insure that the mouth alcohol is working. And typically these technicians would blow a blank sample through it to insure the zeros read zeros.

Q. Now with respect to the test that's in front of you, do you see the situation that you've just described where the testing was done with the .10, the

.3 whatever?

A. Not in this. And actually I have to say that this, initially I thought this is what I had seen before. I've been looking back and forth very quickly to try and identify that very sequence which we did talk about before which might explain a little bit, that these three sheets do not appear to show that. Indeed looking at the other data that's here, I'm not sure this is what I was presented with last time.

I'm sorry, Judge.

THE COURT: That's all right, Mr. Evans.

MS. SIMPSON: Judge, may I approach the witness?

THE COURT: You may approach, Ms. Simpson.

BY MS. SIMPSON:

MS. SIMPSON: Judge, can we take a short recess? I need to find a page that was here before.

THE WITNESS: That I do remember but I'm sorry it's not in there.

THE COURT: All right. Brief, 10 minutes.

MS. SIMPSON: Thank you.

(Whereupon, a break was taken, after which the following proceedings were had herein:)

THE COURT: All right, this is the resumption of

the hearing. All parties present. All right, are we ready resume questioning of Mr. Evans?

MS. SIMPSON: Yes, your Honor.

THE COURT: All right. Ms. Simpson, you may proceed.

BY MS. SIMPSON:

Q. You had just explained to the court about the series of tests that are done at the lab or at the factory when you do repairs.

Are those tests documented in the exhibit that you have, McMurray number 5?

A. Yes, it is.

Q. Could you explain to the court where the various tests are documented at?

And let me ask you this, tell him, it's a five page document, so if you would tell us page 1, page 2 so that we're all on the same page, I think that would be helpful.

A. I can understand that. Okay, I'll take you to page 4, and the bottom of page 4 dated 17th of March, there are three checks. There's one accuracy check at a 100, then another accuracy check or calibration, the next sequence was a calibration at 100. And then another accuracy check at 100. And that was on the

18th of March, that third and final.

And these would be typical the checks and tests the technician would do. One, to determine what the state of the instrument was on receipt, and two, after he's completed his repair, that the instrument is reading accurately and is fit to go to quality control.

Then if you go back one page and it's --

MR. RAMSELL: Are we on page 3 now?

A. Page 3, yes. And you got top series and the bottom series where it's been blacked out, the subject's name and data. And you have a sequence there of 1, 2, 3, 4, 5, 6 tests. Now they are dated the 18th of March, okay, and they're all subject tests. And these show to me that the QC technician starting at --

THE COURT: Can you hold up your document, I want to make sure that I'm looking at the same thing you are, Mr. Evans. Can you see, Don?

MR. RAMSELL: I can follow where he's at.

THE COURT: Okay. All right, what are you referring to? What block are you referring to, Mr. Evans?

THE WITNESS: This is where it's been blocked out.

THE COURT: The top 6, right, okay. All right, I'm with you, all right. Thank you.

A. Now it's indicated to me that after the technician has analyzed the fault, repaired the fault, checked his instrument, it's been passed on to quality control. And on the 18th of March at 9:42 in the morning the quality control technician started a sequence of tests.

And typically the sequence is a 100 simulator water standard blown through the breath tube in subject test mode. Because what we're testing now is we're testing that the instrument will respond to a simulated breath sample accurately and in the correct manner. So what we've done is the first test was a 100 wet standard blown through the breath tube in subject test mode.

THE COURT: Now when you say the first test, what date are you referring to?

THE WITNESS: I'm referring to test number 05-03-18, 306. Okay, dated 18th of March at 09:42.

THE COURT: Okay. All right, I'm with you. All right.

A. That indicates to me that it was a subject test and the result was a .094 for breath sample. That would be the 100 simulator vapor being blown in by the technician to check the instrument's response in

subject test mode. Then it's followed by a test number ending in 307 at 9:45.

The quality technician has used a simulator with an ethanol value of .350. And he's got a .335, which is well within the tolerance range we identify for factory calibrated instruments. Then it's being followed by a mouth alcohol test, whereby we run a vapor through the instrument.

THE COURT: You're referring to the 308 test, right?

THE WITNESS: 308, uh-huh.

THE COURT: Yes, sir.

A. And that's where we simulate a mouth alcohol profile. And we expect it to flag just that, mouth alcohol.

Now for whatever reason, and I can only assume here because I don't have the data in front of me, that the quality control technician saw something he didn't like and, therefore, he returned it. And it came back out then and he did the same sequence that afternoon. And basically if you look, he has virtually identical results, the same three sequence. So this indicates to me a quality control check.

The quality control check by the way does not

just consist of just this occurring, there are other visual checks. There are other inspections we carry out. But these are typical of the procedure we would use and would go into memory as a subject test in this manner.

BY MS. SIMPSON:

Q. When the instrument is at the lab and you do these quality control tests and you do the simulators, you don't erase those from the memory prior to sending the instrument out, do you?

A. You cannot erase individual tests. The erase function will only clear all tests in memory. You cannot select the remove tests from memory on the instrument. Neither can you do it through Intoxnet by the way.

Q. And when you say not through Intoxnet, you mean through the --

A. So the data base which is created from the instrument data, you cannot go in there and selectively change data or delete data. The Intoxnet is designed to prevent that and audit it.

Q. Can an officer or a technician who's doing a certification check on the instrument at the police station, can he delete a test?

A. No.

Q. Could an officer who is running a test delete the test?

A. No.

Q. Is there some type of backup or protection in the software or in the hardware of the instrument that prevents them from being erased individually?

A. There's no mechanism to erase individually. You have no choice other than to erase all or nothing. There's no mechanism that I know of that you could do that.

Q. Do you know whether there is software available that allows the instrument itself, when it approaches the maximum capacity of tests, to delete the oldest test and to keep running?

A. There is an option called first in/first out, FI/FO is the typical short form for it. FI/FO was not available on this firmware when it was developed.

Q. Has that been developed and sold to the State of Illinois for their instruments at this time?

A. No, not at this time.

THE COURT: When you say at this time, is there software that exists for FI/FO or LI/FO.

THE WITNESS: FI/FO, yes.

THE COURT: I know what both of them are. As you speak now, is there somewhere else that software exists allowing you to do that?

THE WITNESS: Yes, we have done it in other firmware versions. It's been a recent introduction option. And indeed, it's an option that we are developing now and offer to our customers who want to upgrade their firmware.

THE COURT: If a person has that software now, could they utilize that on an Illinois machine?

THE WITNESS: No, they would not have the means to introduce. You have to program the instrument with that firmware, so you change the firmware type.

THE COURT: The individual instrument?

THE WITNESS: Yes.

THE COURT: So although the software exists to do it, you'd have to program the machine?

THE WITNESS: Absolutely.

THE COURT: To accept the new software?

THE WITNESS: Absolutely.

THE COURT: To enter a deletion?

THE WITNESS: Absolutely.

THE COURT: All right.

THE WITNESS: And I'm not aware that anybody

outside Intoximeters has that ability.

THE COURT: All right.

THE WITNESS: Or that firmware in possession.

THE COURT: All right, thank you.

Next question.

BY MS. SIMPSON:

Q. With respect to the -- can I have a second, Judge?

THE COURT: Yes, ma'am.

BY MS. SIMPSON:

Q. With respect to the instrument itself, when you try, when police officers from a department go in to print like from the Shift F5 key -- may I approach the witness, your Honor?

THE COURT: Yes, you may, Ms. Simpson.

BY MS. SIMPSON:

Q. I'm going to hand you -- I just handed you what's been marked McMurray number 4. Have you had an opportunity to look at that? I know you did not prepare McMurray number 4, but are you familiar with what's depicted in it?

A. I'm familiar with what's depicted. These are printouts from an instrument.

Q. When you indicate that these are printouts

from an instrument, is this what the document would look like if you went directly to the instrument in the police department and asked for a particular document?

A. Well, this would be either generated at the time that these tests were carried out or could be reprinted by using the reprint function, by putting in the specific test number or through the Shift F5. But this particular case, I would say this has been generated using the reprint function, using the test number. Or it actually could be a photocopy of the actual printout obtained.

Q. You covered a couple of areas here so let's break it down a little bit.

You said that at the time of the test there's a printout. Could you explain to the court what gets printed when a subject test occurs.

A. Well, this is a standard check record we have in front, okay. And this is typical of the recertification process and it's typical of the printout that the machine will produce at the time when a breath alcohol technician from Illinois has selected the standard check option and F3.

And then you got at the top here, this is page 1 by the way, standard check record, model name,

Intoximeter EC/IR, serial number, instrument's unique serial number, location, DuPage County sheriff. Then test record number, 05-07-28. And then the sequential number, test date, time, operator name, Tim Miller.

Then underneath you'll have dry gas standard .081, manufacturer lot number, 4139. And then you'd have underneath it the test, then the result, grams per 210 liters and the time.

And the sequence here is there's been a blank check, looking for zero alcohol, completed at 12:20. A standard where the accuracy, the gas was read by the instrument and it gave you the result of 081, that's the time, 12:22. Then you have a blank again. This instrument has purged itself, accuracy check standard is verifying there's no alcohol in the sample chamber, that was completed at 12:22.

Then a standard check again, another value, another sample of the gas would be read, and it read 081, and result was displayed at 12:24. Then the statement standard check pass and then the operator signature below it. So this is a printout from an accuracy check sequence on the Illinois EC/IR.

Q. And the fact that it shows two tests, is that something that occurs each time a standard check is

done?

A. He has selected the option, the default option of two standard checks, hence, you see the standard occurred twice. Two standard samples were taken.

Q. On this particular instrument, when it prints the test, does it give each test a separate number?

A. Well in this case, in this particular part of the menu, each standard cycle, which is a blank and standard is allocated its own unique test number, so it only has a place here to record the first test number.

But in the memory of the instrument, and therefore in the download from the instrument to Intoxnet, you will see two lines of memory relating to this one test sequence. So you will see one which is related to the first standard at 12:22 will be given the test number ending in 961. And the second one will be given a separate line of entry, and given a separate test number ending in 962.

Q. Does that print that number 962 anywhere?

A. It doesn't print it out on this sequence here. It's not set, it's not structured by the software engineer in that way. Because there's only one field here to show one test number, so it shows you the beginning test number. It doesn't show you the

subsequent test number.

Q. The quick test, which is page 2 of this document, shows that it was done on the same date, 7-28-05, at approximately 12:30.

A. Yes.

Q. And the test number for that is number?

A. 963.

Q. Now does that mean that there was a test in between this to be 62 or would 62 have been the second test that's recorded on the front sheet?

A. Yes, that's exactly what would happen. And indeed, I draw your attention to the fact that at the time of the test, you can see here that the time shows that the last standard check was run on the page 1 which is 12:24. And then the blank check was run at 12:30, six minutes later.

And this is, as I explained, the officer has taken the option of using the F3 default accuracy check, which two dry gas standards, run that and then gone into F2, which is the quick test option, to run the breath blank which is the third requirement or certification of the Illinois procedures. So he's quite simply has done that.

And I have done this on instruments after we

were last in court together. I went back and ran this sequence to my own satisfaction. I actually retained the printout so that I have a strip printout which shows the accuracy, the standard check. And then below it I did a quick test in exactly the same way. And they're connected by the same piece of paper. And just I then looked at the way the record is structured in the Intoxnet report, that same sequence, and it's exactly as I just described.

It's just the way that the firmware engineer who wrote the firmware for the instrument when they run this, they've allocated two test numbers for this sequence. And, therefore, when it's downloaded into Intoxnet, that's how it's recorded there.

So what you might see here, apparent jump or lost test number, in fact it's been allocated but not displayed on this printout.

THE COURT: Well, now if I was going into the machine and I pushed in 962, would it take me to the second test that was done on July 28?

Could I actually go in and retrieve it that way as an operator?

THE WITNESS: No. What would happen is that you would use the test number which is on the attached

record here. The instrument asks you to enter that full test record number that you see there. I have not tried entering --

THE COURT: Well, but if I didn't know it and if I just wanted to go because I knew that it was sequentially maintained in the data, and I just decided at random to go select 962, what would I get?

THE WITNESS: It's a good question. I have not done it. I would have to.

THE COURT: You haven't done it?

THE WITNESS: I have never.

THE COURT: Okay.

THE WITNESS: I've never dreamt it to do it. I would typically be looking and say oh, I want to look at test record, the printout of which ends 961.

THE COURT: So you don't know, right now you don't know the answer?

THE WITNESS: I don't know that answer, no, not to that.

THE COURT: Okay. All right, thank you.

BY MS. SIMPSON:

Q. Do you know whether you can go in and ask for a reprint of a specific test?

A. Yes. And a specific test would be against

this test number here, the full test number. I have not thought to go in and go for the sequential test number, because I have to say nobody has ever asked me or alleged that a test was missing, and therefore, I have to verify it.

Q. If I had taken the test say in October of this year, could I today on December 9th go to the instrument that I took that test on, put in the test number that corresponds to myself and get a printout for that particular test?

A. If the memory of that device had not been cleared. If the memory of the device has been cleared, no, you cannot.

Q. The test slips or the slips that are printed out, you indicated that you have it on a roll. Is this like similar to a cash register receipt?

A. Yes. It's a simple roll.

Q. And when you print -- when you go in and take, when the test is administered first, testing a subject who is believed to be under the influence, does it print out individual copies of the test or how does that work?

A. Well, it will print out the subject test record. And depended how the instrument is being

programmed, it'll print out 1, 2, 3, up to 9 consecutive copies of the same printout. It depends on how it's required in that administration. If my memory serves me right, I think it's three in Illinois.

Q. Would it come out as one single strip?

A. Yes.

Q. Or nine separate strips for each one?

A. One continuous strip, unless you tore it off each time when it was complete, you would then tear it off. But when it's doing multiple copies such as that, it's continuously moving.

So typically people will leave it to print out three consecutive printouts, tear it off, there's a simple tear bar, and then either take a pair of scissors and cut them into individual reports or fold them and tear them, which is what I usually do.

Q. And if you are printing out, say trying to download two or a three month period, it would continue to come out on this --

A. It's a continuous roll, yes.

Q. -- roll until you stopped or cut each part separately?

A. Yes, until it completed the sequence you had selected.

Q. When you go into print the memory and you want a particular time period, is there anyway that you could just ask for say all tests from say zero, 01 through 099, where it would just give you everything in order, or do you have to ask for a subject test separately from the accuracy check?

A. Well, the sequence is typically that you have a date sequence of which you selected, and then you pick subject tests, F2, quick tests or accuracy checks.

Q. So you put the dates in there and then you have to go and make another selection, tell it what it is?

A. That's right. What to filter, which filter you're looking for for all subject tests.

Q. Thank you.

THE COURT: Can I interrupt for one other second, Ms. Simpson?

MS. SIMPSON: Sure, Judge.

THE COURT: If I may. For efficiency purposes, what's more efficient for a person trying to retrieve the data, having software information or programming, as you're describing, a request for individual type of information one at a time?

What is actually more efficient both for the

machine and for a person trying to retrieve information?

THE WITNESS: If you wanted a specific test, and then you knew the test number, you would go in and just use the reprint function against a test's number. That will then reproduce that specific printout.

THE COURT: All right. So for an individual test, the operator function can do that more efficiently?

THE WITNESS: That would be typically, yes.

THE COURT: Can you envision a circumstance where it's easier than to, depending again on what you're seeking, to allow software hookup to the machine to retrieve the data?

THE WITNESS: If you're looking for a date or a month shall we say.

THE COURT: Okay.

THE WITNESS: For instance, when you interface a PC with Intoxnet, that's the communication software.

THE COURT: Right.

THE WITNESS: To an instrument, it takes a matter of seconds to download all data on there. Then you can leave the instrument continue being operational and go away and selected at your leisure the printouts and the reports --

THE COURT: The material you've obtained from the machine?

THE WITNESS: Yes.

THE COURT: Right.

THE WITNESS: Which would be this formatted report.

THE COURT: Okay.

THE WITNESS: This formatted report is only obtainable directly from the instrument itself, this ticker tape type printout. So if you knew the date, in which case you put a very narrow date range in there, or if you knew the specific test number, it's quicker to go to the instrument.

If you did not and this report format is acceptable for your purposes, then Intoxnet would most likely be the most efficient way.

THE COURT: Efficient. All right, thank you.

All right, Ms. Simpson, you may resume questioning of Mr. Evans.

BY MS. SIMPSON:

Q. The air blank, what is the purpose of that?

A. The air blank is carried before and after every ethanol sample is accepted by the instrument. And it's used to establish that there is no ethanol contamination from a previous test present in the

sampling system before you introduce the sample you wish to analyze.

And you obtain an air blank by drawing in ambient air, that is air from the room around the instrument, down through the breath tube, through the sampling system, and then exhaust it through the exhaust port of the instrument. You draw it down there for a fixed period of time, typically 30 seconds, using a small impeller type fan.

And then at the end of that sequence you'll hear a click, which is the fuel cell sampling, sample air, sample from within that sampling system to determine there is zero contamination from any other ethanol of a previous test. That blank is there establishing then after that the next stage to be a standard sample or a subject sample will be accepted into the instrument. The blank sample must be successful before it will progress and allow any ethanol standard, be it a known standard or subject sample to be analyzed.

Q. If the blank does not come up zero zero, what happens?

MR. RAMSELL: Okay, Judge, I'm going to object. I have the transcript. We covered ambient air last time

we were here with this gentleman. And if it didn't, the ambient air wasn't clean, the machine would not proceed forward. We went through this.

THE COURT: I think we did, Ms. Simpson, did we not.

MS. SIMPSON: Okay.

THE COURT: So sustained. If you would maybe move to a different area.

BY MS. SIMPSON:

Q. Well, you were talking about this on the test results or on the testing, the mouth alcohol section. How do you create or recreate mouth alcohol to get it to show that it's, to get it to register?

A. We have two methods. One method is a very simple and quite crude method. And you simply take a cotton wool bud, dip it into alcohol and rub it on inside of the mouth piece you're using and you blow into it. If it produces a profile that the instrument sees of a very fast rise in alcohol, then a very rapid fall off of alcohol, and that is picked up by the instrument and is analyzed as mouth alcohol.

We prefer to use an option where we use basically two simulators. And we have one simulator to high alcohol value and another one at a more normal

value, typically around 08.

And what we do is, we start blowing sample into the instrument in the subject test mode, where it's asked for the subject to blow, and we blow initially from the high standard, vapor ethanol standard. And then we switch over, use a simple direction switch, direction tap to the lower standard. So we create the same high initial profile, dropping off to a more normal profile.

It tests the infrared section of the instrument. The instrument has two specific sensors. It's called an EC/IR, EC stands for electric chemical, IR stands for infrared. The infrared sensor is used to detect the presence of mouth alcohol, that's its primary role. The electric chemical sensor, also known as the fuel cell, is used to determine the value of the sample that is to be analyzed.

Q. When a subject is being tested, and is there a time limit on how long they have to produce a sample in order for it to be read by the instrument?

A. Typically, and Illinois uses the norm, you have three minutes in which to provide a successful sample. That is three minutes from the message, please blow, appears to when the instrument will

automatically, no successful given in those three minutes, the instrument will automatically abort the test sequence and print out an associated message.

Q. And do you know, is there a software design to say what the problem is or how does it recognize --

A. It says insufficient sample.

Q. Does that then constitute a refusal in the instrument?

A. It depends. I believe in Illinois it does constitute a refusal. I don't know.

THE COURT: Ms. Simpson, stop, stop, stop. Aren't we kind of going a little bit in the wrong direction? I'm not concerned about what's a refusal, are you, Ms. Simpson? Are you really concerned about this?

MS. SIMPSON: Yes, your Honor. The reason I'm concerned is because we had testimony from counsel's witness that one of the instruments that had six or seven refusals in a row, that it would appear that there's a problem with the instrument that they didn't recognize. And so what I'm trying to find out is whether, for the court, whether it'll only show it as a refusal or will it show it as an insufficient sample? How does it document that?

THE COURT: Well, the machine never says refusal,

does it?

MS. SIMPSON: That's what I wanted to find out.

THE WITNESS: I'm sorry --

THE COURT: Does it, Mr. Evans?

THE WITNESS: May I explain?

THE COURT: Well, you can. But the machine, if you don't blow in the three minutes that are allowed on the machine, the machine doesn't say refusal, does it?

THE WITNESS: There is an option by which during that three minutes, if the officer decides the subject has refused --

THE COURT: He can print it. But the machine on its own is not going to say, refusal?

THE WITNESS: Well, no. What will happen, Judge, is that the officer, if he presses R during that three minutes, the instrument will then abort the test and print out test refused.

THE COURT: Right.

THE WITNESS: If, again in that three minutes, the subject has three attempts and doesn't give an acceptable sample, it will print out insufficient.

THE COURT: Insufficient sample, right.

THE WITNESS: If they don't provide an acceptable sample in the three minutes, it'll print out time out.

THE COURT: Okay.

THE WITNESS: So there are three potential messages that indicate that, for whatever reason, a sample was not provided during that three minute sequence, an acceptable sample.

BY MS. SIMPSON:

Q. Does that indicate that there's a problem with the instrument, and that it should be taken out, or checked for problems?

A. In the case of the time out and test refused, no, because those are just what they are, insufficient sample. As an engineer -- as an operator, if the operator observed the subject genuinely blowing and given what looks like an acceptable sample, I think, and it needs to happen repeatedly, there could be a problem. It could be that the flow sensor is faulty.

And if that were the case and it repeatedly happened, it would in my opinion be worthy of investigation by a breath alcohol technician, maybe subsequent repair investigation at the Intoximeters.

Q. What's the purpose of the 20 minute waiting period?

A. The 20 minute wait period is almost universal. It's to allow for the elimination of potential mouth

alcohol contamination in the upper respiratory tract.

When a subject has just finished a drink, the upper, the mouth and the upper respiratory tract has raw alcohol in it, typically around 5 percent from a beer, or if he's drinking spirits, maybe up to 40 percent. That can elevate the reading seen by the instrument.

By allowing a 20 minute wait, you're allowing the ethanol, which is a highly volatile chemical, to evaporate from the upper respiratory tract in the mouth, so it has no influence on the result.

The result you're looking to analyze, the sample you're looking to analyze must come from the deep lung air into where the other, all the air is, where the blood and air are in close intimate contact. That's the air you want to be identifying and taking, analyzing the value for ethanol. You do not want this upper respiratory tract with that so.

In scientific papers that I've seen, and there are many out there I have to say, typically mouth alcohol is eliminated in anything from 10 to 12 minutes. And it is very typical that most administrations, most states will allow 20 minutes, which is more than enough time for the elimination of

mouth alcohol effect.

Having said that, equally the instrument is designed and has this mouth alcohol detection system as well. So you have two levels, you have a wait observation period nil by mouth, and then you have the mouth alcohol detector as well. So they both work to prevent this potential for this contamination effect in the results.

Q. If someone were to continually blow into the instrument, just had rinsed their mouth with mouthwash or with alcohol or something and they did it on a repeated basis, does that cause any damage or does it cause any problems with the accuracy of readings after that?

A. No, no. I mean first and foremost, if they did that, typically our instrument, and I have to say most instruments or all instruments that I know of that are out there would detect mouth alcohol for a significant period of time repeated tests.

And then when mouth alcohol has been eliminated, has evaporated out, then and only then if the mouth alcohol detection would say this is an acceptable sample.

But as I say, if you typically allow 20

minutes, according to the papers I have seen, scientific papers by numerous different sources, mouth alcohol effect is zero typically in the order of 10 to 12 minutes. And then there's no chance of it after 20 minutes.

I personally have done these tests, and, yes, that's very much of the order of time. So 20 minutes is a safe time scale to allow evaporation of alcohol from the breath.

Q. If the instrument does not get a zero for the air blank, will the instrument conduct a test?

A. It will not.

MR. RAMSELL: Objection, asked and answered.

THE COURT: Overruled. The answer will stand.

BY MS. SIMPSON:

Q. What types of problems with the instrument would cause the instrument to take itself out of service?

A. If there were a problem with the set solenoid or sample solenoid of the fuel cell sampling system, it would not take itself out of operation, it would prevent a test being completed. That is, it would start the test. But when it came to operate the set or the samples solenoid, it would detect a malfunction and

then abort a test.

If there were an erratic signal from the infrared sensor or the fuel cell sensor, it would sense that at the start of a sequence. Because at the start of every sequence, breath test sequence when you've entered the data in, the instrument then looks at certain parameters of certain sensors on the system. And those sensors in the system must comply to within certain parameters before it will allow it to progress to the next stage, before it will even allow it to draw an air blank, for instance. And one of those would be the basis of the infrared sensor. The other one would be the basis of the fuel cell sensor.

The other test would be, what is the status of the position sensor, which is a subset of the sample solenoid, set solenoid.

Then in addition to that, it would be looking at the status of the critical heater temperatures. There are a sequence of heaters in the system which maintain the sample system and the sensors at a constant temperature. If they are outside the preset temperature limits, the instrument will give it a message which regulate in temperatures is a typical message.

So there are a sequence of checks and balances that the instrument will carry out on itself to prevent a test being completed. Now, these might happen during the sequence and it would pick those up during that sequence.

Q. Does the instrument perform this series of tests each and every time before it is used to be tested?

A. Absolutely, yes.

Q. Do you know whether there is an exact amount of test, number of tests that the instrument will store before its memory is full?

MR. RAMSELL: Objection, asked and answered. They're now in the number of gigabytes, how much data for each test. We went through that.

THE COURT: Sustained.

MS. SIMPSON: I have no further questions, your Honor.

THE COURT: Cross, Mr. Ramsell.

MR. RAMSELL: Judge, at this time then I need to raise, I made two requests of Miss Easom during the time between this witness's last -- I mean to Ms. Simpson between this witness's last testimony and today requesting that the supervisors and

administrators' manuals for this machine be delivered for the purpose of cross.

THE COURT: I thought you had that worked out.

MR. RAMSELL: No, we didn't work it out. Your Honor, on Wednesday -- I don't recall the last time this witness was here, I think they were still playing baseball. Last Wednesday the attorney general came here to request that my request for these manuals be denied. Your Honor said, if he has the manuals, bring them on Friday, and your Honor would make that determination today.

THE COURT: Right, as to that, okay. What else is not resolved?

MR. RAMSELL: I just want the manuals.

THE COURT: Do you have the manuals with you, Mr. Evans? Were you even told that you might need them?

THE WITNESS: I was asked to supply manuals for you, Judge.

THE COURT: Okay. Do you have any with you?

THE WITNESS: I have copies of the supervisor manual.

THE COURT: Okay.

THE WITNESS: And the descriptive manual.

THE COURT: Okay.

THE WITNESS: And I brought them here under the quite implicit understanding that you requested them.

THE COURT: Okay.

THE WITNESS: And that they were for your eyes only.

THE COURT: Okay. Well, that was the understanding the last time. But since that time the lawyers had filed different motions regarding production of the manuals. So what is it you propose to do, we stop the hearing while you read the manuals, Mr. Ramsell? I know you have the supervisors' manual, right?

MR. RAMSELL: Yes. I asked for the administrators' manual, as specifically referred to in his direct. We know what manual that is.

THE COURT: Okay.

MR. RAMSELL: I have the other two.

THE COURT: Right. So what are you proposing that we do right now?

MR. RAMSELL: Well, your Honor told them to bring the administrators' manual that I requested.

THE COURT: Well he has it, right?

THE WITNESS: I have a supervisors' manual.

MR. RAMSELL: I don't want a --

THE COURT: Stop now. One at a time, Mr. Ramsell.

MR. TRINH: Your Honor, if I could speak later.

THE COURT: I just said stop, one at a time.

So what is it that you have with you, Mr. Evans?

THE WITNESS: I have a supervisors' manual, and I have a descriptive manual. I am not aware of an administrator manual, I'm not sure what that means.

THE COURT: Okay. Well then stop right there. And we'll take five minutes. And then you, Mr. Ramsell, Ms. Simpson and Mr. Trinh, talk with Mr. Evans, see if it's one in the same that he's referring to. And if it's not, then how it is that we're going to proceed today, because for scheduling I certainly need to know that, okay. So we'll take a few minutes and see what it is that Mr. Evans has brought. You can use the conference room. So my guess is 10 minutes.

MR. RAMSELL: Thank you. It won't take more than 5 frankly.

THE COURT: All right.

(Whereupon, a break was taken, after which the following proceedings were had herein:)

THE COURT: All right, hearing in progress. A

brief recess was taken for the attorneys to consult with Mr. Evans regarding requested material for today's date.

What do we have to report then, counsels? You want to state your name as you're addressing the court please.

MR. TRINH: Your Honor, Kheng Trinh. I'll spell it. K-h-e-n-g, last name T-r-i-n-h.

Your Honor, I had filed a motion to quash the defendant's request for supplemental discovery. And your Honor, in the words stated that, well you're not going to turn this hearing into something that it wasn't. And that was our main objection. That Mr. Evans or anybody else shouldn't be subject to either discovery or nondiscovery device and basically an extension of an informal hearing.

Your Honor then stated that, well Mr. Evans could bring certain documents with him and that you would decide today. But I believe the point being that we shouldn't be turning this into what it shouldn't be. And your Honor had chastised the parties when we did go beyond the field in this case.

And the request for these manuals is just that, we're going far beyond the issue presented here,

of whether or not it's feasible for the Illinois State Police to print out these Shift F5s, or in the future when the Illinois State Police does have the Intoxnet all hooked up, to provide these printouts to defense as a common occurrence.

THE COURT: Ms. Simpson, do you wish to add anything?

MS. SIMPSON: Deborah Simpson.

Just briefly, your Honor. Part of the problem is the documents that counsel is asking for have information that is protected. It's information that Intoximeters, it's their intelligence, it's their privacy, it's their documented or trade secrets, how things work, what they've done with their particular product.

And that's what he's looking for is for them to turn over the codes that they used, the security codes. He wants documents as far as how the instrument is built, what it contains. He's asking for them to give up what's protected under copywrite laws and manufacturing, to turn them over in this hearing.

And that is the other objection. Mr. Evans did bring some material with him that is confidential, but that his company did allow him to bring out. And

some of it is what's reproduced when you buy the instrument. But some of the material, it's theirs and it's protected and they don't want to let it out. And you can't blame them for that.

And I don't think that what they're trying to keep as a trade secret has anything that's related to the issue of whether or not the Illinois State Police were required to download the memories before they deleted it, or whether they were required to save that someplace before it was deleted, or whether it was even information that should be produced. This is far beyond.

The court had indicated that you wanted to get a basic understanding of how the instrument worked. Mr. Evans is here, he's answered questions. He's more than willing to continue answering questions until the court is satisfied of what it is we're looking for, what it is the instrument is capable of and how it works.

We also, if any of the material that he brought for the court to look at, if you decided that it is discoverable and that Mr. Ramsell should get it, we ask that it be just for this hearing, that it not leave this courtroom and be turned back in to Mr. Evans

so that it doesn't have any potential for being copied and distributed someplace else.

THE COURT: Mr. Locke, do you have any comment?

MR. LOCKE: No, your Honor.

THE COURT: Mr. Ramsell.

MR. RAMSELL: Judge, we've just spent the last five hours of this witness's testimony hearing about how the machine works, what happens when it breaks down, who can repair it, how it can be repaired, whether it prints out operator abort, whether if a certain error occurs, whether a test can still occur or not.

Unlike what Ms. Simpson suggests, I did not ask for any source codes. Unlike her bold statement that everything is a trade secret, frankly what Mr. Evans gave to me I can get on the street.

THE COURT: Well, your motion says production of source codes, that's what it says.

MR. RAMSELL: You're reading the wrong thing, Judge.

THE COURT: Wait, wait, wait. I'm reading the wrong thing. It's your notice of motion says, I'm going to be filing with the circuit court of DuPage County the attached order to compel production of the source code.

MR. RAMSELL: Right. What I filed was an order, a finding of an appellate court for your Honor's persuasive authority.

THE COURT: That's not what the notice of motion says. It says, I'm going to file the attached order to compel. It doesn't say, I'm filing a copy of some nonbinding advisory machine to assist me in asking for compliance.

MR. RAMSELL: I told the attorney --

THE COURT: Mr. Ramsell, hold on. Hold on. I'm addressing what her concern is. Her concern is the basis of the motion. It's a proper concern that the blanket notice of motion says, order to compel. It doesn't say anything about differentiating.

And the reason I chastised, and I'm going to say it again, is that, you know, on December 7, for months of hearing, it's very clear what the scope of the hearing has been. And I'm not going to allow either side to expand the scope of the hearing by adding on matters that occur to the parties as the ongoing hearing is being conducted. We're right to do that.

We would never have any finality either to a hearing, either to a trial or either to an appellate

court brief. Totally out of proportion to allow parties as they're going on to then reconnoiter or go back to their offices and say, you know what, now I want some different stuff, because that's not the scope of the hearing.

The scope of the hearing is discovery, what I'm turning over, whether I'm going to turn over the requested F stop information and listen to the bases for allowing it or not allowing it. Not all these other matters.

And too, more significantly, I don't appreciate from either side, I think I expressed that two days before the hearing that witnesses coming in, and I'm going to deal with an expanded motion now, both the AG's motion to quash the discovery request, your motion to, I don't know, it says compel production. And by definition it is expanding totally the scope of this hearing. That's my concern.

I'm not going to order Mr. Evans to turn over some proprietary information, absent some showing of relevance and necessity and supported by expert affidavits in the industry, not just some witness. And then in two days I'm going to order Mr. Evans to turn all that over, I'm not going to do that.

So if that's what we're here for, and if it's not satisfactory what they've tendered to you, this particular motion is going to be bifurcated. I'm not going to allow proceedings, I'm not going to hear argument about it.

It's stopping this court from getting finality to the issue before it, which is what's the scope of the discovery request that I'm going to honor and also the history of this machine.

I'm not going to have Mr. Evans pour through now at 4:00 o'clock in the afternoon, after a day and a half notice, and decide that I'm going to turn over all of his company's proprietary information because of a thought out, and I say thought out because that's what it is, none of this was prefaced months ago when these began, a thought out occurrence thought, which is you know what, now I want this stuff. I'm not going to allow the hearing to progress in that type of manner.

Either for you or Ms. Simpson or Mr. Locke or anybody else to say, you know what, something else is occurring to me and I like to add that to the hearing, I like to just jam that into the hearing and that get that resolved too. I'm not going to allow the parties to do it.

So if the material that you have that's been tendered to you, if it's not satisfactory, I'm not going to go into any other part of that hearing today, that may or may not be relevant at some future hearing. But not for the purpose of this hearing and not for today.

So I'm not going to order Mr. Evans to produce anything other than what's been agreed to preliminarily between the parties. And if that's not satisfactory, then we stop the hearing.

So tell me how you want to proceed.

MR. RAMSELL: First, I just want to straighten out the record. Number one, and I told the attorney general this three days ago, all I did was I filed an order from Florida, which I thought was relevant legal opinion that would be helpful to assist the court. When they filed their motion to quash, I explained it, I'm not looking for a source code.

The only thing I'm asking for, Judge, so I apologize if you were misled, that's not my discovery. I sent a letter to Ms. Simpson six weeks ago that said, since Mr. Evans has testified, and I'm unable to subpoena him. May I approach and show you what I sent him?

THE COURT: You may approach.

MR. RAMSELL: It says.

THE COURT: Do you want to approach, Ms. Simpson or Mr. Trinh, one of you or both of you.

MR. RAMSELL: It's October 27. It says, since I do not have Mr. Evans' address to subpoena him, please forward this request to his attention so these documents may be made available prior to his testimony. Filed a motion for additional discovery, not some source code thing, which they're misleading you on. That's different. And I asked for the maintenance or repair manuals, Judge, six weeks ago.

Then on November 8, when I came in to schedule this matter on my own, I then sent a second letter to Ms. Simpson. And it may be attached there when I grabbed it. The second letter said, please be advised this hearing has been set for December 9, and please insure that Mr. Evans brings these materials.

There's nothing in my request, Judge, for anything other than the maintenance records. As I explained to Mr. Trinh, when he showed up two days ago, I told him, I tried calling your office and left several messages when you filed your motion to quash my request for a source code, that that's not. And had he

returned my calls, when I saw him on Wednesday, I told him in the hall, I'm not looking for any source codes. All I want is the repair manual for the machine, the one they give to the Illinois breath alcohol technicians.

Because this witness, as you pointed out, is discussing highly technical aspects of what these breakdowns were, okay. Judge, I agree with you 100 percent, that the point of this hearing was merely about whether I could get the internal data, internal memory of the machine.

But I didn't spend the last five hours with Mr. Evans up here and talking for only about 10 minutes of that devoted to that issue, and the remaining 4 hours and 40 minutes about how the machine works, how it breaks down and how it gets fixed. I didn't ask for proprietary information, Judge.

I'm asking for the manual they give to the public employees who fix the machine here, the technicians if you will, the field employees for Illinois. I'm not asking for patents or internal secret documents or software codes or whatever Ms. Simpson claimed.

I'm just asking for, where's the manual that

they give to the State of Illinois police officer that comes in, recalibrates the machine and does some infield service. They just spent five hours talking on the subject. That's all I ask, Judge.

THE COURT: Well, is that commonly available? If that contains that type of information, I wouldn't have Mr. Evans turn it over. When you say supervisor repair manual, I'm not even sure exactly what you're referring to. But if it does contain proprietary information, and if Mr. Evans tells me that it does, I'm not going to have it turned over.

MR. RAMSELL: I respect that too.

THE COURT: And then supervisors' manuals, administrator manuals and repair maintenance and service manuals for what? I guess for the State of Illinois. I mean every single manual that they have?

Again, one, I don't know exactly what you may be referring to, nor do I know that necessarily Mr. Evans can deduce what it is exactly you're referring to. However, if it relates again to proprietary information that is not commonly available to the public, then I'm not going to order him to turn it over, other than in the context as Ms. Simpson is asking for a closed hearing where there be appropriate

orders that they not be allowed outside the scope of the hearing. But that's even without Mr. Evans having an opportunity to tell me what it is that you're talking about.

I mean that's about as general as I can see. All operators' manuals, supervisors' manuals, administrator. I don't even know what an administrator manual is. And repair and maintenance or service manuals for the Intox EC/IR, for what purpose? Just to show me that, what, that I need the information? For what? To go through hours of testimony regarding how it is a field person is going to repair the machine?

I mean that can be answered by I think, and again for purposes of efficiency of the hearing, he's the technical director, he's here. I mean ought to be able first, first, before I get into turning over anything else in the context of this hearing, first hear from the witness a general idea of what it is you really want. And his comments and his statements to me about what it is that's going to show me, as the trier of fact, not you or not the curiosity of Ms. Simpson or Mr. Trinh or yourself, or Mr. Trinh or Mr. Locke when we get all of this stuff out here. I'm not interested in that.

I'm interested in, as a trier of fact, what all, one, is the information relevant; two, is not proprietary, is it relevant to determining whether or not it's necessary to turn materials over. You know, the parties have their own experts. And the hearing ought not to be allowed to be proved up at the expense of the other party to satisfy the possible, the possible concerns or curiosities from the discovery standpoint of the other party, absent some strong showing of relevancy in this case.

And the same notion I guess can be turned against Ms. McMurray, giving me all her private data, which I was very protective. I told Ms. Simpson I'm not going to allow her to get that. I'm not going to order her to bring her stuff, the same I would not order Mr. Evans on behalf of his company, unless there's a strong showing of relevancy.

And I guess that because now having heard some of the testimony regarding Ms. McMurray's exhibits, it could be fairly stated, well you know what, since I've heard two conflicting versions of what this really means, I want Ms. McMurray back, and then she can bring me all of her private stuff and all her source code information for now she analyzes it.

But my point is, that is absurd. We're getting endless hearings on all sorts of speculatory and possible information for people's, I think, discovery curiosity.

It's not helping me in any way to determine, you know, from the basis of people who are studying all the information of possible, possible issues. That runs contrary I think to the general prohibition against discovery fishing expeditions, especially when they're time consuming and expense consuming as they are in this case.

And I'm most mindful of that and for the interest of everybody, yourself, the State, Mr. Evans, his company, everybody else. So I think what we're going to do -- don't walk away, Mr. Ramsell.

MR. RAMSELL: Fine.

THE COURT: It's not fine and we're not done.

Now what I think is the proper procedure at this point, as Mr. Evans is here, for cross-examination purposes. Now if you want to question him regarding the materials you want in a context of a showing of some relevancy and nonproprietary interests, and I would consider or reconsider any request if I think that they are relevant. I'm not going to order him to

turn this stuff over. This could have been determined many months ago in terms of the scope of the hearing.

MR. RAMSELL: I'm not to blame for that, Judge. Do you see these courtesy letters.

THE COURT: I'm not blaming anybody.

MR. RAMSELL: I didn't come in 48 hours ago.

THE COURT: I'm not blaming anybody.

MR. RAMSELL: And then show, have him show up with no materials.

THE COURT: Mr. Ramsell, I'm not blaming anybody. I'm saying that I'm not expanding the scope piecemeal of the hearing based on the parties' anticipation of what may be asked for next, that is not helping. It's not assisting me to get to the ultimate issue in this case which I have to get to.

So, Mr. Evans, if you'd take the stand please.

MR. RAMSELL: I have a motion to strike all of his testimony that was not relevant directly to the accessibility of the internal memory, including 30 pages on ambient errors, how it measures mouth alcohol, what are the slope detectors. Everything that was irrelevant for the last four and a half hours, Judge, I move to strike it.

MS. SIMPSON: Then I move to strike his witness'

testimony as well. Because most of what we put on was put on in response to his two experts. They are things that took us far afield.

THE COURT: All right, both sides' motions to strike will be denied.

MR. RAMSELL: Thank you.

THE COURT: All right, Mr. Ramsell, you may proceed with questioning of Mr. Evans.

CROSS EXAMINATION

By: Mr. Ramsell:

Q. The data that I will refer to as data that you can obtain through a Shift F5 procedure.

A. Yes.

Q. Can be summarized into basically six categories. Category 1, all certifications, correct?

A. Correct.

Q. Category 2, all service logs, correct?

A. That sounds correct, yes.

Q. Category 3, all subject tests, correct?

A. Yes.

Q. Category 4, all quick tests, correct?

A. That's correct.

Q. Category 5, all accuracy checks, correct?

A. Yes.

Q. And category 6, all calibrations, correct?

A. Correct.

Q. All right. And it would take generally a matter of seconds to minutes for each of those, that data to be downloaded, isn't that true?

A. Can I just ask for clarification? Do you mean printed out from the instrument or printed out from the Intoxnet data base? They are two separate sources.

Q. Downloaded to the Intoxnet base.

A. To download all that information to the Intoxnet PC base, data base, would take seconds.

Q. Okay, now let me narrow it down. You hook up a laptop to the rear of an individual EC/IR instrument, okay.

A. Correct.

Q. How long would it take for the laptop to retrieve that data?

A. Depending on the amount of data on there. Up to one minute to download all the data and store it into the data base.

Q. Okay. And then in terms of printing it out from a laptop, or the Intoxnet, which is like website base?

A. No, sorry, it's not website base, no.

Q. Server based.

A. No. It is from that specific PC. In the case you've done a serial download, it will be to that specific PC.

Q. All right.

A. That means you have to take it, connect it to a printer and then go in, log into that specific instrument data base, select the data you want from that instrument specific data base, create the report. These are all matters of single cricks if you imagine. And then produce a printout.

Q. I didn't even finish my question.

A. I haven't finished the answer. I'm sorry.

THE COURT: He's helping out, Mr. Ramsell. Giving you all the things that happen when you press the button.

BY MR. RAMSELL:

Q. So, for example, on McMurray number 5, the 1, 2, 3, 4 pages that are attached, it would take approximately how long for that to be printed out from where ever it's being from the laptop?

A. Once it's in the data base in the laptop, okay.

Q. Right.

A. Let's assume you've done the action of connecting and logging on and downloading. So once that process is done, you have it in the data base then. You then need to connect, you need to connect to a printer, if they've got a printer with them. You then go in, log into Intoxnet, select the instrument you're looking at the reports, you want the reports of. You then go in, select within the Intoxnet options. Imagine that you're clicking on the files.

MR. RAMSELL: That's nonresponsive. My question was --

THE COURT: Wait, wait, stop.

MR. RAMSELL: How long would it take?

THE COURT: No, no. To you it's not responsive because maybe you don't understand exactly what he's trying to tell you. It may or may not be to you.

But to him, in courtesy to Mr. Evans, you ought to let him finish the answer first. Then if it's not really what you want, then tell him what it is you really want, as opposed to what he answered you. I think the witness, Mr. Ramsell, has been very patient with all sides here, trying to candidly give you as much accurate information as he can.

MR. RAMSELL: That's my third question, Judge.

THE COURT: But I mean it's not fair to say to him it's nonresponsive. So next time before you jump to that, why don't you let him finish the answer first.

Go ahead.

A. So you would go through that sequence, again several seconds each sequence. Then review the report to insure it's the report you want. Then you would press the print button. That would be as long it would take the printer to print it out.

And, of course, it's a function of how much data you're printing out. It can take as short as a minute, as long as 10 minutes. But again, it's a generalization, because it's a huge amount of data and many options of which you can select.

I'm sorry if I can't be as specific in my answer more than that.

BY MR. RAMSELL:

Q. How much time would it take for the data on four pages on number 5 to print out on a standard printer from a laptop?

A. It would be a few seconds.

Q. Thank you. In the year 2000, isn't it true that the Illinois State Police had in their possession the Intoxnet software, which gave them the capability

of downloading the internal memory of each Intox EC/IR 2-A PC, yes or no?

A. I don't absolutely know the date in which Intoxnet that was supplied.

Q. Did it have it in the year 2001?

A. It was around 2000. I cannot say with certainty what date.

Q. Either 2000 or 2001?

A. Around that time.

Q. And then the remainder of your answer would be, yes?

A. Yes.

Q. Okay. The only equipment that they would be missing would be the actual PC or laptop. You did not supply that, correct?

A. We did not supply that.

Q. Okay. A telephone cord, did you not supply that?

A. Not a telephone cord. A serial cable.

Q. If you want to use a modem, you need a telephone cord, you said that October 27.

A. No, no. I'm sorry, let me explain again. If you're connecting directly from a laptop to the instrument, you use a serial connection. If you're

connecting remotely via the instrument's internal modem, you'll use a telephone cable plugged into the modem connection.

What you just described to me just now, or at least I understood you describing to me, was the serial connection where you go physically with the laptop to the instrument and connect serially. And I was just trying to be correct in telling you that it's a serial cable that you connect to the back of the instrument when you take the laptop to the instrument.

MR. RAMSELL: May I finish my question, Judge?

THE COURT: Sure.

BY MR. RAMSELL:

Q. A telephone cord, a standard telephone cord, if you wish to download by modem, correct?

A. Correct.

Q. Or a standard serial cable, if you wished to download directly to a laptop, correct?

A. Correct.

Q. Thank you.

THE COURT: Readily available at Radio Shack.

THE WITNESS: Correct.

BY MR. RAMSELL:

Q. Now the Intox EC/IR, when you submitted it to

the National Highway Traffic Safety Administration for approval, more particularly I would have believed it would have been Art Flores of Volpe National Laboratory, Cambridge, Massachusetts, right?

A. Correct.

Q. Okay. Well, when you submitted the machine to him to get it approved by the federal government to place it on the conforming products list, would you agree that you made all of the internal memory accessible to the federal government in their evaluating your instrument?

A. No.

Q. They could not access the internal memory of your machine?

A. No.

Q. All right. Then let's ask it this way, did you provide to the federal government machines that they could test for accuracy and reliability, yes or no?

A. Yes.

Q. And did you provide to the federal government the password or pass code in order for them to access the Shift F5 function of the EC/IR?

A. May I explain something before we go further?

MR. RAMSELL: No. May I ask for an answer of the question please?

THE COURT: Well first of all, can you answer the direct question first?

THE WITNESS: I can't answer the direct question. I wish to explain why.

THE COURT: Well, then you can explain why, if you can't answer it directly.

A. When the instrument was submitted to the Volpe Center, I was not an employee of Intoximeters, so I cannot speak to what did or did not happen then.

I can speak to what the conforming products list and the model tests specification calls for.

MR. RAMSELL: All right, I think he's answered my question. He doesn't know.

THE COURT: All right, thank you. Go ahead.

BY MR. RAMSELL:

Q. Let me ask you this. When you sell this machine, the EC/IR, your company sells it, do they mention to the potential customers the feature of Shift F5 as a feature, yes or no? Is it on the sales literature?

A. I believe it's on the sales literature, yes.

Q. All right.

A. If you ask me if I sold it, no, I don't sell.

MR. RAMSELL: I didn't ask him that, did I, Judge?

THE COURT: Well, he's trying to interpret your questioning. You use the word sell, when you sell.

MR. RAMSELL: Your company.

THE COURT: Well, I think Mr. Evans is trying to make it clear to you and to me that he doesn't participate in sales marketing.

MR. RAMSELL: I'll withdraw the question then and I'll rephrase it.

THE COURT: All right.

BY MR. RAMSELL:

Q. When your company sells this instrument to its customers, isn't it true on its advertising it mentions the Shift F5 as one of the functions on its sales literature?

A. Yes.

Q. And would you consider the retrievability of the information that function that the EC/IR has as an added value of the instrument?

A. Yes, it's a feature.

Q. And why is it a feature? Why would you consider it a feature?

THE COURT: I'm not interested why it's a feature.

You don't need to answer that question.

I think you're getting way beyond relevancy. It's no concern to me whether it makes it more marketable, less marketable that somebody can get or collect different kinds of data.

The issue still is and Mr. Evans, if you recall, Mr. Ramsell, does not disagree with you about the information may be turned over.

It's just a question is, his only thought was whether or not it would be potentially helpful to give you or any other defense attorney Shift F or other shift information. He didn't believe it was particularly helpful. But he wasn't opposed to doing it under the proper circumstances with any proper controls. I think that's my recollection of Mr. Evans' testimony.

Is that correct, Mr. Evans?

THE WITNESS: That is correct.

THE COURT: He's not biting anybody from getting the information. His only question was whether or not it was, one, it would be particularly productive to a person who wanted it. And he's not quibbling with it.

His only concern from his position as technical director from the company, he's not taking a

position opposing or not opposing the turn over of any of his data. So he really hasn't supported either side in that particular request. He hasn't taken, I think he has not taken any biased position one way or the other about who gets that information. And that's really what we're here, is what kind of information are you going to get. Are you going to get that shift information. It's not, really at this point it does not seem to be of any real concern of Mr. Evans whether or not a court order has it turned over.

Am I right or wrong, Mr. Evans?

THE WITNESS: Yes, absolutely correct.

THE COURT: All right, go ahead, Mr. Ramsell.

MR. RAMSELL: May I have 30 seconds please?

THE COURT: You can have more than that. Take whatever time you need.

THE WITNESS: Judge, excuse me. May I --

THE COURT: You can't say anything to me. You got to wait, Mr. Evans.

THE WITNESS: I apologize.

MR. TRINH: Your Honor, if the witness can get a cup of water.

THE COURT: Sure, you can get Mr. Evans some nourishment.

THE WITNESS: Thank you.

MR. RAMSELL: May I proceed?

THE COURT: Sure. Thank you.

BY MR. RAMSELL:

Q. During the first day of your testimony you mention that there were four critical temperatures involved with the EC/IR. Do you recall that category, topic?

A. Yes.

Q. One of them you said was the breath hose?

A. Correct.

Q. You said it's set at 40 degrees centigrade, correct?

A. Correct.

Q. You told us that for every one degree centigrade of variation in theory it could change the result by six percent?

A. I did not say that.

Q. While I'm looking for the answer to that. Here we are. You said there's a sensor for the breath hose temperature?

A. Correct.

Q. And you said if the breath hose temperature was off, the machine would shut down and not work?

A. Correct.

Q. Doesn't that depend on what you've set the parameters for the breath hose temperature to be?

A. Correct.

Q. So it's not 40 degrees ad infinitum, it will shut down based on what the parameters are that are set into the settings of the instrument itself, right?

A. Correct.

Q. So what are the settings for when an instrument will shut down in Illinois? So 40 degrees plus or minus what, within what, one degree, two degrees?

A. My memory serves me correct, it's plus or minus -- it's one or two degrees. I cannot remember exactly which because different systems are set at slightly different parameters. I believe it could be, it would be plus or minus two degrees on the EC/IR one.

Q. Okay. So for every degree that the true value is off from 40 degrees centigrade for a breath hose, what impact does that have on a true ethanol result?

A. None.

Q. Now, you also said that there's a temperature setting for the infrared system, correct?

A. Correct.

Q. And you told the Judge that if that temperature setting was a problem, the machine is capable of aborting itself?

A. That's right. The same message as if the breath tube or any of the heaters are out of specification is regulating temperature.

Q. And it'll abort, won't take, it won't print a test?

A. Won't print out a test.

Q. Now isn't it true that the temperature for the infrared system will only abort based on the parameters that are --

A. Correct.

Q. Can I finish please.

MR. RAMSELL: May I start all over again, Judge, so the record is clear?

THE COURT: Sure, you may.

BY MR. RAMSELL:

Q. Isn't it true that the infrared system is also set up so that it only aborts if the variation in the temperature of the infrared system exceeds the parameters that are entered into it?

A. Correct.

Q. What is the parameter or degree of variation

that the infrared system temperature is set at before it would actually abort?

A. I cannot --

Q. Plus or minus how many degrees?

A. Plus or minus typically two.

Q. Two degrees centigrade?

A. Centigrade.

Q. And does a change in the temperature of the infrared system have any impact on the ethanol, the accuracy of the ethanol result, even to the slightest degree, yes or no?

A. I cannot answer that yes or no. I need to explain my answer.

Q. You said the fuel cell also --

THE COURT: Do you want the answer, because I'll let him explain, I can do that.

MR. RAMSELL: No. I'll get to that in a second. I'm coming back around, Judge.

THE COURT: All right.

BY MR. RAMSELL:

Q. You said the fuel cell also has a critical temperature, isn't that true?

A. Correct.

Q. And that fuel cell has a sensor on it also,

isn't that true?

A. Correct.

Q. You told the Judge that if there's a problem with the temperature of the fuel cell, again the machine will abort and not print a result, isn't that correct?

A. Correct.

Q. But isn't the temperature of the fuel cell also set with parameters so that it only aborts if the temperature exceeds a certain set variation?

A. Correct.

Q. What is the plus or minus variation for the fuel cell before it actually would abort and not print a result?

A. Typically plus minus two degrees.

Q. Centigrade?

A. Centigrade. All in centigrade by the way.

Q. And if it varies but it's less than two degrees, the machine will not abort, isn't that correct?

A. Correct.

Q. The machine will not even print if there was a variation in the fuel cell temperature, isn't that true?

A. True.

Q. Same with the infrared system, if the variance in the actual targeted temperature is within plus or minus two degrees centigrade, it'll print a result with no abort or malfunction printing out, correct?

A. Correct.

Q. And does the machine record that there was, in fact, a variation of temperature of the intended target if it's within that plus or minus two degrees centigrade?

A. May I explain or do you want to know?

Q. I'll have him answer that one.

THE COURT: If you can't answer it directly, then you can explain.

A. The tolerance, the instrument is designed to operate accurately within the tolerances allowed in the heaters, that is the reason you have a tolerance.

There is no heater control system in the world that will keep any device component sensor at 40 degrees without a tolerance. So the art of the design --

MR. RAMSELL: Judge, I apologize, but I asked him whether it would print the variation. He's defending something totally off target.

THE WITNESS: I'm sorry, I apologize.

THE COURT: So the answer is, it doesn't print a variation until it's an error that's over the outside --

THE WITNESS: Outside the design tolerances of the instrument, that's correct.

THE COURT: Right.

MR. RAMSELL: And I move to strike the remainder of his statement as nonresponsive to whether the machine prints that there was a variation.

THE COURT: All right, motion to strike other than the material necessary for the answer to the question will be stricken.

MR. RAMSELL: Thank you.

BY MR. RAMSELL:

Q. When the breath hose has a variance in the intended target of 40 degrees centigrade of less than two degrees centigrade, will the machine still print a result without aborting?

A. Correct.

Q. And will the breath ticket record that the actual breath hose temperature was different than the intended 40 degrees target?

A. Without explanation, I can't answer yes or no.

Q. Does it print on the breath ticket for the person who blew that the breath hose was different than 40 degrees, if it was in fact 41 degrees centigrade, yes or no?

A. I cannot answer it with a straight yes or no. There is no printout of any temperature on the ticket.

Q. Well then the answer is, no, it doesn't print it, isn't that true?

A. You were inferring there was a temperature on the ticket.

MR. RAMSELL: Judge, I'd ask the witness be admonished to stay with my questions, it's cross.

THE COURT: I understand, but he made a statement that he believed that you were inferring. It'll stand. Next question.

BY MR. RAMSELL:

Q. Now, you said the internal simulator tube is the fourth critical temperature of your instrument, correct?

A. Correct.

Q. Again, the internal simulator tube has an intended temperature target, correct?

A. Correct.

Q. What is that, what's in the number?

A. It's 40 plus minus two degrees. Typically --

Q. So the intended target is 40 degrees centigrade, and if it has a variance of plus or minus two degrees centigrade, it will still print a result without aborting, is that a fair statement?

A. Fair statement, yes.

Q. And the breath ticket for that individual would not note that the actual temperature of the internal simulator tube was different than 40 degrees centigrade, is that a fair statement?

A. Yes.

Q. Now you said that water base simulators have some inherent issues, they're temperature sensitive, correct?

A. Correct.

Q. And there's a six percent per degree centigrade variation in the ethanol standard issued, correct?

A. Yes.

Q. That is if you have a .100 solution at 34 degrees, it will give you .100, correct?

A. If it's a .1 at 34, it will give you an ethanol vapor of .1 if it's correct.

Q. However, if it's at 35 degrees, it will give

you a .106, six percent higher reading, correct?

A. Correct.

Q. So you said temperature control is critical, isn't that correct?

A. Of the --

Q. Yes or no?

A. No, I cannot answer that without explaining.

Q. Now are flow rates --

THE COURT: Well here, wait, wait. Stop, stop. Because I want it fairly understood for myself.

I take temperature control to be critical, meaning if the machine is not performing within the specified parameter ranges of plus or minus two degrees, then it is critical. If it is performing and there's no indicator that it is not within plus or minus two degrees, then it's not critical, is that a fair statement or not, Mr. Evans?

THE WITNESS: That's correct.

THE COURT: All right. You can ask him about that, because I want to be sure that I'm understanding what the witness states when he states that it can or cannot be critical. Because as the way I stated it, I believe that he would agree with you, Mr. Ramsell, that it could be critical, if it's not within those parameters,

that's the way I took it.

MR. RAMSELL: I believe six percent is critical, my clients do. I understand your position.

THE COURT: No, I don't disagree with you. Just for argument purposes, I'm not disagreeing with you at all. I'm just understanding what the witness's assertion is when you ask him, is it critical or not. Not that it has no meaning or relevance that there could be a six percent variance, Mr. Ramsell. I'm not disagreeing with you.

MR. RAMSELL: Judge, I was merely trying to ask him whether he, under oath, said, so temperature control is critical. I'm reading from it. He said he can't answer that, yes or no.

THE COURT: Go ahead, next question.

BY MR. RAMSELL:

Q. Did you ever say flow rates are critical?

A. Yes.

Q. Now, what effect does flow rate have on the Intox EC/IR's analytical functions?

A. You must supply a minimum flow rate to the EC/IR for a breath sample to accept it.

Q. And what is that minimum flow rate?

A. Typically 12 liter per minute.

Q. I'm sorry, what?

A. 12 liters per minute typically.

Q. And when would the instrument abort on the flow rate? What is the parameters that are set for that?

A. If the flow rate drops below 12 liters from it, it will, before a minimum volume has been reached, it will abort the test. The instrument flow sensor and firmware is designed to obtain an acceptable sample through expiration of the subject's breath into the instrument.

Q. Now, would you agree that anything that will cause your EC/IR to abort would by nature impair its ability to quantitate a breath alcohol concentration?

A. Sorry, could you repeat that.

MR. RAMSELL: Could I have it read back?

THE COURT: By whom? Just restate the question, or you don't remember the full question.

BY MR. RAMSELL:

Q. Would you agree that anything that would cause the EC/IR to abort would also impair its ability to quantitate a breath alcohol concentration?

A. If an instrument aborts a test, there is no quantification carried out.

Q. So what is your answer, yes or no, do you agree with me or not?

A. I disagree with you.

Q. So what --

THE COURT: Wait here, so I understand the question. Sorry to interrupt you, but I need to understand it more than you, Mr. Ramsell.

If it aborts, it's not quantifying anything?

THE WITNESS: Correct.

THE COURT: It's not performing a test, right?

THE WITNESS: Correct.

THE COURT: So if it aborts for reason A, whatever that reason may be, if it's breath, sample, temperature, whatever, it doesn't mean it's incapable of quantifying on the next test if it's correctly administered, would that be correct?

THE WITNESS: Correct. As long as the parameters, designed parameters of operation and the design parameters of the sample to be delivered meet those design parameters, then it will be acceptable.

THE COURT: Now if I know as an operator that it's aborting because of a specific reason, that's a different answer then. If I know it's not regulating the temperature or the sensors properly and continues

to abort, then I can say with a reasonable degree of certainty this machine is not going to be able to quantify properly because I now know it's not functioning properly?

THE WITNESS: Correct.

THE COURT: Would that be also a correct statement?

THE WITNESS: That would be correct. It would never reach a state in which a sample would be accepted and quantified.

THE COURT: All right. Go ahead, Mr. Ramsell. Thank you.

MR. RAMSELL: Let me repeat my question.

BY MR. RAMSELL:

Q. Wouldn't you agree that anything that would cause your instrument to abort would, in fact, also be impairing its ability to quantitate a breath alcohol concentration?

A. You'll have to be more specific than that.

Q. Okay.

MR. RAMSELL: Judge --

THE COURT: Well, he's saying he disagrees with it.

MR. RAMSELL: Why so?

THE COURT: Because if he's saying you have to be more specific, it's a generalized question. If it

aborts, it can't quantify. He's not agreeing with you.

He's telling you he needs more specific information, that's the way I take the witness's response.

Now if it's wrong, then tell me I'm wrong, Mr. Evans. Is that the way you're taking it or not?

THE WITNESS: You're correct, that's the way I'm taking it.

THE COURT: All right.

BY MR. RAMSELL:

Q. All right. So if the machine is aborting, it might still at the same time quantitate the breath alcohol concentration of the subject?

A. I just said it did not. I'm repeating my same answer.

MR. RAMSELL: Are we talking riddles here, Judge?

THE COURT: No. I understand what he's saying, and that's amazing to me. You may be mind melding with him like, I don't know, like in Star Trek. But I understand what he's saying to me, and he's answering my questions. And I don't know nearly as much as you. If I ask him a question, he answers me in the way that I expect him to answer it, which for me is satisfying my intellectual curiosity about how this works.

Now if there's a different type of curiosity, I'm not aware of what it is. But to me he's explaining himself quite clearly.

BY MR. RAMSELL:

Q. Does mouth alcohol affect the analytical performance of an instrument?

A. No.

Q. Would it affect its ability to quantitate the breath alcohol concentration of a subject?

A. It would not take a breath alcohol sample of the subject to quantify.

Q. So is it affecting the ability of the machine to quantitate a breath alcohol concentration?

A. There's no sample to quantitate, so it is not a question.

Q. All right, let me break it down. Ability, let's do it this way. Would mouth alcohol affect the machine being able to quantitate correctly a breath alcohol concentration?

A. If mouth alcohol were present, it may influence the result. I use the conditional word may.

There's a mouth alcohol detector in the form of the infrared sensor that would detect mouth alcohol, then, therefore, prevent the fuel cell sensor taking a

sample to quantify it. So if mouth alcohol, and I took by your question if mouth alcohol was detected by the instrument, it would abort the test. No sample would be taken by the primary sensor, and therefore, quantitative sample would be produced.

Q. And the machine would no longer be able to quantitate a true breath alcohol concentration?

A. For that sample.

Q. Okay. Yes or no?

A. For that sample, yes.

Q. All right. So if there is mouth alcohol detected, would that affect the EC/IR's ability to quantitate that breath alcohol concentration, yes or no?

MS. SIMPSON: Objection, asked and answered.

THE COURT: Well, here.

MS. SIMPSON: He just answered it.

THE COURT: Stop, stop, stop. I think he answered it anyway. If the machine could do it, which he's saying it won't, but if it could, it would quantify an artificially inflated number of alcohol because of the presence of mouth alcohol. But the machine is designed to not even attempt to do it if it detects mouth alcohol, yes or no?

THE WITNESS: Completely correct.

THE COURT: But I'm missing the point. I don't understand. Again, if I'm understanding him before you're even finished, then you know, I don't know, I don't know why that is. But go ahead.

BY MR. RAMSELL:

Q. All right. Are you familiar with the status codes for the EC/IR?

A. Yes.

Q. In Illinois is there a status code for time out?

A. There are status code, may I explain if it's acceptable?

Q. Well, then let me withdraw the question so I can make sure.

What are status codes?

A. Status codes are either abbreviated statements or messages that may appear on the display and on the printout of the instrument during a subject sample when something, an error of some sort is detected.

Q. Okay. Does the Illinois software program for the EC/IR have status code for a time out?

A. Time out, correct.

Q. Do they have one for high blank?

A. Correct, high blank, yes.

Q. Would a high blank affect the ability of the instrument to proceed with quantitating a breath alcohol concentration?

A. Yes, it would prevent the instrument continuing. It has to have a successful air blank.

Q. Is there a status code for operator report?

A. Yes, test refused -- escape, there's an operator abort, yes.

Q. Any way the operator wants to, he can cause the machine to abort somehow?

A. During the test cycle after the data entry by pressing escape, he can then generate abort of the test procedure and it's notified as an operator abort.

Q. Is there a status code in Illinois for mouth alcohol?

A. Mouth alcohol.

Q. Is there a status code in Illinois for RFI?

A. For RFI, no.

Q. Is there a status code in Illinois for set solenoid?

A. Correct.

Q. If there was a status code showing or if the set solenoid error occurs, does that affect the ability

of the EC/IR to proceed with quantitating a breath alcohol concentration of an individual?

A. There's a set solenoid error will abort a test.

Q. How about is there a status code error for sample solenoid?

A. Correct.

Q. And would that, if that error were to occur, would it affect the ability of the instrument to quantitate a breath alcohol concentration?

A. It would abort the test.

Q. And thereby affecting it, wouldn't you agree, impairs its ability 100 percent?

A. An error has been detected and the instrument is designed to stop its procedure, that's how it's designed.

Q. And would you agree there's a status code in Illinois for accuracy check failure?

A. Correct.

Q. Is there a status code in Illinois for negative one?

A. Negative one? I'm not familiar with that.

Q. The word negative followed by the number one?

A. I'm not familiar with that.

Q. Do you recognize that status code or error code at all?

A. I do not, no.

Q. Do you recognize negative two?

A. No.

Q. Do you recognize admin POS one as a code?

A. Admin, no.

Q. Do you recognize admin POS two as a status code?

A. No.

Q. How about POS one, position one?

A. No.

Q. Status code number 33, no.

How about is there a status code for no sample, not sure?

A. I can't remember if there was no sample. The ones I'm familiar with, time out, insufficient sample.

Q. Is there a status code for interfering substance?

A. No.

Q. No?

A. No.

Q. Calibration error?

A. Correct.

Q. Over value?
A. Correct.
Q. Connect error?
A. Connect, correct, yes.
Q. Simulator error?
A. Correct.
Q. Unit failed system check?
A. I can't remember if that's present in the Illinois version.
Q. Okay. Simulator temperature error?
A. I don't believe that's in the Illinois system.
Q. IR error?
A. Illinois, yes.
Q. IR stands for infrared, right?
A. Yes.
Q. Integral overflow?
A. I'm not aware that's in Illinois.
Q. Unconfirmed positive?
A. That's not Illinois.
Q. Voided analysis?
A. That I think is in Illinois. I'd have to check on that. They're numerous. They vary from different versions of it. I may have to double check on some of these I have to admit.

Q. Failed sensor blank?

A. No, that isn't there.

Q. Pardon?

A. That is not.

Q. Reverse flow detect?

A. I don't believe that's in Illinois.

Q. That's when somebody is sucking on the tube, isn't it?

A. That is a message, I believe they exist in some versions. I'm saying that I don't believe that is in Illinois version 31, but I would have to double check to be quite honest.

Q. How about high CO2?

A. That might be in Illinois, CO2 was installed in Illinois.

Q. What's CO2 mean?

A. It's a CO2 detector on there, it's an infrared detector. It's part of the sampling system.

Q. How about invalid sample?

A. Correct, that should be there, could be there.

Q. How about early flow?

A. That, yes.

Q. Breath tube unplugged?

A. I'm not familiar with that.

Q. How about heater error?

A. No.

Q. No?

A. Not heater error. Regulate in temperature is the only one that I'm aware of.

Q. Okay. The ones that you said are on the Illinois software or system, you would agree that each of those errors impacts the machine's ability to proceed to quantitate a subject's breath alcohol concentration, wouldn't you?

A. I would say they would abort a test and prevent a subject sample being taken and quantified, which is yes, agreeing with you.

Q. Okay. And the software is set up specifically to report those events that you agree out of that list?

A. Yes. That's under error, in the download you would see that in the error column.

Q. Right. And there's no trade secret to those events actually happening, are there?

A. The --

Q. Let me withdraw it. I'm not asking how the machine figures it out, okay. I'm not asking whatever wizardry is inside the little box.

Do you have a problem with the fact that the

machine might print heater error, for example, is that a trade secret if it prints something like that out?

A. It prints it out.

Q. Is there a trade secret when a machine creates an error code for set solenoid, the fact it says it?

A. It's the instrument is doing what it's designed to do.

Q. Right. Is there some proprietary about it reporting there as opposed to how it comes to that? I'm not asking you how the wizards in the box work. Is there a trade secret in it saying, set solenoid?

THE COURT: Why don't you just ask him the generalized question. If I download all the information and I'm allowed to do that, Mr. Evans, is there anything in that downloaded information that's available to the state of Illinois that should not be made available to a defense attorney?

Is there any proprietary information in there that your company has to be concerned with, if I download the information, download the information from the machine?

THE WITNESS: None. I'm under the impression it's there anyway because it appears on the printout and the printout is in the public domain one, it's printed out,

and, therefore, it's in here.

THE COURT: Right. So you answered my question. You're not aware of any other information that, if I downloaded that information or gave Mr. Ramsell or any other attorney an order or ordered the State to download the information, furnish the printout of that data to the other side, that that data itself is not containing inherently any proprietary or patent information, would that be correct?

THE WITNESS: Correct.

THE COURT: Okay. Does that kind of answer, as opposed to going through each and every type of thing that the machine prints?

MR. RAMSELL: Sure, thank you.

THE COURT: You have about five minutes, then we're stopping.

MR. RAMSELL: I understand.

BY MR. RAMSELL:

Q. Now you said that in the four and a half hours of direct that that --

THE COURT: I don't need your comment of how long he testified, Mr. Ramsell. And if the parties want to comment, I am going to comment. And if you invite comment, either one of you, I'm going to continue to

comment.

One, and I'm going to say it so the record is clear, regardless of what my ruling is. I think both sides have gone way beyond, way beyond the scope of this hearing, have not been coordinating together to make it efficient to give me the information, as the trier of fact, that I need to decide discovery information that should or should not be turned over.

The hearing in my impression at this stage has deteriorated to a discovery deposition and a mini Frye hearing, which I don't believe is necessary for me to make the determination of what materials. I've been very lenient to allow both sides very liberal parameters in questioning witnesses regarding a lot of information, much of which is not necessary to me to decide.

And I think Mr. Evans really has answered from day one my question and the question that legitimately that the court should be concerned with, is there some concern that the witness has on behalf of his company with turning over materials to any defense attorney who requests it, and whether or not it is feasible commercially or not or expensive or whether it has an impact or wearing out effect on the machine to request

the machine in a given case to download its information.

And it's clear to me from both sides questioning of Mr. Evans that he has no particular concern, if the court orders it, the machine is not going to breakdown because somebody plugs in and says give me the printout information. It's not his concern.

The machine is designed to do it, that's one of its marketing features of the machine. It stores the information for whatever purpose, whether it's for prosecutorial purposes or whether it turns out to be for defense purposes, it is of no concern to Intox or to Mr. Evans who gets it and why it's being used.

And the only concern which appears to be a concern, but certainly not in terms of the scope of the hearing, is that maybe there's some proprietary interest that might be involved. But that hasn't really been articulated by Mr. Evans to me in the context or Ms. McMurray in the context of downloaded information. That's what the subject of this hearing is about. It's, do I turn it over or not.

And I've been very liberal, and I just wanted the record to reflect and as many times as it now

becomes invited, I'm going to stop the parties and I'm going to emphasize that's really what this hearing is starting to deteriorate to. It's not of any help to me, as a trier of fact, whatsoever to engage what each and every reason and every speculatory reason either side about what can and cannot affect this machine and what somebody else could make of the information if they get it has nothing to do with the discovery aspects that the court is being asked to engage in.

So people should be on fair notice that I'm going to start cutting them off then, because we're getting, we are, this has deteriorated very much into a discovery deposition, and I'm not in concurrence with it.

So I've taken up your five minutes, so we're done for today. We have to reschedule, Mr. Ramsell. And while we're rescheduling, is there any reason, rather than bringing people back, whether it's Ms. McMurray or Mr. Evans, that we can't do it by conference, either phone conference or television conference, if they can arrange it, if the parties can arrange it. Because I don't see the point of bringing everybody back and forth if the parties can agree. And that's for both sides' witnesses, not just for

Mr. Evans.

But it seems at this point that I don't know the necessity, since it's really a discovery dep slash Frye hearing that we can't conclude it by way of either telephonic or TV conferences, if either side has the technology available to do it. It just seems to be that would be more efficient. I'm not going to mandate it be done that way, but if the parties can agree. And again, that's for any experts.

Because both sides have been coming back and forth with experts, and I'm sure it is of some concern costwise and efficiency purposes that it's been becoming inefficient. So if you can, I'll leave it up to the parties to see if there's any way that we can do it.

I have it scheduled I believe January 27th in any event for resumption of hearing, is that right, I think both sides, right?

MS. SIMPSON: That's correct, Judge.

THE COURT: So if there is a way, we have enough time to let me know if we can do it by way of some kind of conference or telephonically or TV or whatever. I mean, I don't know.

Do you have that in your office, Mr. Ramsell,

telephone, TV hookup? Or do I need to go to, I hate to say it, Radio Shack to get a connector that we can do this on. I'll leave it up -- you can get off the stand, Mr. Evans. You don't have to stay on the stand.

Can we do that, is that possible?

MS. SIMPSON: It's possible, Judge.

THE COURT: Mr. Ramsell, is that possible? Like I said, I'm not going to mandate it today. If you can't reach any agreement, I'll hold a conference with the parties prior to the 27th of how we're going to resume.

Okay, we're done for today. You'll be contacted then, Mr. Evans. We'll try to do some of this where the parties all don't have to be in the courtroom. So okay, thank you.

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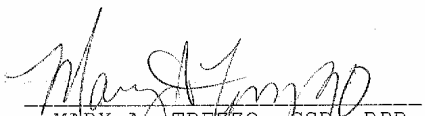
STATE OF ILLINOIS)
)
COUNTY OF DU PAGE)

I, MARY A. TREZZO, hereby certify that I am a certified shorthand Official Court Reporter assigned to transcribe the computer based digital recording of proceedings had of the above-entitled cause, Administrative Order No. 99-12, and Local Rule 1.01(d). I further certify that the foregoing, consisting of Pages 131, inclusive, is a true and accurate transcript, so taken to the best of my ability, hereinabove set forth.



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Eighteenth Judicial Circuit of Illinois
DuPage County
#084-002924