

TESTIMONY OF  
TERRY ROBINSON  
TECHNICAL SUPERVISOR  
NOVEMBER 10, 2005

TERRY ROBINSON,

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

DIRECT EXAMINATION

BY MR. BOYD:

Q. Okay. Mr. Robinson, did you bring -- yes?

A. Yes, sir.

Q. Okay. Can I see that? I'm going to go ahead -- all right. Have you reviewed your maintenance records and the test information logs pertaining to instrument No. 2486 prior to testifying here today, Mr. Robinson?

A. Yes, sir, I looked at them very quickly.

Q. Okay. It seems to me -- now, if any of these records -- do any of these records generate the voltage parameters for the instrument at the time they gave this test?

A. No.

Q. Okay. Where are the voltage parameters recorded, as far as where we could check what those parameters were during the time period?

A. During the test?

Q. Right.

A. As when the test is conducted, they're not.

Q. They're not. How about when you do your inspections?

A. Depends on what kind of instrument it is, if it's a 68 or EN.

Q. Okay. This is just a 68. It's not an EN?

A. Right.

Q. Where would you detect the voltage parameters when you are on site doing the inspection?

A. We look at them and handwrite them on some field notes that we take when we are doing our on-site inspections.

Q. Okay. But you didn't produce the field notes today?

A. No.

Q. But those are reproducible, correct?

A. Yes, uh-huh.

Q. Okay. Now, I notice this test -- may I see the test information, the test slip, DPS 4? Okay. This test was conducted on April 21; is that correct?

A. Yes, sir.

Q. Okay. And you had a test that you ran -- inspection test on the 18th and the 28th; is that correct?

A. Yes, sir.

Q. And so Mr. Doe did it on the 18th and you did it on the 28th; is that correct?

A. Right.

Q. And you have your field notes from those inspection tests; is that correct?

A. Yes, sir, that's correct.

Q. Now, I notice starting around April 1st, we started seeing what I perceived to be low reference sample results --

A. Correct.

Q. -- is that correct?

A. Uh-huh, yes, sir.

Q. Does that indicate to you that the instrument was starting to fall out of tolerance?

A. No. I think what the problem was, is that they had a reference device that was running a little bit cool. It wasn't coming quite up to temperature, so the results were a little bit lower than what they should be.

Q. Isn't the breath test operator supposed to check the temperature on the simulator?

A. Yes, they should.

Q. Okay.

A. But it can still be within -- it can still be within the parameters of a properly operating device and still produce a little bit lower results.

Q. Okay. But I see on here April 1st, you had a .07 on the simulator and that's just, just right in tolerance, isn't it?

A. .070, is that what it is?

Q. Yes.

A. Yes. That's the lowest it can be and be within tolerance.

Q. Okay. But an .09, that would be out of tolerance, wouldn't it?

A. Correct.

Q. Okay. So this was barely in tolerance on April 1st; is that correct?

A. Right.

Q. Okay. And then again on April 1st, I saw .071, I'm seeing .072s, .071s again, on April 6th you see an .07. On April 7th I see a question mark. Was that

something that y'all generated? Was that --

A. I'm not sure what's the -- what's the operational message code next to that question mark.?

Q. 7 (phonetic)?

A. That's a deficient sample.

Q. Okay. But shouldn't the reference simulator, even on a deficient sample with a question mark and such, shouldn't the reference simulator print out?

A. If it occurred -- if the deficient sample occurred on the first sample, that step would never be conducted, so that's what that tells me by seeing the question marks.

Q. April 8th we had the simulator reading an .06; is that correct?

A. Yes, sir.

Q. That was out of tolerance?

A. That is out of tolerance, yes.

Q. Okay. So you had a machine that was out of tolerance. Again on April 9th, you had an .068. The machine is out of tolerance again, isn't it?

A. Yes. Actually, the reading is out of tolerance. I don't believe the instrument is out of calibration. The reading got on that was out of tolerance.

Q. You are attributing that to the simulator running too cold?

A. Right. Too cold or some other reason. But it's not -- the instrument doesn't just go out of calibration.

Q. Okay. How about -- now, I've heard before from Ron Oliver that y'all had trouble with the ENs as far as holding the calibration; is that correct?

A. From who?

Q. From Ron Oliver.

A. Ron Oliver has never had an experience with the ENs. He retired before we started using it.

Q. Okay. And then we had again, on April 9th, April 10th, we have the instrument appears to be -- it's the reference simulator result is out of tolerance; is that correct?

A. I can't see from here.

Q. .069, .068?

A. Yes, .068 would also be out the tolerance.

Q. Okay. Then as we come back to April 10th, 11th, right now it's reading kind of in the midrange of its tolerance. It's within tolerance; is that correct?

A. Yes.

Q. For a while there. And then leading up to this case, it's still reading a little low, but within tolerance; is that correct?

A. Yes.

Q. Okay. Now, you are familiar, I know we talked about this, Terry --

MR. BOYD: I'm going to go ahead and offer DX-2 consisting of 1, 2, 3, 4, 5, 6, 7, 8 pages.

THE COURT: I have this as Defense Exhibit No. 1.

MR. BOYD: No. 1? I originally named my map 1, so I guess this will be 1, since I never offered --

STATE ATTORNEY: No objections.

THE COURT: Okay. I'll admit into evidence what I will mark as Defense Exhibit No. 1.

Q. (By Mr. Boyd) Okay. Are you familiar -- we talked about this before with this Houston Chronicle Article about (inaudible)?

A. Yes.

Q. The broad assertion was that Texas disregards the manufacturer's guidelines for operating a machine. Do you agree with that? Is that correct?

A. No, I don't.

Q. Okay. Where are -- I know that I have seen DPS's regs, okay. Where are DPS's guidelines for an acceptable voltage range for the intoxilyzer (inaudible)?

A. Well, Mr. Cowan, the Scientific Director responded to a request for public information from the author of that article and, which you obviously haven't seen, but that, at least to my understanding, he knew about and he had received that write-up and response to information he was looking for from the Department of Public Safety.

And in the information that Mr. Cowan (phonetic) provided, he stated very concisely and very plainly that the Department of Public Safety does follow CMI guidelines and that the guidelines are posted and written in the technical manual that is provided by CMI to technical supervisors. Now, I'm not sure if everybody has it, but it is available.

Q. Okay. So are there any other guidelines that are published by DPS, other than CMI's guidelines for the voltage parameters?

A. I've never seen anything that -- there may be something that is actually on DPS letterhead, but I have never seen anything that varies from what the manufacturer recommends as to what that article is talking about.

Q. Okay. Now, what I understand is, there are acceptable voltage parameters for the EN, for instance, are from 3300 to 3600?

A. First of all, I think there's a lot of confusion about what that means by voltage. We're not talking about the voltage at which the instrument operates. We're

talking about what are called digital voltage measurements and more precisely they are called ADV, or analog digital counts, for each channel in the instrument.

Q. Okay.

A. There are five channels in the instrument that are used by the instrument that analyze the sample. One is a channel that's used as a baseline, an optical baseline. The other four are used to analyze for ethanol and they are also used to rule out any potential interference in the breath sample. Each one of those channels has what is called an ADV count or an analog. It's a way for us to take a voltage and look at it digitally. And as Mr. Cowan (phonetic) explains in his response that I alluded to earlier, there is a specific range within which those voltages should, it doesn't say must, it says should, be immediately post-autocalibration. That is the ADV count should be between 3300 and 3600 counts. And he goes on to explain --

Q. In each channel?

A. Yes, on each channel. And Mr. Cowan (phonetic) goes on to explain, and I agree with him wholeheartedly, that once the calibration is done, those numbers are going to change. They fall. They will fall over a period of time.

Q. Okay. That's just normal?

A. Exactly.

Q. That's using up the source lamp?

A. It's actually -- it's actually due to the source lamp and the detector. It's called degradation. That doesn't mean they're turning to dust and they are falling apart. It just means as they're -- as they're on, they degrade in the signal output and that's really what we're looking at with those digital voltage numbers or those ADV counts.

Q. Okay. Now, just a minute ago you said post-calibration?

A. Right.

Q. Okay. Now, my understanding is CMI has a specific procedure for recalibration after you replace the source lamp and the chopper motor; is that correct?

A. It's -- it's anytime. Anytime you choose to autocalibrate or calibrate the instrument, for whatever reason, yes, there is a particular -- there's a particular way that you do that.

Q. And that's set forth in the CMI Technical Manual; is that correct?

A. Yes, sir.

Q. My understanding is that the Scientific Director of the Texas Department of Public Safety came up with a different procedure for rechecking the calibration, mixing solutions, and checking each channel with an individual solution; is that correct?

A. The only -- the only change or difference that I'm aware of is that the office of the Scientific Director recommended, as far as the alcohol concentration, so the calibration points that are used there are three instead of four. That is in the technical manual --

Q. So the technical manual --

A. -- published by --

Q. Requires four different solutions?

A. They don't -- they suggest using these four concentrations. And we only use -- we started -- recently, we started going to a four in our office, but the memo that I'm referring to that has this on DPS letterhead suggests that there are three that you use, three alcohol calibration points.

Q. So the Scientific Director of the Texas Department of Public Safety departed from CMI's suggestion as far as their recalibrating a machine; is that correct?

A. Yes, sir. It is different as far as the number of alcohol points.



Q. Okay. Do you check your solution to a gas chromatograph before you put them into service?

A. Yes, sir.

Q. Okay. But to your knowledge, did the Houston Crime Lab check their solution --

STATE ATTORNEY: Objection to relevance.

THE COURT: What is the relevance?

MR. BOYD: That the DPS guidelines are less than CMI's and they're doing a better job here at SWIFS, but not throughout the state.

STATE ATTORNEY: The State objects to not relevant.

THE COURT: Yeah.

MR. BOYD: Okay. Withdraw the question.

Q. (By Mr. Boyd) Where would you look to find CMI's guidelines for the voltage parameters for those five ways --

A. Those five channels?

Q. Channels, yeah.

A. They are in -- again, they are in the technical manual that is published by CMI. Again, like I say, I don't know if everybody has one of those. I know all we did to get one is we asked the National Sales Manager for Law Enforcement Instrumentation for CMI Corporate Office, if we could get one, and he sent us one.

Q. Okay. Have you signed any kind of agreement with CMI about nondisclosure of the technical manual?

A. Years ago we were given a technical manual for the model 68 in a training session in Austin and I signed a document, which I don't exactly remember the wording. Part of it was that this was proprietary information and that's about all I

remember. And also that if we left our jobs in this field, that we would return that document to the Department of Public Safety. I don't recall specifically if it said anything about nondisclosure or anything like that. But the one on the EN, no, sir, we didn't sign anything. We just asked for it and it came from the factory, not from DPS.

Q. Okay. So if I sent you a letter, an open records request, you would give me a copy of the technical manual?

A. Probably not. I would probably -- I would probably ask CMI what their -- since it is their information and it does have schematics of their boards in it, I would definitely ask them if that was something appropriate, which I could sort of predict the response to that.

Q. Okay. But you are saying there is no record that you can get at all that would show the voltage parameters on a particular test, such as the test involved in this case; is that correct?

A. One of the things that sort of struck us is that mentioning that and that article about knowing what the voltage was at the time of the test, the digital voltage measurement or the ADV count, and I'm assuming again they are referring -- and it's actually five of them and referred to one. And I'm assuming they are referring to channel 1 and again, 10, before there's in way to know what that is at the time the test is conducted.

Q. Okay. And, again, with reference back to the test information logs, you are saying that this wasn't a problem relating to the source lamp going out of this instrument, it wasn't related to the chopper motor starting to degrade in this case, it was related to the simulator being too cool; is that correct?

A. It was simulator being a little too cool and it probably had to do with some condensation in the tubing from the simulator to the instrument.

Q. Isn't that something that the breath test operator would have access to? He would be able to look at the simulator solution and say it's not -- how many degrees is it supposed to be?

A. It can be as low as 33.8 or as high as 34.2. And if they look at it and it's within that range, that is considered to be a properly operated reference sample device. And if that solution being used on that instrument is a little bit low, it's a little bit low. The instrument may probably even be calibrated just a little bit below a .08 for that particular value.

It's possible -- it's possible for a solution to, with that combination of that temperature being slightly low and potentially some condensation from that tubing from the instrument to the -- from the reference sample device to the instrument, to cause that sample to be slightly low and in several cases that you pointed out on the test log, be out of tolerance.

Q. Okay. Did that cause you to suspect the breath test operators were ignoring the fact that the temperature was probably out of tolerance as far as on that simulator --

A. Not necessarily.

Q. -- during that time period?

A. Not necessarily. It was probably -- it could have been a little bit low, again, but be within the -- within the proper operating temperature range.

Q. Okay. During the fifteen-minute presence requirement, okay, can a breath test operator delegate any part of the fifteen-minute presence requirement to someone else, even if they are another breath test operator?

A. They can, if they are a certified operator. It is not the best way or recommended or the way they are instructed to do so.

Q. Okay. Now, in this article they said that HP -- Houston Police Department Breath Test Training Chief, Rick Visor (phonetic), who performs maintenance on the machine, testified that DPS's guidelines on the acceptable voltage range for the intoxilyzer differed from the manufacture's (inaudible) although he couldn't say exactly how. What is your reaction to that?

A. My reaction is speculation. However, I -- I -- I don't know what he's talking about. I have never seen, as I testified earlier, any reference to any of that information being published, spoken, e-mailed, anything differently than what the manufacturer says. I have never personally seen that.

Q. Okay. You would agree with me, wouldn't you, that the Texas Breath Alcohol Testing Program Operator's Manual is available, but it does not include the voltage parameters for the intoxilyzer?

A. Yes, that is correct, it does not.

Q. Okay. Now, in this article it says the department, DPS does not make the manufacturer's version, CMI's version, available, which would include the voltage range recommendation.

Now, if you are talking about the technical manual, it's true that you do not make that available; is that correct?

A. Right.

Q. Okay. But the operator's manual doesn't even have that information in it, does it?

A. The operator's manual, if I'm following you correctly, I think they are referring to the operator's manual that's published by the manufacturer, CMI.

Q. That come with the machine, that come with that machine.

A. And that hasn't been shipped with the instruments that at least have

come to Texas for a number of years. But I can recall seeing manuals that did years ago and there were not any, what I would call -- there weren't any -- there wasn't any technical information as far as the specific -- the specific electrical makeup and background and workings of the instrument, other than a general explanation of how infrared spectroscopy works. There wasn't any specifics about how infrared spectroscopy worked in this specific instrument. So there were no numbers like that.

Q. Okay. To your knowledge in November of 2002, did Richard Baxter, head of the DPS Breath Testing Program, ask CMI not to send operator manuals to Texas law enforcement agencies?

A. I don't -- I don't specifically recall seeing that, but I know it exists. I know that that -- that there was a request made. I don't know if it specifically came from Mr. Baxter who was, at the time, the Scientific Director, but I do know that there was a request made and that the operator's manual that previously had been shipped with the instruments was no longer included.

Q. Okay. Do you have any idea when that memo that you read that was part of the internal correspondence and policies of the Department of Public Safety, why they would tell the manufacturer not to ship an owner's manual with the machine?

A. Well, I think the reason is, and I believe it's in the article, it goes on to explain is that the -- but maybe I'm thinking of the response Mr. Cowan (phonetic) sent that I'm alluding to. The reason was -- is that the manual that they shipped was just a generic -- it was a generic operator's manual. It didn't have anything to do with a specific instrument for a specific state and their program. These instruments can be specifically programmed, programmed and set up for a customer, the state that's using it, and to tailor that program to what that particular customer wants. And the reason was, is that that manual is so generic, it just didn't provide any information that was of any use.

And Mr. Cowan (phonetic) went on to explain that we do have an operator's manual that is used as a textbook in the initial certification schools to train breath test operators that does go into a great amount of detail, specifically about the instrument that is used in the State of Texas and how the certified operator is to conduct the analyses on the instrument.

Q. Okay. And would you agree that the guidelines for the voltage parameters that we're talking about, these 7, can you modify under CMI's rule?

A. No.

Q. They can't be modified?

A. They -- they make a recommendation of what they should be post-autocalibration and that's something that we -- that we follow. But it also goes on to explain in the technical manual that -- that the final determination of proper calibration and instrument precision and linearity, is its ability to accurately and precisely analyze known concentrations of ethanol from a 0.02 to a 0.60 grams per 210 liters. And we place a lot of our confidence in the instrument and its ability to do that.

Q. Okay. Now, you do --

[At this time the tape was turned  
over by the Court.]

THE COURT: We're back on the record.

Q. (By Mr. Boyd) Okay. And the source lamp and chopper motor are the two components of the intoxilyzer that degrade, the most common parts that degrade?

A. The source lamp will degrade after a period of time and the signal coming from that source will become noisy. The filter -- excuse me, the chopper motor doesn't really degrade. It just -- it just stops working. It will -- it will get very -- it will start to get erratic in its revolutions. You can see digitally on the instrument's display

what the revolutions per minute are and we look at it and we monitor that.

And as they start to -- if they start to go very up and down by more than -- say more than plus or minus five counts, it's just a matter of time. It may be hours or certainly within a couple of days and it's going to be completely out.

Q. And does that reflect in the digital voltage readout?

A. It will make it unstable.

Q. Okay. So it might vary more than the 3300 to 3600?

A. Absolutely.

Q. Okay. But what is CMI's guideline as far as their technical manual for how often you ought to replace the source lamp and the voltage meter? Would that be more often than what you do?

A. I honestly have never seen a recommendation about how often to do these kinds of things with the instrument.

Q. But if you replace them more like every six months, wouldn't you have less variability, less of the erratic readout that you get -- like we did in this case where -- I mean, I know that you think that the simulator was the reason for this, but a cool simulator, which a breath test operator should be able to see, but is it -- have you ruled it out that it could have been degradation on the source lamp or the chopper motor?

A. Yes. It wouldn't -- the instrument will not -- if there's -- if the source lamp has degraded to the point where it has affected the ADV counts where they are outside that range, they are monitored during the diagnostic check before each analysis, and if they have degraded to a point where they are not within those ranges, the instrument will not pass the diagnostic test.

Q. Okay. Now, Mr. Venger. Do you know Tom Venger?

A. No, I don't.

Q. Okay. According to article he said the voltage range as calculated by the intoxilyzer based upon the number of internal factors, a set range cannot be definitively stated. Is that correct?

A. Yes. I believe that comes from the information he got from the Scientific Director. It simply says it doesn't stay the same. It changes.

Q. Then he said that neither CMI nor DPS publishes the voltage numbers for intoxilyzers that are placed into service; is that correct?

A. That's not true. CMI does publish a recommended (inaudible) technical manual.

Q. So Mr. Vender is incorrect. The spokesman for DPS is incorrect when he says that; is that correct?

A. No. I think maybe what he's saying -- there again, this is speculation on my part, that he's thinking that when you see a number, that it has to be that number, regardless of how long the instrument is in service, and that's not true.

Q. Okay. Okay. Now, you said earlier that the target range for the intoxilyzer is between 3300 and 3600. Okay. Does anything in your record, like the test information logs or your routine maintenance checks during this time period involving Mr. Verret's case, does anything on that show whether the readings fell inside or outside what CMI says is the manufacturer's parameters for the voltage during this time period?

A. Not on that document that you have in your hand, your Exhibit No. 1. It would be on the notes that we take when we do an on-site inspection.

Q. Okay. Okay. Do you agree that the intoxilyzer is supposed to automatically shut down, if the voltage falls outside the manufacturer's range of that 3300, and 3600?

A. Yes. As I said, that it can -- it sets a number for each channel when



the instrument is calibrated and those are called internal standards. And if those internal standards, they will change as the ADV counts or the (inaudible) changes.

Q. As it degrades, it changes?

A. As they change, those internal standards have to be within a specific range, plus or minus five percent, of whatever the base, base number is, and when the diagnostic check is done. If it's outside of that range during the diagnostic check, the instrument will not allow the test to carry on. It will, instead, fail the diagnostic check at that point.

That is what I'm going to assume, because that's somebody that I don't know who they are, I don't know what their background is, is allowed to do that, it is monitored. If it falls outside that range, then it will most likely fail.

Now, I will say this, it's possible for an instrument to have an ADV count or a digital voltage measurement below the 3300 and pass a circuitry check. That does not mean it's incapable of analyzing a sample. All it means is that it changed and it has changed since the time it was autocalibrated.

Q. Okay. Something I'm curious about. Okay. When you have this source lamp, you have a device on the other end of the sample chamber that says there's been diminution in the amount of light at a certain wavelength and that must be due to alcohol.

Does it have an instrument at the beginning where the source lamp goes into the sample chamber to say, yes, that's the amount of light that it should be emitting at the beginning, so we know it's a certain amount that's going into the sample chamber?

A. Well, there is a -- there is a reading that is taken at the beginning of the analysis during a step called an autozero, which is the point at which the instrument

sets itself at zero.

Q. Okay. But the machine doesn't know, necessarily, that it's starting off with less light than it should have at the beginning, does it?

A. It doesn't matter. It doesn't matter. It sets the baseline just before that breath test is introduced and the calculation is made from that baseline and it -- if it changes, as you are saying, you know, the source lamp degrades slightly over a period of time and that number is different from, you know, 10:00 that night until 1:00 in the morning, it doesn't matter because it reestablishes that baseline for each and every analysis.

In fact, it does it three times during each breath test. It does it before the breath test, the first test, it does it before the reference analysis, and it does it before the second breath test.

Q. Okay. But, it says later, it's supposed to automatically shut down, if the voltage falls outside the manufacturer's range, they're supposed to shut down. But when they don't, like you said, you just said that it could go below 3300 --

A. Right.

Q. -- and it might not shut down. Okay. If it doesn't shut down automatically and you got something outside the range, you don't know if the result is high or if it's low. It's just a crapshoot?

A. No, it's not a crapshoot at all. The instrument works fine, if it falls outside that range. Again, that range is established and it's intended to be at those numbers or within that range immediately post-autocalibration and will begin the change and it will change various rates, depending on the instrument. But because it is outside that range, it doesn't mean that it cannot accurately analyze a breath sample.

And I go back to the reference analysis tests that are run with

every breath test. Those alcohol samples that are in that reference sample device, made up by the technical supervisors, and in our case they are verified using another analytical method, and if that reference analysis falls within tolerance, there's no question in my mind that that instrument is capable of accurately analyzing a breath sample.

Q. Would you agree the intoxilyzer, the readout, the printout, the result, the number that we get, depends on a stable electrical current being within the voltage parameters that we discussed?

A. And that is done.

Q. Okay.

A. That voltage there doesn't have that -- that guy there doesn't know what he's talking about.

Q. But if you have an error in any of those parameters, the result could be incorrect; is that correct?

A. I'm sorry, could you repeat that?

Q. Okay. If you have a error in any of those, if you are falling outside the voltage parameters on any of those five channels, that result, then, on the instrument would be incorrect; is that correct?

A. No, I don't believe that at all.

Q. Okay. So if you get a spike or a surge in the voltage, if it's above or below the parameters, that couldn't cause an erroneous reading?

A. Okay. Like I said, that guy doesn't -- that guy is comparing apples and oranges. He's comparing coming out -- the voltage coming out of the wall and he's saying that that has an effect on those and it doesn't. It doesn't have any effect because the instrument has --

Q. It has a power supply?

A. -- has a regulated power supply that has a transformer and breaks that AC current coming into it into three regulated DC voltages of plus 15, minus 15, plus 5 volts DC.

Q. Okay. So you think --

A. And it doesn't -- and if there's -- if there's a spike significant enough to change those numbers, it's going to burn out one of four fuses in that instrument and the instrument will not work at all.

Q. Okay. So you think at this point in the article this Dr. Stefan Rose is talking about the voltage coming out of the wall?

A. That was my -- when I got that article, I just shook my head and said, one doesn't have anything to do with the other one.

Q. Okay. Now, you would agree -- okay. This later article in Florida.

STATE ATTORNEY: Your Honor, I object. That's not a question. He's going through yet another article, someone else's article --

THE COURT: He's discussing the legitimacy of the test results --

STATE ATTORNEY: But he keeps repeating the same thing over and over again. I can't count how many times we have heard this.

THE COURT: (Inaudible) I'll let him go ahead. Go ahead.

Q. (By Mr. Boyd) Okay. Now, you would agree that SWIFS has worked on these machines and to some extent have changed the internal machines, the components of these machines; is that correct?

A. We've never modified anything without being instructed to do so. Sure, we've changed -- changed out parts and replaced old, worn out parts with new parts of the same type.

Q. But have you replaced them with different parts?

A. No.

Q. Okay. And in this case involving this instrument, did you ever go through the process of readapting the sample chamber, for instance, in any of the old 68s, nonENs --

A. If not -- if the -- if the -- if the sample heater needed to be replaced in any instrument, regardless of what model it is, yeah, the heater needs to be removed and it needs to be re(inaudible) so (inaudible) the sample chamber. So this particular instrument, had that ever been done, not during the period of time that those records encompass, but has it ever been done? It may have been at one time. I don't know without going back and looking.

Q. Okay. Now, has CMI on the older models, the 8, which we're talking about one of those, correct?

A. Correct.

Q. The No. 2486?

A. Right.

Q. Has CMI to your knowledge ever changed the software on that instrument while you have been working with these instruments?

A. Yes.

Q. Okay. Okay. Did CMI explain -- did they ever produce the code or anything to show that the changes that they made didn't affect the result?

A. Never seen the code, ever, from the original software to software changes that we've been given by the Department of Public Safety. They're on integrated circuit chips and that's about all I know about it.

Q. Okay. Now, in this case, you have Mr. Doe was stopped at 2:00 in

the morning southbound on Spangler at Northwest Highway and then at 3:18 and 3:20 -- at 3:18 he blew a .106 and at 3:20 he blew and .098, okay? Can you tell us what his probable alcohol concentration was at 2:00 a.m. when he was observed driving southbound on Spangler?

A. No, sir. Only that it may have been higher, lower, or the same as it was when he was tested.

Q. Assuming that he had just left -- Mr. -- Officer Price said he had just left The Lodge, was just there, right there at Spangler and Northwest Highway, okay, 2:00 a.m., I mean, the last call phenomenon may be in effect and we could have a bolus dose situation --

A. Sure.

Q. -- right before leaving the establishment, is it possible that his breath alcohol concentration would have been less than .08 at the time of driving at 2:00 a.m.?

A. If you had a bolus dose within 15 to 30 minutes from the time he was stopped, it is possible for his concentration to have been below 0.08.

Q. In this case it's even, you know, we're talking about he could have had one right before he left, I mean, within a couple of minutes?

A. With a 0.098, yes, that definitely could be possible.

Q. Okay. Now, are any probably greater than the other, that if it had been higher, lower, or in between at the time that he was stopped at 2:00 a.m.?

A. Not given any more information, other than what you have given me, no, sir, there isn't one of the three that is more prevalent that it might be.

Q. So it's entirely possible he was in the absorption stage at the time he was pulled over?

A. He may have been, yes, sir.

Q. Especially the stronger the odor of the alcohol on the breath is consistent with someone who just had a drink; is that correct?

A. Possibly, but it's not -- it's not definitive, just the odor on someone's breath. It's definitive of how recently they consumed.

Q. Okay. Now, we talked about this over the last couple of days and I talked to John Miller also about this.

A. Right.

Q. And they said somebody -- what happened was that Troy McKinney had somebody on the witness stand who didn't really know what he was doing as well as Troy McKinney did. What do you mean -- what did you mean by that?

A. Well, again, not having read the transcript, I'll cut the guy some slack. But I'll suffice to say that having read that, I wouldn't have answered those questions that would have drawn the conclusions that seemed to be drawn by those people in that article.

Q. Okay. How would you have done differently?

A. Well, I would have basically explained things the way you and I have discussed them here today in that I wouldn't have stated that there was a difference between what the manufacturer recommends and what the Department of Public Safety recommends, which is, I believe, was a big point of that article is that the Department of Public Safety has gone off on their own and just started doing things the way they wanted to do them, rather than the way the manufacturer recommends. And I don't agree with that at all.

Q. Okay. So you are saying there are no DPS guidelines, whatsoever, on the voltage parameters for those five channels?

A. Again, I have never seen anything that's on a DPS letterhead that

states the same information that is published in the MCI Technical Manual. But to me that doesn't mean that because it doesn't exist, doesn't mean that they don't agree and they don't recommend those same parameters when calibrating the instrument.

Q. Are you aware of anything, as far as exchange of information between you and the Scientific Director or any of the other technical supervisors, that it would say that they were allowing voltage parameters outside of CMI's guideline?

A. I have never seen such a thing, no, sir.

Q. Okay. Also, I think earlier y'all had expressed some extreme discontent with the fact that -- and the Houston people that we're talking about in this article had expressed some extreme discontent over the way that y'all handled the false 000 readings on the EN?

A. Yes.

STATE ATTORNEY: Objection, Your Honor, relevance.

THE COURT: Overruled. Go ahead.

A. Yes, I did.

Q. (By Mr. Boyd) What did they say to you about blowing the whistle

--

STATE ATTORNEY: Objection, hearsay.

MR. BOYD: We're talking about the expert, talking about the expert, the technical supervisor --

STATE ATTORNEY: -- people in Houston --

THE COURT: (Inaudible).

Q. (By Mr. Boyd) What we're talking about is what was your reaction to their -- their discontent with you blowing the whistle --

STATE ATTORNEY: Objection, relevance.



Q. (By Mr. Boyd) -- on --

MR. BOYD: That is relevant.

STATE ATTORNEY: How is it relevant to this proceeding on whether or not this instrument was working?

THE COURT: It's marginal relevance (inaudible).

Q. (By Mr. Boyd) What was your reaction to their discontent over y'all telling -- blowing the whistle on the 0000?

A. I won't use the words that I used with you, but needless to say, it didn't make me very happy because we didn't take what we get rightly, but we did the right thing and we would do it again in a heartbeat, if the same scenario occurred again. We're not going to proceed with breath alcohol testing in our area of supervision, if there's a problem with a instrument that we cannot explain, that we don't know why it happened. We would do the same thing again.

And they didn't particularly -- they didn't see it that way.

Let's just suffice to say that.

Q. Again, just a quick question on this, you, CMI, and the Scientific Director of the Department of Public Safety came up with a retrofit, a series of parts, that you were going to use to replace the infected instruments, the ENs, as far as being able to solve the problem as you perceived it; is that correct?

A. It was more of a conversation between Department of Public Safety personnel and the manufacturer. I think we brought some -- I think we brought some issues to their attention that were discovered as a result of the investigation that occurred because of what we did and what was found back in March of this year.

Q. And to your knowledge, did they ever send you the replacement parts for the problematic parts?

A. Not yet.

Q. Okay. So you have never replaced any of the problematic parts in those machines?

A. We have replaced some parts, just routine maintenance, like is done on the other instruments in the past. But anything specifically that was alluded to as far as an upgrade package, I have never seen.

MR. BOYD: Pass the witness.

STATE ATTORNEY: I have no questions.

[End of Proceedings]STATE OF TEXAS \*

COUNTY OF DALLAS \*

I, NANCY BREWER, Certified Court Reporter, do hereby certify that the foregoing pages constitute a full, true, and accurate transcript of the testimony of Terry Robinson as transcribed from audio tapes, and not reported by me, to the best of my ability.

SUBSCRIBED to by me on this the \_\_\_\_\_ day of \_\_\_\_\_, 2005.

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NANCY BREWER, CSR, NO. 5759

My Commission Expires 12-31-2006