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CAUSE NO. MB05-56765-A

THE STATE OF TEXAS

\* IN THE COUNTY

vs.

\* CRIMINAL COURT NO. 1

[REDACTED]

\* DALLAS COUNTY, TEXAS

\*\*\*\*\*

REPORTER'S RECORD OF PROCEEDINGS

(Excerpt Testimony of Lori Fuller)

\*\*\*\*\*

On the 13th day of August, 2007, the following proceedings came on to be heard in the above-entitled and -numbered cause before the Honorable Dan Patterson, Judge of County Criminal Court No. 1 of Dallas, County, Texas, at which time the following proceedings were held:

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(Proceedings generated by computer-aided transcription.)

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(August 13, 2007)

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Lori Fuller	-	4	-	-

**EXHIBITS (None)**



1           A.    Sure.  There's software just like any other  
2 normal machine or instrument that is inside this  
3 instrument.  I specifically repair the instrument down  
4 to board and component level.  But as far as software is  
5 concerned, there is a chip that has software already  
6 written into it that I will change when software  
7 changes.  But as far as updating, changing the software  
8 myself, no.

9           Q.    So the answer to that question is you have no  
10 experience in that -- the software?

11          A.    Software?  I'm not understanding your  
12 question.  I'm sorry.  Software programming, no.

13          Q.    You can't program that Intoxilyzer 5000  
14 yourself?

15          A.    No.

16          Q.    The company does it for you.

17          A.    Yes.

18          Q.    So if at anytime there's a need for software  
19 update they send you the actual software and all you do  
20 is stick it in there.

21          A.    Yes.

22          Q.    Okay.  So the answer is no experience in the  
23 actual software program.

24          A.    No.

25          Q.    And you say your background is in -- your

1 degree is in chemistry?

2 A. Yes.

3 Q. Okay. Prior to starting this job as a  
4 Technical Supervisor, how much experience have you had  
5 with this actual breath test machine?

6 A. With the instrument, none, with this specific  
7 one.

8 Q. So everything you've done is through  
9 on-the-job training?

10 A. Yes.

11 Q. So any refresher courses, certification, is  
12 because your scientific director directed you to do  
13 that. Correct?

14 A. Yes.

15 Q. In other words, you're not doing it on your  
16 own.

17 A. We go to training whenever there's training  
18 available and we get the okay by my supervisor, boss, to  
19 go. But according to Texas DPS and the scientific  
20 director, I do have to maintain continuing education and  
21 it has to fall within specified criteria. Yes.

22 Q. It's fair to say that you work for a police  
23 agency?

24 A. No.

25 Q. You don't work for DPS?

1 A. No, I work for DPS. Yes.

2 Q. Okay. DPS, the Department of Public Safety,  
3 is a police agency. Correct?

4 A. Well, yeah. Okay, yes.

5 Q. And you've been testifying in these cases now  
6 for like a little bit under two years, is that right?

7 A. I was first hired in December of 2005, became  
8 certified in November of 2006, and started testifying in  
9 court in February of this year.

10 Q. So you've been testifying, what, about six  
11 months, maybe?

12 A. Yes.

13 Q. Okay. How many times have you come to court  
14 during those six months and said that a person was  
15 intoxicated?

16 A. Many times.

17 Q. And you never looked at the video. Right?

18 A. No.

19 Q. So basically your estimation of a person being  
20 intoxicated is off of what you read on the breath test  
21 result.

22 A. Yes. I see the result and based on the  
23 numerous studies I've read, and people I've talked to,  
24 and courses of instructions I've attended.

25 Q. But not based on watching the video of that

1 particular person.

2 A. No.

3 Q. Have you ever said that person was not  
4 intoxicated?

5 A. No.

6 Q. You would agree with me that scientists, they  
7 disagree amongst themselves as to whether this  
8 instrument is accurate.

9 A. Yes, everybody has different opinions. Yes.

10 Q. Would you agree with me, ma'am, that the  
11 amount of alcohol measured by this instrument is in the  
12 millionths of a gram?

13 A. We don't weigh ethanol molecules so -- it is a  
14 small amount. It's about 81 milliliters, but we don't  
15 weigh it. It's a matter of how much light is absorbed.

16 Q. Is it fair to say it's about a third of a cup  
17 of what's actually measured?

18 A. Okay. Roughly. I'm not exactly sure.

19 Q. But the amount of alcohol in that one-third of  
20 a cup is measured in the millionths of a gram; is that  
21 correct?

22 A. Again, we don't weigh the ethanol molecules.

23 Q. But if it was to be in a weight and not a gas,  
24 would it be in the millionths of a gram?

25 A. Technically, yes.



1 Q. And just to explain to the jury, one gram in  
2 weight is basically like a Sweet'N Low package.

3 A. Yes.

4 Q. And so basically this machine what it does is  
5 give that amount in weight of a Sweet'N Low package and  
6 weighs it into the one millionth of that. Correct?

7 A. Again, it's not based on weight, it's based on  
8 volume and gas. It's a completely different analogy.

9 Q. Okay. Once a person blows into this machine  
10 there is a measurement made inside of that instrument.  
11 Correct?

12 A. Yes.

13 Q. And then there's a calculation or algorithm  
14 that basically comes up with that .13 and .14?

15 A. Yes.

16 Q. And do you know how that calculation occurs  
17 inside of that machine?

18 A. Actually, I just learned that this past week.  
19 Yes, I do, but it's very, very complicated.

20 Q. All right. And could you do that calculation  
21 yourself?

22 A. I would have to have notes. I could do it  
23 myself, but I would have to have paperwork from the  
24 instrument at the time the test was conducted and my  
25 notes with me.

1 Q. And this training to figure out that  
2 calculation was provided by who?

3 A. It was -- it was actually given by our  
4 scientific director.

5 Q. But he has nothing to do with the  
6 manufacturing and programming of this machine. Correct?

7 A. No, not technically, but he is very close with  
8 the manufacturer.

9 Q. Because that's who y'all purchase the machine  
10 from.

11 A. Yes.

12 Q. Who is the manufacturer?

13 A. CMI Incorporated.

14 Q. Because of the amount of air that's measured,  
15 if there's any variation or problem with that machine it  
16 could really throw everything off, correct, and give --  
17 I mean, the air could just really blow the test either  
18 way. It could go really low or really high. Correct?

19 A. I'm not understanding your question. I'm  
20 sorry. The air. What air?

21 Q. If there is anything wrong with that  
22 machine -- I mean, for example, there's a wheel that  
23 turns inside of that machine. Correct?

24 A. It's called a filter wheel. Yes.

25 Q. And that has to turn at a certain rate.

1 A. Yes.

2 Q. Is there a specific rate that that wheel  
3 should turn at?

4 A. The wheel is run by a motor that we do keep at  
5 2325 rotations per minute rpm.

6 Q. Is that 2500 or 2300?

7 A. 2300, yes.

8 Q. Not 23 revolutions.

9 A. No, 2300 and 25 revolutions per minute.

10 Q. So anywhere in-between. Right?

11 A. Anywhere in-between...

12 Q. Between 2300 revolutions and 2500 revolutions.

13 A. No, it's 2325. Two thousand, three hundred  
14 and twenty-five revolutions per minute.

15 Q. And that's the specific rate it is?

16 A. Yes.

17 Q. So if it turns slower or faster than that for  
18 some reason, would that cause a problem in the breath  
19 test?

20 A. No, it wouldn't, but that's where we set it.  
21 And if there is variation among that by a big degree,  
22 that means that the motor is going out and we will  
23 replace the motor. If there is no variation and it's  
24 staying stable at whatever number it's at, then it's  
25 good.

1 Q. The twenty-three hundred, twenty-five, is that  
2 what the manufacturer tells you to set the wheel at?

3 A. Yes.

4 Q. That's the exact number?

5 A. Yes.

6 Q. And that's in the manual somewhere?

7 A. Yes.

8 Q. So if the varies at all there is an issue.

9 A. No. If there's variance within the instrument  
10 when I'm looking at the number itself, and it's varying  
11 by plus or minus 1, 2, or 3, then we will investigate  
12 the issue.

13 Q. Do you know if that was the policy in 2005?

14 A. I don't know specifically, but I know that CMI  
15 has had the same book that I was given last year at my  
16 training for a few years. So I would assume, yes.

17 Q. If I were to tell you that these use to be a  
18 range, in other words, from 2200 to 2400 revolutions per  
19 minute in 2005, would that sound correct?

20 A. I don't want to say that I would be surprised,  
21 but I don't know.

22 Q. So this 2325, you don't know if that was the  
23 actual number of revolutions per minute that was used  
24 back in 2005. Correct?

25 A. No, I don't.

1 Q. Is there a minimum length of time that a  
2 person needs to blow into this machine in order to get a  
3 valid sample?

4 A. It varies. In a non-intoxicated person it  
5 takes between five and six seconds. Depending on the  
6 intoxication of the individual, the length varies.

7 Q. And the way that an operator -- in other  
8 words, the officer that is conducting this test, the way  
9 they know it is it, or the way a jury could know, is  
10 when they watch the video there is a tone, correct.  
11 When a person is blowing into the machine?

12 A. There's actually a couple of different audible  
13 and visible signs when the instrument can accept a  
14 sample and this is audibly, a tone will sound; visibly  
15 stars will appear on the display. But we train our  
16 operators to have the subject blow into the instrument  
17 the first time for as long as they can until they are  
18 completely out of breath and that's when the instrument  
19 accepts the sample.

20 Q. But a jury would only be able to audibly hear  
21 that because they can't see the screen.

22 A. Yes, you're correct.

23 Q. Do you remember the length of time my client  
24 blew into this machine?

25 A. No.

1 Q. But the jury can still listen for it. Right?

2 A. Yes.

3 Q. If it's under six seconds, would that  
4 necessarily make it an invalid sample?

5 A. No.

6 Q. But usually it's more than six seconds, would  
7 you say?

8 A. Usually it's five to six seconds for a  
9 non-intoxicated person.

10 Q. Would you agree with me that the length of  
11 breath a person blows into the instrument will affect  
12 the score?

13 A. Yes, and no.

14 Q. Is it fair to say that the longer a person  
15 blows the higher they score?

16 A. Again, when you first start blowing, you're  
17 going to be starting at the very bottom and have to ramp  
18 up. So on the surface, yes, that's true.

19 Q. Do you guys -- when I say "you guys" Technical  
20 Supervisors, do y'all train operators to, for example,  
21 on the first test if they get to about say -- regardless  
22 of time or length of the blow -- if it gets to two stars  
23 that they are looking at, do they try to replicate that  
24 on the second?

25 A. Yes.

1 Q. So they will, say, keep blowing until they see  
2 a second star, for example?

3 A. Yes. Again, we do try and train our operators  
4 to have them blow as long as they can on the first one  
5 until they are completely out of breath. On the second  
6 sample, we try to get them to blow as long as they did  
7 on the first one, if that makes any sense. So for at  
8 least as long as the first one.

9 Q. How much time do y'all train your operators to  
10 take between both tests, between the first sample and  
11 the second sample?

12 A. It's already programmed that it's a minimum of  
13 three minutes.

14 Q. And the machine will somehow let the operator  
15 know that it's time to give a second test?

16 A. Yes.

17 Q. Although you've trained your officers or your  
18 operators in a certain manner, it's at their discretion  
19 as to how long they blow, correct --

20 A. That's true. Yes.

21 Q. -- or how the person blows?

22 A. Yes.

23 Q. Would a valid sample be able to be given if,  
24 let's say, there are no stars that appear on the LCD  
25 screen?

1           A. . If there were no stars that would appeared,  
2 that would be indicative to me that a sample hasn't been  
3 accepted by the instrument. And so if this instrument  
4 doesn't get an acceptable sample within a specified  
5 amount of time, then it does invalidate the test as a  
6 deficient sample.

7           Q. . In your background and training as somebody  
8 who does scientific experiments or has done them, is it  
9 fair to say that in order for a experiment to be valid  
10 you would want to perform it exactly the same way every  
11 time?

12           A. . Yes.

13           Q. . And you would be sure to measure certain  
14 things a certain way in the exact same amount in order  
15 to test that type of experiment as true. Correct?

16           A. . Yes.

17           Q. . Would you agree with me that if an officer has  
18 discretion as to how long the first test is and the  
19 second test is, it might throw things off?

20           A. . I wouldn't say it would throw things off, no,  
21 but there is also an operational message that the  
22 subject test have to agree within .02 of each other. So  
23 if the officer is doing this, then it's also part of the  
24 instrument's capabilities to know whether it agrees or  
25 not to be a valid test.



1 MR. AGUILAR: May I approach the witness,  
2 Your Honor?

3 THE COURT: Yes, sir.

4 Q. (BY MR. AGUILAR) So in other words, you're  
5 saying that on this first sample if it's a .13, then the  
6 second sample can be as low as .12, or as high as .16 in  
7 order for them to be valid with each other?

8 A. Actually .11 to a .15 -- oh, I'm sorry.  
9 You're talking about the second sample, or the first  
10 sample?

11 Q. Well, the first sample is .13 and it's a plus  
12 or minus .02. Correct?

13 A. Yes.

14 Q. So this -- this is going to be --

15 A. .11 to .15.

16 Q. Okay. Maybe I'm the one who is getting  
17 confused here. I mean, you always go out for the first  
18 test, correct, and then .02 plus or minus is what the  
19 second test has to agree with?

20 A. Yes.

21 Q. So, in other words, you're not saying the  
22 first one is plus or minus .02, it's really the second  
23 one that you're looking at in order for the test to be  
24 valid.

25 A. Yes.

1 Q. So it could be as high as -- as low as .12 and  
2 then plus or minus all the way up to .16.

3 A. Yes, that's right. I'm sorry. Yes.

4 Q. Is that right --

5 A. Yes.

6 Q. -- in order for this test to be valid?

7 A. Yes.

8 Q. So if all of a sudden the second test was,  
9 let's say, a .17, it would invalidate the test.

10 A. Yes, that's right.

11 Q. Would you agree with me that just because an  
12 instrument puts out a slip that says it's a test, it  
13 doesn't necessarily mean that it's accurate?

14 A. I wouldn't necessarily agree with that, no.

15 Q. Okay. So it's never been that you've never  
16 had where a slip has been issued that says it's valid  
17 and then down the road you have to contact the DA's  
18 office and say, you know what, there's problems with  
19 that machine. Has that ever happened?

20 A. We may invalidate the test, yes, but it  
21 doesn't mean that it's not accurate. But we may  
22 invalidate the test, yes.

23 Q. So once you invalidate it, it's inaccurate.

24 A. No, that's not necessarily right.

25 Q. Okay. But it could be invalidated --

1 A. Yes.

2 Q. And do you know that, that's happened before?

3 A. Yes.

4 Q. And, obviously, you're aware that that person  
5 goes to jail if they don't -- if they're not to give a  
6 breath test. Right?

7 A. Yes.

8 Q. Do you know whose decision it is whether to  
9 offer a breath test or a blood test? Who makes that  
10 decision, do you know?

11 A. I don't know.

12 Q. Do you know if -- do you train your officers  
13 to offer a breath test? Do you know if that's how y'all  
14 train your operators, or your officers, basically?

15 A. We train them how to give a breath test. We  
16 also read over the law and rules with them about certain  
17 criteria and so forth, but it's up to the officer's  
18 discretion.

19 Q. But you know that they can offer a blood or a  
20 breath test?

21 A. Yes, I do know that.

22 Q. Which one would be cheaper? Would the breath  
23 test be cheaper, or the blood test be cheaper?

24 A. I would say the breath test.

25 Q. It's cheaper to offer --

1 A. Yes.

2 Q. -- and to give the people. Right?

3 A. Yes.

4 Q. Are you also aware that a person who agrees to  
5 a breath test, they have two hours to have their own  
6 physician like draw blood from them. Do you know that?  
7 Are you aware of that?

8 A. I don't know.

9 Q. Well, do you think if you don't know and you  
10 work for the -- well, basically for Dallas County, do  
11 you think a normal person would know that?

12 A. No.

13 Q. Is there a way that this machine, the  
14 Intoxilyzer 5000 -- well, excuse me. Let me back up.

15 What happens to the samples or the two breath tests  
16 that are given by a person? What happens to the test,  
17 to the samples?

18 A. They're purged out of the system.

19 Q. And when you say "purge", you mean it just  
20 kind of spits it out in the way the machine does?

21 A. Yes. There's a vent in the back that releases  
22 the the air from inside.

23 Q. Is there a way to capture that sample for  
24 future testing?

25 A. On our instruments, no, there's not.

1 Q. Is there a way to do it?

2 A. There is a contraption that is for sale, yes.

3 Q. When you say "contraption," you mean --

4 A. It's called the Toxi-trap.

5 Q. Okay. And who is that offered for sale by?

6 A. I don't know.

7 Q. Do you know if CMI offers it?

8 A. I don't know.

9 Q. But there is such a thing.

10 A. There is.

11 Q. And the scientific director who is basically  
12 your boss, correct --

13 A. Yes.

14 Q. -- he's decided that we don't want to buy this  
15 contraption.

16 A. Because they are very expensive.

17 Q. So it would just be -- it would just cost a  
18 lot to equip each machine with a Toxi-trap.

19 A. Yes.

20 Q. But there is a way to do it.

21 A. Yes.

22 Q. And so, basically, at that point the affect  
23 of that is that all we have left is this slip of paper  
24 and your testimony saying that, that test is valid.

25 Correct?

1 A. Yes.

2 Q. In other words, I couldn't -- I'm not able to  
3 hire a scientist myself and say I'm going to analyze  
4 this exact sample and test it myself to see what it is,  
5 to see what the alcohol concentration is, right?

6 There's no way to do that.

7 A. Correct.

8 Q. There would be a way, and there is a way, in a  
9 blood test. Correct?

10 A. Yes.

11 Q. Because blood tests are actually stored.

12 A. Yes.

13 MR. AGUILAR: I'll pass the witness,  
14 Judge.

15 THE COURT: Mr. Cummings.

16  Just briefly, Your Honor.

17

18 (End of Excerpt of Proceedings.)

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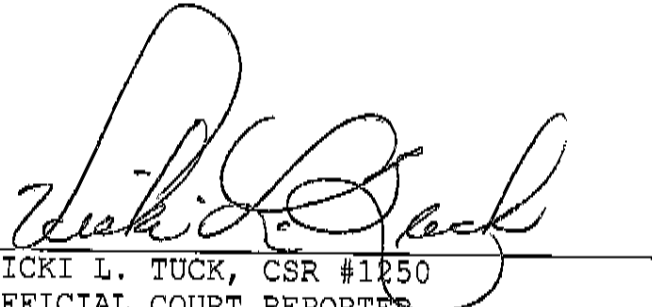
COUNTY OF DALLAS )  
STATE OF TEXAS )

I, VICKI L. TUCK, Official Court Reporter in and for County Criminal Court No. 1 of Dallas County, State of Texas, do hereby certify that the above and foregoing contains a true and correct transcription of all proceedings directed by counsel to be included in the Reporter's Record in the styled and numbered cause, all of which occurred in open court, or in chambers, and were reported by me.

I further certify that this Reporter's Record of Proceedings truly and correctly reflect the exhibits, if any, offered by the respective parties.

I further certify that the total cost for the preparation of this Reporter's Record is \$ \_\_\_\_\_ and was paid by Defense Attorney, Mr. Hugo Aguilar.

WITNESS MY OFFICIAL SIGNATURE on this 24th day of January, 2008.

  
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Certification Expires: 12-31-08.