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 TRIAL ON MERITS - Excerpts of Testimony
 Volume 1 of 1
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EXHIBITS TABLE

(None marked)

1 PROCEEDINGS
 2 May 7, 2007
 3 Monday
 3:45 p.m.
 4 (Open court. Defendant present. Jury
 5 present)
 6 (Direct examination not transcribed)
 7 MARK FONDREN,
 8 having been duly sworn, testified under oath as
 9 follows:
 10 CROSS-EXAMINATION
 11 BY MR. MEDLIN:
 12 Q. Mr. Fondren, part of your job is to testify
 13 in court in support of the breath testing program in
 14 Tarrant County; is that correct?
 15 A. That would be.
 16 Q. And so you're employed by and your salary
 17 is paid by the Tarrant County Medical Examiner's
 18 Office, which is part of the Tarrant County
 19 government or the Tarrant County government agency;
 20 is that correct?
 21 A. We are.
 22 Q. Now --
 23 MR. MEDLIN: May I approach the
 24 witness, Your Honor?
 25 THE COURT: Yes, sir.

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 Deputy Official Court Reporter

1 I do is to run a calibration check.
 2 Q. And it gets different readings from time to
 3 time?
 4 A. You do.
 5 Q. It also doesn't always get the .081 that it
 6 got on September 21st?
 7 A. Correct. You will have a range. Sometimes
 8 it's a little higher. Sometimes it's a little lower.
 9 If the solution gets dirty or if it starts getting
 10 bad with fungal growth or something like that, we'll
 11 actually see it start falling off.
 12 Q. So sometimes you have it showing that the
 13 value is greater than .08 and sometimes less than
 14 .08; is that fair to say?
 15 A. That would be.
 16 Q. And the fact is it was off by as much as
 17 .01 on September 28th; is that correct?
 18 A. On the 28th we ran it, and it was 070.
 19 Q. So it was off by .01; is that correct?
 20 A. .01.
 21 Q. Outside of that margin of what's allowed;
 22 is that correct?
 23 A. It would be.
 24 Q. So you have a reference sample in the
 25 machine, which can be off by as much as plus or minus

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1 Q. (By Mr. Medlin) You brought the subject
 2 test records with you, did you not, in this case?
 3 A. I have the one test record.
 4 Q. How about the check, the instrument
 5 maintenance repair logs?
 6 A. I brought what I needed for my testimony,
 7 which was roughly 30 days before and after.
 8 Q. May I review that briefly?
 9 A. Sure.
 10 Q. And the test we're talking about is on
 11 September 21st, 2005, and when was the next time that
 12 you changed the solution, the reference sample
 13 solution?
 14 A. Referring to before or after the test?
 15 Q. After September 21st.
 16 A. After? There.
 17 Q. So that's on --
 18 A. October 24th.
 19 Q. Okay. Thanks. So in between that period
 20 of time, September 21st and October 24th, you're
 21 getting readings when you check the machine on what
 22 it's telling you the reference sample is whenever you
 23 check it, right?
 24 A. When you do the modem check, one of the
 25 things that would be done, or one of the things that

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1 .01, and it's still okay, right?
 2 A. You would have to fall within that window,
 3 sure.
 4 Q. And we even see on this particular machine
 5 that it was off by as much as .01 at that time,
 6 right?
 7 A. Sure. On one day we hit as low as 070.
 8 Q. And the two samples that you get from the
 9 subject have to be within .02 of each other; is that
 10 correct?
 11 A. They do.
 12 Q. Okay. So if a person has a .08 on their
 13 first sample and the second sample could be as high
 14 as .10 or as low as .06 and be within that range
 15 that's allowed for this machine, right?
 16 A. Sure, if the subject were to provide those
 17 samples.
 18 Q. Yeah. You're familiar, aren't you, with --
 19 well, the machine, the solution is supposed to be at
 20 a particular temperature; is that right?
 21 A. It is.
 22 Q. And what is that?
 23 A. 34 degrees Celsius.
 24 Q. And it could be a little bit higher or a
 25 little bit lower, right?

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1 A. The range has to be plus or minus .2.
 2 Q. .2, okay. And Celsius is a different scale
 3 than Fahrenheit, right?
 4 A. Yes.
 5 Q. 34 degrees Celsius, what does that equal in
 6 Fahrenheit, about 93 something?
 7 A. About 92.
 8 Q. About 92? So you change a degree Celsius,
 9 and that's like changing about 2 degrees Fahrenheit
 10 generally speaking, right?
 11 A. It's just under two.
 12 Q. Okay. And this machine doesn't measure the
 13 temperature of the person giving the breath sample,
 14 does it?
 15 A. No.
 16 Q. Now, if the person's breath temperature is
 17 higher, then that can increase the score that would
 18 result from the same amount of alcohol; is that true?
 19 A. You would have -- it would still be
 20 reflected of the alcohol concentration that
 21 individual had on the breath sample. It would be a
 22 different value as compared to a blood draw taken at
 23 the same time.
 24 Q. But another way we can look at that is say
 25 a person has a given amount of alcohol, say five

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1 degrees, and it ran .100. If we then increase the
 2 simulator to 35 degrees Celsius, that same solution
 3 would then give us a reading of .106.
 4 Q. Okay. And 98.6 degrees Fahrenheit, would
 5 you say what that equals in Celsius, about 38?
 6 A. 37.
 7 Q. 37.5 or 37?
 8 A. 37.
 9 Q. Okay. Now, you would agree, wouldn't you,
 10 and I think the way you described it earlier, that
 11 alcohol affects mental faculties first; isn't that
 12 correct?
 13 A. It does.
 14 Q. And you're familiar with Dubowski's work on
 15 what symptoms are, what symptoms can be seen at given
 16 levels of alcohol concentrations; isn't that correct?
 17 A. Sure.
 18 Q. And when you have two values on a breath
 19 test, you typically just accept one of them as being
 20 the value that you use in the case?
 21 A. Both have meaning to me.
 22 Q. Okay.
 23 A. And if we're doing mathematical
 24 computations and statistics, we'll generally choose
 25 the lower of the two values.

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1 drinks over a given period of time of one hour, and
 2 you have another person who is the same weight, same
 3 sex, they have all the other factors are the same,
 4 they could have the same amount of alcohol, same
 5 strength and everything, but if their breath
 6 temperature is higher than the others' they could
 7 have a higher breath test score; is that right?
 8 A. Sure.
 9 Q. It would be accurate of what's in the
 10 breath, but it's higher than another person with the
 11 same amount of alcohol, right?
 12 A. Sure. There's a mathematical equation to
 13 express that.
 14 Q. And you're familiar with Dr. Jones' work on
 15 that, right?
 16 A. Sure.
 17 Q. So if you increase the breath temperature
 18 one degree Centigrade, then that results in, what is
 19 it, six point --
 20 A. At the .1 level we would see a difference
 21 of .006 between the two samples.
 22 Q. .006 would be the actual score difference,
 23 correct?
 24 A. For example, if we used .1 -- in the first
 25 instance, for example, the simulator ran exactly 34

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1 Q. Kind of benefit of the doubt kind of thing?
 2 A. We do.
 3 Q. So say at .118, some of the symptoms that
 4 we see of alcohol are euphoria; is that right?
 5 A. Sure.
 6 Q. Loss of critical judgment?
 7 A. I would agree.
 8 Q. Decreased inhibitions, talkativeness?
 9 A. Talkativeness in some individuals, sure.
 10 Q. Excitement?
 11 A. Yes.
 12 Q. Memory and comprehension effect, loss?
 13 A. Impairment, yes.
 14 Q. Muscular incoordination?
 15 A. To some degree, yes.
 16 Q. Aggressiveness?
 17 A. Again, in some.
 18 Q. And this breath test, Intoxilizer 5000, the
 19 5000 has been around since the 80's; is that right?
 20 A. Sure.
 21 Q. Granted, it's got different models where
 22 they make little tweaks or add filters or things like
 23 that, right?
 24 A. A good analogy, much like the Ford F-150.
 25 The F-150 truck goes back many years. There are lots

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- 1 of revisions, lots of models. The 5000 is the name
2 that everyone's familiar with.
- 3 Q. But the 5000 in this particular case has
4 the same computer chip that's been used since the
5 80's; is that right?
- 6 A. Probably. It may be a slightly different
7 chip. I don't know.
- 8 Q. But basically that's the chip that's from
9 the same generation as the chip that ran the Atari
10 home video games, right?
- 11 A. Could be.
- 12 Q. And it's got an RFI detector; is that
13 correct?
- 14 A. Yes.
- 15 Q. And that RFI detector is the same one that
16 they've been using since the mid-80's, which was
17 before today's generation of cell phones and all the
18 different frequencies that come from those; is that
19 correct?
- 20 A. Whether or not it's the exact same one, I
21 don't know. Definitely the 80's would be before cell
22 phones or things like that.
- 23 Q. And this machine runs on a program, right?
- 24 A. It does.
- 25 Q. But you've never been able to review that

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- 1 A. Correct.
- 2 Q. And you didn't bring one of those with you
3 today, did you, the machine?
- 4 A. No, I didn't.
- 5 Q. It's actually a little heavy, but you're
6 strong enough to carry it. It's something that could
7 be brought into court to show a jury, isn't it?
- 8 A. Other people have, sure.
- 9 Q. Do you have any diagrams with you or any
10 pictures of it?
- 11 A. No.
- 12 Q. The breath tube kind of sticks off to the
13 side of the machine kind of like an arm, almost like
14 a one-armed bandit, but it rotates up and down for
15 ease of the person reaching their mouth level so they
16 can blow into it, right?
- 17 A. Sure.
- 18 Q. And on the end of the breath tube you have
19 a mouth piece that the operator wants to put a clean
20 one on for each subject; is that right?
- 21 A. Correct.
- 22 Q. And do you require them to change the mouth
23 piece between the two samples on the same person?
- 24 A. No. As long as we just recommend they use
25 the one mouth piece or one clean mouth piece for each

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- 1 program, have you?
- 2 A. As for the, like, code level line or
3 reading of things like that, no.
- 4 Q. Okay.
- 5 A. -- one is well outside of my area of
6 expertise.
- 7 Q. But also nobody else has, right?
- 8 A. I can't speak for other individuals.
- 9 Q. Well, CMI considers it proprietary interest
10 in that they don't allow people to get their program;
11 right?
- 12 A. Generally so.
- 13 Q. Now, when the machine does an air blank, it
14 basically blows air through the sample chamber,
15 right?
- 16 A. It will pull air in following the same path
17 as what a subject's breath sample will.
- 18 Q. Which means going through the sample
19 chamber, right?
- 20 A. Well, it would go through the external
21 breath tube, the internal breath tube, the cellinoid,
22 and finally the sample chamber.
- 23 Q. And then the exhaust port?
- 24 A. Correct.
- 25 Q. On the back of the machine?

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- 1 individual. If they want to change them between
2 that, that's fine, but at a bare minimum, each
3 individual gets one mouth piece.
- 4 Q. But the mouth piece is partly there to try
5 to keep foreign materials from getting into the
6 machine, right?
- 7 A. It would, and also the main purpose is
8 sanitary.
- 9 Q. Sanitary, okay, so each person has a clean
10 mouth piece to blow on, right?
- 11 A. Sure. I wouldn't want to use your mouth
12 piece.
- 13 Q. No. No, you wouldn't. In fact, the
14 machine gets used by lots of different people, right?
- 15 A. It does.
- 16 Q. And maybe John Doe doesn't know who has
17 blown into that machine before him, does he?
- 18 A. Like the subject in this case wouldn't. I
19 can look at it and see who provided the samples
20 before.
- 21 Q. And that could be a wide assortment of
22 people from different occupations and different walks
23 of life, right?
- 24 A. Or it could be me.
- 25 Q. And it could be people who are healthy and

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1 people who aren't healthy; isn't that right?
 2 A. Sure.
 3 Q. The breath test tube is heated, isn't it?
 4 A. It is.
 5 Q. And actually you've taken some of these
 6 machines apart before, and some of the inner workings
 7 get a little bit gunked up, don't they?
 8 A. It depends on the environment the
 9 instruments are in. Every instrument gets dirty in
 10 some form or fashion; if nothing else, just from
 11 dust.
 12 Q. Part of that 15 minute presence period, you
 13 want to make sure there's no mouth alcohol, right?
 14 A. That's -- sure.
 15 Q. If a person burps or they have gas escaping
 16 from the stomach, it could introduce alcohol into the
 17 mouth; is that correct?
 18 A. First for alcohol to be a problem, there
 19 has to be alcohol present in the stomach. The
 20 drinking has to have been relatively recent.
 21 Q. Right.
 22 A. But then it's part of the rules and
 23 regulations to ensure against that. We want to make
 24 sure they don't regurgitate or anything like that.
 25 Q. Because if that happens, you would want

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1 other things such as chewing tobacco, chewing gum, a
 2 mint, all of that would have to be removed.
 3 Q. Ideally you would want no foreign things in
 4 the mouth, right?
 5 A. That is correct.
 6 Q. Now, what you were talking about as far as
 7 the result, .118, you were talking about that being
 8 an expression of grams for 210 liters of breath; is
 9 that correct?
 10 A. Correct.
 11 Q. And when we talk about -- .08 is the legal
 12 limit, right?
 13 A. It is.
 14 Q. And if we -- so the sample chamber is not
 15 210 liters big, is it?
 16 A. No, it's not.
 17 Q. In fact, 210 liters, for easy
 18 understanding, that's a whole lot, right?
 19 A. That's a large volume.
 20 Q. Would be like a 55 gallon drum?
 21 A. Sure.
 22 Q. So we don't have 210 liters in our lungs,
 23 do we?
 24 A. Not at one time, no.
 25 Q. Maybe the strongest, Lance Armstrong,

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1 that 15 minute presence period to start over again,
 2 right?
 3 A. If they regurgitate or if they introduce
 4 other substances in the mouth, then yes.
 5 Q. To allow whatever it is to dissipate,
 6 right?
 7 A. That's right.
 8 Q. Now, the machine has a slope detector,
 9 which is supposed to detect mouth alcohol; is that
 10 right?
 11 A. It does.
 12 Q. But it doesn't always, does it?
 13 A. When operating correctly, yes.
 14 Q. But it can be defeated, and it's been shown
 15 to be defeated, right?
 16 A. Yes. On the older instruments it was very
 17 easy to defeat, sure. Just turn it off.
 18 Q. And if a person has something in their
 19 mouth, a foreign substance, it ought to be taken out,
 20 right?
 21 A. They would, except for certain things. You
 22 wouldn't allow a penny to be kept in there. If they
 23 have permanent dentures or anything like that, then
 24 we would leave those. If they have tongue piercings,
 25 we would recommend that those remain intact, but

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1 doesn't have more than about six or seven liters?
 2 A. Probably around there.
 3 Q. More than most people, though. So what's
 4 in the sample chamber, you can tell the jury about
 5 how many CC's that is; isn't that right?
 6 A. Sure, if you would like me to.
 7 Q. Yeah, please.
 8 A. Sample chamber is about 80 or 90 CC's.
 9 Q. So can you kind of give the jury an idea of
 10 how it's shaped or what size it is inside the
 11 machine?
 12 A. The sample chamber is about 11 inches long.
 13 To give a good analogy, a stainless steel pipe. It's
 14 about three-quarters of an inch thick. It's about
 15 11 inches long. The internal diameter, or the walls
 16 are about three-quarters of an inch thick. The
 17 inside opening would be about a half inch. So
 18 roughly a half-inch wide by 11 inches long. At one
 19 end you have the infrared detector, the other end the
 20 infrared source.
 21 Q. So .08 grams, that would be a little
 22 less -- if it were in a solid form, that would be a
 23 little less than a packet of a Sweet 'N Low; is that
 24 right?
 25 A. About a tenth of that.

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- 1 Q. And what amount of alcohol is in the sample
2 chamber to equal .08 is actually much less than that,
3 isn't it?
4 A. At the very end of the breath sample, sure.
5 Q. In fact, you've done the math several
6 times, right?
7 A. Sure.
8 Q. Can you go ahead and tell me without going
9 through the calculations, how many zeroes?
10 A. Probably three or four or five. It's .08
11 divided by 2,300 roughly.
12 Q. Have you got your calculator?
13 A. I don't.
14 Q. You want to trust mine?
15 A. That's fine. You have your decimal point,
16 four zeros.
17 Q. One, two, three, four.
18 A. And then three.
19 Q. Okay.
20 A. We'll stop there.
21 Q. So that would be -- so that's the decimal
22 point. So you've got tenths, hundredths,
23 thousandths, ten-thousandths, so that's three
24 hundred-thousandths of a gram; is that correct?
25 A. Of a gram, correct.

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- 1 Q. The deep alveolar would be the last part of
2 that whole system before the air meets with the blood
3 that's going through the lungs to exchange oxygen; is
4 that correct?
5 A. That is correct.
6 Q. And the respiratory system branches about
7 17 times between there; is that right?
8 A. I don't know the number of branches. It
9 would be a number of branches, though.
10 Q. And so the machine is based on the idea
11 that after the subject blows for a period of time
12 that what you're getting is the deep alveolar breath,
13 right?
14 A. That would be true.
15 Q. Where it's a good idea is that the blood
16 and breath are in equilibrium as far as the alcohol
17 being exchanged; is that right?
18 A. That is.
19 Q. Now, you're familiar with Dr. Michael
20 Hlastala's papers and work in this area; is that
21 correct?
22 A. To some degree.
23 Q. Are you familiar with his position in his
24 papers that talk about respiratory science being
25 wrong, that we now know that alcohol is exchanged all

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- 1 Q. Three hundred-thousandths of a gram?
2 A. Right.
3 Q. Is how much it would take to be in that
4 sample chamber to equal .08; is that correct?
5 A. Per 210 liters of breath.
6 Q. Correct.
7 A. Yes.
8 Q. So you agree with me that's a pretty small
9 amount, right?
10 A. Well, when you express it that way, sure.
11 Q. You couldn't see it with the naked eye,
12 could you?
13 A. Actually you could, yes.
14 Q. Because it's dispersed in a gas?
15 A. If you look at it in the gas phase, then
16 no, you cannot see it.
17 Q. Okay. All right. So -- and what you're
18 aiming to get in the breath sample that's analyzed by
19 the machine is the deep alveolar breath; is that
20 correct?
21 A. We are.
22 Q. The respiratory system starts out, I guess,
23 at the mouth going down to the trachea to the lungs,
24 right?
25 A. It does.

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- 1 the way through the respiratory system at every level
2 or branch and not just in the deep alveoli?
3 A. I would say that's always been the belief.
4 Q. You haven't watched the video in this case,
5 have you?
6 A. No, I haven't.
7 Q. Now, if the breath test result is accurate,
8 that may give you the breath alcohol concentration at
9 the time of the test, but not necessarily at some
10 other given time; is that fair to say?
11 A. I would agree.
12 Q. And on this particular test, the first
13 sample was at 2:47 a.m.; is that correct?
14 A. Yes.
15 Q. And if the driving occurred at 2:00 a.m. or
16 2:02 a.m., then you need some information, don't you,
17 before you can say or estimate what the .118, excuse
18 me, at 2:47 can tell you about what the breath
19 alcohol concentration would have been at 2:02 a.m.?
20 A. Well, there are some conclusions we can
21 draw immediately without knowing anything. We can
22 know that it can't be any higher than we're talking
23 45 minutes, the highest individual is going to be
24 about .135. It could be the same as the test record,
25 but it's a .11 or .12. They could also be lower.

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1 How much lower, that's where I would have to have
2 other information.
3 Q. You need more information. What kind of
4 information?
5 A. We want to know when the individual last
6 consumed an alcoholic beverage, when they last
7 consumed food. Based upon the answers to the minimum
8 of those two questions, that may tell me what I need
9 to know or it may lead me to further questions, and I
10 wouldn't know what those questions are until I hear
11 the first answers.
12 Q. You'd want to know the amount of alcohol,
13 right?
14 A. Potentially. That would depend upon,
15 again, when that last drink was.
16 Q. And these are common questions for police
17 to ask a person, when they ask them if they've been
18 drinking, how much, over what period of time; is that
19 correct?
20 A. Generally so.
21 Q. And those are questions, the answers to
22 which can be very helpful to you in trying to
23 extrapolate or estimate what the score was at a
24 previous time; is that right?
25 A. If I'm going to do some mathematics, then

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1 Q. You don't expect those two samples to be
2 exactly the same, do you?
3 A. No. We're not looking for that. We want
4 them to be representative, in the same ball park.
5 Q. And we're going to time it three minutes
6 between the two tests?
7 A. Yes.
8 Q. Give or take some portion of the minutes
9 since the time only goes to a full minute, not
10 portions thereof, right?
11 A. Correct.
12 Q. So really between 2:47 and 2:50 is there
13 any significant change in the alcohol concentration?
14 A. No, as reflected on the test record and as
15 is reflected in the biochemistry of the body, they're
16 the same.
17 Q. But you get different results because of
18 the breathing patterns, right?
19 A. Well, you get different results because,
20 one, the quality of the breath sample. We're looking
21 at two different samples. Just like when I measure
22 the same reference sample on different days, we get
23 different values. If we're going to measure this
24 individual twice, we're going to get slightly
25 different values.

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1 yes. I have to know that information.
2 Q. Now, if the only information you have is
3 that a person prior to 2:02 a.m. had three beers, but
4 you don't know the size of the beers, you don't know
5 when the first one was, you don't know when the last
6 one was. Can you say that that person was over .08
7 at 2:02 a.m.?
8 A. I would conclude that there's not enough
9 information for me to make any conclusion with based
10 on that.
11 Q. So basically that person could be blowing
12 .08 at the time of driving, right?
13 A. I would say it would be one of three
14 things. It would be either below .08, they are .08,
15 or they're above .08. I don't know which of the
16 three.
17 Q. You don't know which of the three, right?
18 A. Sure.
19 MR. MEDLIN: Pass the witness, Judge.
20 (Redirect examination not transcribed)
21 **RE-CROSS-EXAMINATION**
22 BY MR. MEDLIN:
23 Q. You get two different results on two
24 different breath samples usually, right?
25 A. Generally so.

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1 Q. So it doesn't surprise you that there's
2 different values?
3 A. No.
4 Q. And you could have the exact same
5 concentration in a person and get a different value
6 with the next test, right?
7 A. Sure.
8 Q. Because you said the quality of the breath
9 sample, right?
10 A. The quality of the breath sample and just
11 natural differences in biological sampling.
12 Q. Okay.
13 MR. MEDLIN: Pass the witness.
14 (End of excerpt, 4:25 p.m.)
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STATE OF TEXAS
COUNTY OF TARRANT
I, Jana Kay Bravo, Deputy Official Court Reporter, do hereby certify that the following proceedings were reported by me on the date and at the place indicated in the attached report. I further certify that the attached report is a true and correct copy of the original report as filed with the County Clerk of Tarrant County, Texas. I further certify that the attached report is a true and correct copy of the original report as filed with the County Clerk of Tarrant County, Texas. I further certify that the attached report is a true and correct copy of the original report as filed with the County Clerk of Tarrant County, Texas.

I further certify that this reporter's Report of the proceedings and the exhibits, reflects the same, as they appeared in the respective parties. Signed this ____ day of _____, 20__.

Jana Kay Bravo
Texas CSR #1144
Deputy Official Court Reporter
County Criminal Court No. 9
Tarrant County, Texas
411 W. Belknap
Fort Worth, Texas 76102-1114
Expiration: 12/31/2008

Jana Kay Bravo, CSR
Deputy Official Court Reporter