

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff/Appellee

v.

MSC No. 162211
COA No. 350391
Circuit Case No. 2019-175232-AR

ALTON FONTENOT, JR.,
Defendant/Appellant.

KAREN D McDONALD (P59083)
Oakland County Prosecutor/Appellee
1200 N. Telegraph Road
Pontiac, MI 48341
(248) 858-0656

ALONA SHARON(P68782)
Attorney for Appellant
28411 Northwestern Highway
Suite 875
Southfield, MI 48034
(248) 545-4755

APPELLANT ALTON FONTENOT'S APPENDIX

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45th District Court
13600 Oak Park Blvd
Oak Park, MI 48237

Register of Actions



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STATE OF MICHIGAN	CASE NO: 1700391SP D01 SD
145TH JUDICIAL DISTRICT	REGISTER OF ACTIONS
ORI634515J	X-REFERENCE #: X3122289
PIN: 2112688-17	STATUS: DISP

JUDGE OF RECORD: APPEL, MICHELLE FRIE P-32709
 JUDGE: APPEL, MICHELLE FRIE P-32709

STATE OF MICHIGAN v

FONTENOT/ALTON/JR
 21376 BETHLAWN BLVD
 FERNDALE MI 48220

CTN:
 TCN: MI17203882T
 SID: 2810480T
 ENTRY DATE: 10/04/17
 OFFENSE DATE: 10/03/17 250 PM
 ARREST DATE:

DEF PHONE: (248) 632-8597 VEHICLE TYPE: PA VP: MI DSC7040 18
 DOB: ##### SEX: M RACE: B CDL: N
 VEH YR: 2002 VEH MAKE: JEEP VIN: 1J4GW48S62C202427 PAPER PLATE:

DEFENSE ATTORNEY ADDRESS	BAR NO.
SHARON, ALONA,	P-68782 APPOINTED
28411 NORTHWESTERN HWY	Telephone No.
STE 875	
SOUTHFIELD MI 48034	(248) 545-4755

OFFICER: GJURASHAJ	DEPT: STATE POLICE
PROSECUTOR: COOPER, JESSICA R.,	P-23242
VICTIM/DESC:	

CNT: 01 C/M/F: M 1025 PACC#257.6251-A
 OPERATING WHILE INTOXICATED

ARRAIGNMENT DATE: PLEA: PLEA DATE:

FINDINGS: ORD TO STAY DISPOSITION DATE: 06/25/19

SENTENCING DATE:

FINE	COST	ST.COST	CON	MISC.	REST	TOT FINE	TOT DUE
0.00	0.00	0.00	0.00	25.00	0.00	25.00	0.00

JAIL SENTENCE: PROBATION:

VEH IMMOB START DATE: NUMBER OF DAYS: VEH FORFEITURE:

DATE	ACTIONS, JUDGMENTS, CASE NOTES	INITIALS
------	--------------------------------	----------

10/03/17
 1 ORIGINAL CHARGE OPERAT INTOX WEB
 SCHEDULED FOR ARRAIGNMENT/PRE-TRIAL
 110917 100P APPEL,MICHELLE FRIE P-32709 WEB

10/04/17
 FILING DATE 100417 WEB
 MISCELLANEOUS ACTION ALL COUNTS WEB
 PROS COOPER, JESSICA R., P-23242 WEB
 NOTICE TO APPEAR GENERATED
 ALL COUNTS WEB

11/06/17
 SID ADDED CRM
 TCN ADDED CRM

11/09/17
 PROCEEDING HEARD ALL COUNTS CRM
 JDG APPEL,MICHELLE FRIE P-32709 CRM
 ADJOURNED FOR PRE-TRIAL 113017 100P APPEL,MICHELLE FRIE P-32709 CRM
 ADJ TO CONSULT AN ATTY CRM

11/30/17
 NAME: FONTENOT/ALTON/JR CASE NO: 1700391SP PAGE 2

DATE	ACTIONS, JUDGMENTS, CASE NOTES	INITIALS
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T/C CANNOT MAKE CT DATE, ADV TO FAX LTR TOC
 1 PROCEEDING HEARD OPERAT INTOX CRM
 JDG APPEL,MICHELLE FRIE P-32709 CRM
 ATT SHARON,ALONA, P-68782 CRM
 ADJOURNED FOR PRE-TRIAL 122117 900A APPEL,MICHELLE FRIE P-32709 CRM
 APPT S.SHARON CRM
 ADJ FOR DISCOVERY CRM

12/19/17
 1 MISCELLANEOUS ACTION OPERAT INTOX CRM

REMOVED FROM DOCKET 122117 900A APPEL, MICHELLE FRIE P-32709 CRM
 ADJOURNED FOR PRE-TRIAL 011118 100P APPEL, MICHELLE FRIE P-32709 CRM
 OK TO ADJ PER KC CRM
 1 NOTICE TO APPEAR GENERATED
 OPERAT INTOX CRM
 01/11/18
 1 PROCEEDING HEARD OPERAT INTOX CRM
 JDG APPEL, MICHELLE FRIE P-32709 CRM
 ADJOURNED FOR PRE-TRIAL 012518 100P APPEL, MICHELLE FRIE P-32709 CRM
 ADJ FOR ADD DISCOVERY CRM
 1 NOTICE TO APPEAR GENERATED
 OPERAT INTOX CRM
 01/25/18
 1 PROCEEDING HEARD OPERAT INTOX CRM
 JDG APPEL, MICHELLE FRIE P-32709 CRM
 ADJOURNED FOR PRE-TRIAL 021518 100P APPEL, MICHELLE FRIE P-32709 CRM
 1 NOTICE TO APPEAR GENERATED
 OPERAT INTOX CRM
 NOTICE TO APPEAR GENERATED
 OPERAT INTOX CRM
 02/15/18
 PROCEEDING HEARD ALL COUNTS CRM
 JDG APPEL, MICHELLE FRIE P-32709 CRM
 ADJOURNED FOR MOTION HEARING
 041018 1000A APPEL, MICHELLE FRIE P-32709 CRM
 DEFENSE MOTION TO BE FILED BY 3/16/18 AND CRM
 RESP DUE BY 3/30/18 CRM
 SET HEARING FOR 4/10/18 @ 10AM CRM
 MISCELLANEOUS ACTION ALL COUNTS CRM
 REMOVED FROM DOCKET 041018 1000A APPEL, MICHELLE FRIE P-32709 CRM
 EVIDENTIARY HEARING 041018 1000A APPEL, MICHELLE FRIE P-32709 CRM
 03/16/18
 DEF'S MOTION AND BRIEF FOR SUPPRESSION CRM
 OF HGN, PBT, LACK OF CONVERGENCE AND CRM
 MODIFIED ROMBERG AND FOR SUPPRESSION OF CRM
 EVIDENCE BECAUSE OF LACK OF PROBABLE CRM
 CAUSE TO ARREST, OR IN THE ALTERNATIVE CRM
 FOR A DAUBERT HEARING FILED. CRM
 04/02/18
 PPL'S RESPONSE AND BRIEF TO DEFENDANT CRM
 MOTION TO SUPPRESS AND DISMISS FILED CRM
 FWD FILE TO MFA TO REVIEW MOTIONS CRM
 04/10/18
 1 PROCEEDING HEARD OPERAT INTOX CRM

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NAME: FONTENOT/ALTON/JR

CASE NO: 1700391SP

PAGE 3

DATE	ACTIONS, JUDGMENTS, CASE NOTES	INITIALS
	JDG APPEL, MICHELLE FRIE	P-32709 CRM
	EVIDENTIARY HEARING 050118 230P APPEL, MICHELLE FRIE	P-32709 CRM
1	NOTICE TO APPEAR GENERATED	
	OPERAT INTOX	CRM
04/20/18		
	RVCD STIP AND ORDER TO ADJ EVIDENTIARY	CRM
	HEARING. FWD FILE TO MFA	CRM
04/24/18		
	MISCELLANEOUS ACTION ALL COUNTS	CRM
	JDG APPEL, MICHELLE FRIE	P-32709 CRM
	REMOVED FROM DOCKET 050118 230P APPEL, MICHELLE FRIE	P-32709 CRM
	EVIDENTIARY HEARING 051518 300P APPEL, MICHELLE FRIE	P-32709 CRM
	ORDER TO ADJ GRANTED.	CRM
	NOTICE TO APPEAR GENERATED	
	ALL COUNTS	CRM
05/16/18		
	EVIDENTIARY HEARING HELD ALL COUNTS	CRM
	JDG APPEL, MICHELLE FRIE	P-32709 CRM
	EVIDENTIARY HEARING 061918 230P APPEL, MICHELLE FRIE	P-32709 CRM
	ADJ FOR CON'T ARGUMENT AND DECISION.	CRM
06/19/18		
1	PROCEEDING HEARD OPERAT INTOX	CRM
	JDG APPEL, MICHELLE FRIE	P-32709 CRM
	ADJOURNED FOR HEARING 071718 200P APPEL, MICHELLE FRIE	P-32709 CRM
	ADJ FOR RULING	CRM
07/17/18		
1	PROCEEDING HEARD OPERAT INTOX	CRM
	JDG APPEL, MICHELLE FRIE	P-32709 CRM
	DEF'S MOTION TO SUPPRESS PBT AND ROMBERG	CRM
	DENIED.	CRM
	MISCELLANEOUS ACTION OPERAT INTOX	CRM
	ADJOURNED FOR REVIEW 080218 500P APPEL, MICHELLE FRIE	P-32709 CRM
	NEED NEXT ACTION BY PROS	CRM
08/06/18		
1	MISCELLANEOUS ACTION OPERAT INTOX	CRM
	REMOVED FROM DOCKET 080218 500P APPEL, MICHELLE FRIE	P-32709 CRM
	ADJOURNED FOR PLEA 082118 200P APPEL, MICHELLE FRIE	P-32709 CRM
1	NOTICE TO APPEAR GENERATED	
	OPERAT INTOX	CRM

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SET PER KC CRM

08/21/18

1 PROCEEDING HEARD OPERAT INTOX CRM

JDG APPEL, MICHELLE FRIE P-32709 CRM

ADJOURNED FOR JURY-TRIAL 102618 900A APPEL, MICHELLE FRIE P-32709 CRM

NO PLEA TAKEN; SET FOR JURY TRIAL. CRM

BLOCK 10/29/18 AM. CRM

09/07/18

1 MISCELLANEOUS ACTION OPERAT INTOX CRM

REMOVED FROM DOCKET 102618 900A APPEL, MICHELLE FRIE P-32709 CRM

ADJOURNED FOR JURY-TRIAL 011819 900A APPEL, MICHELLE FRIE P-32709 CRM

ADJ PER KC-SUBJECT TO CHANGE. CRM

10/04/18

MISCELLANEOUS ACTION ALL COUNTS CRM

NAME: FONTENOT/ALTON/JR CASE NO: 1700391SP PAGE 4

DATE	ACTIONS, JUDGMENTS, CASE NOTES	INITIALS
	REMOVED FROM DOCKET 011819 900A APPEL, MICHELLE FRIE P-32709	CRM
	ADJOURNED FOR JURY-TRIAL 030819 900A APPEL, MICHELLE FRIE P-32709	CRM
	NOTICE TO APPEAR GENERATED	
	ALL COUNTS	CRM
02/14/19	STIP AND ORDER TO ADJ JT FILED-FWD FILE TO	CRM
	MFA	CRM
	MISCELLANEOUS ACTION ALL COUNTS	CRM
	JDG APPEL, MICHELLE FRIE P-32709	CRM
	REMOVED FROM DOCKET 030819 900A APPEL, MICHELLE FRIE P-32709	CRM
	ADJOURNED FOR JURY-TRIAL 051719 900A APPEL, MICHELLE FRIE P-32709	CRM
	STIP AND ORDER TO ADJ JURY TRIAL GRANTED-	CRM
	MAY 17 AND MAY 20	CRM
	MISCELLANEOUS ACTION ALL COUNTS	CRM
	ADJOURNED FOR JURY-TRIAL 052019 900A APPEL, MICHELLE FRIE P-32709	CRM
	NOTICE TO APPEAR GENERATED	
	ALL COUNTS	CRM
03/11/19		
1	MISCELLANEOUS ACTION OPERAT INTOX	CRM
	REMOVED FROM DOCKET 051719 900A APPEL, MICHELLE FRIE P-32709	CRM
	REMOVED FROM DOCKET 052019 900A APPEL, MICHELLE FRIE P-32709	CRM
1	MISCELLANEOUS ACTION OPERAT INTOX	CRM
	ADJOURNED FOR JURY-TRIAL 052419 900A APPEL, MICHELLE FRIE P-32709	CRM
	ADJ PER CRT	CRM
1	NOTICE TO APPEAR GENERATED	

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OPERAT INTOX CRM

04/12/19
 PPL'S PRETRIAL MOTION TO DECLARE THAT RESULTS OF 120 DAY TESTS,AS REFLECTED IN DATAMASTER LOGS,ARE NONTESTIMONAL,AND ADMISSIBLE PURSUANT TO MRE 803 FILED CRM
 CRM
 CRM
 CRM

04/15/19
 PER MFA/KC-DEF'S RESP. TO PPL'S MOTION IS DUE 5/3/19 AND SET HEARING 5/7/19 @3PM CRM
 CRM
 MISCELLANEOUS ACTION ALL COUNTS CRM
 ADJOURNED FOR MOTION HEARING
 050719 300P APPEL,MICHELLE FRIE P-32709 CRM
 NOTICE TO APPEAR GENERATED
 ALL COUNTS CRM

04/22/19
 1 MISCELLANEOUS ACTION OPERAT INTOX CRM
 REMOVED FROM DOCKET 050719 300P APPEL,MICHELLE FRIE P-32709 CRM
 ADJOURNED FOR MOTION HEARING
 050719 1100A APPEL,MICHELLE FRIE P-32709 CRM
 ADJ PER KC CRM
 1 NOTICE TO APPEAR GENERATED
 OPERAT INTOX CRM

05/02/19
 DEF'S RESP TO PPL'S PRETRIAL MOTION CRM
 FILED CRM
 FWD FILE TO MFA TO REVIEW CRM

05/07/19
 HEARING ON MOTION HELD ALL COUNTS CRM

NAME: FONTENOT/ALTON/JR CASE NO: 1700391SP PAGE 5

DATE	ACTIONS, JUDGMENTS, CASE NOTES	INITIALS
	JDG APPEL,MICHELLE FRIE	P-32709 CRM
	PROS.MOTION TO ALLOW 120 DAY TEST	CRM
	NONTESTIMONIAL PURSUANT TO MRE 803(6)	CRM
	IS DENIED. MOTION TO STAY GRANTED TO ALLOW	CRM
	APPEAL. JURY TRIAL ADJ.	CRM
05/09/19	MISCELLANEOUS ACTION ALL COUNTS	CRM
	REMOVED FROM DOCKET 052419 900A APPEL,MICHELLE FRIE P-32709	CRM
	ADJOURNED FOR REVIEW 053019 500P APPEL,MICHELLE FRIE P-32709	CRM
05/15/19	COPIES OF DATAMASTER LOGS PPL SEEK TO	CRM

ADMIT AT TRIAL FILED. CRM

06/04/19

1 NOTICE OF NON-COMPLIANCE OPERAT INTOX

06/05/19

MISCELLANEOUS ACTION ALL COUNTS CRM

REMOVED FROM DOCKET 053019 500P APPEL,MICHELLE FRIE P-32709 CRM

ADJOURNED FOR REVIEW 062619 500P APPEL,MICHELLE FRIE P-32709 CRM

NNC NOT MAILED CRM

NNC STOPPED CRM

MISCELLANEOUS ACTION ALL COUNTS CRM

ELIGIBLE - NNC CRM

06/25/19

ORDER RE:STAY OF APPEAL FILED CRM

ORDER SIGNED BY MFA AND TRUE COPIES GIVEN CRM

TO PROS. CRM

1 MISCELLANEOUS ACTION OPERAT INTOX CRM

JDG APPEL,MICHELLE FRIE P-32709 CRM

ORDER TO STAY PROCEEDINGS CRM

06/26/19

1 MISCELLANEOUS ACTION OPERAT INTOX CRM

REMOVED FROM DOCKET 062619 500P APPEL,MICHELLE FRIE P-32709 CRM

09/30/19

T/C DEF SAID SOS WONT RENEW LIC. ADV SPK TMS

W/ATTY TMS

1 MISCELLANEOUS ACTION OPERAT INTOX CRM

ADJOURNED FOR HEARING 100319 500P APPEL,MICHELLE FRIE P-32709 CRM

1 MISCELLANEOUS ACTION OPERAT INTOX CRM

REMOVED FROM DOCKET 100319 500P APPEL,MICHELLE FRIE P-32709 CRM

ADJOURNED FOR REVIEW 100319 500P APPEL,MICHELLE FRIE P-32709 CRM

10/18/19

MISCELLANEOUS ACTION ALL COUNTS CRM

REMOVED FROM DOCKET 100319 500P APPEL,MICHELLE FRIE P-32709 CRM

ADJOURNED FOR REVIEW 121819 500P APPEL,MICHELLE FRIE P-32709 CRM

12/19/19

1 MONETARY TRANSACTION OPERAT INTOX TMS

APPEAL FEES \$ 25.00 TMS

PAYMENT \$ 25.00 D314492 TMS

1 CHECK TENDERED 2376 TMS

12/20/19

MAILED CERTIFICATE OF RECORD TRANSMITTED CRM

FOR APPEAL AND COPY OF FILE TO CRT OF CRM

APPEALS. CRM

NAME: FONTENOT/ALTON/JR

CASE NO: 1700391SP


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DATE	ACTIONS, JUDGMENTS, CASE NOTES	INITIALS
09/21/20	MISCELLANEOUS ACTION ALL COUNTS	TAK
	ADJOURNED FOR PRE-TRIAL 101520 140P APPEL, MICHELLE FRIE P-32709	TAK
	DT PICKED BY PROS LOUIE MEIZLISH AND ATTY SHARON	TAK
09/22/20	NOTICE TO APPEAR GENERATED ALL COUNTS	TAK
10/15/20	PROCEEDING HEARD ALL COUNTS	WEB
	JDG APPEL, MICHELLE FRIE P-32709	WEB
	ADJOURNED FOR REVIEW 123020 500P GUBOW, DAVID M., P-24778	WEB
	PLEA OFFER REJECTED - DEF TO PROCEED WITH APPEAL - FILE AT CRM DESK	WEB
11/12/20	NOTICE OF LILING RECEIVED	JMG
12/15/20	REMOVED FROM DOCKET 123020- 500P GUBOW, DAVID M., P-24778	WEB
	ADJOURNED FOR REVIEW 022621- 500P POWELL HOROWITZ, JAI P-67466	WEB
02/25/21	REMOVED FROM DOCKET 022621- 500P POWELL HOROWITZ, JAI P-67466	WEB
	ADJOURNED FOR REVIEW 043021- 500P POWELL HOROWITZ, JAI P-67466	WEB
04/19/21	REMOVED FROM DOCKET 043021- 500P POWELL HOROWITZ, JAI P-67466	WEB
	ADJOURNED FOR REVIEW 063021- 500P POWELL HOROWITZ, JAI P-67466	WEB
06/28/21	REMOVED FROM DOCKET 063021- 500P POWELL HOROWITZ, JAI P-67466	WEB
	ADJOURNED FOR REVIEW 073021- 500P POWELL HOROWITZ, JAI P-67466	WEB
07/20/21	REMOVED FROM DOCKET 073021- 500P POWELL HOROWITZ, JAI P-67466	WEB
	ADJOURNED FOR REVIEW 100121- 500P POWELL HOROWITZ, JAI P-67466	WEB
09/28/21	REMOVED FROM DOCKET 100121- 500P POWELL HOROWITZ, JAI P-67466	WEB
	ADJOURNED FOR REVIEW 121721- 500P POWELL HOROWITZ, JAI P-67466	WEB
***** END OF REGISTER OF ACTIONS ***** 10/12/21 16:09		

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Case Number

2019-175232-AR

Entitlement

PEOPLE vs. FONTENOT ALTON JR

Judge Name

NANCI J. GRANT

Case E-Filed

YES

Case Filed

07/15/2019

Case Disposed

08/12/2019

Date	Code	Desc
09/10/2020	ORD	ORDER FILED COA
09/10/2020	ORD	ORDER FILED COA
12/17/2019	NTC	NOTICE FILED FILING APPLICATION LV TO APPEAL
12/17/2019	POS	AFFIDAVIT/PROOF OF SERVICE FILED
12/17/2019	MPS	MIFILE PROOF OF SERVICE FILED
12/11/2019	SEN	SENT TO COA/FTP/JM
12/10/2019	NTC	NOTICE FILED REQ FOR FILE COA
09/27/2019	ORD	ORDER FILED COA
09/16/2019		ORDER RET TO 45B DIST CT/HW
08/12/2019	M	MOTION INTERLOCUTORY APP FOR LEAVE DENIED
08/12/2019	FCO	FINAL COURT DISMISSAL
08/12/2019	ORD	ORDER FILED DENY PEOPLE APPEAL
08/05/2019	MPS	MIFILE PROOF OF SERVICE FILED
08/05/2019	RES	RESPONSE FILED TO APPLICATION LV APPEAL/DFT
08/05/2019	OTH	APPENDICES TO RES TO APPLICATN LV APPEAL FILED

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Date	Code	Desc
08/05/2019	MPS	MIFILE PROOF OF SERVICE FILED
07/15/2019	CA	CLAIM OF APPEAL FILED 45TH DC/PEOPLE
07/15/2019	MPS	MIFILE PROOF OF SERVICE FILED
07/15/2019	POS	AFFIDAVIT/PROOF OF SERVICE FILED

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COA 350391 MSC 162211

PEOPLE OF MI V ALTON FONTENOT JR

Lower Court/Tribunal

OAKLAND CIRCUIT COURT

Judge(s)

GRANT NANCI J



Docket

Case Documents

Case Information



Case Header

Case Number

COA #350391

MSC #162211

Case Status

MSC Pending on Application

COA Case Concluded; File Open

Published Case Citation(s)

333 Mich App 528

Parties & Attorneys to the Case – Court of Appeals

1

PEOPLE OF MI

Plaintiff - Appellant

Attorney(s)

MEIZLISH LOUIS F

#75168, Prosecutor

2

FONTENOT ALTON JR

Defendant - Appellee

Attorney(s)

SHARON ALONA

#68782, Appointed

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Parties & Attorneys to the Case – Supreme Court

1

PEOPLE OF MI

Plaintiff

Attorney(s)

Louis F. Meizlish

#75168

2

FONTENOT ALTON JR

Defendant

Attorney(s)

Alona Sharon

#68782

3

NATIONAL COLLEGE FOR DUI DEFENSE

Amicus Curiae

Attorney(s)

Michael J. Nichols

#59391

4

CDAM

Amicus Curiae

Attorney(s)

Michael J. Nichols
#59391

5

MI ASSN OF OWI ATTORNEYS

Amicus Curiae

Attorney(s)

Alyssa McCormick
#82522

David A. Rudoi
#75169

Michael Komorn
#47970

COLLAPSE ALL

EXPAND ALL

08/28/2019	1 App for Leave to Appeal - Criminal	+
08/12/2019	2 Order Appealed From	+
08/28/2019	3 Transcript Filed By Party	+
08/28/2019	4 Transcript Filed By Party	+
08/28/2019	5 Correspondence Sent	+
09/03/2019	6 Answer - Application	+

09/13/2019	7 Reply to Answer - Application	+
09/24/2019	10 Submitted on Motion Docket	+
09/25/2019	11 Order: Application - Grant	+
09/25/2019	12 Transcript Complete Per COA Atty	+
10/09/2019	13 Correspondence Received	+
10/22/2019	14 Brief: Appellant	+
11/05/2019	15 Motion: Extend Time - Appellee	+
11/12/2019	16 Submitted on Administrative Motion Docket	+
11/14/2019	17 Order: Extend Time - Appellee Brief - Grant	+
12/09/2019	18 Brief: Appellee	+
12/09/2019	19 Noticed	+
12/12/2019	20 Electronic Record Filed	+
12/17/2019	24 Email Contact	+
12/17/2019	25 Email Contact	+
12/17/2019	26 Proof of Service - Record on Appeal	+
12/30/2019	27 Record Filed - Supplemental	+
12/30/2019	30 Brief: Reply	+

12/30/2019	31 Correspondence Received	+
01/21/2020	36 Copy Request Fulfilled	+
01/21/2020	37 Motion: Motion	+
01/21/2020	43 Brief: Appendices in Support of Brief	+
01/23/2020	39 Answer - Motion	+
01/28/2020	40 Submitted on Administrative Motion Docket	+
01/29/2020	42 Order: Grant - Generic	+
04/14/2020	44 Submitted on Case Call	+
09/10/2020	50 Opinion - Authored - Published	+
09/10/2020	51 Opinion - Dissent	+
11/05/2020	52 Application for Leave to SCT	+
11/05/2020	53 Other	+
11/10/2020	54 Supreme Court Motion: Miscellaneous	+
11/10/2020	55 Supreme Court Motion: Remand to Tr Ct	+
11/11/2020	56 Supreme Court Motion: Amicus - Leave Application	+
11/16/2020	57 Supreme Court Order: Chief Justice - Grant	+
11/24/2020	58 Supreme Court Motion: Housekeeping	+

11/25/2020	59 Supreme Court Order: Chief Justice - Grant	+
12/02/2020	60 Supreme Court: Amicus Curiae Brf - SCt Application/Complaint	+
12/04/2020	61 Supreme Court Motion: Amicus - Leave Application	+
12/08/2020	62 Supreme Court Order: Chief Justice - Grant	+
12/28/2020	63 Supreme Court: Amicus Curiae Brf - SCt Application/Complaint	+
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09/27/2021	67 Michigan Appeals Reports Publication	+

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EVIDENTIAL BREATH TESTING ACCURACY CHECK LOG

AUTHORITY: Michigan Administrative Rule 325.2653; COMPLIANCE: Mandatory; PENALTY: Failure to comply may result in breath alcohol analysis results being inadmissible in court or other proceedings.

Instrument Location <i>MSP MOUTH</i>	Instrument Number <i>300257</i>	
ORI Number <i>MI 6302100</i>	Month <i>9</i>	Year <i>17</i>
Dry Gas Alcohol Standard Lot Number / Expiration Date <i>814177 17-23-20</i>		

Accurate Test Results Shall Be: (1) Wet Bath = .076 to .084 Inclusive or (2) Dry Gas = Within Five Percent of the Target or Correction Factor

Day	Operation Performed	Target	External Standard	Operator ORI Number	Certification Number	Signature
<i>4</i>	<i>ACCURACY CHECK TEST</i>	<i>.0780</i>	<i>.0760</i>	<i>MI 6302100</i>	<i>22145</i>	<i>[Signature] #391</i>
<i>4</i>	<i>accuracy and certiv that it is in proper working order</i> <i>Mohammed Ghan</i>	<i>.080</i>	<i>.080</i>	<i>MI</i>	<i>99998</i>	<i>[Signature] Guth .080 lot 16180 B-1-18</i>
<i>11</i>	<i>ACCURACY CHECK TEST</i>	<i>.0792</i>	<i>.0788</i>	<i>MI 6302100</i>	<i>22145</i>	<i>[Signature] #391</i>
<i>18</i>	<i>ACCURACY CHECK TEST</i>	<i>.0784</i>	<i>.0786</i>	<i>MI 6302100</i>	<i>22145</i>	<i>[Signature] #391</i>
<i>25</i>	<i>ACCURACY CHECK TEST</i>	<i>.0785</i>	<i>.0785</i>	<i>MI 6302100</i>	<i>22145</i>	<i>[Signature] #391</i>
Day	Operation Performed	Target	External Standard	Operator ORI Number	Certification Number	Signature
				<i>MI</i>		
Day	Operation Performed	Target	External Standard	Operator ORI Number	Certification Number	Signature
				<i>MI</i>		
Day	Operation Performed	Target	External Standard	Operator ORI Number	Certification Number	Signature
				<i>MI</i>		

Supervisor/Designee Signature <i>[Signature] #391</i>	Date <i>09/25/2017</i>
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EVIDENTIAL BREATH TESTING ACCURACY CHECK LOG

AUTHORITY: Michigan Administrative Rule 325.2653; COMPLIANCE: Mandatory; PENALTY: Failure to comply may result in breath alcohol analysis results being inadmissible in court or other proceedings.

Instrument Location METRO NORTH MICHIGAN STATE POLICE	Instrument Number 300357	
ORI Number MI 6302100	Month 10	Year 17
Dry Gas Alcohol Standard Lot Number / Expiration Date 814177 '07/23/2020		

Accurate Test Results Shall Be: (1) Wet Bath = .076 to .084 Inclusive or (2) Dry Gas = Within Five Percent of the Target or Correction Factor

Day	Operation Performed	Target	External Standard	Operator ORI Number	Certification Number	Signature
2	ACCURACY CHECK TEST	.0789	.0789	MI 6302100	22145	[Signature] #391
9	ACCURACY CHECK TEST	.0777	.0772	MI 6302100	22145	[Signature] #391
16	ACCURACY CHECK TEST	.0788	.0786	MI 6302100	22145	[Signature] #391
23	ACCURACY CHECK TEST	.0782	.0776	MI 6302100	22145	[Signature] #391
30	ACCURACY CHECK TEST	.0773	.0770	MI 6302100	22145	[Signature] #391
Day	Operation Performed	Target	External Standard	Operator ORI Number MI	Certification Number	Signature
Day	Operation Performed	Target	External Standard	Operator ORI Number MI	Certification Number	Signature
Day	Operation Performed	Target	External Standard	Operator ORI Number MI	Certification Number	Signature

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Supervisor/Designee Signature [Signature] #391	Date 10/30/2017
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EVIDENTIAL BREATH TESTING ACCURACY CHECK LOG

AUTHORITY: Michigan Administrative Rule 325.2653; COMPLIANCE: Mandatory; PENALTY: Failure to comply may result in breath alcohol analysis results being inadmissible in court or other proceedings.

Instrument Location MISTRO NORTH MICHIGAN STATE POLICE	Instrument Number 300357	
ORI Number MI 6302100	Month 11	Year 17
Dry Gas Alcohol Standard Lot Number / Expiration Date 814177 / 07-23-2020		

Accurate Test Results Shall Be: (1) Wet Bath = .076 to .084 Inclusive or (2) Dry Gas = Within Five Percent of the Target or Correction Factor

Day	Operation Performed	Target	External Standard	Operator ORI Number	Certification Number	Signature
6	ACCURACY CHECK TEST	.0781	.0774	MI 6302100	22145	[Signature] #391
13	ACCURACY CHECK TEST	.0792	.0786	MI 6302100	22145	[Signature] #391
20	ACCURACY CHECK TEST	.0783	.0777	MI 6302100	22145	[Signature] #391
27	ACCURACY CHECK TEST	.0784	.0777	MI 6302100	22145	[Signature] #391
Day	Operation Performed	Target	External Standard	Operator ORI Number MI	Certification Number	Signature
Day	Operation Performed	Target	External Standard	Operator ORI Number MI	Certification Number	Signature
Day	Operation Performed	Target	External Standard	Operator ORI Number MI	Certification Number	Signature
Day	Operation Performed	Target	External Standard	Operator ORI Number MI	Certification Number	Signature
Supervisor/Designee Signature [Signature] #391					Date 11-27-2017	

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EVIDENTIAL BREATH TESTING ACCURACY CHECK LOG

AUTHORITY: Michigan Administrative Rule 325.2653; COMPLIANCE: Mandatory; PENALTY: Failure to comply may result in breath alcohol analysis results being inadmissible in court or other proceedings.

Instrument Location METRO NORTH MICHIGAN STATE POLICE	Instrument Number 300357
ORI Number MI 6302100	Month 12 Year 17
Dry Gas Alcohol Standard Lot Number / Expiration Date 814177 / 07-23-2020	

Accurate Test Results Shall Be: (1) Wet Bath = .076 to .084 Inclusive or (2) Dry Gas = Within Five Percent of the Target or Correction Factor

Day	Operation Performed	Target	External Standard	Operator ORI Number	Certification Number	Signature
4	ACCURACY CHECK TEST	.0788	.0779	MI 6302100	22145	#391
11	ACCURACY CHECK TEST	.0784	.0772	MI 6302100	22145	#391
18	ACCURACY CHECK TEST	.0782	.0778	MI 6302100	22145	#391
25	ACCURACY CHECK TEST	.0781	.0776	MI 6302100	22145	#391
30	<small>accuracy and certify that it is a proper working instrument Manufacturer's Authorized Representative</small> Operation Performed #391	.080	.078	MI	99998	#391 <small>with 080 lot 1618 8-1-18</small>
Day	Operation Performed	Target	External Standard	Operator ORI Number MI	Certification Number	Signature
Day	Operation Performed	Target	External Standard	Operator ORI Number MI	Certification Number	Signature
Day	Operation Performed	Target	External Standard	Operator ORI Number MI	Certification Number	Signature
Supervisor/Designee Signature #391					Date 12/31/2017	

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STATE OF MICHIGAN

45TH JUDICIAL DISTRICT, COUNTY OF OAKLAND

THE PEOPLE OF THE STATE OF MICHIGAN,

V

District No. 1700391SP

ALTON FONTENOT,

Defendant.

_____ /

MOTION HEARING

BEFORE THE HONORABLE MICHELLE FRIEDMAN APPEL, (P32709)
13600 OAK PARK BOULEVARD, OAK PARK, MICHIGAN 48237
On Tuesday, May 7, 2019

APPEARANCES:

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Oak Park, Michigan

Tuesday, May 7, 2019 - 11:13 a.m.

- - -

THE COURT: Calling 17-00391, Alton Fontenot.

MR. MCINTYRE: Jack McIntyre appearing on behalf of the People. Good morning, Your Honor.

MS. SHARON: Good morning, Your Honor. Alona Sharon on behalf of Mr. Fontenot. Your Honor --

THE COURT: Fontenot.

MS. SHARON: -- it's okay. Um, Your Honor, I spoke with, ah, Kasey this morning and indicated -- and the Court indicated that, ah, Mr. Fontenot did not have to appear.

THE COURT: I --

MS. SHARON: So I would waive his appearance for argument this morning.

THE COURT: I agree.

MS. SHARON: Thank you, Your Honor.

THE COURT: So today is the date and time set for a motion brought by the prosecutor to, um, declare the testimony of Dr. Gier as non-testimonial therefore, not requiring his presence. Is that an accurate --

MS. SHARON: He is not deserving of the title doctor. No offense to Mr. Gier.

THE COURT: Well Mr. Gier.

MS. SHARON: Yeah.

1 THE COURT: Okay. Other than the misstatement of
2 his, um, title. But that summarizes what the issue is here
3 today?

4 MR. MCINTYRE: Yes, Your Honor. There, well, there
5 was also the issue of whether the, the logs were admissible as
6 business records.

7 THE COURT: Correct.

8 MR. MCINTYRE: Including the 120 day portion of the
9 (inaudible) but, yes.

10 THE COURT: Correct. Okay. But there were two
11 arguments in reference to it. Okay.

12 MS. SHARON: That's correct.

13 THE COURT: I've read the briefs. Would you like --
14 anything you'd like to say?

15 MR. MCINTYRE: Yes, Your Honor. I, I won't go long
16 but I, I did want to mention a couple of things, um, cause I
17 didn't have a chance to respond in writing to, ah, defense
18 counsel's brief. Um, I, I first of all wanted to, to briefly,
19 ah, address the Court of Appeals case in, um, *People vs.*
20 *Nunley*. Um, I of course cited, um, the Michigan Supreme Court
21 case but in the Court of Appeals case the citation is 294
22 *Mich. App. 274*. That's a 2011 case. Um, there they found
23 that the certificate of mailing at issue in *Nunley* was made
24 under circumstances which would lead an objective witness to
25 believe the statement would be available for use later at

1 trial. That's quoting language from *Melendez-Diaz*. They
2 also, um, said it was not created, ah, due to a legal
3 obligation but to -- not created due to a legal obligation to
4 maintain records but for trial use. Um, the Court of Appeals
5 relied heavily on *Melendez-Diaz* in deciding that case and I, I
6 believe if you look at the Court of Appeals case you'll see
7 that the reasoning defense counsel uses in her brief is highly
8 analogous to the reasoning that the Court of Appeals used when
9 deciding *Nunley*. Um, but of course the Court of Appeals was
10 overturned. The Michigan Supreme Court rejected that same
11 reasoning when they decided the Supreme Court case, *People vs.*
12 *Nunley*, ah, on the grounds that, I'm going to go through a few
13 of these factors. The certificate of mailing was routine.
14 Likewise the 120 day test is obviously routine. It happens
15 one hundred -- every 120 days. Um, the, ah, certificate of
16 mailing was to comply with the statute. Likewise, ah, the
17 certificate -- I'm sorry. The 120 test is to comply with the
18 administrative rule requiring performance of that test. Um,
19 the mailing was conducted in a, in the regular course of
20 business. Likewise, 120 day test, regular course of business,
21 um, the mailing, ah, certificate of mailing was created, ah,
22 was properly within the prevue of the agency. Same with 120
23 day test, the agency being Michigan State Police and its
24 agent, the National Patent Analytical Systems which is the,
25 um, company Marv Gier works for. It was created before the

1 crime was committed, that's the certificate of mailing. The
2 120 day test was done before the crime was committed and the,
3 the Court relied heavily on that factor. Before the crime was
4 committed. The first 120 day test was before the crime was
5 committed, um, and the second one, while after the crime was
6 committed, in no way depended on the defendant being charged.
7 Ah, it would have been done and would have yielded the same
8 results regardless of whether the defendant was ever charged
9 or, um, or tested on the machine. And then finally, within
10 the authorized use of the agency, independent of any
11 investigative or prosecutorial purpose. The company Marv Gier
12 works for, National Patent Analytical System is, is not in the
13 business of prosecuting people and those tests are done
14 regardless of whether anybody is prosecuted. Um, so for all
15 those reasons, Your Honor, and that's outlined in the brief,
16 um, based on the reasoning in *Nunley*, the 120 test is non-
17 testimonial. Um, I would also point out that the cases
18 defense cites are not applicable. *Melendez-Diaz* is clearly
19 and obviously distinguishable from the case, ah, from the
20 issue before the Court here. *Melendez-Diaz*, ah, addressed
21 whether a drug test of drugs actually found in defendant's
22 possession, um, was cocaine or not. That's what the, the
23 test, ah, addressed. In other words is analogous to the
24 breath test that was performed on defendant's breath to
25 determine the, the breath alcohol content of defendant at that

1 time. It's indisputable that that would be testimonial. If
2 the People attempted to admit the results of the lab test on
3 defendant without the, ah, without the trooper who performed
4 that test, that would conflict with *Melendez-Diaz* and would
5 violate defendant's confrontation rights. *Melendez-Diaz* did
6 not decide the issue if another test used to calibrate the
7 machine that was used to test the cocaine was testimonial.
8 That was not at issue in *Melendez-Diaz* at all. *Melendez-Diaz*
9 is not in any respect whatsoever applicable to this case.
10 Same thing with *Bullcoming*. *Bullcoming* addressed the issue of
11 an alcohol test performed on that defendant's blood. The test
12 at issue in this case was not performed on defendant's breath
13 or have anything to do directly with defendant. And then
14 there's *Fackelman* which again was a, a psychiatric report that
15 was performed on defendant, not calibrating something or
16 whatever. Um, and finally in the, um, Appendix A that defense
17 counsel attached to her brief there was testimony about a wet
18 bath solution that Mr. Gier used to, ah, perform the 120 test
19 and there was testimony that was not objected to, from Mr.
20 Gier, that the concentration of that wet bath solution was
21 such that it would yield a 0.08 if the Datamaster instrument
22 was functioning properly. That's how he tests it is he runs
23 the wet bath solution through the Datamaster and sees if he
24 gets the result he's expecting. Now if we take defense's
25 reasoning that also is testimonial. The testimony about the

1 concentration of alcohol in the wet bath sample used to, um,
2 test the Datamaster, that would be testimonial because the
3 only way to know for a fact that that concentration is
4 accurate is through a lab test. And apparently defense is
5 arguing that all lab tests are testimonial if they pertain to
6 this case. So that would mean we have to bring in the person
7 who manufactured that wet bath canister as well as Mr. Gier
8 because that would be testimonial too and if we take
9 *Bullcoming* we couldn't even bring in a representative from the
10 company, we would have to bring in the person who manufactured
11 that specific canister and if for example the 220 (sic) day
12 test were different canisters, we'd have to bring in both
13 people for each canister. This was not objected to in the
14 previous trial and the reason I believe it was not objected to
15 is because if you carry defense's position to its logical
16 conclusion, it's absolutely unworkable. It just, it, and it,
17 it -- there's no case law to support it, um, and for those
18 reasons the People are respectfully asking the Court to hold
19 that the, ah, 120 day test, ah, evidence of the 120 day test
20 is non-testimonial. Um, I won't mention the, um, I have no
21 argument regarding the, um, --

22 THE COURT: Business records?

23 MR. MCINTYRE: -- business record at this time, Your
24 Honor. I reserve any further argument for rebuttal.

25 MS. SHARON: Thank you.

1 THE COURT: Response.

2 MS. SHARON: Um, so I think there's kind of a lot
3 there to respond to that I don't necessarily have that much
4 notice of but I'll do my best, Your Honor. Um, I guess first
5 to deal with the issue of this *Nunley* case and the arguments
6 and trying to distinguish it from *Melendez-Diaz* and, and
7 specifically Mr. Fontenot's case and the facts that we're
8 dealing with, Your Honor, is, um, a certificate of mailing,
9 Your Honor, requires no analysis, ah, that no analysis
10 happened by a witness whereas in this case Mr. Gier, which the
11 Court is very familiar with previous testimony that's given in
12 other cases and, and specifically what he does in the 120 day
13 test, his job is not to, ah, generate a notice of mailing but
14 his job is that of, um, engaging in testing in an instrument
15 that the results of which are then used to prosecute citizens.
16 So that is a very important distinction. This isn't just a
17 notice of mailing, this is a man who conducts, um, a series of
18 ten tests on a machine, the results of which are then used in
19 criminal prosecutions. So that is an incredibly important,
20 um, distinction between *Nunley* and this case and what makes
21 this case more similar to *Melendez-Diaz* and *Bullcoming*. But,
22 um, also, Your Honor, what's important is that it's, it's
23 Michigan case law that requires the prosecution to establish
24 that the Datamaster is reliable and that's under *People v.*
25 *Tipolt*. Right, *Tipolt* gives us four basis, um, that the

1 prosecutions has to meet. I think it's the third one that's
2 been overturned, but the one that's, one of the, ah, three
3 that still remains is that the machine, um, be proven to be
4 reliable. How is that reliability, um, demonstrated? One,
5 that it goes through this every week test and I don't object,
6 I don't argue that the logs, ah, that record the, the every
7 seven day test, those are not testimonial. Those are a
8 business record. The issue becomes when you're inserting this
9 stamp from Marvin Gier, who is not an employee of the Michigan
10 State Police, and I, I would just note that this makes, um,
11 Mr. McIntyre's argument sort of very contentious because he's
12 trying to argue, first of all, for two different agencies.
13 You have the Michigan State Police and then you have the
14 company that owns the Datamasters. You're much better at the
15 name of the company than I am. I can never remember it. Um,
16 of course now the company's changed but they are not the same
17 agency. They are two entirely separate companies and yet you
18 have Marv Gier who's a third party, inserting information into
19 the business record of the Michigan State Police. And, and
20 that's what really causes a problem for the prosecution, um,
21 in part with the argument that that logs are, um, a business
22 record and I did cite some law to that argument, Your Honor.
23 But you have a gentleman who's coming, who is running analysis
24 on this machine so that a conclusion can be reached that the
25 machine is calibrated and therefore reliable, which is a

1 necessary foundational element to the admission of the test
2 results which is necessary to the prosecution of defendants.
3 So there is very much a distinction between *Nunley* and, um,
4 this case and a similarity between this case and *Melendez-*
5 *Diaz*. So is it exactly the same? Is it that you're trying to
6 prove that Mr. Fontenot had drugs on him? No. Is it similar
7 in the sense that without being able to prove the reliability
8 of the machine then the prosecution can't get in the analysis
9 of the breath? That is critical. And if you look also, Your
10 Honor, at the, um, the language that I cite from *Fackelman*
11 which is a Michigan Supreme Court case, that case discusses ad
12 nauseam this requirement of what the primary purpose is of
13 something and in *Fackelman*, at the very end of its, um,
14 decision, Your Honor, talks about, you know, this, this
15 concentration of what is the primary purpose of a document is
16 really misplaced when you're talking about what is a
17 defendant's confrontation clause rights. And if you look at
18 the block quote at page five, the *Fackelman* court says, the
19 confrontation clause of the sixth amendment of the United
20 States reads, in all criminal prosecutions the accused shall
21 enjoy the right to be confronted with the witnesses against
22 him. By its straightforward terms, the confrontation clause
23 directs inquiry into two questions. Does the person in
24 controversy comprise a witness against the accused under the
25 confrontation clause and if so has the accused been afforded

1 an opportunity to confront that witness against, um, under the
2 confrontation clause. If Marv Gier's entire role is to ensure
3 the reliability and calibration of the machine, how can he be
4 said to not be a witness against a defendant in an operating
5 while intoxicated case. Without him you don't have the
6 reliability of the machine and therefore you don't have the
7 admissibility of those results. And I think when you look at
8 that, um, language from *Fackelman*, it's impossible to reach
9 the conclusion that Marv Gier isn't a witness against a
10 defendant in an operating while intoxicated case. And I think
11 also when you look at the language, um, that I cited from
12 *Melendez-Diaz* it is only through the confrontation clause
13 right that a defendant can, um, confront or essentially
14 question the work of an analyst. And that is what Gier is.
15 He is not, he is not, ah, Trooper Whitcomb, I think in this
16 case or in other cases I've had, he's not just pulling a
17 ticket from a machine and putting the results in the log like
18 the every seven day test. He is actually running tests, ah,
19 running analysis on that machine and then reaching a
20 conclusion that the machine is calibrated and so to the extent
21 his work is similar to the analysts in *Melendez-Diaz* and
22 *Bullcoming*. And the only way the defendant can challenge his
23 work on the 120 test is by way of confrontation, Your Honor.
24 Um, I think I've explained also why his, um, entries into the
25 logs are not covered by, um, the business record exception.

1 If the Court wants me to talk about that a little bit more.
2 But I do think it was interesting that the prosecution in its
3 brief argued that Trooper Whitcomb would be able to testify at
4 trial that the entries into the logs regarding each test are
5 made at or near, um, the time the test is conducted. I think
6 that's entirely false because I can say from my personal
7 experience, um, those who keep the logs are almost never
8 present when Marv Gier conducts his test. So the trooper
9 would never be able to testify that the stamp is placed at the
10 same time that the 120 day test. I think it's certainly an
11 educated guess but he certainly wouldn't have any foundation,
12 um, Your Honor, for that testimony. So, um, that's all, Your
13 Honor. Thank you.

14 THE COURT: Response.

15 MR. MCINTYRE: Yes, Your Honor. Thank you. Um, I
16 first want to address this issue of Marv Gier being an
17 analyst. Um, I am not aware of any case law that says whether
18 or not a person is an analyst, ah, affects whether there are
19 confrontation rights. But regardless, um, the certificate of
20 mailing, the person who generates that certificate of mailing,
21 certainly could be fruitfully crossed and, um, it might have
22 a, major effect on the outcome of the case. Was, was this,
23 was there a mistake made in the mailing, was it sent to the
24 right address, when was it sent, what are the procedures that
25 you follow in ensuring that the, um, defendant got notice of

1 this mailing. That -- the fact that it could be fruitfully
2 crossed didn't change the outcome in *Nunley*. Um, and likewise
3 it shouldn't change the outcome in this case. Um, regard -- I
4 would also point out, um, defense just said that the only way
5 to challenge him is, ah, through the confrontation right which
6 is factually not true. She has subpoena power just like I do,
7 if she wants to call Mr. Gier as a defense witness she has
8 every right to do that. Um, finally regarding confrontation,
9 um, the, the language defendant quoted from *Fackelman*, um, is
10 very broad. We have much more specific analysis of an
11 analogous issue in *Nunley*, ah, and I would encourage the Court
12 to rely on that much more specific set of criteria in deciding
13 this case. Ah, in regard to the business records, um, first I
14 believe defense is mistaken when she says that the People need
15 to prove the reliability of the instrument through admissible
16 evidence. She didn't say that but implicitly she's saying
17 that the reliability must be proven through admissible
18 evidence. I would argue that that's not true. Pursuant to
19 Michigan Rule of Evidence 104(a), ah, the reliability of the
20 instrument in regard to, um, whether the result is admissible
21 is a threshold issue of admissibility to be decided without
22 the rules of evidence applying. So I could make that showing
23 to the Court that the, ah, appropriate, um, administrative
24 rules were complied with, um, it doesn't have to be admissible
25 evidence. I could make the showing to the Court, the Court

1 could decide that it's admissible and the People could then
2 present the evidence. All right. This is a, a conflation of
3 two issues. Whether it's admissible and whether, ah, whether
4 the result is admissible and whether the evidence making it
5 admissible must be admissible. Those are two different --
6 does that make sense, Your Honor? In other words --

7 THE COURT: Maybe not. Okay.

8 MR. MCINTYRE: A threshold --

9 THE COURT: So 104 --

10 MR. MCINTYRE: 104(a) means a threshold at issue of
11 admissibility. Whether or not evidence is admissible is to be
12 decided by the Court and in making that decision, the Court
13 need not rely only on admissible evidence. So even assuming
14 for the sake of argument --

15 THE COURT: So you're saying that the logs create
16 the reliability that would make it admissible under 104?

17 MR. MCINTYRE: Yeah. So even assuming for the sake,
18 even assuming for the sake of argument that the --

19 THE COURT: Is that what you're saying? Let me just
20 make sure that I understand.

21 MR. MCINTYRE: I'm sorry. Can you repeat what you
22 just said?

23 THE COURT: You agreed with me without hearing what
24 I said? So 104, um, would allow me to find that the, um,
25 testing is relevant and that therefore it's admissible, right?

1 Doesn't --

2 MR. MCINTYRE: And reliable, Your Honor. That it
3 could, it could -- the Court could make a finding that, um,
4 the legal requirement for admission of the Datamaster is met
5 even if that finding is not based on evidence that's
6 admissible at trial.

7 MS. SHARON: May I just interject one point?

8 MR. MCINTYRE: I have no objection.

9 MS. SHARON: Okay. There, there is no authority --
10 while I agree with what Mr. McIntyre is saying that the rule
11 stands for, just because there's a rule of evidence that
12 allows what he's saying, it doesn't flush the confrontation
13 clause down the toilet. So, um, just like we have statutes
14 that allow for the admission of statements in certain domestic
15 violence cases, right, there's a tension between the statute
16 or the rule of evidence and, and a constitutional right that a
17 defendant has so while I may agree that rule 104 stands for
18 what Mr. McIntyre is saying, um, this -- the Court still has
19 to honor and respect a defendant's confrontation clause
20 rights.

21 MR. MCINTYRE: Yeah. I, I certainly don't disagree
22 with that, Your Honor, I was addressing the issue of the
23 business records.

24 THE COURT: Okay.

25 MR. MCINTYRE: And in regard to the business

1 records, the fact that, even assuming for the sake of argument
2 that the stamp was not admissible as a business record, it
3 could still be used to establish the admissibility of the
4 Datamaster result, ah, pursuant to Michigan Rule of Evidence
5 104(a). This is something that's done routinely, the Court
6 looks at all sorts of inadmissible evidence in deciding
7 whether other evidence is admissible.

8 THE COURT: So you're saying that because I'm aware
9 of the process that precedes the stamp that I can find that it
10 is admissible?

11 MR. MCINTYRE: Yes. That's what I'm saying, Your
12 Honor.

13 THE COURT: Okay.

14 MR. MCINTYRE: And the People at an evidentiary
15 hearing or through other routes could present that evidence to
16 the Court even if for the sake of argument it's not admissible
17 for a jury at trial.

18 THE COURT: Okay.

19 MR. MCINTYRE: Um, I'd also just point out in regard
20 to the business records, um, National Patent Analytical System
21 is an agent of the Michigan State Police. They're, they're
22 doing Michigan State Police business for them. They are
23 allowed to, to make business record entries as an agent of
24 Michigan State Police. Um, and in regard to --

25 THE COURT: But based on what?

1 MR. MCINTYRE: Based on how business records work,
2 Your Honor. And I would point out that the cases --

3 MS. SHARON: I think she's asking based on what are
4 they an agent?

5 MR. MCINTYRE: They're -- so the Michigan State
6 Police, ah, --

7 THE COURT: Why aren't they an independent
8 contractor that they hire?

9 MR. MCINTYRE: Well they are, Your Honor, but
10 they're doing business that the Michigan State Police is
11 required to do and they're having another agency --

12 THE COURT: But they're not an employ -- they're not
13 an agency of the state they're --

14 MR. MCINTYRE: They're not an agency of the state
15 but when I say agent, what I mean is --

16 THE COURT: Okay.

17 MR. MCINTYRE: -- they're acting on their behalf to
18 do something that the Michigan State Police --

19 THE COURT: That someone they employ --

20 MR. MCINTYRE: -- is required to do.

21 THE COURT: -- a third party they employ.

22 MR. MCINTYRE: A third party they employ to do their
23 duties. Right. An agent's --

24 THE COURT: Okay. But they're not an agent of the
25 state. They're --

1 MR. MCINTYRE: No. That's not what I mean, Your
2 Honor.

3 THE COURT: Okay.

4 MR. MCINTYRE: They're, they're an agent of -- agent
5 in the sense that one could be an agent of company or, or
6 anything else.

7 THE COURT: Okay.

8 MR. MCINTYRE: Okay. Um, and the case law that
9 defense cites in regard to this issue of, um, business
10 records, um, *Merrow v. Bofferding*, I believe defense's
11 reliance on this case is misplaced. There's nothing in that
12 case about whether a non-employee statement can be used as a
13 business record. That case addresses hearsay within hearsay.
14 That's a case where there are medical records and there are
15 some, ah, hearsay statements within the medical records and
16 the Court held that unless there's another exception that
17 applies to those hearsay records, they're not admissible.

18 THE COURT: Well who provided the hearsay
19 information? Was it an -- someone they employed to do work
20 and collect information?

21 MR. MCINTYRE: No. It was not, Your Honor. It was,
22 ah, it was a patient at the hospital. The patient at the
23 hospital gave a number of statements, um, when he was treated
24 and some of those statements were held to be not admissible,
25 ah, pursuant to medical treatment and also not admissible as

1 business records because there was a hearsay within hearsay
2 problem.

3 THE COURT: Okay.

4 MR. MCINTYRE: Ah, it's not applicable to the
5 instant case. It just doesn't -- there's nothing, I'm not
6 aware of any case law regarding that issue of, ah, non-
7 employees making entry in business records. Also *Woods v.*
8 *City of Chicago*, a federal case from another circuit, in no
9 way binding, and it says nothing of help to defense, defense's
10 case. It's a very broad holding that doesn't address that
11 issue specifically of a non-employee entering, ah, making
12 entries into business records. And finally last point I want
13 to make --

14 THE COURT: But by definition if it's a non-employee
15 does that, doesn't that take it outside the usual course of
16 employ -- of business?

17 MR. MCINTYRE: If they keep it in the, if they keep
18 these records in the ordinary course of business then, no. I
19 don't believe that's true, Your Honor. I believe if, if it
20 meets the other requirements of the rule then it is admissible
21 as a business record and there's nothing in the foundational
22 requirements of a business record regarding whether it's an
23 employee or a non-employee, that, that's just not -- it, it's
24 not an issue I don't think, Your Honor.

25 THE COURT: Okay.

1 MR. MCINTYRE: And finally, um, the, the issue of,
2 um, whether Trooper Whitcomb can lay the foundation for Marvin
3 Gier's entries or when the entries were made, if, if we accept
4 that argument that the person who, um, lays foundation for
5 admission, ah, admission of business records, must be able to
6 authenticate every single individual entry within those
7 records then there is no business record exception. You would
8 have to call every single person who made an entry to, to
9 authenticate the record. It, it negates the business record
10 exception. The point is you need a custodian of the record
11 who need not necessarily be able to testify as to every single
12 entry into the business record. So, ah, nothing further, Your
13 Honor, unless the Court has any questions.

14 THE COURT: Thank you. Anything else?

15 MS. SHARON: Ah, Your Honor, I would just echo the
16 point that even if the Court finds that it's a business
17 record, um, and I still stand firm on the point that because
18 he is outside of the business then by definition it does not
19 qualify as a business record but even if the Court finds that
20 it's a business record you -- the prosecution still has to
21 meet the hurdle of it not being testimonial and not violating
22 the defendant's confrontation clause rights which I think that
23 it can't meet, so.

24 THE COURT: Thank you. Prosecution argues that, um,
25 the testimony or the certification of Mr. Gier is non-

1 testimonial pursuant to MRE 803(6) and analogizes it to the
2 certification of a driving record citing *Nunley*, routine
3 objective cataloging of an unambiguous factual matter
4 documenting that the D.O.S. has undertaken it's statutorily
5 authorized bureaucratic responsibility. Defendant argues that
6 this is forensic analysis that goes to the reliability of the
7 machine. That there is a process involved and not simply a
8 machine generated number and that pursuant to the sixth
9 amendment, um, defendant has the right to confront the
10 witnesses. The Court finds that notice of suspension and the
11 mailing of notice is not analogous to a machine entry, that
12 the entire role of Gier is to establish the reliability of the
13 machine and the defendant has to have the right to confront
14 the work of Mr. Gier. The Court also finds that the nature of
15 the relationship between the company that Gier works for is
16 such that he is coming in from the outside and that this is
17 not a business record. Although the logs themselves are, the
18 certification is subject to confrontation by the defendant and
19 I will sign an order.

20 MR. MCINTYRE: Um, Your Honor, at this time the
21 People are asking the Court to stay this proceeding for leave
22 to appeal.

23 THE COURT: Is this cause you don't want to work on
24 Memorial Day weekend?

25 MR. MCINTYRE: Well, doing a trial in courtroom two

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is also not ideal.

MS. SHARON: I get these cases -- can we go off the record for a second?

THE COURT: Sure.

(At 11:40 a.m., court recessed)

(At 11:42 a.m., court reconvenes)

THE COURT: Court will grant the prosecution's motion with the indication from defense that she has no objection, we were shortly off the record, um, to appeal.

MR. MCINTYRE: Thank you, Your Honor.

MS. SHARON: So you need an order for the stay, don't leave without it cause your appellate prosecutor will be angry.

MR. MCINTYRE: Okay.

MS. SHARON: And, um, --

THE COURT: Oh, I'll -- so I should specifically say I grant the stay to allow --

MS. SHARON: Right. But he needs a --

THE COURT: But I didn't specifically -- I granted the motion to appeal but I did not specifically indicate that I would grant the stay.

MS. SHARON: Right. But you need, ah, he's going to need an order for the Court of Appeals.

COURT REPORTER: Are we done? Off the record?

THE COURT: Are we off the record?

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MS. SHARON: And, um, --

THE COURT: Prosecution motion to -- what was it called, to allow 120 day test pursuant to MRE 803(6) is denied.

MS. SHARON: Your Honor, it was, it was a motion to declare them --

THE COURT: Non-test --

MS. SHARON: -- non-testimonial.

THE COURT: Right.

MS. SHARON: And admissible pursuant to 803(6).

THE COURT: And non-testimonial. Okay. So prosecutor's motion to allow 120 pursuant to MRE 803 and non-test -- and to declare non-testimonial denied. Motion to stay granted to allow appeal. Jury trial adjourned. Okay then.

(At 11:44 a.m., proceedings concluded)

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STATE OF MICHIGAN)
COUNTY OF OAKLAND)

I, Kassandra Ginn, certify that this transcript, consisting of 25 pages, held on Tuesday, May 7, 2019, before the HONORABLE MICHELLE FRIEDMAN APPEL, Chief Judge at the 45th District Court, located at 13600 Oak Park Boulevard, Oak Park, Michigan, 48237, is a complete, true, and correct transcript of the electronic recordings.

6/20/19

Kassandra Ginn

Date

Kassandra Ginn, CER 8822
45th District Court
13600 Oak Park Boulevard
Oak Park, Michigan 48237
(248) 691-7442

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND

PEOPLE

Plaintiff,

V

FONTENOT,ALTON,,JR

Defendant,

NO: 2019-175232-AR

HON. Nanci J. GRANT

ORDER

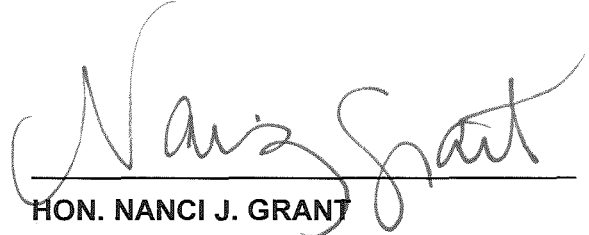
At a session of Court
held in Oakland County, Michigan
on 08/12/2019

THE COURT FINDS:

The matter is before the Court concerning the People's interlocutory application for leave to appeal from the trial court's June 25, 2019 Order, which denied the People's motion in limine. After reviewing the pleadings and the documentary evidence, the Court finds that it is proper to deny the People's interlocutory application for leave to appeal. In so holding, the Court notes that, even assuming without deciding that the statements made by Marvin Gier were nontestimonial, the Court fails to see how it could reverse the trial court's June 25, 2019 Order when the People failed to present evidence before the trial court to support that the records in question amounted to business records. See *People v Vargo*, 139 Mich App 573, 580 (1984) ("For a proper foundation to be established for the admission of this document as a business record, a qualified witness must establish that the record was kept in the course of a regularly conducted business activity and that it was the regular practice of such business activity to make that record."). Rather, the People appear to have merely promised to present such evidence at trial.

THEREFORE, THE COURT HEREBY ORDERS:

The People's interlocutory application for leave to appeal is denied. This Order resolves the last pending claim and closes the case.



HON. Nanci J. GRANT

Circuit Court Judge

STATE OF MICHIGAN
 IN THE COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,
 Plaintiff/Appellant

v.

COA No. 350391
 Circuit Case No. 2019-175232-AR
 District Case No. 2017-391-SP

ALTON FONTENOT, JR.,
 Defendant/Appellee.

JESSICA R. COOPER (P23242)
 Oakland County Prosecutor/Appellant
 1200 N Telegraph Road
 Pontiac, MI 48341
 (248) 858-0656

ALONA SHARON (P68782)
 Attorney for Appellee
 28411 Northwestern Highway
 Suite 875
 Southfield, MI 48034
 (248) 545-4755

**DEFENDANT/APPELLEE’S MOTION TO SUPPLEMENT BRIEF ON APPEAL OR IN THE
 ALTERNATIVE APPELLEE’S MOTION FOR THE COURT TO TAKE JUDICIAL NOTICE OF MSP
 CORRECTIVE ACTIONS REGARDING DATAMASTER MAINTENANCE**

Appellee, Alton Fontenot, by and through his attorney of record, Alona Sharon, moves this Court to allow him to supplement his brief on appeal timely filed with this Honorable Court on December 9, 2019 or in the alternative asks this Court to take Judicial Notice of recent corrective actions taken by the Michigan State Police regarding maintenance and calibration of Datamasters throughout the state of Michigan and in support of his motion states the following:

1. Appellee timely filed a brief on appeal on December 9, 2019. Within the appellee’s brief the Appellee argued that those who conduct the 120-day calibration of the Datamaster are akin to forensic analysts and that confrontation of those analysts are critical to ensure accurate forensic analysis. (See Appellee’s brief on appeal, pgs. 5-6).
2. Echoing the United States Supreme Court case in *Melendez-Diaz v Massachusetts*, 557 US 305 (2009), the Appellee argued that only confrontation can help to weed out both

- the incompetent and dishonest forensic analyst. (See Appellee's brief on appeal, pgs. 5-6).
3. On January 10, 2020, the Michigan State Police informed various prosecutors that a stop order had been issued to the vendor who was entrusted with calibration of the state's Datamaster instruments. This stop order was issued on January 7, 2020. (See Appendix A).
 4. Three days later, the Michigan State Police went even further and explained in a follow up letter that it was removing all 203 Datamasters out of service until the Michigan State Police could inspect and verify each instrument and ensure each instrument was properly calibrated. (Appendix B). The Michigan State Police also disclosed that it had opened investigations into potential fraud committed by contract employees of the state's Datamaster vendor. The letter disclosed that the Michigan State Police believed that at least two of the three contract employees engaged in fraud. (Appendix B).
 5. An Official Statement was released by Col. Joseph Gasper of the Michigan State Police on January 13, 2020, echoing much of the same information that was contained in the January 10, 2020 and January 13, 2020 information provided to various prosecutors. (Appendix C).
 6. On January 16, 2020, a Judiciary and Public Safety Committee meeting was held and a timeline of events was presented by the Michigan State Police. This document details some of the fraudulent activity uncovered by MSP. (Appendix D).
 7. A court can take judicial notice of facts that are "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." MCR 201(b).
 8. The existence of the releases put out by the Michigan State Police are the type of facts appropriate for the court to take judicial notice of.
 9. In the alternative, the disclosures made by the MSP are highly relevant to the issues in the pending appeal but counsel could not append the information to her brief because the information was not disclosed until early 2020 and Appellee's brief was filed in December 2019.
 10. The information disclosed by MSP supports the need for confrontation of forensic analysts who perform the 120-day certification of the State's Datamasters and evidence of their fraudulent activity only bolsters Appellee's argument previously made argument to this Honorable Court.

For these reasons, Mr. Fontenot respectfully requests that this Honorable Court allow him to supplement his brief on appeal with Appendices A-D, attached to the instant motion, or in the alternative take judicial notice of the information contained in Appendices A-D, attached to the instant motion.

Respectfully Submitted,

/s/ Alona Sharon
Alona Sharon (P68782)
Attorney for Defendant/Appellee
28411 Northwestern Highway
Suite 875
Southfield, MI 48034
(248) 545 4755

Dated: January 20, 2020

APPENDIX A



STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

COL. JOSEPH M. GASPER
DIRECTOR

GRETCHEN WHITMER
GOVERNOR

January 10, 2020

Re: Modifications to Breath Testing Instrument Testing and Maintenance

Criminal justice partners: The Michigan State Police (MSP) is statutorily responsible for the purchase, certification, and maintenance of evidential breath alcohol testing instruments, currently the Datamaster DMT, located at law enforcement agencies across the state (MCL 257.625h, and Administrative Rules R 257.991-996, 325.2651-2658).

For more than 20 years, the MSP has contracted the service work (120-day certifications, service calls, and maintenance) for the state's 203 Datamaster DMTs to a vendor. This letter is to notify you that a stop order on the current vendor's contract was issued January 7, 2020, due to performance-related issues. Prosecutors with cases impacted by the contractor errors identified by the MSP have already been notified. However, out of an abundance of caution, we are examining all available data to determine if any additional tests are impacted by the contractor errors. If any additional errors are found, a report will be immediately forwarded to the affected prosecutor.

Because the integrity of the criminal justice process is of paramount importance, effective immediately, the MSP will assume the duties previously contracted to the aforementioned vendor. Fully certified MSP personnel will ensure that all Datamaster DMTs are certified, calibrated, and serviced according to state law and industry standard.

Any questions regarding this change can be directed to F/Lt. Keith Disselkoen of the MSP Training Division at 989-818-2219.

Sincerely,

Maj. Greg Zarotney
Office of Professional Development
Michigan State Police

APPENDIX B



STATE OF MICHIGAN
DEPARTMENT OF STATE POLICE
LANSING

GRETCHEN WHITMER
GOVERNOR

COL. JOSEPH M. GASPER
DIRECTOR

January 13, 2020

Re: **UPDATE: Modifications to Breath Testing Instrument Testing and Maintenance**

Criminal justice partners:

Based on new information learned over the weekend, the Michigan State Police (MSP) is taking all 203 Datamaster DMT evidential breath alcohol testing instruments out of service until the MSP can inspect and verify each instrument to ensure it is properly calibrated. Agencies that house Datamaster instruments are asked to place them out of service but not disconnect the power. The MSP recommends that police agencies utilize blood draws rather than breath tests to establish evidence of drunk driving.

In addition, the MSP opened investigations into potential fraud committed by contract employees of the state's Datamaster vendor, Intoximeters. The MSP will conduct a thorough and complete investigation and if we find criminal acts occurred, will pursue criminal charges against those responsible.

At this early stage in the investigation, the MSP does not know how many records were falsified or how long these deceptive practices were occurring. Based on what we know today, we believe these issues impact at least two employees of their three contract employees, both of which were hired in 2018.

While we realize that placing the instruments temporarily out-of-service and assuming responsibility for maintaining all Datamaster instruments in the state is an extreme move that places a burden on all of the state's law enforcement resources, it is an absolutely necessary move to safeguard the integrity of the criminal justice process.

The MSP is still in the process of reviewing vendor records and will be for some time, but possible discrepancies have been identified to-date involving Datamaster instruments at the following locations:

- Alpena County Sheriff's Department
- Beverly Hills Police Department
- Detroit Detention Center
- Montcalm County Sheriff's Department
- Niles Police Department
- Pittsfield Township Police Department
- Tecumseh Police Department
- Van Buren County Sheriff's Department

County prosecutors for each of these areas have been notified of the issue.

Questions regarding this evolving issue can be directed to F/Lt. Keith Disselkoe of the MSP Training Division at 989-818-2219.

Sincerely,

Maj. Greg Zarotney
Office of Professional Development
Michigan State Police

MICHIGAN STATE POLICE HEADQUARTERS • 7150 HARRIS DRIVE • DIMONDALE, MICHIGAN 48821
MAILING ADDRESS • P.O. BOX 30834 • LANSING, MICHIGAN 48909
www.michigan.gov/msp • 517-332-2521

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APPENDIX C

1/16/2020 Judiciary + Public Safety Committee

EX-202 (12/2018)
MICHIGAN STATE POLICE

OFFICIAL STATEMENT

MICHIGAN STATE POLICE

Michigan State Police Temporarily Suspends Use of Datamaster DMT in Wake of Criminal Investigation into Contractor Malfeasance

Statement by Col. Joseph Gasper, Director

January 13, 2020

Based on new information learned over the weekend, the Michigan State Police (MSP) is aggressively investigating potential fraud committed by contract employees of Datamaster vendor, Intoximeters, and also moving today to take all 203 Datamaster DMT evidential breath alcohol testing instruments out of service until MSP can inspect and verify each instrument to ensure it is properly calibrated. In the interim period, the MSP recommends that police agencies utilize blood draws rather than breath tests to establish evidence of drunk driving.

On Jan. 10, 2020, the MSP alerted prosecutors and police departments statewide that it had issued a stop order on the current vendor's contract due to performance-related issues. The vendor, Intoximeters, employs three contract employees who were responsible for servicing all 203 Datamaster DMT instruments in the state, and it is records from these service sessions that are in question. Effective Jan. 10, 2020, fully certified MSP personnel have taken over responsibility for ensuring all Datamaster DMTs are certified, calibrated and serviced according to state law and industry standard.

Review of vendor records in the last two days has yielded additional discrepancies that may point to the potential for a more widespread issue with the way in which some instruments were being serviced. While the discrepancies do not directly impact or deal with the results of evidential breath tests, it is concerning that it appears as though some certification records have been falsified. As a result, the MSP has opened a criminal investigation that is looking into possible forgery of public documents.

To be clear, a properly calibrated and maintained Datamaster DMT is an extremely reliable instrument, which is why issuing the stop order, placing the instruments temporarily out-of-service and assuming responsibility for maintaining all Datamasters in the state is an extreme move that places a burden on all of the state's law enforcement resources, but it is an absolutely necessary move to safeguard the integrity of the criminal justice process. Upon learning of additional and more egregious discrepancies, I am no longer comfortable having police agencies using these instruments until we can be confident they are certified, calibrated and serviced according to state law and industry standard.

MORE

EX-202 (12/2018)
MICHIGAN STATE POLICE

Page 2

The MSP will conduct a thorough and complete investigation and if we find criminal acts occurred, we will pursue criminal charges against those responsible. We will also pursue any remediation available to the department, including possible legal action, in order to recoup costs bore by the state.

At this early stage in the investigation, the MSP does not know how many certification records were falsified or how long these deceptive practices were occurring. The MSP sent a letter to Intoximeters in August of 2019 outlining grounds for breach of contract and requesting a corrective action plan. That same month, Intoximeters responded with a corrective action plan. When issues rose again shortly after that, the MSP again contacted Intoximeters and we have been working with them to remedy the issues.

Based on what we know today, we believe these performance issues impact at least two employees of their three contract employees, both of which were hired in 2018.

The MSP is still in the process of reviewing vendor records and will be for some time, but possible discrepancies have been identified to-date involving Datamaster instruments at the following locations:

- Alpena County Sheriff's Department
- Beverly Hills Police Department
- Detroit Detention Center
- Montcalm County Sheriff's Department
- Niles Police Department
- Pittsfield Township Police Department
- Tecumseh Police Department
- Van Buren County Sheriff's Department

County prosecutors for each of these areas have been notified of the issue and will determine any potential impact on drunk driving cases. When a discrepancy arises, it can be efficiently remedied through proper testing and inspection done by certified personnel.

The MSP has been working since mid-2018 to strengthen the state's breath alcohol testing program by hiring a technical leader in the MSP Forensic Science Division to provide oversight, and it was through this work that these discrepancies were identified.

###

APPENDIX D

1/16/2020 Judiciary +
Public Safety Committee



STATE OF MICHIGAN

DEPARTMENT OF STATE POLICE
LANSING

GRETCHEN WHITMER
GOVERNOR

COL. JOSEPH M. GASPER
DIRECTOR

Timeline:

September 1, 2018 – Effective date of three-year maintenance contract with Intoximeters Inc.

- Contract is \$1.26 million; requires vendor's three technicians to conduct 120-day certifications of all instruments, perform service calls and routine maintenance, and provide court testimony on the service and maintenance of the instruments.
- The technicians whose work is in question were hired in September and November of 2018.

January 2019 – With the intent to bring the state's evidentiary breath alcohol testing program into alignment with forensic laboratory standards and work toward national accreditation, the MSP created a new position, Breath Alcohol Technical Leader, within the Forensic Science Division. The accreditation process was expected to take at least 18 months.

April 2019 – MSP put additional workflow requirements in place with the vendor to ensure compliance with state law and administrative rules and move toward accreditation. It was after these additional controls were put in place that the MSP began to notice noncompliance by the vendor's technicians.

August 9, 2019 – After identifying repeated failures by the technicians to meet contractual requirements and the inability to perform the mandated tasks of maintaining and certifying the Datamaster instruments, the MSP asked DTMB Central Procurement to issue a letter to Intoximeters outlining grounds for breach of contract and requesting a corrective action plan.

- Examples of improper actions include:
 - Not performing timely 120-day certifications in 60 instances.
 - Incorrect recording of important elements during instrument checks; these include dry gas lot numbers and expiration dates, which can create issues in court when the lot numbers recorded by the technicians are wrong, or do not exist.
 - Sharing instrument passwords with jail staff.

August 21, 2019 – MSP received a corrective action plan from Intoximeters that outlined their action plan to correct the contractual failures.

August 23, 2019 – An Intoximeters technician committed a serious error that resulted in the dismissal of an OWI case in Montcalm County.

- On August 23, 2019, the technician went to the Montcalm County Jail and signed the Datamaster Maintenance Log. The technician did not notify the MSP nor Intoximeters of this visit and did not submit any paperwork regarding the reason for his visit. Later that day, an MSP sergeant arrested an individual for OWI and utilized that instrument for evidential testing. MSP was first made aware of this technician's August 23rd visit by the Montcalm County Prosecutor's Office on November 15, 2019. The technician and Intoximeters were both unable to explain this visit, casting doubt on the reliability of any tests conducted on August 23, 2019 through August 26, 2019 when an accuracy check was performed by the technician. This lack of documentation resulted in the dismissal of this OWI case.

October 10, 2019 – Another serious error occurred that resulted in the dismissal of evidence in six cases in Wayne County.

- On this date, a technician arrived at the Detroit Detention Center to perform a 120-day certification. The instrument failed testing, but the technician did not notice the failure. Consequently, he left the instrument in service until October 13, 2019. During this 3-day period, the instrument was used for six OWI evidential breath tests. Because the instrument was not properly serviced and was left in service, these six cases did not have reliable breath evidence. The MSP sent a notice to the Wayne County Prosecutor's Office, which decided to dismiss the evidence in these cases.
- Following discovery of this error, MSP requested removal of the technician responsible, with removal and replacement to occur no later than January 15, 2020. This never occurred due to the MSP actions taken on January 7 to issue the stop work order.

December 2019 – MSP began the process of establishing a unit within the Forensic Science Division to oversee the state's breath alcohol testing program. The unit will be comprised of three equipment technician positions that will conduct maintenance and certification for the state's breath alcohol testing equipment.

January 2, 2020 - During a routine audit of documents submitted by the vendor for the prior two-week period, an irregularity is noticed on an instrument at the Alpena County Sheriff's Department. The MSP immediately requested the original documents from the technician.

January 6, 2020 – MSP confirmed the irregularity was the result of the technician fabricating the paperwork for a required test that was not performed on the instrument.

- A criminal investigation is opened by the MSP into possible forgery of a public document. This investigation is ongoing.

January 7, 2020 – With what is now potentially criminal action by an Intoximeters technician, the MSP issues a stop work order with the vendor and secures all equipment and paperwork from the three technicians.

January 10, 2020 – MSP finalizes an emergency plan to immediately bring all maintenance responsibilities for the state's 203 instruments in-house, and notification is made to police and prosecutors of the stop work order and MSP's new responsibilities.

January 13, 2020 – MSP personnel continued through the weekend to review records from the technicians yielding additional discrepancies involving a second technician and three more impacted instruments (Beverly Hills PD, Pittsfield Township PD, and Tecumseh PD), in which it is suspected that instrument calibration tests were again fabricated.

- With this new information, MSP removes all 203 Datamaster DMT evidential breath alcohol testing instruments from service until they can be inspected and verified by MSP personnel to ensure they are properly calibrated.
- MSP recommends to police agencies that they utilize blood draws rather than breath tests to establish evidence of drunk driving during the interim period.

Impact:

The MSP is still in the process of reviewing vendor records. To date, discrepancies have been identified involving eight instruments at the following locations:

Instrument Location	Period of Time in Question	Number of Breath Tests	Possible Criminal Act
Alpena County Sheriff's Department	11/14/19 – 1/9/20	8	Yes
Beverly Hills Police Department	1/22/19 – 6/21/19	9	Yes
Detroit Detention Center	10/10/19 – 10/13/19	6	No
Montcalm County Sheriff's Department	8/23/19 – 8/26/19	1	No
Niles Law Enforcement Center	1/15/19 – 2/18/19	7	No
Pittsfield Township Police Department	12/20/18 – 8/7/19	5	Yes
Tecumseh Police Department	2/15/19 – 6/28/19	12	Yes
Van Buren County Sheriff's Department	11/21/19 – 12/9/19	4	No

As irregularities are identified, notification is made to the affected prosecutor regarding impacted breath tests. Prosecutors will review each case on a case-by-case basis to determine what actions to take.

Thirty-seven of 203 Datamaster DMT evidential breath alcohol testing instruments have been returned to service following verification by MSP personnel that the instruments are properly calibrated. MSP personnel are re-certifying the most frequently used instruments and those in areas with limited access to obtaining blood samples first, with hopes of returning all instruments to service by the end of February.

Court of Appeals, State of Michigan

ORDER

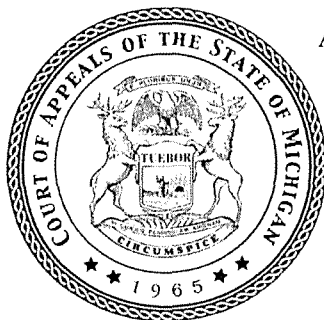
PEOPLE OF MI V ALTON FONTENOT JR

Docket No. **350391**

LC No. **2019-175232-AR**

Elizabeth L. Gleicher, Judge, acting under MCR 7.211(E)(2), orders:

The motion to supplement defendant-appellee's brief is GRANTED. The four appendices attached to the motion are accepted for filing and shall be appended to appellee's brief on appeal.



A true copy entered and certified by Jerome W. Zimmer Jr., Chief Clerk, on

JAN 29 2020

Date

Jerome W. Zimmer Jr.
Chief Clerk

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ALTON FONTENOT, JR.,

Defendant-Appellee.

FOR PUBLICATION

September 10, 2020

9:05 a.m.

No. 350391

Oakland Circuit Court

LC No. 2019-175232-AR

Before: MURRAY, C.J., and RONAYNE KRAUSE and TUKEL, JJ.

TUKEL, J.

The prosecution appeals by leave granted¹ the circuit court’s order denying the prosecution’s interlocutory application for leave to appeal, which seeks a declaration that DataMaster logs, which are generated through breath tests administered by police officers conducting alcohol-related investigations, are both nontestimonial under the Confrontation Clause of the Sixth Amendment and admissible as business records under MRE 803(6). This appeal is being decided without oral argument pursuant to MCR 7.214(E)(1). We vacate.

I. FACTS

On October 3, 2017, Michigan State Police Trooper Jon Gjurashaj conducted a traffic stop of a car driven by defendant in Royal Oak, Michigan because the front passenger was not wearing a seatbelt. Upon approaching the car, Trooper Gjurashaj saw that defendant had bloodshot and glassy eyes and droopy eyelids; Trooper Gjurashaj smelled an odor of alcohol coming from the car and defendant’s mouth. After defendant failed to pass field sobriety tests, Trooper Gjurashaj arrested defendant for operating under the influence of alcohol. Defendant was then taken to a Michigan State Police post and given two DataMaster breath tests; both tests revealed a 0.09 BAC. In September 2017 and December 2017, Marvin Gier, the Class IV operator who conducted the 120-day tests on the DataMaster, inspected the particular machine used on defendant, verified its

¹ *People v Fontenot*, unpublished order of the Court of Appeals, entered September 25, 2019 (Docket No. 350391).

accuracy, and certified that it was in proper working order, which is reflected in the DataMaster logs.

The prosecution filed a pretrial motion in limine in the district court to declare that the DataMaster logs are nontestimonial under the Confrontation Clause and admissible as business records under MRE 803(6); those declarations would have made it unnecessary for the prosecution to call Gier as a witness at trial. The district court denied the prosecution's motion in limine and stayed the trial pending the prosecution's appeal to the circuit court. On appeal, the circuit court concluded that it was proper for the district court to deny the prosecution's motion in limine because

even assuming without deciding that the statements made by Marvin Gier were nontestimonial, the Court fails to see how it could reverse the trial court's June 25, 2019 Order when the People failed to present evidence before the trial court to support that the records in question amounted to business records. . . . Rather, the People appear to have merely promised to present such evidence at trial.

This appeal followed.

II. ANALYSIS

The prosecution argues that the DataMaster logs are nontestimonial and admissible as business records under MRE 803(6). We agree with both propositions.

A. STANDARD OF REVIEW

“The decision whether to admit evidence is within a trial court's discretion. This Court reverses it only where there has been an abuse of discretion.” *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of reasonable and principled outcomes. *People v Johnson*, 502 Mich 541, 564; 918 NW2d 676 (2018). Furthermore, “[a] trial court also necessarily abuses its discretion when it makes an error of law.” *People v Al-Shara*, 311 Mich App 560, 566-567; 876 NW2d 826 (2015). “To the extent that the trial court's ruling involves an interpretation of the law or the application of a constitutional standard to uncontested facts, our review is de novo.” *People v Tanner*, 496 Mich 199, 205; 853 NW2d 653 (2014) (quotation marks and citation omitted).

B. CONFRONTATION CLAUSE

The Confrontation Clause of the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him” US Const, Am. VI. In *Crawford v Washington*, 541 US 36, 50-54; 124 S Ct 1354; 158 L Ed 2d 177 (2004), the United States Supreme Court held that, under the Confrontation Clause, out-of-court testimonial statements are inadmissible against a criminal defendant unless the declarant is unavailable and the defendant has had a previous opportunity to cross-examine the declarant. In *Crawford*, the Court left

for another day any effort to spell out a comprehensive definition of “testimonial.” Whatever else the term covers, it applies at a minimum to prior

testimony at a preliminary hearing, before a grand jury, or at a former trial; and to police interrogations. These are the modern practices with closest kinship to the abuses at which the Confrontation Clause was directed.” [*Id.* at 68 (footnote omitted).]

Pretrial statements are testimonial if the declarant would reasonably expect that the statement will be used in a prosecutorial manner and if they were made “under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial[.]” *Id.* at 51-52 (citation and quotation marks omitted).

The United States Supreme Court later narrowed the scope of what constitutes a testimonial statement in a plurality opinion in *Williams v Illinois*, 567 US 50; 132 S Ct 2221; 183 L Ed 2d 89 (2012).² In *Williams*, Justice ALITO, writing for a four-justice plurality, held that testimonial statements have two characteristics: “(a) they involve[] out-of-court statements having the primary purpose of accusing a targeted individual of engaging in criminal conduct and (b) they involve[] formalized statements such as affidavits, depositions, prior testimony, or confessions.” *Id.* at 82. Our Supreme Court adopted the *Williams* primary purpose confrontation clause analysis in *People v Nunley*, 491 Mich 686; 821 NW2d 642 (2012), when it held that a certificate of mailing was not a testimonial statement because the certificate of mailing’s primary purpose was to establish that notice was given—not to be used at a later trial. See also *id.* at 706 (“Instead, we believe that the circumstances under which the certificate was generated show that it is a nontestimonial business record created primarily for an administrative reason rather than a testimonial affidavit or other record created for a prosecutorial or investigative reason.”).

In *Nunley*, our Supreme Court additionally held that the circumstances under which a statement is given should be considered to determine whether a statement is testimonial. *Nunley*, 491 Mich at 706 (“[U]nder *Crawford* and its progeny, courts must consider the circumstances under which the evidence in question came about to determine whether it is testimonial.”). For example, the certificate of mailing in *Nunley* was nontestimonial because it was “a routine, objective cataloging of an unambiguous factual matter, documenting that the [Department of State] has undertaken its statutorily authorized bureaucratic responsibilities.” *Id.* at 707. Consequently, the certificate of mailing was “created for an administrative business reason and kept in the regular course of the [Department of State]’s operations in a way that is properly within the bureaucratic purview of a governmental agency” and, therefore, was not a testimonial statement.

Here, the DataMaster logs are nontestimonial. The DataMaster logs here were created before defendant’s breathalyzer test to prove the accuracy of the DataMaster machine; they were not created for the purpose of prosecuting defendant specifically; thus, they did not “accus[e] a targeted individual of engaging in criminal conduct, *Williams*, 567 US at 82.

Furthermore, the DataMaster logs were also created as part of the Michigan State Police’s normal administrative function of assuring that the DataMaster machine produces accurate results.

² “A plurality opinion of the United States Supreme Court, however, is not binding precedent.” *People v Beasley*, 239 Mich App 548, 559; 609 NW2d 581 (2000).

The DataMaster would have been checked for proper functioning even if defendant had not been tested with it. Thus, the primary purpose of Gier testing the DataMaster’s accuracy was to comply with administrative regulations, see Mich Admin Code R 325.2653(3), and to ensure its reliability for future tests—not to prosecute defendant specifically. As such, the DataMaster logs were nontestimonial and the trial court erred by holding that they were testimonial. See *Nunley*, 491 Mich at 706. See also *Melendez-Diaz v Massachusetts*, 557 US 305, 311 n 1; 129 S Ct 2527; 174 L Ed 2d 314 (2009) (“[W]e do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution’s case.”).

C. MRE 803(6)

Business records are admissible under MRE 803(6), which provides:

A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

“The business records exception is based on the inherent trustworthiness of business records. But that trustworthiness is undermined and can no longer be presumed when the records are prepared in anticipation of litigation.” *People v Jambor*, 273 Mich App 477, 482; 729 NW2d 569 (2007).

Here, the DataMaster logs are business records under MRE 803(6). The Michigan State Police keep the DataMaster logs “in the course of a regularly conducted business activity” and it is “the regular practice of that business activity to make the . . . record” as required by the administrative DataMaster regulations. MRE 803(6). Mich Admin Code R 325.2653(3) states:

Approved evidential breath alcohol test instruments shall be inspected, verified for accuracy, and certified as to their proper working order within 120 days of the previous inspection by either an appropriate class operator who has been certified in accordance with R 325.2658 or a manufacturer-trained representative approved by the department.

Although the DataMaster logs are occasionally presented at trials, they are not prepared for the purpose of litigation, but rather, because the administrative regulations require the keeping of such a log. Thus, the logs are admissible under MRE 803(6).³

Our dissenting colleague believes that the circumstances surrounding the creation of the DataMaster logs in this case establish that they are untrustworthy and, therefore, that they cannot be admissible as business records. We disagree. MRE 803(6) addresses the trustworthiness of the type of document in question, not the specific document at issue in a given case. Whether the DataMaster logs at issue in this case were accurate has no effect on whether they are an actual business record. Indeed, a business record can certainly be inaccurate such as when a business intentionally creates inaccurate accounting statements for tax evasion purposes. Those records are certainly not trustworthy, but they certainly would be considered business records because they were created during the normal course of business. Whether those records are believed by the fact-finder is a question of the weight and credibility of the evidence for the fact-finder to decide. Such is the case here. Whether the DataMaster logs in this case are accurate and trustworthy is a question of the weight that the fact-finder should give to the DataMaster logs. See, e.g., *People v Hardiman*, 466 Mich 417, 428; 646 NW2d 158 (2002) (“It is for the trier of fact, not the appellate court, to determine what inferences may be fairly drawn from the evidence and to determine the weight to be accorded those inferences.”). That is a separate question from whether they are admissible as business records. Thus, the DataMaster logs were admissible as business records. Defendant, however, may still challenge the reliability and credibility of the DataMaster logs. But that question is for the fact-finder to decide, not for the courts to decide in our gate keeping function when determining whether evidence is admissible.

III. CONCLUSION

We vacate the district court’s order denying the prosecution’s motion in limine and remand to the district court for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jonathan Tukel
/s/ Christopher M. Murray

³ While the DataMaster logs are admissible as business records, this ruling does not prevent defendant from challenging the accuracy of DataMaster testing machine itself in the future. We express no opinion on that question, or on whether such a challenge would go to weight rather than admissibility of the evidence.

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

ALTON FONTENOT, JR.,

Defendant-Appellee.

FOR PUBLICATION
September 10, 2020

No. 350391
Oakland Circuit Court
LC No. 2019-175232-AR

Before: MURRAY, C.J., and RONAYNE KRAUSE and TUKEL, JJ.

RONAYNE KRAUSE, J. (*dissenting*)

I respectfully dissent. The evidence in this case demonstrates that the specific records at issue are unreliable, and therefore not admissible under MRE 803(6), irrespective of whether the records are considered "testimonial." Furthermore, the nature of the records at issue here is fundamentally different from the nature of the records at issue in the case law upon which the majority relies for the conclusion that they are not "testimonial." I would therefore affirm the lower courts.

As the majority explains, MRE 803(6) provides an exception to the hearsay evidence rule for "records of regularly conducted activity" as follows:

A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or a statute permitting certification, *unless the source of information or the*

method or circumstances of preparation indicate lack of trustworthiness.^[1] The term “business” as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. [(Emphasis added.)]

“The business records exception is based on the inherent trustworthiness of business records. But that trustworthiness is undermined and can no longer be presumed when the records are prepared in anticipation of litigation.” *People v Jambor (On Remand)*, 273 Mich App 477, 482; 729 NW2d 569 (2007). Importantly, however, nowhere in MRE 803(6) is there any limitation on or specification of how or why a record might lack trustworthiness.

Under the circumstances, “the source of information or the method or circumstances of preparation” clearly *does* “indicate a lack of trustworthiness.” Defendant has provided evidence that Marvin Gier, the Class IV operator who conducted the 120-day tests on the DataMaster, testified in another proceeding that he had used an expired test sample kit on one occasion, and he had no ability to prove the test kits he used relevant to that proceeding were not also expired. By necessary implication, Gier apparently only learned he made the mistake in the prior case because it was brought out on cross-examination.² Thus, the testing procedure is clearly fallible and is not self-correcting. This is critical, because the testing logs are not merely a bureaucratic record that a routine was followed. Rather, the logs are substantive evidence establishing the reliability of any particular alcohol-level test performed by a DataMaster machine in specific cases. In turn, those individual alcohol-level tests carry enormous probative weight. Indeed, in many cases, including felonies, the tests are outright conclusive and effectively unchallengeable—even if, as here, there is a danger that they might be wrong due to an improperly calibrated piece of equipment that is not itself capable of being examined. The evidence shows that the 120-day test logs may not, in fact, be trustworthy *for the purpose for which they are introduced into evidence*: to show that the DataMaster machines were properly tested therefore provide reliable evidence of a defendant’s blood alcohol level.

Importantly, the testing logs are not *merely* kept pursuant to a stray piece of bureaucratic red tape, to be filed away somewhere and usually forgotten. It begs the question simply to say that they are kept because a rule requires them to be kept. The purpose of the administrative rules pertaining to blood alcohol level breath tests is to ensure that the tests are accurate, and failure to comply with the rules therefore renders the accuracy of those tests questionable. *People v Boughner*, 209 Mich App 397, 338-339; 531 NW2d 746 (1995). Our Supreme Court has overruled older case law holding that noncompliance with breath test administrative rules or statutes *per se* precludes the admissibility of those tests. See *People v Anstey*, 467 Mich 436, 446-449, 447 n 9; 719 NW2d 579 (2006). However, noncompliance with the administrative rules or statute does

¹ As a consequence of this qualifying clause, I respectfully disagree with the majority that the analysis under MRE 803(6) considers only the general kind of document at issue and disregards trustworthiness concerns pertaining to the specific document at issue.

² Although the implications of Gier’s testimony are easily deduced on this occasion, the better practice would have been to also provide Gier’s testimony from the prior case.

undermine the probative value of those tests. *People v Wager*, 460 Mich 118, 126; 594 NW2d 487 (1999). Importantly, “the reliability of the testing device” remains a prerequisite to the admissibility of breath test results. *People v Kozar*, 54 Mich App 503, 509 n 2; 221 NW2d 170 (1974), overruled in part on other grounds by *Wager*, 460 Mich at 122-124.³ In other words, although the testing logs are technically kept pursuant to a regulatory rule, the reason for the regulatory rule is *for the purpose of using the tests in prosecutions*. It cannot be overemphasized that the 120-day test logs do not simply show that a test was administered, but rather that a test was *properly* administered, which in turn is of direct relevance to the reliability and thus admissibility of the test.⁴

In contrast, the certificates of mailing at issue in *People v Nunley*, 491 Mich 686; 821 NW2d 642 (2012), were mechanically generated purely for the purpose of showing the bare fact that a mailing had occurred. *Id.* at 690, 695-696. In other words, the certificates in *Nunley* contrast drastically with the logs here, which exist to certify that a potentially-fallible human properly performed a complex operation calling for training and expertise. At the other end of the spectrum, the certificates at issue in *Melendez-Diaz v Massachusetts*, 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 (2009), were actually literal affidavits prepared by persons who conducted sophisticated analyses for the sole and direct purpose of criminal proceedings against particular individuals. *Id.* at 307, 310-311. Those certificates again contrast with the logs in this case, but in the opposite direction, because they were prepared to directly establish facts at issue in a specific prosecution. Thus, the 120-day testing logs here seem to occupy an intermediate position not directly addressed in any binding case law. However, because the logs are clearly kept for the *substantive* purpose of litigation, and because they offer one of the very limited avenues by which a defendant might be able to test the forensic evidence against him, I would find that the logs should be considered testimonial in nature. See *Nunley*, 491 Mich at 706-707.

Nevertheless, I recognize that, as the majority observes, because the logs “are necessarily created *before* the commission of any crime that they may later be used to help prove,” our Supreme Court has held that they therefore *per se* cannot be “*made under circumstances* that would

³ *Wager* specifically only overruled *Kozar* to the extent *Kozar* held that there was a “reasonable time” requirement for the administration of blood alcohol level breath tests.

⁴ Of course, noncompliance that has no actual bearing on the accuracy or reliability of testing equipment may be harmless. *People v Rexford*, 228 Mich App 371, 378; 579 NW2d 111 (1998). However, as noted, it appears that Gier himself only learned that he had used an expired test kit because he was subpoenaed and called to testify. Thus, there is simply no way a defendant, facing potentially devastating and lifelong consequences, could test the reliability of the equipment used to dictate his or her fate unless that reliability is itself testimonial. It is impossible to determine whether noncompliance is harmless without first learning that it occurred. It has long been recognized that cross examination is the “‘greatest legal engine ever invented for the discovery of truth.’” *People v Fackelman*, 489 Mich 515, ___ n 5; 802 NW2d 552 (2011), quoting *California v Green*, 399 US 149, 158; 90 S Ct 1930; 26 L Ed 2d 489 (1970). This case shows that cross-examination serves more purposes than merely permitting the trier of fact to assess credibility. Justice requires defendants to be able to explore the reliability and potential for human error of forensic tests that will likely otherwise be regarded as infallible.

lead an objective witness reasonably to believe that [they] would be available for use at a later trial.” *Nunley*, 491 Mich at 707, 709 (emphases in original). Thus, because the logs were not prepared for the benefit of a specific prosecution or targeted at a specific individual, even though they are clearly prepared for litigation, they are definitionally not testimonial.

To reiterate, I find this reasoning concerning because notwithstanding the applicable administrative rule, the DataMaster testing logs clearly are expected to be used in litigation, commonly are used in litigation, and are critical to establishing the reliability of evidence that is frequently conclusive *per se* and otherwise difficult to challenge. The United States Supreme Court has indicated that the business record exception is inapplicable “if the regularly conducted business activity is the production of evidence for use at trial” or “calculated for use essentially in the court, not in the business.” *Melendez-Diaz*, 557 US at 321-322 (quotation omitted). Because the entire purpose for keeping the logs is to establish the reliability of individual test results for prosecutions, they are clearly not just ordinary and routine administrative check-boxes, and I am unconvinced they are not, in substance, testimonial. At a minimum, they should not be admitted as business records without establishing their trustworthiness.

Therefore, I would hold that under the circumstances of this case, the lower courts correctly determined that the 120-day testing logs were not admissible under MRE 803(6), irrespective of whether the logs are testimonial, and I would affirm. I am constrained by *Nunley* to agree that the logs are definitionally not “testimonial,” but I believe the situation at bar differs significantly from the situation in *Nunley*. Therefore, I respectfully urge our Supreme Court to provide the bench and bar with additional guidance.

/s/ Amy Ronayne Krause

STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff/Appellant

MSC No. 162211
COA No. 350391
Circuit Case No. 2019-175232-AR

v.

ALTON FONTENOT, JR.,
Defendant/Appellee.

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DEFENDANT/APPELLANT'S MOTION TO ENLARGE THE RECORD ON APPEAL

Alton Fontenot, by and through his attorney of record, Alona Sharon, moves this Court to allow him to enlarge the record on appeal, pursuant to MCR 7.316, and in support of his motion states as follows:

1. Mr. Fontenot has filed an application for leave to appeal the Court of Appeals' split decision in Docket #350391, issued September 10, 2020.
2. Mr. Fontenot seeks reversal of the Court of Appeals' majority opinion for the reasons stated in both Judge Krause's well-reasoned dissent and in Mr. Fontenot's application for leave to appeal.
3. The legal issue presented in the application for leave to appeal directly affects a defendant's constitutional right to confront a critical piece of evidence against him when charged with a drunk driving offense, that being the 120-day certification of the

Datamaster instrument.

4. This certification states that the instrument has been calibrated using the correct processes, the correct results have been obtained and that the machine is functioning properly so that the results are reliable. This is a foundational requirement before the results of the Datamaster can be introduced in a criminal trial against a Defendant charged with a drunk driving offense.
5. Because this Honorable Court must decide an issue with such broad implications for all drunk driving prosecutions throughout the state and defendants' ability to confront critical witnesses against them, the Appellant asks this Court to consider the documents affixed to the instant motion which include the following:
 - a. Procedure to Complete the 120 Day Maintenance check/Inspection of Datamaster DMT; and
 - b. Instructions for the Wet Bath Standard (Appendix B).
 - c. Affidavit from Attorney Neil Rockind (Appendix C).
6. The 120 Day Maintenance/Inspection Procedure is authored by W. Mark Fondren, the Breath Alcohol Technical Leader of the Michigan State Police. The document details every step necessary for completing the 120-day check, including the need to administer wet bath calibrations. (Appendix A).
7. The wet bath calibrations must be completed while the simulators are at a specific temperature, with little room for error.
8. The analyst must then conduct simulated breath tests until 1.6L of breath is provided to the machine.
9. The wet bath tests must be conducted with three different alcohol concentrations,

starting with the lowest solution, moving up to the highest solution.

10. Prior to the wet bath calibrations the operator must confirm that all simulators are at 34 Degrees Centigrade, +/- .02. The Fondren lays out in painful detail every step that must be accomplished before the wet bath calibrations are completed. (See Appendix A).
11. If the temperature of the simulator is off by as little as one degree, a variance of approximately 7% will occur in the result. A variance of this degree would result in readings that fall outside the range to validate the results of the simulated tests. (See Appendix C).
12. Appellant believes that it is critical for this Honorable Court to have a true and full understanding of the forensic work that is required to correctly complete the 120-day check in order to fully appreciate the scientific nature of the work, the sensitive nature of the calibration and the important distinction between the scientific work done for the 120-day test and the “routine, objective cataloging of an unambiguous factual matter” in *People v Nunley*, 491 Mich 686, 707; 821 NW2d 642 (2012).
13. To that end Appellant requests that this Court not only enlarge the record on appeal to include the attached documents but also to remand the matter so that the Appellant can take testimony from necessary witnesses such as Mark Fondren, to demonstrate the forensic work required for the 120-day test.
14. This Court has authority to enlarge the record on appeal pursuant to MCR 7.316(A)(1); (4); (5) and (6).¹

¹ MCR 7.316(A) provides:

(A) Relief Obtainable. While a matter is pending in the Supreme Court, the Court may, at any time, in addition to its general powers

RELIEF REQUESTED

WHEREFORE, the Appellant Alton Fontenot, requests that this Honorable Court grant this Motion to Enlarge the Record, accept the documents contained in Appendices A and B for consideration by this Court and remand the matter for development of the factual record.

Respectfully Submitted,

/s/ Alona Sharon

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Dated: November 10, 2020

(1) Exercise any or all of the powers of amendment to the lower court of tribunal;

(4) Permit the transcript or record to be amended by correcting errors or adding matters that should have been included;

(5) Adjourn the case until further evidence is taken and brought before it;

(6) draw inferences of fact

APPENDIX A



Procedure to Complete the 120 Day Maintenance check / Inspection of DataMaster DMT

Purpose:

The Purpose of this procedure is to describe the steps necessary to complete the 120 day maintenance check / inspection of an evidential DataMaster DMT breath testing instrument in the State of Michigan.

Equipment and Reagents:

DataMaster DMT

Electronics tool kit

Extra dry gas cylinders

NIST Traceable Barometer

Simulator Solutions at nominal concentrations: 0.040 g/210L, 0.080 g/210L, 0.200 g/210L

Tygon type tubing with an assortment of quick connectors to facilitate connecting Simulator to DMT

Various working Simulators

Simulator pump or analyst may blow thru simulator to create the simulated breath sample

Acetone solution – ACS Grade (Approximate concentration of 0.2 mL/500 ml)* inside a simulator

*This solution may be prepared onsite as needed using tap water from a sink or drinking fountain. The absolute concentration is not important or critical. What is critical is that the instrument recognize, and 'flag' the test/sample as INTERFERENCE, and not report the sample as ethanol.

Safety Precautions:

The most common hazard related to this procedure is a cut from a broken, cracked, or chipped glass jar. If a glass simulator jar is broken, cracked, or chipped, do not use. Remove from service and dispose of in an appropriate container. If an appropriate container is not available at the testing site, the jar should be placed in container that prevents injury to others.

Care should also be exercised when using sharp tools such as screwdrivers, wire cutters, scissors, etc.

*120 Day Maintenance / Inspection Procedure
Issued by: Breath Alcohol Technical Leader – W. Mark Fondren
Original Issue Date: 1 July 2019*

*Revised:
Page 1 of 6*

Procedure - General outline

1. Each evidential DMT Instrument must have a complete maintenance check / inspection every 120 days (or sooner). This inspection may be completed by a Class IV operator working in the Michigan State Police Alcohol Program, the Breath Alcohol Technical Leader of the Michigan State Police / Forensic Science Division, or a manufacturer-trained representative.
2. A Maintenance Check / Inspection is comprised of at least the following:
 - a. Verify time and date
 - b. Verify barometer reading
 - c. Perform Diagnostic check
 - d. Dry gas calibration check (5 replicates)
 - e. Wet bath calibration check with 0.040 simulator solution
 - f. Wet bath calibration check with 0.080 simulator solution
 - g. Wet bath calibration check with 0.200 simulator solution
 - h. Wet bath calibration check with acetone solution
 - i. Verify radio frequency interference (RFI)
 - j. Sign or initial all instrument printouts
 - k. Completion and sign instrument log book at site

Procedure - Detailed Explanation:**3. Verify Time and Date**

- a. **DATE:** The analyst **SHALL** verify the instrument displays the correct date. If the date is incorrect, the analyst **SHALL** correct the date in/on the DMT instrument and document on the OD-84, or diagnostic report printout, that date displayed by DMT was incorrect; what the displayed date was prior to correction, and that the date was corrected. An example of such a notation may read: DMT date incorrect, displayed March 1, 2020 ... today is Feb 29, 2020. Corrected. If the Date displayed by the DMT is correct, no action or documentation is required.
 - b. **TIME:** The analyst **SHALL** verify the instrument display shows the correct time. Analyst should use their cell phone as a reference for comparison. If the time is incorrect by more than 2 minutes, the analyst **SHALL** correct the time in/on the DMT instrument and document on the OD-84, or diagnostic report printout, that time was adjusted, and the extent by which the instrument was 'off' prior to the adjustment. An example of such a notation may read: Time on DMT was 4 minutes fast – corrected. If the Time displayed by the DMT is correct, no action or documentation is required.
4. **Verify Barometer Reading:** The analyst **SHALL** verify the barometer reading displayed by the DMT instrument by comparing the DMT value to a calibrated barometer carried by the analyst. If the DMT barometer differs by more than 5 millibars compared to the NIST traceable barometer, the analyst **SHALL** adjust the DMT to match the Analyst's NIST Traceable barometer. Any adjustment of the barometer shall be documented on the OD-84, or diagnostic report printout, with wording similar to: "adjust barometer". The actual reading of the DMT's

*120 Day Maintenance / Inspection Procedure
 Issued by: Breath Alcohol Technical Leader – W. Mark Fondren
 Original Issue Date: 1 July 2019*

*Revised:
 Page 2 of 6*

barometer is printed on the diagnostic record (step 5), and the analyst **SHALL** also record the reading of their NIST traceable barometer on the diagnostic record or the OD-84 form. If the barometer is adjusted, the analyst **SHALL** record the "as found – as left" readings of the DMT barometer and the NIST barometer reading. The analyst **SHALL** also record the serial number of their NIST barometer, along with the date of Calibration **OR** the due date for the next calibration.

5. **Perform Diagnostic check:** The analyst **SHALL** conduct a diagnostic check by selecting diagnostic check in the software menu, and then entering the correct password when prompted. The analyst **SHALL** review the diagnostic printout to ensure the instrument PASSES all checks, sign and/or initial the document.
6. **Dry Gas Calibration Check:** The analyst **SHALL** conduct a 'Technician Test Dry' test by entering the software and selecting the appropriate option in the menu, and then entering the password when prompted. The 'Technician Test Dry' causes the DMT to conduct 5 replicate checks using the dry gas cylinder installed in the instrument. After the instrument completes the 5 analyses and prints the record, the analyst will review the record to ensure all 5 results are +/- 0.004 g/210L of the pressure adjusted target value. If so, the analyst signs the record and no further action is required.

*The record also lists the lot number and expiration date of the gas cylinder currently installed in the DMT. If the tank is set to expire before the analyst is expected to return to the instrument, it should be changed and the 'TANK CHANGE' test conducted in addition to the "Technicians Test Dry" test to document the installation a new cylinder. A 'TANK CHANGE' test is required even if the new tank is of the same lot/expiration date as the tank being removed from the instrument.

7. **Wet Bath Calibration Checks (0.040 g/ 210L – 0.080 g/210L – 0.200 g/210L – Acetone)**
 - a. **Before starting this portion of the check / inspection,** the analyst **SHALL** confirm that all simulators are at $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$. If not, the analyst shall wait until all simulators are at $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$ before proceeding. Additionally, depending on the fitting of the simulator, it may be necessary to attached flexible tubing and mouthpieces to the ports of the simulator, or a simulator pump may be used to create the simulated breath sample. The model, serial number, and temperature of each simulator **SHALL** be recorded either on the results printout or the OD-84.
 - b. Once all simulators are at $34^{\circ}\text{C} \pm 0.2^{\circ}\text{C}$, the analyst **SHALL** conduct a 'Technician Test Wet' test by entering the software and selecting the appropriate option in the menu, and then entering the password when prompted. The 'Technician Test Wet' allows the analyst to conduct 5 checks with wet bath simulators that will provide simulated breath samples at various alcohol concentrations to the DMT to verify its calibration and accuracy.
 - c. The DMT instrument will first purge the external breath tube and sample chamber with room air and conduct blank analysis. When the instrument says "Please Blow" the analyst should connect the external breath tube of the DMT to the Simulators 'OUTLET'. The analyst should then blow through the mouthpiece/tubing attached to the simulators 'INLET', or activate the simulator pump to force air into the simulators INLET

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from the pump. When properly connected, this creates a simulated breath sample having an alcohol concentration equal to the value of the solution inside the simulator. The analyst should continue to blow thru the simulator until a breath sample of approximately 1.6L is provided to the DMT. After the sample is accepted by the DMT, it will calculate the amount of alcohol present in the sample. The analyst will disconnect the simulator from the external breath tube of the DMT and prepare to provide the next sample. The analyst shall provide the samples starting with the lowest value and progressing to the highest alcohol concentration.

- d. After the analyst provides the 0.200 g.210L sample, the next time the instrument says, "Please Blow" the analyst should connect the simulator containing the acetone solution to the external breath tube and blow thru the simulator. If the DMT instrument is working properly, the test record will list the values of all 3 samples, and then indicate **INTERFERENCE** for the sample containing acetone. Note: The analyst has 2 attempts (per test sequence) for the instrument to correctly identify **INTERFERENCE**.
 - e. If the instrument fails to detect **INTERFERENCE** on both attempts, the analyst will prepare a fresh acetone solution and conduct the test again. The ethanol samples (0.040 – 0.080 – 0.200) do not have to be repeated. If, on the 2nd sequence, the instrument correctly indicates **INTERFERENCE** for the sample containing acetone, the analyst shall sign and retain BOTH pages, indicated on the 2nd page that a fresh acetone solution was prepared. The instrument may remain in service. IF the instrument FAILS to indicate **INTERFERENCE** on the 2nd sequence, BOTH pages will be signed by the analyst and retained, and the analyst shall indicate on the 2nd page that a fresh acetone solution was prepared. Since the instrument has failed the 120 day check, it will be removed from service, repaired, or calibrated onsite followed by a 2nd onsite inspection (120 day check) in its entirety. Meaning, all steps, as defined above (2, a-k). All pages are retained, and should bear appropriate notes to fully explain the sequence of events, and what was done onsite. Forward ALL pages to MSP.
8. **Verify Radio Frequency Interference (RFI):** The analyst **SHALL** conduct a 'Accuracy Check Test' or 'Technician Test' by entering the software and selecting the appropriate option in the menu, and then entering the password when prompted. When the instrument starts the purging cycle, the analyst **SHALL** turn on his hand held radio (if not on already) and depress the talk button while passing the radio from left to right (or right to left) in a sweeping motion. If operating correctly, the DMT instrument will abort the testing sequence and the words 'RFI Detected' will be present on the printout. If the instrument does not detect the presence of the RFI signal, the analyst should make sure the batteries are fully charged in the radio, and attempt the test again. In the alternative, or if the batteries are not charged sufficiently to allow for a repeated test, the analyst may attempt to borrow or secure the use of a 2nd radio from Law Enforcement who may be present. If on the 2nd attempt the instrument correctly identifies the presence of the RFI signal, the analyst will sign and retain BOTH printouts. If an alternative radio is used for the 2nd test, the analyst will make a note indicating such on the printout...and indicate the make/model of the radio if it can be obtained. If the make and model cannot easily be obtained, a simple notation indicating 'handheld police radio from "Name of Officer" was used to complete this RFI test. Batteries of analyst radio were dead. Or something to that effect. The exact wording is not important, but the note **SHALL** clearly indicate the chain of events.

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9. Sign all instrument Printouts: If printouts were not already signed, the analyst SHALL review and sign (or initial) each printout.
10. Complete and Sign Logbook at Site: Finally, before leaving the site, the analyst SHALL complete and sign the logbook indicating his 120 day check / inspection is complete. The analyst SHALL ensure that whatever he/she writes is legible.

Disposition of DMT Printouts:

Each document / page created by the DMT during the 120 day check / inspection SHALL be initialed and/or signed by the analyst.

As soon as practical, all printouts, and the completed OD-84 from a unique location SHALL be scanned and forwarded to the Alcohol Program Manager with the Michigan State Police. If a location has 2 instruments, the documents should NOT be combined into a single file. Meaning, each file shall contain only records pertaining to 1 specific instrument.

All pages will be accounted for by calculating the predicted number of pages and verifying with the actual number of pages scanned. No formal documentation or recording of this practice is required. In the event the total number of scanned pages does not match the predicted number of pages, the analyst will rescan the documents until all pages are accounted for.

If a page / record, is missing, the analyst shall make a reasonable effort to retrieve the missing page / record. If the page / record is permanently lost, then the record shall be replaced with a memo or other similar document explaining what the original record was, when it was determined to be 'lost', and what specific actions the analyst took to retrieve, find, locate the missing page / record.

Documentation:

The following documents are considered part of the 120 day maintenance check / inspection and digital copies shall be forwarded to the Alcohol Program Manager of the Michigan State Police. The analyst should retain the original printouts.

- Completed OD-84
- Diagnostic Record Printout
- Technicians Test Dry Printout showing results of 5 dry gas replicates
- Technicians Test Wet Printout showing results accuracy tests with wet bath simulators
 - 0.040 g/210L
 - 0.080 g/210L
 - 0.200 g/210L
 - Acetone Check / Interference Detected
 - RFI Detected / Check

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It is noted if additional works is completed (for example tank change) additional instrument printouts will be included.

If an analyst arrives at location and determines the instrument is not operational or will not power on, AND is not fixable at the current location:

The analyst may decide to remove the instrument from the testing site for repair, or to be sent to the factory for repair: In this circumstance, the analyst shall complete and submit to the Michigan State Police a completed OD-84 indicating the instruments serial number, location, date of removal, and some note on the OD-84 indicating that the instrument was inoperable, (why it was inoperable-if known), and that the instrument has been removed for further evaluation / repair, or to be sent to the factory for repair.

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APPENDIX B

Wet Bath Standard

Intoximeters recommends that external accuracy checks and calibrations be performed using either a dry gas or wet bath standard approved for use by both NHTSA and Intoximeters. (Wet bath simulators would be used with properly certified and maintained ethanol solutions).

In all cases the compressed gas tanks, simulators and simulator solutions should be used and maintained only in accordance with the quality assurance plans provided by their respective manufacturers to insure that they produce consistent and reliable samples.

Approved Wet Bath Simulator (Standard)

An Alcohol Breath Simulator (used in conjunction with a known Simulator Solution Standard) is a thermostatically controlled, water-alcohol instrument for the purpose of providing a precise vapor calibration standard for checking the accuracy and calibrating breath alcohol analyzers.

ELEMENTS:

- A. Glass jar which holds 500cc of solution.
- B. Jar head contains heater thermostat, stirrer, thermometer, and inlet and outlet ports for sampling headspace gas standing above the solution.
- C. Solution is a water/alcohol mixture of a certified

BrAC/BAC concentration.

GENERAL INFORMATION:

- A. Solution has a seven-month shelf life for refrigerated, unopened bottles of solution, **or as determined by the manufacturer.**
- B. 25-30 tests per bottle of solution.
- C. Liquid should be clear with no visible particles suspended in the solution.
- D. A simulator containing a solution of known BrAC/BAC value must be at the operating temperature of 34°C , $\pm .2^{\circ}\text{C}$, before use.
- E. The simulator top must be on securely so the system is airtight. To check, cover the outlet port and blow into the intake port. Air bubbles will not rise through the solution if the top is secure.
- F. When in use keep the simulator out of extreme cold or hot environments. Also, keep it out of drafty locations.

OPERATING GUIDELINES:

- A. Attach tubing to the inlet port.
- B. Remove the glass container from the simulator top housing. Make sure all parts are clean and dry. (*To prevent breakage, do not strike the thermostat or mercury thermometer against the glass container.*)
- C. Pour certified simulator solution to the 500 ml mark on the glass container. (DO NOT OVER FILL).
- D. Reassemble the simulator by replacing the container into the top housing; be sure the container is properly seated to the top housing. (DO NOT OVER TIGHTEN).
- E. Plug simulator into electric outlet. Turn the power ON and allow the solution to heat to 34°C . This will require approximately 30 minutes. The heater lamp

- is lit when the heating element is heating. The heater lamp is OFF when the simulator has reached the proper temperature of 34°C. (It is normal for the heater lamp to rapidly turn on and off as the instrument cycles.) Once the heater lamp turns OFF, wait an additional 15-30 minutes prior to testing.
- F. Observe the reference thermometer to verify the simulator has reached the proper operating temperature. Blow a sample into the inlet port to purge the initial headspace.
 - G. The simulator is ready for use. A new mouthpiece should be attached/inserted to instrument and then this assembly should be attached to the outlet port on the front of the simulator.
 - H. The connection from the outlet port of the simulator and the instrument should always be as short as possible. Long tubes will collect condensation and can effect the stability of a provided sample.
 - I. When the simulator is not in use, connect the inlet tube to the outlet port to seal the simulator to avoid loss of alcohol from the solution.

Note: Always check the temperature of the simulator before use. Producing the proper expected alcohol concentration is dependent upon the simulator being heated to 34°C, \pm .2°C. Additionally, only use current simulator solution from an accredited supplier.

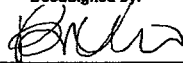
(CAUTION: DO NOT remove the top housing and expose the heating element to room air with the power turned ON. This will result in damage to the heating element).

APPENDIX C

9. According to Mr. Fondren, having 120-day tests that "bracket" subject tests is very important in order to rely on the results of those tests.
10. According to Mr. Fondren, a part of the 120-day test is the "wet bath calibration test", i.e., simulated breath tests using allegedly known concentrations of ethanol (alcohol) to test the unit at different alcohol levels.
11. According to Mr. Fondren, simulator devices are used to perform this "wet bath calibration test."
12. According to Mr. Fondren, the simulator devices contain solutions that must be heated up to a specific temperature, i.e., 34 degrees Centigrade +/- 0.2 degrees.
13. According to both Mr. Fondren and Dr. Stolz, it is vitally important to ensure that the temperature of the solutions is at 34 Degrees Centigrade +/- 0.2 Degrees. If the simulator solution temperatures are higher or lower than 34 degrees Centigrade +/- by as little as one (1) degree, a variance of approximately 7% will occur in the result.
14. According to both Dr. Stolz and Mr. Fondren, a variance of this degree would result in readings that fall outside the range to validate the results of the simulated tests.
15. According to Dr. Stolz, calibrating the simulator device temperature is the only way to ensure that the simulator device is heating the solutions to the proper temperature.
16. According to Dr. Stolz, the method to reliably calibrate and verify that the simulator device thermometer is accurate is to test and compare it with a reference thermometer.
17. According to Dr. Stolz, a reference thermometer is a thermometer that has been calibrated as accurate and reliable by an approved calibration organization, e.g., National Institute for Standards in Testing (NIST).
18. According to Dr. Stolz, where the reference thermometer reveals that the simulator thermometer is inaccurate, the simulator thermometer needs to be recalibrated.
19. Dr. Stolz also provided information that there are many ways that the use of the reference thermometer can go wrong. For instance, not allowing the liquid to properly heat up and then cool before reaching an equilibrium temperature of 34 degrees Centigrade, putting the thermometer in too soon, or placing the thermometer too close to the heating element to name a few. All of these mistakes can result in incorrect readings.
20. Dr. Stolz has testified that absent these verifications, the results of the wet bath calibration test are not scientifically reliable.
21. As mentioned above, Mr. Fondren has conceded that as a scientist, having these bracketed 120 days tests is very important in to order to rely on breath test results.
22. I certify that the above is an accurate recitation of Mr. Fondren's testimony in the 52-4 District Court.

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FURTHER Affiant saith not.
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 Neil Rockind

Subscribed and sworn to before me
 On this 8th day of November, 2020

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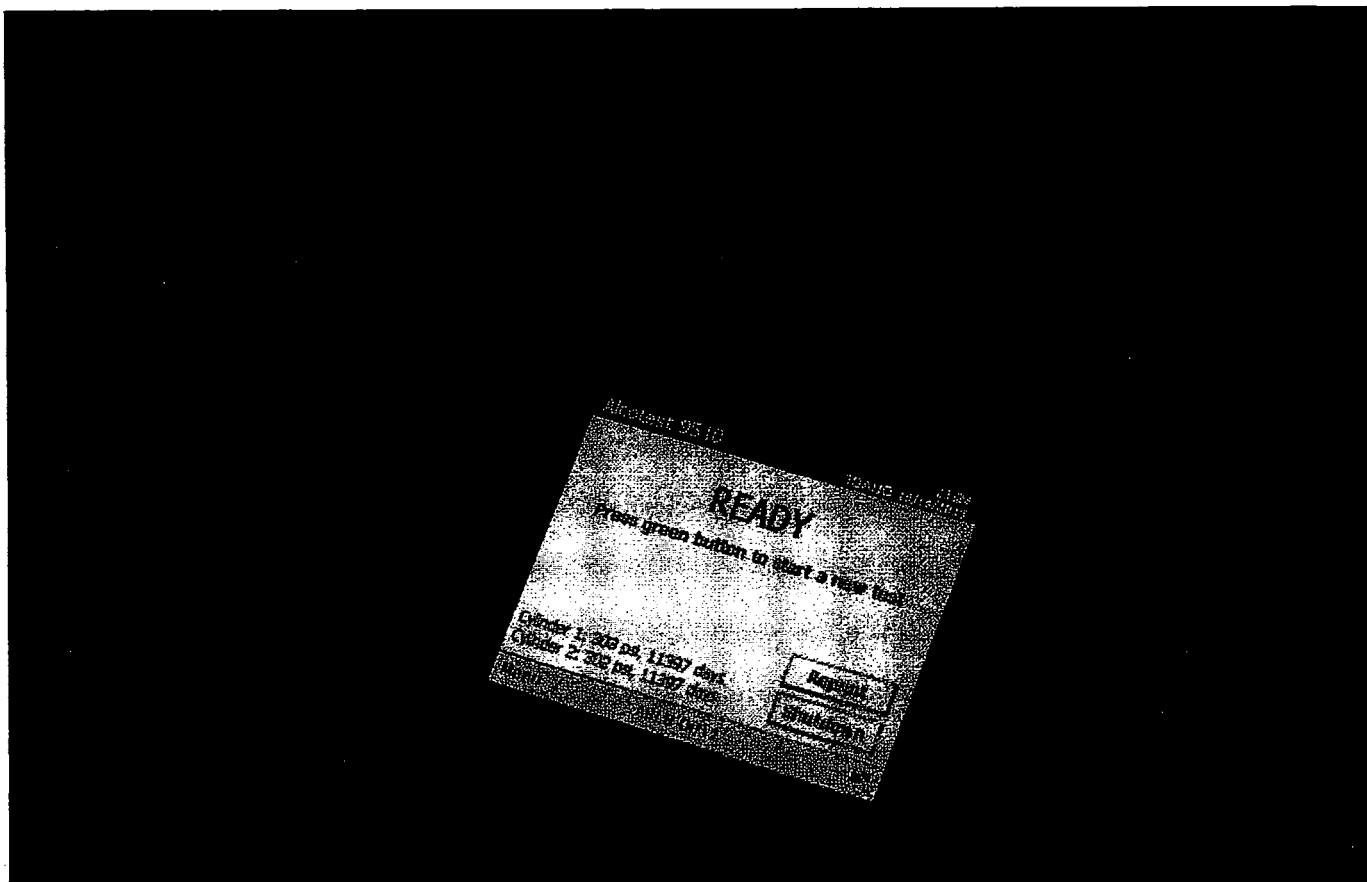
, Notary Public

My Commission Expires: 5/10/2022

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These Machines Can Put You in Jail. Don't Trust Them.

By Stacy Cowley and Jessica Silver-Greenberg Nov. 3, 2019



The Dräger Alcotest 9510 and similar devices from other manufacturers are found in police stations across the country. The test results produced by these machines are increasingly drawing skepticism from judges. Cooper Neill for The New York Times

A million Americans a year are arrested for drunken driving, and most stops begin the same way: flashing blue lights in the rearview mirror, then a battery of tests that might include standing on one foot or reciting the alphabet.

What matters most, though, happens next. By the side of

the road or at the police station, the drivers blow into a miniature science lab that estimates the concentration of alcohol in their blood. If the level is 0.08 or higher, they are all but certain to be convicted of a crime.

But those tests — a bedrock of the criminal justice system — are often unreliable, a New York Times investigation found. The devices, found in virtually every police station in America, generate skewed results with alarming frequency, even though they are marketed as precise to the third decimal place.

Judges in Massachusetts and New Jersey have thrown out more than 30,000 breath tests in the past 12 months alone, largely because of human errors and lax governmental oversight. Across the country, thousands of other tests also have been invalidated in recent years.

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The machines are sensitive scientific instruments, and in many cases they haven't been properly calibrated, yielding results that were at times 40 percent too high. Maintaining machines is up to police departments that sometimes have

spotty standards and lack expertise. In some cities, lab officials have used stale or home-brewed chemical solutions that warped results. In Massachusetts, officers used a machine with rats nesting inside.

Watch "The Weekly," The Times's New TV Show, on FX and Hulu

There are more than a million drunken driving arrests in America each year, but the devices the police use to test drivers' breath may not even work.

"The Weekly"/The New York Times/FX/Hulu

Technical experts have found serious programming mistakes in the machines' software. States have picked devices that their own experts didn't trust and have disabled safeguards meant to ensure the tests' accuracy.

The Times interviewed more than 100 lawyers, scientists, executives and police officers and reviewed tens of thousands of pages of court records, corporate filings, confidential emails and contracts. Together, they reveal the depth of a nationwide problem that has attracted only sporadic attention.

A county judge in Pennsylvania called it "extremely questionable" whether any of his state's breath tests could

withstand serious scrutiny. In response, local prosecutors stopped using them. In Florida, a panel of judges described their state's instrument as a "magic black box" with "significant and continued anomalies."

Even some industry veterans say the machines should not be de facto arbiters of guilt. "The tests were never meant to be used that way," said John Fusco, who ran National Patent Analytical Systems, a maker of breath-testing devices.

Yet the tests have become all but unavoidable. Every state punishes drivers who refuse to take one when ordered by a police officer.

The consequences of the legal system's reliance on these tests are far-reaching. People are wrongfully convicted based on dubious evidence. Hundreds were never notified that their cases were built on faulty tests.


And when flaws are discovered, the solution has been to discard the results — letting potentially dangerous drivers off the hook.

A man backed his car into an 83-year-old woman outside a liquor store and then failed field sobriety tests. Another man was stopped after vomiting out the window and veering "all over the road." One more driver, with a suspended license, was pulled over and blew a 0.32 — a level of drunkenness

that would leave most people unconscious.

All three were arrested and charged with driving drunk. All three had previous convictions for driving while intoxicated, according to police reports and court records. And all three were acquitted after Massachusetts was forced to throw out their breath tests — along with more than 36,000 others — in one of the largest exclusions of forensic evidence in American history.

A FATEFUL TRIP



Matthew Mottor of Hinsdale, Mass. His case took more than five years to resolve. Tony Luong for The New York Times

The Deerfield River snakes through the woods of northwestern Massachusetts, and on a hot Sunday in July 2013 it was packed with rafters. Matthew Mottor arrived with more than a dozen friends and family members and two coolers of Blue Moon beer.

They spent hours tubing down the river and drinking before going ashore for a picnic. That's when a drunk woman in the group caught the eye of a Massachusetts State Police trooper patrolling the area. The trooper, Steven Hean, told them to get their friend home. The party over, Mr. Mottor left his girlfriend and got a ride to his truck, a few miles upriver.

He pulled his gray Dodge Durango onto the winding road. He made it about 200 yards. Then he saw the flashing lights.

Trooper Hean wrote in a report that he stopped Mr. Mottor for driving 41 miles per hour in a 25 m.p.h. zone. Detecting "a strong odor" of liquor on Mr. Mottor's breath, the trooper asked him to perform some field sobriety tests, including walking heel-to-toe.

Accidents years earlier had left Mr. Mottor with metal plates in his ankles and feet, court records show. "I explained to him that I'm not great at walking around on two feet on an everyday basis," Mr. Mottor said. After passing two tests — reciting the alphabet and standing on one leg — he struggled to walk in a line. Trooper Hean brought out his breath tester.

Hand-held devices, like Trooper Hean's Alco-Sensor IV, contain fuel cells that react to the alcohol in exhaled breaths

and generate an electric current — the stronger the current, the higher the alcohol level. They are inexpensive and easy to maintain, but their results can be inconsistent. Older women sometimes have trouble producing enough breath to get the machines to work. Toothpaste, mouthwash and breath mints — even hand sanitizer and burping — may throw off the test results.

Tests from those portable machines are not admissible in court in most states (California is among the exceptions). But they often trigger an arrest, which leads to a test on another machine at the police station. That result determines whether someone is charged — and, often, whether they're convicted.

By the side of River Road, Mr. Mottor blew a 0.13, far above the legal limit. That's when the cuffs came out.

THE DRUNKOMETER

Attempts to prevent drunken driving predate the modern automobile.

In the late 19th century, Britain had outlawed being drunk while operating a "carriage, horse, cattle or steam engine." In 1897, a London taxi driver named George Smith crashed his electric cab. He confessed to having had "two or three glasses of beer" and was fined 20 shillings. It is widely

regarded as the first arrest for intoxicated driving.

Near the end of Prohibition, a biochemist invented a suitcase-sized machine with vials of chemicals and a balloon to blow into. Alcohol in the driver's breath would trigger a reaction: the drunker the driver, the deeper the chemicals' color. It was called the Drunkometer. But it was bulky and hard to use.

Two decades later, a police photographer and amateur chemist named Robert Borkenstein developed a similar but more portable machine. He named it the Breathalyzer.

Police departments around the country bought Mr. Borkenstein's invention and versions developed by competitors. Then, in 1980, a fatal collision led to an overhaul of America's drunken driving laws — and a sales boom for companies that made breath-testing devices.

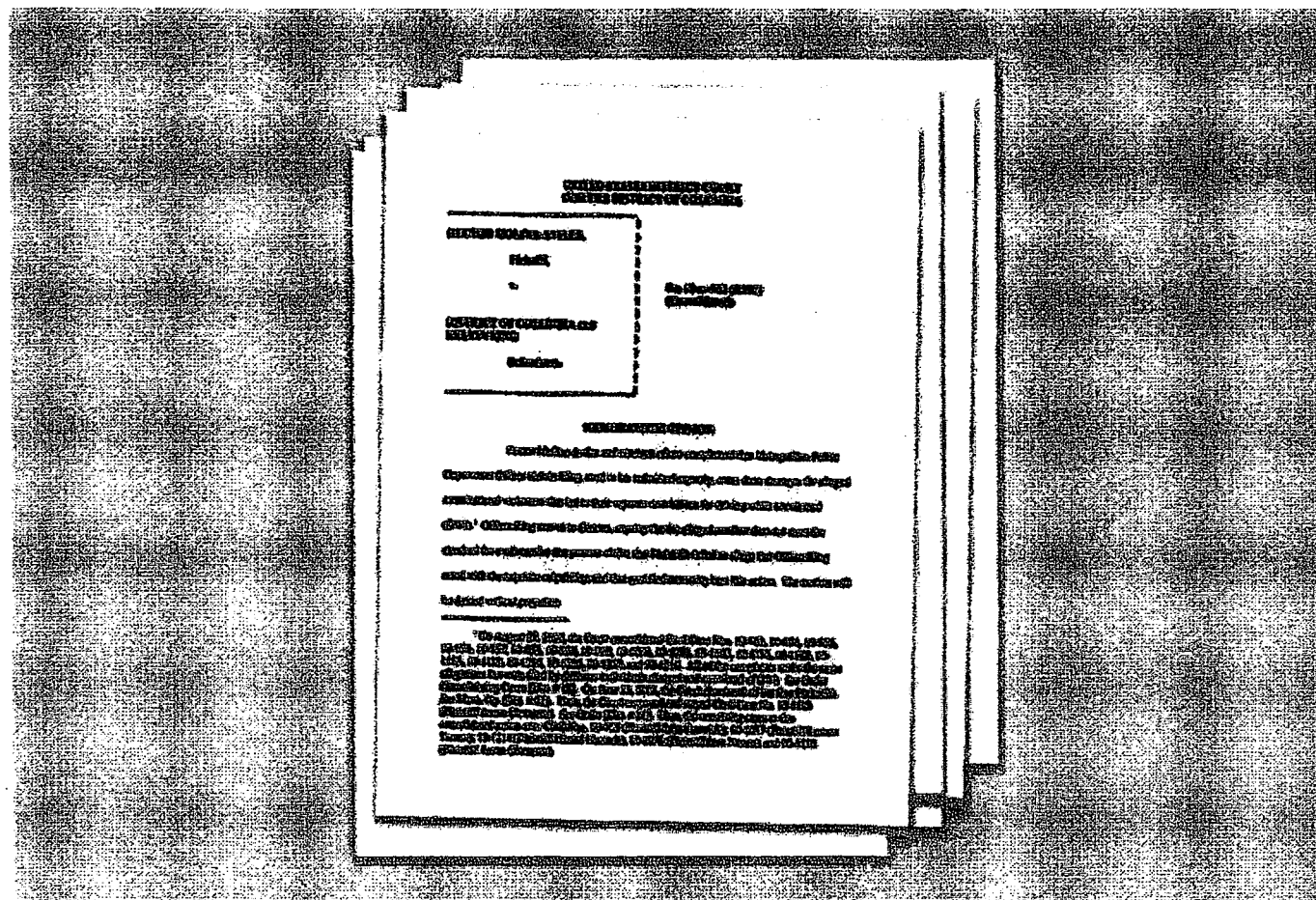
Carime Lightner, 13, was walking to a church carnival in Fair Oaks, Calif., when a drunken driver slammed into her so hard she was knocked out of her shoes. The man had been arrested repeatedly for intoxicated driving.

Carime's mother started Mothers Against Drunk Driving and launched one of the most effective citizen lobbying campaigns in history. States set stiffer penalties, including mandatory jail time in some cases, and made it illegal to

drive with a blood-alcohol level above a designated mark.

The crackdown worked. In 1982, the year the National Highway Traffic Safety Administration began keeping records, some 21,000 people were killed in drunken-driving incidents. The number of deaths tumbled to around 10,500 in the most recent annual tally, even as the number of miles driven by Americans has nearly doubled.

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From the First Drunken Driving Case to Modern Challenges

Read the documents The Times gathered to understand breath-testing machines, and the problems that have caused tens of thousands of tests to be thrown out.

in most of the country, the threshold for illegal drunkenness is 0.08 grams of alcohol per 100 milliliters of blood. The only way to measure that directly is to draw blood, which requires a warrant. Breath tests are simpler.

Testing machines can go for \$10,000 or more, and some two dozen companies sell them in the United States. The biggest contracts, with state police crime labs, are worth millions.

A St. Louis company, Intoximeters, made the portable device used on Mr. Mottor. Dräger, a German company, owns the rights to the Breathalyzer name. CMI, based in Kentucky, is another industry leader.

"Our top priority is the quality and safety of our products," said Brian Shaffer, a Dräger spokesman. "Our products provide the highest level of forensic and legal integrity." He added, "Our advanced evidential breath alcohol testing instruments exceed the requirements of national and international regulatory agencies."

CMI and Intoximeters did not respond to multiple requests for comment.

STARTING TO PANIC

shirtless and still in swim trunks, Mr. Mottor arrived at the police barracks in Cheshire, Mass. He didn't think he was drunk. But he was starting to panic.

He had left his phone in his S.U.V. and had no way to tell his girlfriend what had happened. He pictured her alone by the river, thinking he had driven into a ditch.

Mr. Mottor was escorted to the station's breath-testing machine. It was larger, more sophisticated and in theory more reliable than Trooper Hean's portable instrument, and its results were admissible in court. Trooper Hean asked Mr. Mottor to start blowing. Hoping it would help him get back to his girlfriend faster, he complied.

The Alcotest 9510, manufactured by Dräger, resembles a fax machine with a small hose. As a person breathes into the device, a beam of infrared light is shot through the sample. Chemicals, including the ethanol in alcoholic drinks, absorb light to varying degrees. By analyzing how much light is absorbed, the instrument can identify the type of chemical and the amount of it present.

Many machines, including the Alcotest 9510, also use a fuel-cell sensor — the same type of tool that is in portable devices. Each system is supposed to operate independently; if both return similar results, the theory goes, it's an extra assurance that the measurement is

accurate.

Mr. Mottor blew for about 10 seconds, the machine beeped, and a number flashed on its screen: 0.08.

He was charged with operating under the influence, which leads to the automatic revocation of driving privileges in Massachusetts. Trooper Hean confiscated Mr. Mottor's license and called a truck to tow his S.U.V.

SECRET SOFTWARE

The Dräger Alcotest 9510 has been the subject of intense scrutiny by defense lawyers in Massachusetts and Washington State. Cooper Neill for The New York Times

Breath-testing machines need less than a minute to run their calculations. What happens during those 60 seconds, though, has been the subject of years of courtroom fights.

Defense lawyers have repeatedly tried to forensically examine the machines, especially their software. Inspecting the code could reveal any built-in flaws or assumptions the devices use in their calculations.

But even procuring a machine is a challenge. Manufacturers won't sell them to the public.

Jan Semenoff, a former police officer who works with defense lawyers, was once a CMI salesman and had a

machine left over from those days. When he sent it in for a repair, CMI wiped the machine's memory chip. "They turned the damn thing into a paperweight," Mr. Semenoff said.

Courts in at least six states, including New York, have rebuffed defense lawyers' attempts to get their hands on the machines' code.

But in 2007, the New Jersey Supreme Court granted a request by defense lawyers and ordered Dräger to allow outside experts to analyze the software for the Alcotest 7110 machines in use statewide. The experts said it was littered with "thousands of programming errors," according to their report to the court.

After reviewing the evidence, the court deemed the Alcotest 7110 "generally scientifically reliable." But the state court also acknowledged the devices had "mechanical and technical shortcomings" that had the potential to produce the wrong result. Dräger said it quickly fixed the problems, but the state never rolled out the software update, court records show. Dräger now advertises the 7110 as the only device on the market whose software "has been reviewed by independent third parties and approved by a Supreme Court decision."

None of that made a difference in other states, which employ a variety of machines and standards. Each state

decides now rigorously it will test machines, and several have used devices that were deemed unreliable elsewhere.

In 2005, for example, Vermont's toxicology lab scrutinized machines from four manufacturers. The lab rated CMI's Intoxilyzer 8000 as "unsatisfactory" and found that it gave inaccurate results on "almost every test," according to a lab technician's report.

But the same device was already being used in Mississippi, and it would soon be deployed by other states, including Ohio and Oregon.

Florida, too, adopted the Intoxilyzer 8000, even after a test machine short-circuited and started to smoke, state records show.

When the state began setting up its new devices, technicians found they were returning inaccurately low results, according to court testimony. A CMI engineer diagnosed a problem with airflow, and he drilled a small hole in the exhaust valve to solve it.

The fix worked. CMI started boring holes in all the devices it sent to police departments in Florida, court records show.

When defense lawyers discovered the undisclosed change, they challenged its legality. The Collier County judge who heard the case in 2012 said he ~~was~~ "extremely concerned"

about the modifications.

"A criminal defendant should not face conviction and possible incarceration based on secret undisclosed evidence," he wrote in his ruling. Ultimately, that case and others led several Florida judges to stop allowing breath tests to be used in their courtrooms.

Defense lawyers in state courts across the country have sought to learn more about the devices being used to convict their clients. In two states, Washington and Massachusetts, they took aim at the instrument that Mr. Mottor blew into: Dräger's Alcotest 9510.

'THROW CAUTION TO THE WIND'

Falcon Momot, left, and Robert Walker, information security consultants who tested Dräger's device, were told to stay quiet about the results. Daniel Berman for The New York Times

When the State of Washington decided to spend more than \$1 million to replace its aging machines in 2009, the state police chose the Alcotest 9510 despite a report by their own scientist that described the machines as "not yet ready for implementation."

Before rolling out the machines, state officials debated whether to spend tens of thousands of dollars on an outside expert to evaluate the software. Fiona Couper, a state

toxicologist, emailed her colleagues: "I think we throw caution to the wind and proceed without paying up front for an independent evaluation." (In an email to The Times, Ms. Couper said that "it was too premature to evaluate the software at that time." Court records show no evaluation was ever done.)

In 2015, a local judge granted a request from defense lawyers to review the software underpinning the state's Alcotest machines. That task fell to a consulting company run by two veteran programmers and security experts, Robert Walker and Falcon Momot.

Mr. Walker had worked at Microsoft for more than a decade and was adept with Windows CE, the obsolete operating system powering the Alcotest 9510. Mr. Momot, a soft-spoken hacker with spiky facial piercings and a rainbow-colored mohawk, was known for his talent in hunting down complicated computer bugs and software vulnerabilities.

Dräger insisted on extraordinary security. It demanded that its software be reviewed on an isolated computer network and that the state police be able to inspect the testers' equipment, according to court documents.

"I worked on the most confidential things that Microsoft does, and they don't have any procedures like this," Mr. Walker said in an interview.

After a couple weeks dissecting the Alcotest code, they wrote a nine-page draft report, "Defective Design = Reasonable Doubt." They planned to dig further, but things went awry when they shared their report with defense lawyers at a convention.

Dräger sent Mr. Walker a letter demanding that he and Mr. Momot ask anyone with a copy of their report to destroy it — including the lawyers who hired them — and to stay silent about the instruments' inner workings. Facing a giant company, Mr. Walker felt he had no choice but to comply. "I am an ant," he said.

Mr. Shaffer, the Dräger spokesman, said the company was defending its intellectual property. "We really have nothing to hide, but we have something to protect," he said.

Although Mr. Momot and Mr. Walker's preliminary report never made it into court, a few copies survived. The Times obtained one from a defense lawyer.

The report said the Alcotest 9510 was "not a sophisticated scientific measurement instrument" and "does not adhere to even basic standards of measurement." It described a calculation error that Mr. Walker and Mr. Momot believed could round up some results. And it found that certain safeguards had been disabled.

Among them: Washington's machines weren't measuring drivers' breath temperatures. Breath samples that are above 93.2 degrees — as most are — can trigger inaccurately high results.

Washington had decided against spending more on a sensor that would check breath temperature and allow the software to adjust for it, according to Mr. Shaffer. He said Washington wasn't alone; most of Dräger's American clients skip the sensors.

The Washington State Patrol is "very confident in the accuracy and reliability of the Dräger 9510 breath test instrument," said Sergeant Darren Wright, a spokesman. He added that the patrol did not believe that the breath temperature sensor was needed to produce accurate results.

Other states have disabled different safeguards.

In Minnesota, for example, officials found that the fuel-cell systems in their DataMaster devices often broke down, according to court testimony. Instead of fixing the problem, technicians simply turned off that portion of the machine in 2012. The effect was to eliminate an important quality-control check — one that had been a selling point when the machines were purchased.

The state's Bureau of Criminal Apprehension, which manages the testing program, said it "remains confident in the reliability of results obtained by DataMaster devices across Minnesota."

INSOMNIA AND SHAME

His license revoked, Mr. Mottor relied on rides from family and friends to get to the restaurant in the Berkshire Mountains where he was a chef.

The consequences rippled outward. He and his girlfriend shelved plans to buy a house. He couldn't sleep. He could no longer drive his 2-year-old daughter to play dates. He worried about going to jail and leaving his family unable to afford to heat their single-wide trailer.

"I think I took 10 years off my mother's life," Mr. Mottor said.

After three months, he was able to get his license reinstated while his case progressed. Mr. Mottor hired a lawyer to fight the charges. To pay that bill, he maxed out his credit cards, raided his retirement fund and borrowed money from nearly everyone he knew.

His lawyer planned his defense: Mr. Mottor had been entrapped by the state trooper, his foot injury explained why he failed the field sobriety test, and a phenomenon called

“retrograde extrapolation” meant that Mr. Mottor’s blood-alcohol level might have been lower when he was on the road than when he was tested at the police station.

It didn’t occur to either of them to question the breath-testing device itself.

DISREGARDING TRUTH AND ACCURACY

Robert Friedlander was pulled over on Highway 119 near Black Hawk, Colo. Other defendants would seize on his challenge. Theo Stroomer for The New York Times

Questioning the device worked for Robert Friedlander — and set off a chain reaction that destabilized Colorado’s enforcement of drunken-driving laws.

On the night of May 30, 2016, a Colorado State Patrol officer pulled Mr. Friedlander over after seeing his Audi sedan swerving. At the station, he blew a 0.07 — below the threshold at which a driver is considered drunk, but high enough in Colorado for him to be charged with a lesser offense, impaired driving.

Mr. Friedlander, however, was adamant that he was not impaired — and that he had evidence to support his claim. Years earlier, he had been convicted of impaired driving, and he had carried around a small portable breath tester ever since.

That May night, Mr. Friedlander had been drinking at the Ameristar casino in Black Hawk. He tested himself and blew a 0.05, he said. Then, he said, he waited an hour, without drinking, before he hit the road.

As Mr. Friedlander fought the charges, his case uncovered widespread problems with how the state forensic lab had deployed its fleet of more than 160 new Intoxilyzer 9000s.

Before Colorado got those machines in 2013, a lab technician, Michael Barnhill, had tested devices from a number of manufacturers. He testified in Mr. Friedlander's case that his manager ordered him to destroy records from those tests, as well as the manual for the Intoxilyzers, in case defense lawyers tried to subpoena the materials.

The Colorado lab was rushing to meet its deadline to get the machines up and running. But breath-testing devices are not operational right out of the box. Each machine needs to be calibrated using samples with known alcohol concentrations. The process can take an hour or more per machine.

Mr. Barnhill said lab records were faked to show that he had calibrated dozens of instruments that he had never touched. And to speed things up, the lab's supervisor summoned assistants, including an intern, a CMI lawyer and a sales manager, to help.

had taken apart equipment before, but, you know, with my father and whatnot," the intern, Adam Lopez, said in a deposition. "But never ever have I like done it on an instrument that is on a state level where it's responsible for, you know, somebody's prosecution." He added: "There probably were some errors here and there."

In addition, the lab's former science director said in a sworn affidavit that her digital signature had been used without her knowledge on documents certifying that the Intoxilyzers were reliable. The lab kept using her signature after she left for another job.

The judge overseeing Mr. Friedlander's case was appalled. The lab decided to "consciously disregard truth and accuracy," he wrote. The judge ruled that Mr. Friedlander's test was inadmissible unless the lab could prove its machine was producing sound results.

At that point, the prosecutor offered Mr. Friedlander a chance to plead guilty to the lesser charge of reckless driving. He took the deal.

Defense lawyers in Colorado seized on the ruling in Mr. Friedlander's case to challenge breath test results in dozens of other cases. Most courts followed the judge's lead and excluded the tests, but there was no statewide resolution, according to local lawyers.

Any problems have long since been resolved," said Scott Bookman, the laboratory director at the Colorado Department of Public Health and Environment. "I am fully committed to transparency and accuracy, and we will operate with those chief principles at the forefront of everything we do."

Mr. Friedlander, however, is skeptical.

"I don't condone drunken driving in the least little bit, but I was trying to follow the law," he said. "The machines that they're using really materially affect people, and these lab bureaucrats, running their little fiefdoms, didn't seem to give a damn if they were accurate or not."

HOME-BREWED CHEMICALS

Colorado wasn't the only place where human mistakes caused a cascade of problems.

When Ilmar Paegle was hired to run the breath-testing program for the Metropolitan Police Department in Washington, D.C., his first order of business was to test its Intoxilyzers. Mr. Paegle, a retired United States Park Police officer, was stunned: Every machine was generating results that were 20 percent to 40 percent too high.

That discovery, in 2010, most likely meant that years of

faulty tests had convicted innocent drivers.

Mr. Paegle's predecessor, Kelvin King, who oversaw the program for 14 years, had routinely entered incorrect data that miscalibrated the machines, according to an affidavit by Mr. Paegle and a lawsuit brought by convicted drivers.

In addition, Mr. Paegle found, the chemicals the department was using to set up the machines were so old that they had lost their potency — and, in some cases, Mr. King had brewed his own chemical solutions. (Mr. King still works for the Metropolitan Police Department. A department spokeswoman said he was unavailable for comment.)

Mr. Paegle, believing the machines hadn't been giving reliable results for at least a decade, pulled them out of service. He alerted the city's attorney general, whose office prosecuted drunken-driving cases.

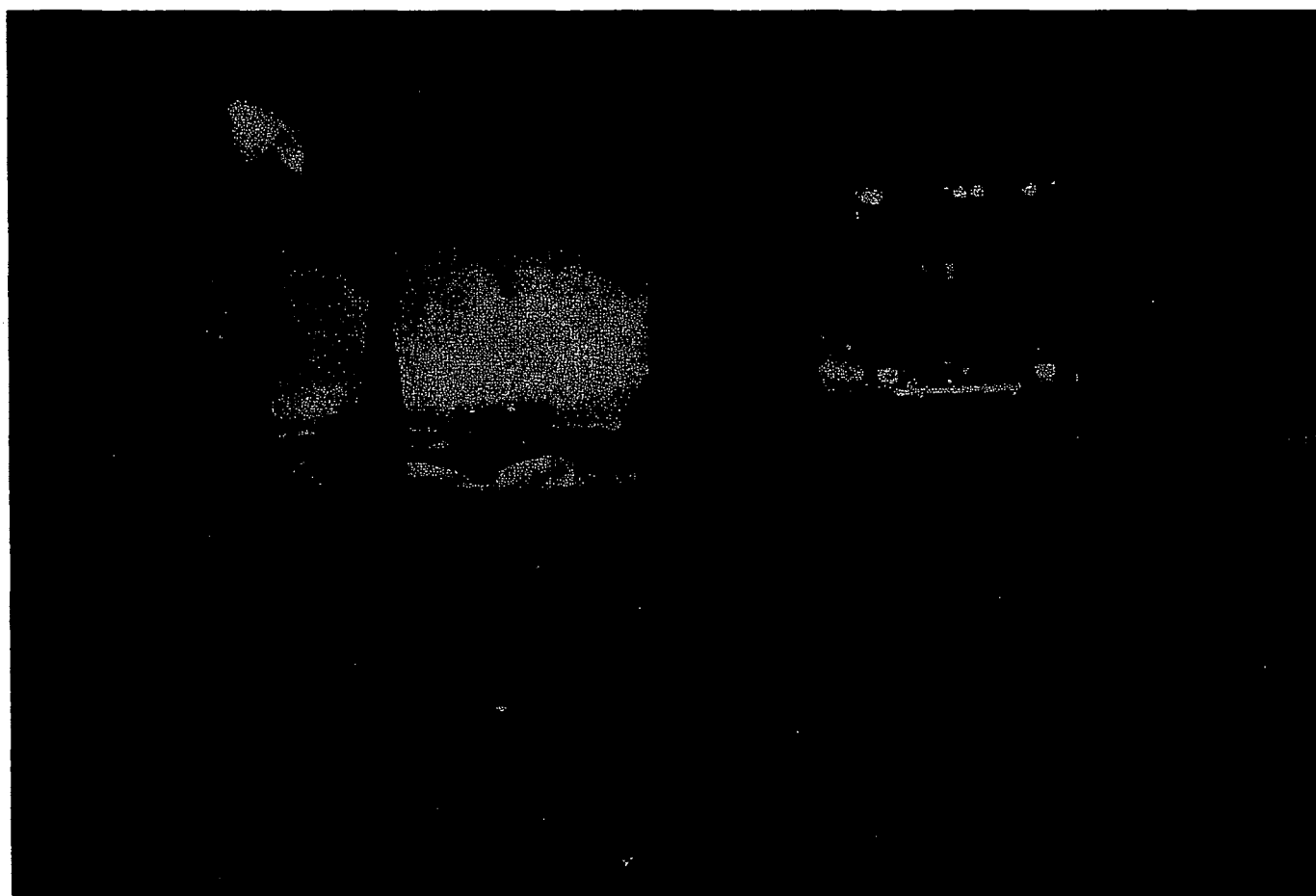
The city stopped using breath-test results in new prosecutions, but it only acknowledged problems in cases going back 18 months. The attorney general's office determined that in that span, 350 people had been convicted based solely on results that were far too high. Lawyers for those drivers were notified that their clients could ask to have their cases reopened.

But more than 700 other people also had been convicted

after receiving initiated test results. The attorney general's office didn't believe those convictions hinged on the breath tests, so it decided not to notify those defendants that their results had been incorrect.

The reality, though, was that most of those 700-plus cases had ended in guilty pleas by defendants who thought, wrongly, that prosecutors had infallible scientific evidence that they were drunk.

'SERIOUS ERRORS OF JUDGMENT'



The scene of a crash in Washington State; troopers believed that a driver was intoxicated. The Weekly/The New York Times/FX/Hulu

As Mr. Mottor's case inched along in Massachusetts, a

parallel legal fight was playing out: Lawyers representing hundreds of drunken-driving defendants were pelting the state's courts with requests for more information on the Dräger Alcotest 9510. (Their cases were consolidated into a single action.)

In 2016 — three years after Mr. Mottor was pulled over — the state's highest court ruled that Massachusetts had to hand over two Alcotest machines. The defense lawyers would be allowed to hire experts to test them.

The decision caused paralysis. Prosecutors froze thousands of cases until the review was finished.

The software experts and scientists who inspected the Alcotest 9510 machines found troubling mistakes, according to their reports to the court. In some circumstances — when the devices' two testing methods produced substantially different results, for example — the machines were supposed to generate error messages and terminate the test. Instead, the devices printed a result. (Dräger blamed an error by its computer programmers, which it said has now been fixed.)

But the machines weren't the only problem. The Massachusetts forensic lab, which for years had been plagued by scandals over faked drug test results and tampered evidence, lacked a written procedure to set up

and test machines, the lab's technical director testified.

The justice hearing the case, Robert A. Brennan, said the lab could not prove that it had followed a "scientifically sound methodology," and in 2017 he threw out all of its breath test results from 2012 through 2014.

That was only the beginning. Lawyers soon discovered that the lab had hidden records of hundreds of failed calibrations. The discovery provoked a state investigation that blasted the lab's leadership for "serious errors of judgment."

Justice Brennan later expanded his previous order: No tests from the lab were admissible until it was accredited by a national board that oversees forensic labs. Eight years of tests — more than 36,000, according to defense lawyers — were suddenly off-limits.

Mr. Mottor's trial finally got underway on Jan. 10, 2018. He and his lawyer didn't realize that his breath test was among those that had been invalidated. It remained the state's crucial piece of evidence.

His lawyer told the court about Mr. Mottor's shaky balance and metal-filled feet, but the arguments didn't resonate. The only thing that seemed to matter to the jury was the breath test.

"The .08 comes in, and to them that's a conviction," Mr. Mottor said. He was found guilty.

A couple of weeks later, he learned that his breath test never should have been part of the prosecution. He asked to have his case reopened.

When Mr. Mottor's request was granted, the prosecutor made him an offer: Plead guilty to a lesser offense, and the drunken-driving charge would be dropped. In February, more than five years after his arrest, Mr. Mottor took the deal.

"Even the people in the clerk's office were high-fiving me afterward," he said. "They were happy that it was over."

Since his arrest, Mr. Mottor has maintained a clean driving record. He is still paying off the roughly \$30,000 he accrued in fines, court fees and legal bills.

42,000 CONVICTIONS AT RISK

Nearly 29,000 of the invalidated tests in Massachusetts were already used to convict drivers, state records show.

This month, the state will begin informing those defendants that they can seek a new trial, and lawyers are bracing for a flood of requests.

So are lawyers in New Jersey, where more than 13,000

people were found guilty based on pre-⁴tests from machines that hadn't been properly set up.

Between those two states, at least 42,000 convictions are at risk. Thousands of other defendants have already been acquitted in cases that prosecutors believe they would have won if they had been able to use their most powerful piece of evidence.

And recognition of the tests' problems is spreading.

In Minnesota, a judge ruled last year that the state's machines appeared to be rounding up results, falsely nudging some defendants over the legal limit. (A spokeswoman for the state's testing program said the judge misunderstood the technology.)

In Washington State, where Dräger sent its cease-and-desist letter, D.U.I. lawyers are trying to consolidate a group of cases to challenge the reliability of the state's machines.

And in courts around the country — including one last year in Queens County, N.Y. — judges continue to toss out individual cases when questions arise about the tests' accuracy.

"If we are going to put people in jail and punish people, take their liberties away, take their licenses away, we have an obligation to be accurate," said Joseph Bernard, the

defense lawyer who helped Mr. Mottor get a new trial and is representing dozens of others in Massachusetts.

But there is a cost. Throwing out tens of thousands of faulty breath tests will inevitably let some dangerous drivers back on the road.

"Let's not fool each other," Mr. Bernard said. "I am not going to sit here and tell you that situation and that dynamic isn't going to happen. Of course it's going to happen. The question is, whose fault is it?"

Natalie Kitroeff contributed reporting. Susan Beachy and Sheelagh McNeill contributed research.

STATE OF MICHIGAN

45TH JUDICIAL DISTRICT, COUNTY OF OAKLAND

THE PEOPLE OF THE CITY OF OAK PARK,

V

District No. 1700503SP

HERMAN LEE STARKS,

Defendant.

EXCERPTS OF PROCEEDINGS
TESTIMONY OF MARVIN GIER
JURY TRIAL

BEFORE THE HONORABLE MICHELLE FRIEDMAN APPEL, (P32709)
13600 OAK PARK BOULEVARD, OAK PARK, MICHIGAN 48237
On Monday, January 14, 2019

APPEARANCES:

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Oak Park, Michigan

Monday, January 14, 2019 - 12:53 p.m.

MR. MCINTYRE: The People call Mr. Marvin Gier.

THE COURT: Okay. If you'll come forward, Sir.

MR. GIER: Right here?

THE COURT: Yeah. If you'll stop for a minute. Raise your right hand. You do solemnly swear or affirm the testimony you're about to give in this matter shall be the truth.

MR. GIER: Yes, Your Honor.

THE COURT: Thank you. Have a seat, please. And if you could state your full name for the record and spell your name for the record.

THE WITNESS: Um, my full name is Marvin Ray Gier. Last name spelling, G-I-E-R.

THE COURT: Thank you. You may proceed Mr. McIntyre.

M A R V I N R A Y G I E R

(At 12:53 p.m., called by Mr. McIntyre and sworn by the Court, testified as follows:)

DIRECT EXAMINATION

BY MR. MCINTYRE:

Q Um, Mr. Gier, where do you work?

A Ah, currently?

1 Q Yes.

2 A I work at the Grand Traverse Pie Company over in Ann Arbor.

3 Q Really?

4 A Yes.

5 Q Do you work anywhere else?

6 A Ah, no.

7 Q Did you, ah, on December 17th of 2017 did you work somewhere
8 else?

9 A I worked with, ah, National Patent Analytical Systems and the
10 State of Michigan.

11 Q Okay. And what were your responsibilities in that position?

12 A Ah, I was at that time a technician and, ah, I had taken care
13 of the, ah, breath testers on the entire eastern half of the
14 state of Michigan. There were 143 instruments at 141
15 departments and, ah, after 24 years, nine and a half months I
16 decided to retire again.

17 Q When you say retire again, what did you retire from the first
18 time?

19 A The Michigan State Police.

20 Q Okay. How long did you work there?

21 A Twenty-five years and three months.

22 Q Okay. Now because you, ah, conducted testing on the
23 Datamaster instrument, I assume you've had, um, training in
24 how to conduct that testing?

25 A Yes.

1 Q Please explain the training that you had in how to conduct
2 testing on the Datamaster instrument.

3 A Ah, on the current one it, ah, the training was a, basically a
4 three day training session and, ah, most of the experience
5 that you gain as a technician, you'll gain from actual
6 experience out in the field.

7 Q Okay. And what kind of things did they cover during the
8 training session?

9 A Ah, just, they just made us aware of because they had changed
10 the structure of the interior with the exception of the
11 scientific principals, you know the boards were different,
12 electronic boards were different, ah, the filtering system was
13 different and, ah, so you just had different things to look
14 for and where to look for them when they went bad.

15 Q Okay. Um, and what kind of certification do you have in
16 regard to the Datamaster instrument? Or I should say at the
17 time that you conducted this test, what kind of certification?

18 A Ah, what is my class?

19 Q Yes.

20 A It was a class 4-B.

21 Q And can you explain what that means? What is a class 4-B?

22 A A class 4-B means that, ah, you should be able to take care of
23 anything that's alcohol related, ah, as far as certification
24 or repair and things like that.

25 Q Okay. Um, now at that, um, time in December 17th of 2017, um,

1 please explain your duties in regard to testing the Datamaster
2 instrument.

3 A Ah, explicitly with the, ah, D.M.T. or the breath testing
4 device used at that time, I was responsible for every 120 days
5 or less, to go around and certify them to make sure they're
6 working properly and to take care of any preventative
7 maintenance as I may see and, ah, and then at the same time if
8 any of them broke down in between the 120 day inspections then
9 I was assigned to go and, and fix them and make sure they're
10 working properly and put them back in service.

11 Q Okay. Now what kinds of tests could you potentially conduct
12 on a Datamaster instrument when you do your 120 day test?

13 A Ah, during the 120 day there were a number of things that we
14 looked at. We looked at date and time, make sure the clocks
15 are working and the date's correct and then we also did, ah,
16 what we call dry gas testing. And, and the dry gas is a, ah,
17 tank that's attached to the instrument and it provides
18 automatic testing on Monday morning. And then we would also
19 do wet bath testing. We'd also test, ah, and that would
20 include three different alcohol levels, 0.04, 0.08, 0.20. And
21 then we also tested for acetone and acetone is something that
22 a diabetic can produce so we wanted to make sure that that
23 instrument could sort out the difference between acetone and
24 alcohol.

25 Q Okay. Um, did you, when you conduct a 120 day test, um, did

1 you mark that you completed the test on, on a log form?

2 A I did. Ah, there's a log, a monthly log kept at each police
3 department where they record their results on the Monday
4 morning test and then I would come by on my 120 day
5 inspections or service calls and then I would, ah, stamp it
6 and, ah, indicate that the instrument is working properly when
7 I left.

8 MR. MCINTYRE: I'm holding People's purposed Exhibit
9 3, um, I'm showing it to defense counsel. Ah, permission to
10 approach the witness, Your Honor?

11 THE COURT: Yes.

12 BY MR. MCINTYRE (continuing):

13 Q I'm handing the purposed Exhibit to the witness. So what I
14 handed you has four pages, um, if I could direct your
15 attention to first page one that I handed you, um, do you see
16 one of your stamps on that page?

17 A I do.

18 Q What date, um, did you put that stamp there?

19 A That's, ah, I stamped this on, ah, September the 4th, 2017 and
20 the results were, ah, the target is 0.080 and then the result
21 of my, ah, testing was 0.080.

22 MR. MCINTYRE: Your Honor, if I may use the computer
23 to put this on the screen so the juror can see the, ah,
24 purposed Exhibit.

25 THE COURT: Sure.

1 BY MR. MCINTYRE (continuing):

2 Q Okay. So that would be, um, this, this one on September 4th
3 that you're talking about?

4 A Yes.

5 Q Okay. And what is, what is this here that I'm -- the, the
6 signature, is that your signature?

7 A That is my signature and then the, ah, the printing and --
8 just indicates that I've, ah, serviced the instrument and it's
9 in good working condition.

10 Q Okay. So let's start with this, ah, target number. It says
11 0.080. What does, what does that mean?

12 A Ah, target value is, ah, that is the drunk driving 0.08 limit.
13 Well even at that target value, I can have as much as a plus
14 of, plus or minus .5% of the 0.08. So I could have as low as
15 0.076 or as high as 0.084 and it would still be considered
16 working good.

17 Q All right. Um, and then you have the external standard, and
18 what does that mean?

19 A That is the result of the wet bath, ah, that I perform and I
20 perform that with what they call a simulator and it simulates
21 a person's breath. And then I have a known solution that I've
22 been given that has been certified and, ah, and that's what I
23 run in the simulator to see the result that I would get.

24 Q So, so the known solution, um, that contains a known amount of
25 alcohol? Is that right?

1 A Yes.

2 Q Okay. And, and what is it known to -- what concentration is
3 it known to have?

4 A Well, ah, the actual concentration that they have before they
5 get to me, I never see those results.

6 Q Okay.

7 A But that's done between the company that makes the solution
8 and the state of Michigan. They test them, ah, before they're
9 sent to me in the field.

10 Q And, and based on those tests, what do you understand the
11 concentration to be?

12 A Ah, when the instrument's working properly, then it should
13 come somewhere between that 0.076 at the low end and 0.084 at
14 the high end and anything in between is good.

15 Q All right. But is the known quantity 0.08 exactly, if you
16 know?

17 A I, like I say, I don't know --

18 Q You don't know. Okay.

19 A -- the testing results that they get.

20 Q All right. And if you could explain, when, when you conduct
21 this test, um, so you mentioned you have a sample, how is that
22 sample, how, how do you have the sample when you walk into the
23 police station to conduct this test? Is it in a bottle or
24 what kind of sample is it?

25 A The, the sample itself is in a, ah, simulator and, like I say,

1 the simulator operates at breath temperature and, ah, you
2 know, and I carry that with me to each department and, ah, and
3 that's what I use for testing.

4 Q Okay. And, and the simulator do you hook it up to the
5 Datamaster instrument somehow?

6 A I do.

7 Q Okay. How, how do you go about doing that?

8 A It's, it's hooked up, ah, with a small tube, hooks to the end
9 of the breath tube and then I equilibrate it to make sure that
10 the water and the air mixture from the head to the water,
11 excuse me, is, is properly, ah, mixed up and then after I do
12 that, then I can do the testing procedure.

13 Q Okay. And, and does the testing procedure involve taking a
14 sample of the contents of that, um, simulator?

15 A Yes.

16 Q Okay. And the sample runs through the Datamaster instrument?

17 A Yes.

18 Q Okay. And when the sample runs through the instrument, then
19 what does the instrument do?

20 A Well the instrument will evaluate that sample and give, give
21 the result which I then register on the log.

22 Q Okay. Ah, does the instrument register that result in the
23 same was as, ah, if a subject was giving a breath test or is
24 it in some way different?

25 A No, it's the same.

1 Q Okay. And then I, so I'll note we see a certification number
2 there, I assume that's your number?

3 A Yes.

4 Q And then over here, finally the last column we have -- what do
5 we see in that column?

6 A In that column there that tells, ah, that's the Deguth, that's
7 the name of the company that makes the solution and then the,
8 the next one tells me that it's a 0.08 solution and then the
9 next one is the lot number, ah, 16-180 every, every batch of
10 solution that's made as its own lot number. And then the, ah,
11 the date there is the date when that solution expires.

12 Q Ah, was that solution expired when you used it?

13 A No.

14 Q Um, was the result of that test that you performed on
15 September 4th of 2017 satisfactory?

16 A Yes.

17 Q Did you have to do any, um, change anything with how the
18 instrument was functioning as a result of that test?

19 A No.

20 Q And I'll now draw your attention to the last page of the
21 document I just handed you, um, which is December of 2017, and
22 we see here, um, direct your attention to, ah, December 30th,
23 ah, is this your signature here in the operation perform
24 column?

25 A Yes.

1 Q Okay. And we have a target of 0.080, is that right?

2 A Yes.

3 Q And what was the result of the test that you ran on that day?

4 A And the results were 0.078, which is, ah, two thousands under
5 the 0.08.

6 Q Is that considered a satisfactory result?

7 A It is.

8 Q Is this test the same kind of, ah, wet bath test that you
9 described earlier?

10 A Yes.

11 Q And certification number, is this your certification number
12 here?

13 A Yes.

14 Q And finally we have a signature and please explain again what
15 we see in the signature column.

16 A Ah, here again it relates to the wet bath solution that I used
17 that day and, ah, it appears as though I left a zero off the,
18 ah, 16-80 and then the expiration date.

19 Q Was the, ah, dry gas expired on that date?

20 A This is wet bath.

21 Q Oh, I'm sorry. Wet bath. Was it, was it expired on that
22 date?

23 A No.

24 MR. MCINTYRE: Okay. At this time the People move
25 to admit People purposed Exhibit 3 into evidence.

1 THE COURT: Any objection?

2 MS. SHARON: I have no objection. Well, may I voire
3 dire?

4 THE COURT: Sure.

5 MS. SHARON: Briefly?

6 VOIRE DIRE

7 BY MS. SHARON:

8 Q Nice to see you, Mr. Gier. I have a question for you.

9 A Uh-huh.

10 Q Mr. McIntyre asked you about this 120 check and this log
11 contains one portion of that test result, correct?

12 A That's correct.

13 Q Okay. In total, how many tests do you conduct as part of the
14 120 day check?

15 A There are ten.

16 Q Ten?

17 A Yeah.

18 Q Okay. Of which we have one test result today, correct?

19 A Yes.

20 Q Okay. And I think when you were testifying earlier, you said
21 that you were -- when you were doing this job, you were, um,
22 responsible for 143 machines? Did I get that right?

23 A Instruments.

24 Q Instruments. Okay. Um, and it's fair to say that you don't
25 have any independent recollection of the test results from

1 September 4th, 2017 of this machine, is that fair?

2 A That's correct.

3 Q Or from December 30th, 2017 for this machine, correct?

4 A That's correct.

5 Q Okay. So the other tests of the 120 day test are the, the

6 0.04 wet bath, correct?

7 A Yes.

8 Q Okay. We don't have any test results for that test, correct?

9 A No.

10 Q No, I'm not correct or correct?

11 A Yes, you are correct.

12 Q Okay.

13 A No, I have no results.

14 Q Okay. And you run a 0.08 test and those are that, those

15 results?

16 A That's correct.

17 Q Okay. You run a 0.20 test, correct?

18 A Yes.

19 Q And we have no results for that?

20 A No.

21 Q Okay. You run -- are those the only wet bath that you run?

22 A No. We also do the acetone.

23 Q Okay. And you don't have any results for that?

24 A No.

25 Q Okay. Um, what are the other -- so then we still have six

1 more tests that you're running, correct?

2 A Yes.

3 Q Okay. Of those six we have no results for any of those tests,
4 correct?

5 A No.

6 Q Okay. We have no documentation that the samples used for the
7 0.04, the 0.20 and the acetone were before their expiration
8 date, correct?

9 A No.

10 Q Correct or no?

11 A Correct.

12 Q Okay. Um, when you run the wet bath test, you're required to
13 use a thermometer to ensure the appropriate temperature of the
14 wet bath test, correct?

15 A Yes.

16 Q Okay. You don't have any documentation showing the serial
17 number of that thermometer, correct?

18 A We do not use thermometers.

19 Q What do you use?

20 A The simulator is set up to the -- the simulators are built in
21 such a manner that they, once they go out of the temperature
22 that they're prescribed to run, at mouth temperature, ah, they
23 shut down. They will not operate.

24 Q Okay. So the machine is setting the temperature?

25 A The simulator.

1 Q Okay. Um, what are the other six tests that you don't have
2 the results for today?

3 A There are, ah, five dry gas tests.

4 Q Okay. And those are similar, ah, tell me, I'm asking. Those
5 are similar to the accuracy check test that are run every
6 seven days?

7 A Yes.

8 Q Okay. And we don't have results for any of those tests?

9 A No.

10 Q Okay. And so we're --

11 A And the other one is, ah, radio interference.

12 Q Okay. And that's to check for interference on the machine,
13 correct?

14 A That's correct.

15 Q And we don't have a result for that test?

16 A No.

17 Q And you don't have any independent recollection of how the
18 machine performed on any of those tests, is that correct?

19 A No.

20 Q Correct?

21 A Correct.

22 MS. SHARON: Okay, Mr. Gier. Your Honor, given that
23 testimony and the certification that's listed in the logs, um,
24 I would object to the admission of the logs, ah, because I
25 think that there is not a sufficient reliability given the

1 certification that's on the logs from Mr. Gier and, um, the
2 lack of test results that the prosecution has failed to
3 provide today to the jury. I, I can ask one other question of
4 Mr. Gier. Mr. Gier, all of these tests results, they are all
5 available to the prosecution, correct?

6 THE WITNESS: Yes.

7 BY MS. SHARON (continuing):

8 Q Okay. You record the test results from each one of these ten
9 tests, correct?

10 A Yes.

11 MS. SHARON: Okay. That's all, Your Honor. That's
12 all for my voire dire and objection.

13 THE COURT: I understand.

14 MR. MCINTYRE: Okay. If I could follow up, Your
15 Honor.

16 THE COURT: Sure.

17 BY MR. MCINTYRE (continuing):

18 Q Now these other tests that you run, if there is something, if
19 there's some malfunction with the machine, if it's not running
20 the way it's supposed to be running, um, would you take note
21 of that?

22 A I would.

23 Q Um, based on, um, your memory and your notes here, do you
24 remember if there was any malfunction on these two dates that
25 you ran these two tests?

1 A If there were, if there were anything else wrong with that
2 instrument, I would not stamp the log and sign it that it's
3 working properly.

4 Q So would it be fair to say that your certification for each
5 one of these, um, 120 day tests is a certification that it
6 passed every single one of those ten tests?

7 A Yes.

8 MR. MCINTYRE: Your Honor, based on the testimony,
9 um, there has been substantial compliance, in fact complete
10 compliance, with the administrative rule. There is certainly
11 enough evidence, um, to admit this -- there is enough
12 reliability to admit this into evidence.

13 THE COURT: Objection overruled and I will admit the
14 log.

15 (At 1:12 p.m., PX#3 admitted)

16 MR. MCINTYRE: Um, and just one last thing that I
17 wanted to cover, um, at this time the People are moving also
18 to admit People's purposed Exhibit 4 into evidence. The
19 foundation was already laid, ah, through Trooper Tasker and
20 now that the logs are admitted, I believe this can be admitted
21 as well, Your Honor.

22 MS. SHARON: Your Honor, I disagree. I think under
23 People vs. Tipolt, without the other test results to all of
24 the 120 day tests, Your Honor, that I don't think a
25 reliability has been established where we don't know the

1 results of any of the other, um, tests that were conducted on
2 either September 4th or December 30th.

3 THE COURT: The Court is satisfied that the
4 testimony is that if any of -- and inherent in the
5 certification made by this witness that those other tests were
6 conducted and there were no adverse results. So I will admit
7 that as, admit the, the ticket as well, the Datamaster ticket
8 which is Exhibit 4 or?

9 MR. MCINTYRE: Ah, yes. It will be People's Exhibit
10 4, Your Honor.

11 THE COURT: Okay. So now I've admitted 3 and 4.

12 (At 1:13 p.m., PX#4 admitted)

13 MR. MCINTYRE: Yes.

14 THE COURT: Thank you.

15 BY MR. MCINTYRE (continuing):

16 Q Um, one more question about the December test, ah, the target
17 was 0.08 and the actual standard was 0.078, does that mean it
18 was actually reading lower than the know amount, quantity of
19 alcohol in the sample?

20 A It, it read lower than the 0.08.

21 Q Okay. Um, I'm holding --

22 A The target value.

23 MR. MCINTYRE: Thank you. And I'm holding People's
24 purposed Exhibit 4, I'm showing it to defense counsel,
25 permission to approach the witness, Your Honor?

1 THE COURT: Yes.

2 BY MR. MCINTYRE (continuing):

3 Q I'm handing the Exhibit to the witness, um, do you recognize
4 what I just placed in front of you?

5 A Yes. This is a print out of a subject test.

6 MR. MCINTYRE: Now, ah, again if I may use the
7 computer, Your Honor?

8 THE COURT: Yes.

9 MR. MCINTYRE: There's no PDF viewer on the -- I
10 assume?

11 THE COURT: That's what it says.

12 MR. MCINTYRE: May I download a PDF viewer?

13 THE COURT: If it will allow you to do it. So
14 there's pros and cons to modern technology.

15 MR. MCINTYRE: Sorry for the delay. Hopefully it
16 will not take long.

17 THE COURT: This is an updated version of a watched
18 pot never boils I think. A watched download. There you go.
19 You wanna rotate it?

20 MR. MCINTYRE: Yes. Okay. Here we go. Okay.
21 Somebody knows how to do this better than me?

22 JUROR #5: Right click on the document. On the
23 document.

24 MR. MCINTYRE: Okay.

25 JUROR #5: And then rotate clockwise or

1 counterclockwise? What are your options?

2 MS. SHARON: I could have told you that.

3 THE COURT: There you go.

4 BY MR. MCINTYRE (continuing):

5 Q Okay. Ah, okay. So this is the, a copy of the People's
6 Exhibit 4 that you have in front of you. Um, let's start at
7 the top. You said it's a Datamaster ticket. What is the date
8 on the ticket?

9 A Ah, 12/17/17.

10 Q And we have a time. And what is the name listed as the
11 subject name?

12 A That is, ah, Mr. Starks.

13 Q Herman Starks.

14 A Herman Starks, yes.

15 Q Okay. And the operator, ah, name?

16 A Tasker.

17 Q Tasker. Okay. And we have, ah, a blank test can you, if you
18 know, what is a blank test?

19 A The blank, the blank test is where the instrument takes a look
20 at what's in the sample chamber to see if there's anything
21 there and, ah, it shouldn't be and if there is then the test
22 procedure will stop. Ah, if the blank test comes out clean,
23 then it can proceed.

24 Q So is the expected result what we see here? 0.00?

25 A 0.0 -- oh, yeah. For the blank test, that is correct.

1 Q For the blank test. So what does that mean when it says 0.00?

2 A It means there's nothing in the sample chamber and the, ah,
3 testing result or test can proceed.

4 Q Okay. And then we have an internal standard verified, what
5 does that mean?

6 A That there is, it takes a look at a calibration and exactly
7 what it does there, I don't know. I only know it looks at the
8 calibration, if there's something wrong with it, then the test
9 will stop again.

10 Q Okay. And then we see a subject sample, what does that mean?

11 A That means that that is the result of the subject, ah, who
12 blew into the instrument.

13 Q All right. And what was the subject sample received for test
14 one?

15 A It was a 0.08.

16 Q Okay.

17 A Eight percent.

18 Q And you mentioned that it could be plus or minus 5% from that
19 number?

20 A Yes. That's the, that's the companies accepted error. Plus
21 or minus 5%.

22 Q So do you know how low could that possibly be and how high
23 could that possibly be?

24 A If it read to the third digit on subject testing, which it
25 don't, ah, if there were, it's conceivable it could have been

1 as low as 0.076 or as high as 0.084.

2 Q Okay. And then we have another, another test. So we have a
3 blank test, would that be for -- I'm sorry. Another blank
4 test, would that be for the second test?

5 A Yes.

6 Q Okay.

7 A Here again it's making sure that the, ah, sample chamber is
8 clean and that the test can proceed.

9 Q Now we see another subject sample and what is the result of
10 the next subject sample?

11 A It's, ah, 0.09 or 9%.

12 Q Okay. Um, can you explain, how is it possible that you would
13 get these slightly different results for two tests?

14 A From a scientific --

15 MS. SHARON: Objection.

16 THE WITNESS: -- standpoint I cannot.

17 MS. SHARON: Object --

18 THE COURT: He just said he can't.

19 THE WITNESS: You're beyond my expertise.

20 MS. SHARON: Okay.

21 BY MR. MCINTYRE (continuing):

22 Q Um, and then we have another, ah, well and also if you know,
23 so, would the plus or minus 5%, ah, apply to the, ah, second
24 test as well?

25 A Yes.

1 Q Um, there's another blank test. What, why is there a third
2 blank test?

3 A Ah, in between every test it checks the sample chamber to make
4 sure that it's clean for the next test.

5 Q And finally we see, ah, internal standard listed as verified.
6 What does that mean?

7 A And here again it's looking at the calibration and to make
8 sure there's nothing in there that interferes.

9 Q And when it says verified, does that mean --

10 A That it, it was working properly.

11 MR. MCINTYRE: Just one moment, Your Honor. No
12 further questions at this time, Your Honor.

13 THE COURT: Cross-exam.

14 MS. SHARON: Thank you, Judge.

15 **CROSS-EXAMINATION**

16 BY MS. SHARON:

17 Q Mr. Gier, we've, we've met before. We've had a trial before a
18 different person, right?

19 A Yes.

20 Q Okay. Um, maybe you remember, um, cause you seem to have a
21 pretty impressive memory. Um, do you remember at that
22 previous trial you had filled out a log and had used an
23 expired, um, tank.

24 MR. MCINTYRE: Objection, Your Honor. Relevance of
25 another test performed for another trial.

1 MS. SHARON: I think it goes to the whether or not
2 how certain he can be of whether or not he used expired
3 samples in this case where we don't have any documentation
4 showing the expiration dates for other sample tanks.

5 MR. MCINTYRE: Actually we do have documentation,
6 it's written right on People's Exhibit 3.

7 MS. SHARON: Not for the 0.04 and not for the 0.20
8 and that's all part of the 120 day check. You have an
9 expiration date for one tenth of the 120 day check.

10 MR. MCINTYRE: Your Honor, it's not relevant what
11 the, the witness --

12 THE COURT: You can ask him why he believes it was
13 appropriate but I don't think you can ask him in reference to
14 a prior case.

15 MS. SHARON: I think that has -- may I respond, Your
16 Honor?

17 THE COURT: Sure.

18 MS. SHARON: I think that has to do with the, I
19 don't want to say carefulness, I'm not sure that's a word but
20 with how careful he is when, when conducting these tests and
21 if we don't have any evidence of the expiration dates on all
22 of these simulator or the testing tanks that he used in this
23 test, I do think that that raises doubt as to how much we can
24 rely on the reliability of this, of this specific instrument.
25 How is that not relevant? How is not previous, um, conduct

1 when executing these tests not relevant?

2 THE COURT: Well first of all, do you remember that
3 case, Mr. Gier?

4 THE WITNESS: Do I, I do remember the case.

5 THE COURT: Okay. And what is your follow up
6 question?

7 MS. SHARON: Whether or not he mistakenly used an
8 expired tank on a 120 day test.

9 THE COURT: In this case or previous?

10 MS. SHARON: No, in that case. Because we have
11 portions, Your Honor. We have 90% of the tests of the 120 day
12 check that we have no documentation for. Okay?

13 THE COURT: I guess that goes to weight and that
14 goes to argument but I don't think --

15 MS. SHARON: But not until I get the testimony from
16 him. I agree with you that it goes to weight but I need to
17 get the testimony from him before I can argue that it goes to
18 weight.

19 THE COURT: I guess you can ask him if he knows
20 whether, how he knows they weren't expired in this case.

21 MS. SHARON: Okay. I'm sorry, Your Honor, may I ask
22 about the previous case or no?

23 THE COURT: Well he says he remembers.

24 MS. SHARON: Okay.

25 MR. MCINTYRE: Well, Your Honor, just so I can

1 clarify. So you are finding that it is relevant what this
2 witness -- a test that this witness performed on another
3 instrument, at another time, on another date, is relevant to
4 this case and is admissible evidence?

5 THE COURT: I'm not -- he remembers. It's a yes or
6 no.

7 MR. MCINTYRE: Okay.

8 THE COURT: He remembers. Okay. Now you can ask --
9 no more questions about, I mean, he remembers that that
10 occurred. Is that your question?

11 MS. SHARON: I'm not sure that I had phrased it that
12 way. I, I would -- can I rephrase it that way and pose it to
13 Mr. Gier?

14 THE COURT: Yes.

15 BY MS. SHARON (continuing):

16 Q Okay. Do you recall in a previous case that, in which you
17 testified and I litigated, that you had used an expired, ah,
18 0.08 tank to conduct the 120 day test?

19 A Yes.

20 Q Okay. Um, and that, that was a mistake that you made,
21 correct?

22 MR. MCINTYRE: Objection, Your Honor. You just said
23 she can ask one question and now she's asking a second
24 question.

25 MS. SHARON: I just --

1 THE COURT: It's a conclusion if someone chooses to
2 draw that. I sustain the objection.

3 BY MS. SHARON (continuing):

4 Q Okay. Um, and in this case, we have no way of knowing whether
5 or not you used expired tanks -- I'm using a wrong word, tank
6 is not the right word, correct? Expired solutions?

7 A Tank is correct --

8 Q Okay.

9 A -- in dry gas but in solutions it's wet bath.

10 Q Okay. So, and -- well let me ask you this, for the dry gas,
11 do those have expirations also?

12 A Yes.

13 Q Okay. So as it relates to the wet bath test which you use for
14 the 0.04 and the 0.20 tests, we have no way of knowing whether
15 or not those tests that you ran were with expired or up to
16 date tanks, correct?

17 A Solutions.

18 Q Solutions. Solutions. Is that right?

19 A Yes. I have -- I do not have, ah, I do not have those
20 expiration dates.

21 Q Okay. And as for the dry gas, ah, test that you ran as part
22 of the 100 day, 120 day check, we also can't be sure that
23 those tanks weren't expired, is that correct?

24 A I do not have that, ah, expiration date either.

25 Q Okay.

1 A On hand.

2 Q And you are required to use solutions and tanks that have not
3 expired, correct?

4 A Yes.

5 Q Okay. Um, because of your, ah, class operator status, I think
6 you can answer this question, if you can't just let me know,
7 um, is it true that you can ask the machine to run an accuracy
8 check test at any time? You can press a button and it'll run
9 an accuracy check test?

10 A You mean can an operator do that?

11 Q Yes. Like if, if you just wanted to ask the machine to run an
12 accuracy check test, similar to a seven day check, it can just
13 do it at any time?

14 A Dry gas.

15 Q Yes.

16 A Yes.

17 Q Okay. You're getting paid to testify today?

18 A Yes.

19 Q And is that by the prosecution?

20 A Yes.

21 Q And you have no independent recollection of the testing that
22 you conducted on, um, this machine, correct?

23 A Other than the paperwork, no.

24 Q Okay. But even that, I mean, you don't have any independent
25 recollection of the test that's reflected in this paperwork,

1 correct?

2 A I'm not sure I understand.

3 Q Do you remember conducting this test on December 30th, 2017 on
4 this machine?

5 A If it were not for the results on the paper I would not, no.

6 MS. SHARON: Okay. Um, I think that's all, Your
7 Honor.

8 THE COURT: Redirect?

9 MR. MCINTYRE: Yes, Your Honor.

10 **REDIRECT EXAMINATION**

11 BY MR. MCINTYRE:

12 Q Um, now you mentioned that you maintained a, when you worked
13 for, ah, when you did this job, you maintained 143 Datamaster
14 instruments?

15 A Yes.

16 Q And when you visited one of the test sites, did you conduct
17 that test in the same way every time?

18 A Yes.

19 Q All right. Um, was it your habit to check to see if, um,
20 samples, whether it's dry gas or wet bath, did you check to
21 see if those were expired before using them?

22 A Yes.

23 Q If they were expired, what did you do?

24 A I, ah, exchanged them for non-expired, ah, solutions or dry
25 gas.

1 Q So you would not use an expired, um, dry gas or wet bath
2 solution?

3 A I, I tried to never to do that intentionally.

4 Q All right. It's, it's possible it happened but it's something
5 that you checked for?

6 A Yes.

7 MR. MCINTYRE: All right. Ah, no further questions,
8 Your Honor.

9 MS. SHARON: May I enquire?

10 THE COURT: Yeah.

11 **RECROSS-EXAMINATION**

12 BY MS. SHARON:

13 Q Okay. Despite what Mr. McIntyre just asked you about, you
14 have made that mistake in the past, correct?

15 A I did on that, in that particular test that you're
16 questioning, yes.

17 MS. SHARON: Okay. Thank you.

18 MR. MCINTYRE: Nothing, Your Honor.

19 THE COURT: Okay. May this witness be excused?

20 MS. SHARON: Yes.

21 MR. MCINTYRE: As far as I'm concerned, yes, Your
22 Honor.

23 THE COURT: Thank you very much. Next time bring
24 pie for everybody.

25 THE WITNESS: Thank you, Your Honor.

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THE COURT: Thank you, Mr. Gier. You're free to
leave.

(At 1:31 p.m., witness excused)

1 STATE OF MICHIGAN)

2 COUNTY OF OAKLAND)

3 I, Kassandra Ginn, certify that this transcript, consisting of
4 33 pages, held on Monday, January 14, 2019, before the HONORABLE
5 MICHELLE FRIEDMAN APPEL, Chief Judge at the 45th District Court,
6 located at 13600 Oak Park Boulevard, Oak Park, Michigan, 48237, is
7 a complete, true, and correct transcript of the electronic
8 recordings.

9
10 3/6/19

Kassandra Ginn

11 Date

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