

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CRIMINAL TRIAL DIVISION

COMMONWEALTH OF PENNSYLVANIA :

v. :

TERRENCE STERLING :

CP-51-CR-0005302-2013

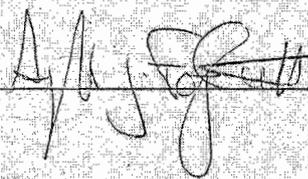
RECEIVED

MAY 21 2014

ORDER

ACTIVE CRIMINAL RECORDS  
CRIMINAL MOTION COURT

AND NOW, this 21<sup>st</sup> day of May, 2014, upon consideration of the Defendant's Motion to Suppress Evidence of BAC Readings, it is hereby ORDERED and DECREED that said Motion is DENIED for the reasons set forth in the attached Trial Court Opinion.

  
\_\_\_\_\_ J.

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CRIMINAL TRIAL DIVISION

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MAY 21 2014

COMMONWEALTH OF PENNSYLVANIA :

ACTIVE CRIMINAL RECORDS  
CRIMINAL MOTION COURT

v. :

SARAH L.L. CHRISTIANSEN :

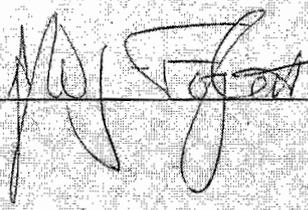
CP-51-CR-0010429-2012

ORDER

RECEIVED

AND NOW, this 21<sup>st</sup> day of May, 2014, upon consideration of the Defendant's  
Motion to Suppress Evidence of BAC Readings, it is hereby ~~ORDERED~~ that  
said Motion is DENIED for the reasons set forth in the attached Trial Court Opinion.

MAY 21 2014  
ACTIVE CRIMINAL RECORDS  
CRIMINAL MOTION COURT

  
\_\_\_\_\_ J.

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CRIMINAL TRIAL DIVISION

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MAY 21 2014

ACTIVE CRIMINAL RECORDS  
CRIMINAL MOTION COURT

COMMONWEALTH OF PENNSYLVANIA :

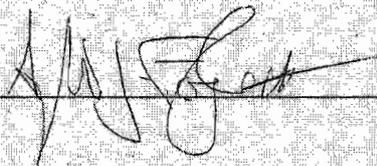
v. :

GINGER SELDEN :

CP-51-CR-0001727-2013

ORDER

AND NOW, this 21<sup>st</sup> day of May, 2014, upon consideration of the Defendant's Motion to Suppress Evidence of BAC Readings, it is hereby ORDERED and DECREED that said Motion is DENIED for the reasons set forth in the attached Trial Court Opinion.

  
\_\_\_\_\_ J.

IN THE COURT OF COMMON PLEAS  
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA  
CRIMINAL TRIAL DIVISION

RECEIVED

MAY 21 2014

COMMONWEALTH OF PENNSYLVANIA :

v. :

SARAH L.L. CHRISTIANSEN :

GINGER SELDEN :

TERRENCE STERLING :

CP-51-CR-0010429-2012

CP-51-CR-0001727-2013

CP-51-CR-0005302-2013

ACTIVE CRIMINAL RECORDS  
CRIMINAL MOTION COURT

OPINION OF THE TRIAL COURT

I. INTRODUCTION

These matters before this Court relate to the accuracy of Breathalyzer results for three separate cases. Each defendant was arrested for DUI between August, 2012 and December, 2012. Two defendants were tested on the same instrument and the other on a second unit. Both instruments are Intoxilyzer 8000s, which were manufactured by CMI.

It is alleged by the Commonwealth that each defendant's blood alcohol content (BAC) was accurately determined to be in excess of 0.15% BAC, despite the instrumentation only have been tested for accuracy by the Philadelphia Police to 0.15% prior to administration of the tests.

The defense maintains that since the instruments' accuracy was checked to only 0.15%, any BAC readings in excess of that percentage are not reliable and, therefore, the test results should be disregarded and the respective evidence against each defendant suppressed.

The questioning of the accuracy of these instruments has been recently raised in similar DUI cases in the Commonwealth of Pennsylvania and all have brought into question the reliability of the breath test evidence. Notably, the trial court in *Commonwealth v. Schildt*, CP-

22-CR-0002191-2010 (Pa.Com.Pl. Dec. 31, 2012), *reversed and remanded*, 87 A.3d 374, Docket No. 196 MDA 2013 (Pa.Super. Sep. 5, 2013), *appeal denied*, 86 A.3d 233, Docket No. 757 MAL 2013 (Pa. February 25, 2014), found that the underlying methodology utilized to calibrate the Intoxilyzer 5000EN resulted in readings that were not legally accurate and, therefore, the Commonwealth could not meet its burden of proving an essential element of a DUI offense beyond a reasonable doubt. Upon this reasoning, the trial court granted the Defendant's Motion to Quash.

On appeal by the Commonwealth, the Superior Court, in a Memorandum Opinion, *Commonwealth v. Schildt*, 87 A.3d 374, Docket No. 196 MDA 2013 (Pa.Super. Sep. 5, 2013), *appeal denied*, 86 A.3d 233, Docket No. 757 MAL 2013 (Pa. February 25, 2014), reversed the lower court's decision and held that a Motion to Quash was not the proper vehicle for precluding the breath test evidence since a Motion to Quash is considered a form of habeas corpus relief in which the evidence is not held to a **beyond a reasonable doubt standard**, but instead to a **probable cause standard**. The Superior Court held that as long as the Commonwealth can show probable cause for the offense, thus making a prima facie case, the Motion to Quash must be denied. Any challenges regarding the accuracy of the breath tests affect the weight of the evidence and can be challenged at trial.

Although this Court is not bound by the Superior Court's holding in *Schildt*, it did look to that Opinion for guidance in considering the matters at hand. Here, the Defendants have presented the Court with a different motion, namely, a Motion to Preclude Evidence under Pa.R.E. 702.

In issuing this Opinion, this Court took into consideration the testimony of both sides' expert witnesses, the testimony of whom was presented over several days, the documentary

evidence received and the arguments of counsel. This Court, however, did not take into consideration the joint brief of the defendants due to its late filing. Further, the Commonwealth, despite several extensions granted by this Court, failed to even file a brief. This Court did grant the Commonwealth's Request to Re-Open the Record to submit into evidence documents that were testified to by its expert witnesses.

In reaching its decision, this Court performed an analysis under both Pa.R.E. 702 and the *Frye* standard; reviewed the Commonwealth's statutes, regulations, codes, and interpretive case law governing the administration of breath tests and admissibility of breath tests into evidence, as well as the application of Rule 702 and the *Frye* standard to certain presumptions and inferences required under the aforesaid laws.

Finally, this Opinion discusses the Defendant's evidentiary challenge in light of the evidence and testimony offered by both parties, both as it pertains to the statutes and regulations and as it pertains to the competing methodologies offered by both parties through their expert witnesses.

## II. STATEMENT OF FACTS

The three defendants, Sarah Christiansen, Terrence Sterling, and Ginger Selden were arrested for DUI and tested on August 11, August 20, and December 19 of 2012, respectively.<sup>1</sup> They were taken to the Philadelphia Police Department (PPD) and administered breath tests on the Intoxilyzer 8000 to determine their blood alcohol content (BAC). Ms. Christiansen and Mr. Sterling were each tested on the FFF version of the machine and Ms. Selden was tested on the CCC.

The instruments were both purchased from CMI. As required by law, the PPD utilizes testing solutions manufactured by Guth Laboratories which are then certified by an independent

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<sup>1</sup> Exhibits C-17, C-18, C-19.

third party laboratory, Adirondack. The solution percentages used during the time period in question were 0.05%, 0.10% and 0.15%.

### III. ANALYSIS

#### A. Section 702 and the *Frye* Standard

The admissibility of testimony by expert witnesses is governed by Pa.R.E. 702, which states:

“A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) the expert’s scientific, technical, or other specialized knowledge is beyond that possessed by the average layperson;
- (b) the expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and
- (c) the expert’s methodology is generally accepted in the relevant field.”

Rule 702(c) has been further elucidated by the Pennsylvania Supreme Court as incorporating the *Frye* standard, which was first announced in *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923) and adopted in Pennsylvania for application in criminal matters in *Commonwealth v. Topa*, 471 Pa. 223, 369 A.2d 1277 (1977). In 1993, the U.S. Supreme Court replaced the *Frye* standard with the *Daubert* standard in an effort to be more consistent with the “liberal thrust” of the Federal Rules of Evidence. *See Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 579 (1993). However, after the adoption of the Pennsylvania Rules of Evidence in 1998, the Pennsylvania Supreme Court decided that the *Frye* standard should remain in place in the case of *Grady v. Frito-Lay*, 576 Pa. 546, 839 A.2d 1038 (2003). “Under *Frye*, novel scientific evidence is admissible if the methodology that underlies the evidence has general acceptance in the relevant scientific community. *See Commonwealth v. Blasioli*, 552 Pa. 149, 713 A.2d 1117, 1119 (1998).” *Id.* at 555.

The *Frito-Lay* Court further organized the entire analysis under Pa.R.E. 702 as follows:

- (1) “the proponent of expert scientific evidence bears the burden of establishing all of the

elements for its admission under Pa.R.E. 702, which includes showing that the *Frye* rule is satisfied.” *Id.* at 558. (2) The proponent of the testimony must only prove that the expert’s *methodology* is generally accepted in the scientific community, not the *conclusions*. *Id.* Moreover, the proponents must “prove that scientists in the relevant field (or fields) generally accept [the expert’s] methodology as a means for arriving at such a conclusion.” *Id.* at 561. (3) In addition to the expert’s testimony passing the *Frye* test, the expert must be “qualified as an expert by knowledge, skill, experience, training, or education,” as articulated in Rule 702. *Id.* at 558-59. (4) The admission of expert scientific testimony remains within the discretion of the trial court. *Id.* at 559.

As a preliminary threshold, the scientific testimony under *Frye* must contain “novel scientific evidence,” which, the Supreme Court has noted, “has historically been decided on a case-by-case basis, and there is some fluidity in the analysis; indeed, science deemed novel at the outset may lose its novelty and become generally accepted in the scientific community at a later date, or the strength of the proponent’s proffer may affect the *Frye* determination.” *Commonwealth v. Dengler*, 586 Pa. 54, 69-70 (2005).<sup>2</sup> The Supreme Court has also noted that a heretofore accepted scientific methodology which has recently been called into question does not necessarily need to be challenged under *Frye* due to its lack of strict novelty. *Commonwealth v. Chmiel*, 612 Pa. 333, 386, 30 A.3d 1111, 1142 (2011). The Court has suggested that an analysis under Rule 702(c), which concerns itself simply with whether “the expert’s methodology is

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<sup>2</sup> “We do not discredit the notion, which Appellant appears to advance, that a once-viable science may lose its wide acceptance in the scientific community and may be challenged pursuant to Rule 702. However, Appellant does not provide any support for the view that as of Appellant’s 2002 trial, forensic hair microscopy was no longer an accepted science. In fact, the record establishes just the opposite. Not only does Appellant ignore the evidence given by Surma at trial regarding the scientific basis, acceptance, and reliability of forensic microscopy, limited though it may be, but Appellant also astonishingly ignores the more compelling evidence given by Appellant’s own witness at the PCRA hearing, upon which Appellant heavily relies for his other arguments herein.”

generally accepted in the relevant field,” suffices, and that *Frye*’s combination of novelty and general acceptance is a separate component of Rule 702. *Id.* at 386 n.13.<sup>3</sup>

In the instant matter, although the proceedings were designated as a “*Frye* Hearing,” the challenge was directed more as a Rule 702 challenge, as the defense conceded that DUI breath testing was not novel science and was generally accepted. It was the underlying methodology of the testing that was in dispute with which the Defense took issue.

B. Statutory Interpretation

Adding a layer to the defendants’ Rule 702 challenge in this case is the Commonwealth statutes and regulations addressing breath tests, accepted and approved instruments, and the manner and method of accuracy checks of each instrument prior to use on a suspect to determine the individual’s BAC. These legislative enactments explicitly deem as admissible any breath test evidence that adheres to the detailed standards contained therein.

The admissibility provision is contained in 75 Pa.C.S. § 1547(c) and states:

“In any summary proceeding or criminal proceeding in which the defendant is charged with a violation of section 3802 [the provision governing DUI offenses] or any other violation of this title arising out of the same action, the amount of alcohol or controlled substance in the defendant’s blood, as shown by chemical testing of the person’s breath, blood or urine, which tests were conducted by qualified persons using approved equipment, **shall be admissible in evidence.**”

75 Pa.C.S. § 1547(c) (emphasis added).

The statute further specifies the standards that both breath test instruments and personnel must meet in order for the test results to be considered admissible:

“Chemical tests of breath shall be performed on devices approved by the Department of Health using procedures prescribed jointly by regulations of the Departments of Health and Transportation. Devices shall have been calibrated and

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<sup>3</sup> “However, Appellant has not raised a challenge pursuant to Rule 702, but rather only under one of its components: *Frye*. We are not aware of any case that applies *Frye* to the circumstance of an accepted scientific method losing its widely-held acceptance. At any rate, Appellant does not develop a relevant argument on this point.”

tested for accuracy within a period of time and in a manner specified by regulations of the Departments of Health and Transportation. For purposes of breath testing, a qualified person means a person who has fulfilled the training requirement in the use of the equipment in a training program approved by the Departments of Health and Transportation. A certificate or log showing that a device was calibrated and tested for accuracy and that the device was accurate shall be presumptive evidence of those facts in every proceeding in which a violation of this title is charged.”

75 Pa.C.S. § 1547(c)(1).

In 1986, the Superior Court interpreted § 1547(c)(1), stating:

“[T]he statutory language “within a period of time and in a manner specified by regulations ...,” refers only to the words “tested for accuracy.” This language was not intended to require regulations pertaining to the “calibration” of breath testing devices. If approved equipment has been calibrated at the factory and has been tested for accuracy as “specified by regulations,” there is no reason for refusing to receive test results in evidence so long as the equipment has been used by a qualified person. Here, the calibration had been done at the factory. Moreover, the equipment had been tested for accuracy within thirty (30) days of its use as required by regulations of the Departments of Health and Transportation. This was sufficient to render the test results admissible in evidence. The failure to make a recent test of the equipment's calibration, if such was the case, was relevant with respect to the weight to be given the test results, but it did not render the results incompetent or inadmissible. *Commonwealth v. Sessler*, 358 Pa.Super. 582, 518 A.2d 292 (1986).

The Superior Court recently reiterated the holding in *Sessler*, stating that “absent a legislative requirement, the lack of documentary evidence of calibration . . . goes to the weight of the evidence.” *Commonwealth v. Manahan*, 45 A.3d 413 (Pa. Super. 2012).<sup>4</sup>

The Pennsylvania Departments of Health and Transportation have in turn promulgated the regulations mentioned in §1547 in 67 Pa. Code §§ 77.22-77.26. Section 77.22 defines the various terms regarding the accuracy and calibration tests which must be performed on the breath

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<sup>4</sup> “Nonetheless, we agree with the Commonwealth that it was not required to provide documentary evidence of calibration relative to the EDM device. Appellant has not cited any relevant authority for his position to the contrary and failed to cite case law discussing calibration requirements for radar and breath test devices. We conclude that, absent a legislative requirement, the lack of documentary evidence of calibration of an EDM goes to the weight of the evidence. *See Commonwealth v. Sessler*, 358 Pa.Super. 582, 518 A. 2d 292 (1986), *and compare Commonwealth v. Mabrey*, 406 Pa.Super. 437, 594 A.2d 700, 702–703 (1991). Since Mr. Grubb testified that the device was calibrated and he had extensive experience utilizing the device, the court was free to accept his testimony.

test instruments:

*“Accuracy inspection test--*A series of five simulator tests using a simulator solution designed to give a reading of .10% conducted by a certified breath test operator on Type A alcohol breath test equipment within 30 days prior to using the breath test equipment to perform an actual alcohol breath test. . . .

*Calibrate--*The term includes both of the following:

- (i) Performance of a series of five simulator tests at each of three separate readings on Type A alcohol breath test equipment.
- (ii) Adjustment of the equipment when necessary upon the failure of the equipment in the simulator tests. . .

*Simulator solution--*An aqueous standard ethanol solution which, when equilibrated with air in a breath simulator device, produces an air-alcohol mixture of a predetermined concentration that is designed to give a specific reading on breath test equipment and can be used to calibrate and verify the accuracy of Type A alcohol breath test equipment.

*Simulator test--*Use of simulator solution in a breath simulator device to verify the accuracy of or calibrate Type A alcohol breath test equipment.”

67 Pa. Code § 77.22.

Section 77.24(b) specifies the procedures for conducting breath tests:

“Alcohol breath tests shall be conducted by a certified breath test operator. Accuracy inspection tests and calibrations conducted using breath test equipment shall be performed by a certified breath test operator, the manufacturer or its authorized representative or a person who has received comparable training or instruction. Alcohol breath tests, accuracy inspection tests and calibrations conducted using breath test equipment shall be performed in accordance with accepted standard procedures for operation specified by the manufacturer of the equipment or comparable procedures. The procedures for alcohol breath testing shall include, at a minimum:

- (1) Two consecutive actual breath tests, without a required waiting period between the two tests.
- (2) One simulator test using a simulator solution designed to give a reading of .10%, to be conducted immediately after the second actual alcohol breath test has been completed. The lower of the two actual breath test results will be the result used for prosecution. The test results will be disregarded, and the breath test device will be removed from service under § 77.25(b)(4) (relating to accuracy inspection tests for Type A equipment) if one of the following occurs:

(i) If the difference between the results of the two actual alcohol breath tests is .02 or more, for machines read to the second decimal place, or .020 or more for machines read to the third decimal place.

(ii) If the simulator test yields a result less than .09% or greater than .10% when the breath test device is read to the second decimal place, or if the simulator test yields a result less than .090% or greater than .109% when the breath test device can be read to the third decimal place.”

67 Pa. Code § 77.24(b).

Section 77.24(d) also requires operators to verify the accuracy of a breath test instrument with a simulator solution that has been verified by a lab independent of the manufacturer to be of a certain concentration.<sup>5</sup> Section 77.25(a) requires that such accuracy tests “shall be conducted on Type A alcohol breath test equipment within 30 days prior to using the breath test equipment to perform an actual alcohol breath test.”

Finally, Section 77.26 details in relevant part the procedures for calibration of breath test instruments:

“(a) *Frequency.* Type A alcohol breath test equipment shall be calibrated annually within 1 year of using the breath test equipment to perform an actual alcohol breath test.

(b) *Procedures for calibration testing.*

(1) Calibration testing a breath test device shall consist of conducting three separate series of five simulator tests. One of the series of tests shall use simulator solution designed to give a reading of .10%. One of the series of tests shall use simulator solution designed to give a reading of .05%. The last series of tests shall use simulator solution designed to give a reading above .10% which is a multiple of .05%.

...

(d) *Certificate of calibration.* Upon satisfactory completion of the calibration procedure, the test record shall be recorded on a certificate of calibration of a type provided or

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<sup>5</sup> “(d) *Simulator solution certification.* The manufacturer of simulator solution shall certify to the test user that its simulator solution is of the proper concentration to produce the intended results when used for accuracy inspection tests or for calibrating breath test devices. This certification shall be based on gas chromatographic analysis by a laboratory independent of the manufacturer.”

approved by the Department. The certificate of calibration shall be signed and dated by the individual who performed the calibration procedure and shall be retained for a period of 3 years from the date of the calibration procedure.”

67 Pa. Code § 77.26.

C. The Application of *Frye* to Statutorily Admissible Evidence

When the Commonwealth has codified scientific determinations in statutes and regulations, the Supreme Court has found that these determinations are not “pure science,” but actually statutory questions, concluding that an “assessment which follows the statutory formula for an assessment cannot be deemed ‘novel science’ and therefore no *Frye* hearing is necessary.”

*Id.* at 71-72.

In *Commonwealth v. Dengler*, 586 Pa. 54, 890 A.2d 372 (2005), a case involving a statutory determination of Sexually-Violent Predator [SVP] status, the Supreme Court reasoned:

“This case does not pose the classic *Frye* scenario. The Commonwealth has not come into court and offered penological, psychological or psychiatric literature and research, or the examples of other states with SVP laws, and then asked the court, as a common law matter, to adjudicate SVP status and to devise some sort of consequence attending that designation. **Rather, the ‘science’ here (and the SVP designation consequences it triggers) is responsive to, indeed it is a direct byproduct of, a specific legislatively-adopted scheme which sets forth the relevance and contours of the challenged evidence.**”

*Id.* at 71 (emphasis added).

As a result of this reasoning, the Court did not find an abuse of discretion where the trial court admitted without a *Frye* hearing the report and testimony of a licensed clinical psychologist and member of the State Sexual Offenders Assessment Board who determined that the defendant was an SVP. *Id.* at 72-73.

In a subsequent case, *Commonwealth v. Conklin*, 587 Pa. 140, 897 A.2d 1168 (2006), the Court allowed a clinical social worker to testify as to SVP status since the witness qualified

as a criminal justice expert and the statute required no more. This demonstrates that the fulfilment of minimum statutory requirements makes an expert's testimony admissible.<sup>6</sup>

## II. Discussion

It is with these statutory and regulatory provisions in mind that we turn to the arguments of the Defendant's Counsel and the Commonwealth.

The Defendants articulated their *Frye* challenge as follows:

N.T., 10-01-2013, P. 20.

[Mr. Innes for the Defendants:]

3 That's the novelty here. The novelty which  
4 kicks in *Frye* is that the Commonwealth is saying to you  
5 that they don't have to prove that the calibration was  
6 appropriately done at the factory and that they could  
7 just rely on the fact that they have some [statutory] rights that  
8 say it's admissible.  
9 The calibration at the factory before it ever  
10 came to Philadelphia is the issue before the Court.  
11 That's the *Frye* issue.

The Commonwealth responded as follows:

N.T., 10-01-2013, P. 20.

12 MS. McGLYNN [for the Commonwealth]: And our response to that is

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<sup>6</sup> "The lower courts found that the licensed clinical social worker who testified in the SVP hearing in this case, though not a licensed psychologist or psychiatrist, nevertheless was qualified to offer opinion testimony on the question of whether appellant was an SVP because the clinical social worker qualified as a criminal justice expert and the statute requires no more. We agree with the lower courts' interpretation of the statutory requirement, and we therefore affirm....Accordingly, we hold that, in order to carry its burden of proving that an offender is an SVP, the Commonwealth is not obliged to provide a clinical diagnosis by a licensed psychiatrist or psychologist; the opinion of a qualifying criminal justice expert suffices." *Com. v. Conklin*, 587 Pa. 140, 142-43, 897 A.2d 1168, 1169 (2006). "Nothing in this Opinion exists as a bar to a defendant seeking to challenge the qualifications of a proffered Board-approved SVP expert evaluator in a particular case. What is at issue here is whether the Commonwealth may present an otherwise qualified SVP expert evaluator in the face of an objection, external to the statute, that the expert is neither a psychiatrist nor a psychologist; we hold that it can. **Moreover, we emphasize that the question here is one of bare qualification and admissibility; the ultimate determination of SVP status is made by the trial judge, who is not obliged to accept the SVP evaluator's expert opinion.** The sorts of concerns animating the concurrence are always available in impeaching and arguing the merit and persuasiveness of the evaluator's substantive opinion." *Id.* at 158 n.17 (emphasis added).

13 under the regulations, it doesn't say that the  
14 manufacturer has to use a solution by an independent  
15 body. It says that the user does, which is AID [Accident Investigation Division].  
16 THE COURT: It doesn't say the manufacturer?  
17 MS. McGLYNN: No, it says the user has to.

The Defendants then reiterated their position:

N.T., 10-01-2013, P. 26.

3 [Mr. Innes:] What we asked for -- the bottom line is are  
4 they calibrating it properly at the factory? That's  
5 what we're asking for. Did they calibrate it properly  
6 and above .15 because the three defendants that you have  
7 here all blew above a .15.

In essence, this Court must decide on the novelty of the following methodology: whether an expert can conclude that the Intoxilyzer 8000 gave accurate readings above 0.15% by relying only on the PPD's regular accuracy tests and calibration checks of the instrument – which only assess the instrument up to 0.15% – when there is no documentary proof from its manufacturer, CMI, that the instrument was initially calibrated above 0.15%. Additionally, even with proof from CMI of an initial calibration at levels higher than 0.15%, can an expert conclude that the instrument was accurate for readings above 0.15% if the police officer administering the test did not also conduct calibration checks above 0.15%?

Although accuracy tests, calibration checks, and/or factory calibrations above 0.15% are not statutorily required for a breath test reading to be admitted as evidence, the methodology in question – although never previously articulated as such – is implicit in any inference that a breath test which follows the statutory requirements (and nothing more) may be accurate.

It would seem that this kind of methodology, though not strictly novel, would be subject to a *Frye* analysis. However, the existence of a statutory scheme creates a *presumption of admissibility* for breath tests that adhere to the standards in the statute. More specifically, “[a]

certificate showing that breath test equipment has been inspected for accuracy, and is accurate, shall be the presumptive evidence of accuracy required by 75 Pa.C.S. § 1547(c)(i), and, with the certificate of calibration, will be considered sufficient to support a reliable test result.” *Commonwealth v. Mongiovi*, 521 A.2d 429 (Pa. Super. 1987).

Consequently, the issues of novelty and general acceptance which would otherwise be included in a *702/Frye* analysis, are instead factors which can be examined at trial in order to determine the accuracy of the tests which are admitted into evidence by application of statute. The accuracy of the tests, however is a matter that goes to the weight of the evidence. The Superior Court held in *Commonwealth v. Sibley*, 972 A.2d 1218, 1220 (Pa. Super. 2009) that at “the end of the trial, the court acknowledged that machine testing involved some inherent imperfection. Indeed, the court noted it did not believe chemical tests could be 100% accurate. However, the court considered the imperfection involved with the testing equipment in this case to be a matter of weight, not sufficiency.”

This Court will now assess the regulatory adherence of the Intoxylizer instruments used to administer breath tests to the Defendants followed by an analysis of the interpretive methodologies advanced by both the Commonwealth and the Defendants.

A. Testimony Regarding Regulatory Adherence

The Commonwealth called Philadelphia Police Officer Mary Beth Novak to the stand as its expert in breath test maintenance and administration. Officer Novak testified that she has worked for the Accident Investigation Department (AID) of the Philadelphia Police Department since 2004. N.T., 09-30-2013, P. 15. Officer Novak was first certified as an Operator of the Intoxylizer 8000 by ILEE in 2007,<sup>7</sup> she was certified as a Supervisor in 2011 by both PennDOT

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<sup>7</sup> Exhibit C-3.

and ILEE,<sup>8</sup> and certified by both ILEE and PennDOT again in 2012 for taking an Operator Refresher course.<sup>9</sup> She has also received Certificates of Completion for training courses administered by CMI and Guth Laboratories.<sup>10</sup> Officer Novak elaborated on her training at CMI upon direct and cross examination. N.T., 09-30-2013, P. 28-30, 56-57.

Based on the testimony elicited from Officer Novak and the accompanying certificates of calibration dated May 4, 2012 (Ex. C-10), the Intoxylizer 8000 FFF adhered to § 77.26(b)(1) of the regulations which simply require that in order to carry out a proper calibration check of the machine, the operator must test the machine five times at each of three levels: .05%, .10%, and a multiple of .05% above .10%, in this case 0.15%.

The direct testimony of Officer Novak, was as follows:

2 A. Yes. So I check the instrument on three different  
3 levels, .05, .10, and .15. The instrument checks those  
4 levels five times for each solution and it prints out a  
5 receipt. The levels would have to be within a .009 above the  
6 intended value of .010 below the intended value. We mark  
7 down the actual readings of what the instrument produced, you  
8 add up the difference between each reading and you divide it  
9 by five for the five tests. Then that answer has to be under  
10 the .005 to meet the State guidelines.

11 So we do that with the .005 solution, the .10, and  
12 the .15 solution, for each level.

13 Q. Where do you get the solution?

14 A. It's purchased from Guth.

15 Q. How do you know what the contents of that solution  
16 are?

17 A. The bottles are marked with a sticker on them.  
18 They're sealed. They list the lot number on the bottom and  
19 list what the value is, or the intended value for that  
20 solution and they come with a certificate from Guth and then  
21 come with a secondary certificate from Adirondack with the  
22 same lot number and the same expiration date for that.

N.T., 10-01-2013, P. 77.

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<sup>8</sup> Exhibits C-4, C-5.

<sup>9</sup> Exhibits C-6, C-7.

<sup>10</sup> Exhibits C-8, C-9.

Corroborating Officer Novak's testimony, Exhibit C-10 contains certifications from both Adirondack and Guth Laboratories for the .05%, .10%, and .15% solutions, along with receipts with each of the test values. Officer Novak testified that the tests at each level gave average values within the acceptable average deviation allowed by regulation (0.002). See N.T., 10-01-2013, P. 95-97.

Another calibration check was administered on Unit FFF on September 26, 2012, which also adhered to all of the regulations. See N.T., 10-01-2013, P. 97-99; Exhibit C-11. Officer Novak then testified that the Intoxilyzer 8000, Unit FFF had not been returned to the manufacturer for maintenance between May 4 and September 26, 2012.

Finally, Exhibit C-12 and Officer Novak's testimony demonstrate that Unit FFF was also calibration checked on May 15, 2013 at the levels .05%, .10%, .15%, .20%, and .30%.

Officer Novak further testified:

1 MS. KOTCHIAN: This is May 15 of 2013.

2 BY MS. KOTCHIAN:

3 Q. Officer, I'm showing you C-12.

4 What is that?

5 A. This is the calibration certificate for May 15,  
6 2013, for instrument Triple F signed by myself and other  
7 officers.

8 Q. And to your knowledge was that instrument Triple F  
9 sent back to CMI between September 26th of 2012 and May 15th  
10 of 2013?

11 A. I don't feel comfortable -- I don't know that for  
12 sure. I would have to look at the maintenance logs. I don't  
13 know from the top of my head.

14 Q. Okay. What calibration checks did you do on May  
15 15th of 2013?

16 A. I calibrated it at .05, .10, .15, .20, and .30.

17 THE COURT: I'm sorry. Give me the numbers  
18 again.

19 THE WITNESS: Sure. It's .05, .10, .15, .20,  
20 and a .30.

21 MS. KOTCHIAN:

22 Q. So that's five different calibration points?

23 A. Yes.  
24 Q. What happened when you ran the .05 solution through  
25 the instrument?

1 A. You want all the test results?  
2 THE COURT: Just give us the total deviation.  
3 THE WITNESS: Sure. The total deviation for  
4 the .05 was .000; for the .10, the total deviation was  
5 .001; for the .15, the total deviation was .000; for the  
6 .20 the total deviation was .002; and for the .30, the  
7 total deviation was .001.

N.T., 10-01-2013, P. 100-101

The Defendants also elicited in their cross-examination of Officer Novak, the fact that the Intoxylizer 8000, Unit FFF, had just been returned from CMI for maintenance on May 2, 2012, several months prior to the tests at issue, with a letter from CMI dated April 30, 2012. N.T., 10-01-2013, P. 108-09, 116.

In regard to the Intoxylizer 8000, Unit CCC, on four (4) separate occasions, August 10, 2012<sup>11</sup>, December 3, 2012<sup>12</sup>, January 23, 2013<sup>13</sup> and May 16, 2013<sup>14</sup>, calibration tests were performed and the degree of accuracy was determined to be within the range specified in the Department of Health and Department of Transportation Regulations promulgated under Section 1547 (c) of the "Vehicle Code," the Act of June 17, 1976 (PL 162, No, 81)(75 Pa, C.S. 1547(e), as amended. Unit CCC was also serviced by CMI on July 16, 2012.<sup>15</sup>

Overall, the Intoxylizer 8000, Units CCC and FFF, which were used on the Defendants, adhere to the requirements of §77.24(d), as they were properly tested with simulator solutions

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<sup>11</sup> Exhibit C-21 – Tests at 0.05%, 0.10% and 0.15%

<sup>12</sup> Exhibit C-22 - Tests at 0.05%, 0.10% and 0.15%

<sup>13</sup> Exhibit C-23 - Tests at 0.05%, 0.10% and 0.15%

<sup>14</sup> Exhibit C-24 - Tests at 0.05%, 0.10%, 0.15%, 0.20% and 0.30%

<sup>15</sup> Exhibit C-16

manufactured by Guth Laboratories that were also verified by the independent laboratory, Adirondack.<sup>16</sup>

B. Testimony Regarding Methodologies

The Defendants' main point of contention with the breath tests conducted on these instruments is that each had only been calibration checked at .05%, .10%, and .15% percents and in order to obtain accurate readings above .15%, the instrument needed to be calibration checked at levels above 0.15%. Exhibit C-12 and officer Novak's testimony above indicate that on May 15, 2013, the Intoxilyzer 8000, Unit FFF was calibration checked at .05%, .10%, .15%, .20%, and .30%. Although Officer Novak did not testify to it, Exhibit C-24 indicates that on May 16, 2013, the Intoxilyzer 8000, Unit CCC was calibration checked at .05%, .10%, .15%, .20%, and .30%. Because these calibration checks were performed within one year of the Defendants' breath tests, the checks suffice to show that the Intoxilyzer 8000, Units CCC and FFF were accurate at those levels for the Defendants' breath tests.<sup>17, 18</sup>

The Defendant's also contend that since CMI never provided any information regarding the proof of the accuracy of the instruments' original calibrations, the readings are unreliable. See N.T., 10-01-2013, P. 25-26, 31; 12-11-2013, P. 56. However, proof of original calibration levels by the manufacturer are not necessary according to regulations. Calibrations need only "be performed by a certified breath test operator." § 77.24(b). This lack of documentary evidence or testimony regarding CMI's calibration procedures is what distinguishes this case from the trial court's finding in the *Schildt* case. In *Schildt*, a CMI representative testified that

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<sup>16</sup> For the FFF: C-10, C-11, C-12. For the CCC: C-21, C-22, C-23, C-24.

<sup>17</sup> Exhibit C-12 shows that the FFF was successfully calibration checked at 0.05%, 0.10%, 0.15%, 0.20% and 0.30%. Exhibit C-24 shows the same for the CCC.

<sup>18</sup> "Intoxilyzer test results were admissible even though the Intoxilyzer was not calibrated before the test, since this section, requires only that the calibration be performed within 1 year following breath test." *Commonwealth v. Williamson*, 514 A.2d 917 (Pa. Super. 1986).

the factory does not use independently verified solutions for initial calibration, thus failing to comply with § 77.24(d). *Com. v. Schildt*, CP-22-CR-0002191-2010 at 21. Moreover, according to the *Sessler* and *Manahan* cases discussed in Section II.B above, a lack of documentary evidence of calibration goes to the weight of the evidence and not its admissibility.

Despite the statutory presumption of admissibility for breath tests that adhere to these minimum statutory and regulatory requirements, both the Commonwealth and the Defendants presented thorough expert testimony addressing the weight of the breath test evidence. The Commonwealth offered the testimony of Dr. Richard Cohn, who is a forensic toxicologist and pharmacologist for Drug Scan, Inc. N.T., 12-11-2013, P. 5. Dr. Cohn testified extensively regarding his qualifications. See N.T., 12-11-2013, P. 5-10.<sup>19</sup> When asked about the accuracy of breath test results that are outside the levels of calibration, Dr. Cohn testified as follows:

23           THE COURT: The question as I understand it,  
24           is within the parameters of the testing that is done by  
25           the Philadelphia Police Department or the calibration  
1           that is done or the calibration checks that are done at  
2           .05 -- let me get this correct -- below .050 percent and  
3           above 0.150 percent -- are readings above or below those  
4           figures with those calibration checks scientifically  
5           valid within a reasonable degree of scientific  
6           certainty?  
7           THE WITNESS [DR. COHN]: Yes.  
8           THE COURT: Tell us your reasons for that,  
9           Doctor?

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<sup>19</sup>     A [DR. COHN]: I have a Bachelors of Science and Pharmacy from  
2     Temple University School of Pharmacy. I have a masters in  
3     toxicology from Temple University Graduate School. I have a  
4     PHD degree in pharmacology, which is on the basic medical  
5     science from Jefferson Medical College of Philadelphia,  
6     what's now known as Thomas Jefferson University.  
7     Q [MS KOTCHIAN]. When were you awarded your PHD?  
8     A. 1974.  
9     Q. And when were you awarded your master's degree?  
10    A. 1968.

N.T., 12-11-2013, P. 6.

10 THE WITNESS: What's been referred here is the  
11 range of .05 to .15 percent is what's referred to as a  
12 certificate of calibration. That is what Officer Novak  
13 testified to. A certificate of calibration is not used  
14 to calibrate the instrument. It's used to demonstrate  
15 that the instrument is still in calibration.

16 The calibration of the instrument is performed  
17 by the manufacturer, sent to the Police Department or  
18 the law enforcement entity. The law enforcement entity  
19 prior to putting that instrument into service, is  
20 required to perform a certificate of certification.  
21 That certificate of certification must utilize  
22 standards. It has to. Mandated. It has to use  
23 standards that were prepared and certified by a third  
24 party.

25 THE COURT: And that would be CMI in this  
1 case, correct?

2 THE WITNESS: No. Actually, that would be --  
3 actually they buy them from Guth Laboratories. They  
4 were certified by G[u]th Laboratories.

N.T., 12-11-2013, P. 86-88.

Dr. Cohn then went on to explain his rationale for concluding that the PPD's calibration checks and accuracy tests are sufficient for determining that the Intoxilyzer is accurate for values below .05% and below .15%, even without reports from the manufacturer detailing the values of initial calibration:

6 THE WITNESS: So it's not the manufacturer and  
7 it's not the Police Department that prepares them [the simulator solutions for  
accuracy tests]. So  
8 they're independently prepared and certified calibrators  
9 or standards. Those have to be put into the instrument  
10 for the certificate of calibration at each of those  
11 three levels five different times and there are specific  
12 responses they must get. That is to demonstrate that  
13 the instrument, as proceeded to the Police  
14 Department by the manufacturer and calibrated by the  
15 manufacturer, is, in fact, still in calibration.

16 If the instrument failed to give those nominal  
17 values, those values that were certified to and  
18 specified by the independent preparer, then that

19 instrument could not be accepted as being in calibration  
20 and could not used to perform evidential breath test on  
21 individuals. The key I'm making here is that the  
22 instrument already has been calibrated. The calibration  
23 occurs up to .16 and, in fact, there is --

24 MR. KELLY: Objection. It's actually .15.

25 THE COURT: It's .15. Go ahead. I  
1 understand.

2 THE WITNESS: You're talking about the  
3 certificate of calibration. I'm talking about the  
4 calibration of the instrument.

5 MR. TEMPLE: Objection.

6 MR. CHOITNER: He's assuming facts that are  
7 not in evidence.

8 THE COURT: I'm going to allow him to testify  
9 because I have follow-up questions.

10 THE WITNESS: I'm talking about the  
11 calibration of the instrument as performed by CMI for  
12 which I have seen letters documenting that they actually  
13 run calibration data up to 0.300 percent.

14 THE COURT: Okay. Doctor, did you finish?

15 THE WITNESS: For now.

16 THE COURT: Would your opinion change if there  
17 are no, I guess calibration data or how the calibrations  
18 are made by either G[u]th Lab or CMI prior to the machine  
19 being sent to the Police Department with the  
20 understanding that they are only calibrated checked  
21 below .05 and above .15?

22 THE WITNESS: It would change, your Honor,  
23 yes. The instrument has to -- there has to be  
24 documentation some place that the instrument was  
25 calibrated. In this particular instance for these  
1 instruments, it's performed by the manufacturer, which  
2 is CMI.

3 THE COURT: And did you utilize that  
4 documentation, at least in part, as the basis for your  
5 opinion?

6 THE WITNESS: Yes. I assumed that based on  
7 the correspondence that I reviewed.

8 THE COURT: So you're basing it on a letter as  
9 oppose to actual scientific data?

N.T., 12-11-2013, P. 88-90.

Dr. Cohn stated that he reviewed two letters from CMI indicating that CMI did, in fact, calibrate the machine at the factory.<sup>20</sup> But, the letter does not indicate the values for the initial calibration.<sup>21</sup> However, when it comes to the actual values of the initial calibration, Dr. Cohn is simply saying that he has “seen letters documenting that they actually run calibration data up to 0.300 percent.” N.T., 12-11-2013, P. 89-90, Lines 12-13. Nevertheless, Dr. Cohn maintained as follows:

14 THE WITNESS: But, Your Honor, it's also  
15 buttress by the fact that independently prepared  
16 calibrators or standards gave the required specified  
17 responses during the certificate of calibration. If the  
18 instrument was not properly calibrated, then a certified  
19 standard of .05, .10, or .15 percent could not give rise  
20 to those values because the instrument would not have  
21 been calibrated properly.

22 That's the purpose of the certificate of  
23 calibration. We are using these terms calibration and  
24 then certificate of calibration. The only similarity is  
25 that they both contain the word calibration. There's  
1 also an accuracy check, which Your Honor referred to  
2 just a moment ago. That's not a calibration. That is a  
3 taking a .10 percent standard, independently prepared  
4 and certified standard or calibrator, and putting it  
5 into the instrument after the individual has been tested  
6 to establish that that nominal or certified .10  
7 concentration actually gives a .10 percent concentration  
8 within the allowable various levels.

9 THE COURT: So you're saying it's  
10 scientifically valid to opine, as you're opining, that  
11 as long as the accuracy checks or the calibration  
12 checks, or whatever you want to call them, are made any  
13 readings given either below or above those accuracy  
14 checks would be scientifically valid?

15 THE WITNESS: Yes, because it's already  
16 been established by various entities that there's a  
17 straight line response for concentrations below .05. I  
18 think to at least .02 percent and up to .30 percent.  
19 That's already been established.

20 THE COURT: By the correspondence you're

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<sup>20</sup> C-15. Appendices to report of Dr. Richard Cohn dated 10/22/13

<sup>21</sup> *Id.*

21 referring to, right?  
22 THE WITNESS: By the correspondence and by  
23 what's published by NHTSA, National Highway  
24 Transportation Safety Administration. And for that  
25 matter, what's published in the PA bulletin.

N.T., 12-11-2013, P. 90-91.

Dr. Cohn testified that in addition to the two letters dated January 4 and January 28, 2013, he also reviewed other documents from CMI indicating that the units were initially calibrated according to the NHTSA-approved guidelines for the Intoxylizer 8000 as a model.<sup>22</sup> He also reviewed the calibration certificates from the PPD which attest that the machines were calibration checked according to the same guidelines. Dr. Cohn attested that the PPD could not

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<sup>22</sup> 19 BY MR. TEMPLE:

20 Q. Those two letters there, are those the letters that  
21 you're referring to from CMI?

22 A. Letters, yes.

23 Q. Okay. And those are both letters from Mr. Triggs,  
24 who identifies himself as corporation counsel for CMI?

25 A. That's true.

1 Q. Okay. And fair to say both of those letters  
2 postdate dependency of this litigation?

3 A. I have no idea.

4 Q. What are the dates on those letters?

5 A. One is January 4, 2013.

6 THE COURT: Is that D-5?

7 THE WITNESS: That's the second one.

8 BY MR. TEMPLE:

9 Q. That's the second one that I handed you?

10 A. January 4, 2013. The first one you handed me was  
11 January 28, 2013.

...  
3 A. No. I thought there was -- my recollection is that  
4 there was some actual documentation as to analytical findings  
5 based on procedures they performed.

6 Q. When you say that, are you referring to documents  
7 that were sent back to the Police Department when machines  
8 were sent into CMI for repair? Is that what you're referring  
9 to when you say you seen documents from CMI?

10 A. Probably. Whether that was the reason why they were  
11 supplied or whether they were requested by the Commonwealth,  
12 I don't know. But that's what I'm referring to.

N.T., 12-12-2013, P. 6-8.

have obtained accurate calibration checks at the levels of .05%, .10%, and .15% if the units were not certified by CMI as meeting the NHTSA guidelines as accurate up to levels of .30%, which is why NHTSA placed the Intoxilyzer 8000, as a model, on the approved products list. Dr. Cohn found this to be sufficient to conclude that the specific units were also accurate to .30%.

14 BY MS. KOTCHIAN:

15 Q. Dr. Cohn, how are you able to determine that the  
16 linear range continues to be linear above the point where the  
17 Philadelphia Police Department does their calibration  
18 checks?

19 A. A, the instrument was certified by the manufacturer  
20 and B, calibration checks prior to putting that instrument  
21 into service and at least every 30 days -- at least once a  
22 year must undergo the certificate of calibration, which is to  
23 demonstrate that the instrument is still calibrated properly.  
24 On top of that, after every test, an accuracy check using a  
25 .10 percent level of blood alcohol concentration calibrator  
1 is put into an instrument to verify that at the time of the  
2 measurement a certified .10 percent control gave raise to a  
3 .10 percent control.

4 So if the instrument was out of the manufacturer's  
5 calibration, as demonstrated by the manufacturer and has been  
6 attested to and then published on the performing products  
7 list of NHTSA, then there's no way that you could get those  
8 results. That's this difference between the calibration of  
9 the instrument and the certificate of calibration.

...

15 Q. Is it your testimony that even without reviewing the  
16 data from CMI regarding the original calibration of the  
17 instrument, you could determine based on the calibration  
18 checks that the instruments were capable of producing linear  
19 results?

20 MR. INNES: Okay. Leading.

21 THE COURT: Overruled.

22 THE WITNESS: Yes. I do believe that I did  
23 see in some instances the actual data for the  
24 calibration by the manufacturer.

25 THE COURT: The data?

1 THE WITNESS: Yes. I believe I saw that, but

2 I know for a fact I read the correspondence.  
3 THE COURT: Was the data referred to in your  
4 report?  
5 THE WITNESS: Somewhere on there. Yes. I  
6 talk about the manufacturer's calibration. Given the  
7 fact that the manufacturer's calibration and the NHTSA  
8 documentation -- I referred to that.

N.T., 12-11-2013, P. 92-94.

Crucially, Dr. Cohn maintains that the manufacturer's attestation that the units were calibrated according to NHTSA guidelines for the Intoxilyzer 8000 as a model is enough to conclude that the specific units -- the CCC and FFF -- were accurate below .05% and above .15% up to .30%, even though he did not have documentation from CMI indicating that the CCC and FFF were calibrated below .05% and above .15% up to .30%.

4 THE COURT: And this is in general. Not with  
5 regard to these specific machines, correct?

6 THE WITNESS: No. It involves these specific  
7 instruments because they're on the NHTSA conforming  
8 products list.

9 MR. TEMPLE: I think there's a confusion  
10 there.

11 MR. INNES: Yeah. I think he's talking about  
12 the brand, Intoxilyzer 8000. We're talking about the  
13 specific machines, Serial No. 91 and 88.

14 THE COURT: Triple C and Triple F, right?

15 THE WITNESS: Well, I disagree because there  
16 was a certificate of calibration that was presented for  
17 those instruments showing that they met the calibration  
18 criteria under those guidelines. And since it met those  
19 qualifications, that means that that instrument is  
20 linear from whatever NHTSA has determined and whatever  
21 the manufacturer has determined. In this case the  
22 manufacturer had gone up to .300 percent.

23 So therefore, concentrations obtained using  
24 those instruments above .15 percent and below .02 --  
25 below .05 percent are scientifically valid. They  
1 couldn't have done a thing if the calibrators on the  
2 certificate of calibration had not met the mandatory  
3 requirements.

N.T., 12-11-2013, P. 92-95.

When questioned on the other documents from CMI that he reviewed, Dr. Cohn testified that CMI re-calibrated one of the Intoxilyzer 8000 units below .05% and above .15% on August 20, 2010 while they were servicing it before they sent it back to PPD.<sup>23</sup>

11 A. No. They perform a calibration. They perform a  
12 manufacturer's calibration.

13 Q [BY MR. TEMPLE]. So you're saying they perform a fresh manufacturer's  
14 calibration?

15 A. That's true. I think I also saw in those documents  
16 that they do independent accuracy checks.

17 Q. How do you --

18 A. It's not mandatory, but they do.

19 Q. How do you know, based on the anything that's in  
20 here that -- on what basis are you saying that they performed  
21 a fresh calibration of what we described as manufacturer's  
22 calibration of the instrument rather than a check of the  
23 existing calibration at certain levels?

24 A. I never said that they do a calibration at certain  
25 levels. I said they do a calibration. They perform an  
1 actually calibration of the instrument. The documentation  
2 that's contained in here, they have target value. They go  
3 from .30 to .40 percent.

4 Q. What I'm saying to you, Doctor, is what you have  
5 there are sheets of data which indicate essentially  
6 percentage values for solutions, that kind of thing, right?

7 A. Yes.

8 Q. It's a somewhat more elaborate version of the kind  
9 of documents that you see related to when the police do a  
10 calibration check, right? They also generate data sheets?

11 A. Absolutely not. This is a full calibration. Each  
12 document contains the target values, the actual calibration  
13 points of which the instrument was calibrated at. I have one  
14 here for the Intoxilyzer 800[0] going from 0.020 percent to  
15 0.300 percent. And that is what the police do. The police  
16 do a certificate of calibration.

17 Q. Could you pull that open and tell me what you're  
18 referring do?

19 A. The second document.

20 Q. Right here. Intoxilyzer 8000.

21 MR. INNES: May I approach as well, Your  
22 Honor?

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<sup>23</sup> Exhibit C-16.

23 THE COURT: Everyone can approach.

24 BY MR. TEMPLE:

25 Q. All right. So your testimony is that this

1 represented not a check against these various values, but a

2 fresh calibration? That that machine has been zero out; is

3 that what you're saying?

4 A. It's a calibration. Yes, that's what I'm saying.

N.T., 12-12-2013, P. 34-36.

Upon cross-examination, however, Dr. Cohn admitted that his conclusions about CMI's initial calibration comes from his background knowledge of proper procedures under regulatory standards and not directly from the documents provided by CMI.

4 Q [BY MR. TEMPLE]. Okay. So, again, you have not seen any

5 documentation from CMI regarding the practices and procedures

6 they use in conducting a manufacturer's calibration; is that

7 fair?

8 A. No. You just had a whole packet of material that I

9 reviewed demonstrating what standards they used in performing

10 the manufacturer's calibration.

11 THE COURT: Is that C-16?

12 THE WITNESS: Yes.

N.T., 12-12-2013, P. 42.

However, after much further cross- and re-direct examination on Exhibit C-16, Dr. Cohn was able to explain that the Intoxilyzer 8000 unit that CMI serviced on August 20, 2010 was recalibrated below .05% and above .15% based on the documentary evidence provided by CMI in Exhibit C-16.

15 BY MR. TEMPLE:

16 Q. At this point, Doctor, you are saying that you

17 believe that the document in front of you represents a fresh

18 manufacturer's calibration because it's your understanding

19 that that's what a manufacturer is supposed to do when it

20 gets its machine back; is that right?

21 A. I interpreted that as a calibration of the

22 instrument.

23 Q. Okay. But the reason for that is because you're  
24 assuming that they do what you believe to be the right thing  
25 to do, which is to recalibrate it?

1 A. No. I see instrumental data that comports with the  
2 NHTSA and the Commonwealth of Pennsylvania requirements.

3 Q. I'm asking is there anything about that data that  
4 tells you they were teaching the instrument as oppose to  
5 checking to see what the instrument had been taught?

6 A. Check the instrument? First of all, I think it was  
7 one value. So it's not the five values that you're doing for  
8 a particular concentration. That's for the police  
9 certificate of calibration. That tells me that there's a  
10 calibration that's being generated. I looked at that and I  
11 think any expert in the field of forensic toxicology could  
12 look at those values and say that that is a calibration curve  
13 for the instrument.

14 Q. Okay. When you say that is a "calibration curve,"  
15 there's no curve or line or anything like that represented on  
16 that sheet, is there?

17 A. No. There are not represented graphically. They  
18 did not happen to plot it in the graphic form. That can be  
19 plotted in a graphic manner.

20 Q. What you saw there are several data points? You saw  
21 .02 and certain other things up to .3, right?

22 MR. INNES: Could we ask the doctor to state  
23 what he's referencing?

24 THE WITNESS: C-16.

25 BY MR. TEMPLE:

1 Q. All that document contains -- it says wet bath  
2 calibration at the top, right?

3 A. Well, it says target. It gives you the target  
4 values. And the target values indicate 0.020 percent, the  
5 instrument average 0.21 percent. That was the experimental  
6 value that was obtained. The next one 0.40 percent, which is  
7 the target value. That value obtained by the instrument was  
8 0.0422 percent.

9 Q. And in each of those cases, the instrument is being  
10 feed a particular solution and then a reading is being taken,  
11 right?

12 A. True.

13 Q. And that reading is not exactly the value -- the  
14 presented value of the solution that's being given?

15 A. That's why I addressed in my opinion what considered  
16 to be variance and what variances is allowable pursuant to  
17 the regulations.

18 Q. Right. The variance, Doctor, is the result of the

19 test. You put in a .02 solution and you expect to get back  
20 something within a reasonable range of a .02, if the machine  
21 is functioning properly, right?

22 A. Right. We got more than reasonable results.

23 Q. I'm not disputing that. What I'm saying is you give  
24 it a .02 to see if it's properly calibrated to read a .02,  
25 right?

1 A. To demonstrate that it's capable of performing the  
2 specifications, yes.

3 Q. To demonstrate that it's capable of properly reading  
4 the .02 that you previously taught it?

5 A. No -- okay.

6 Q. And, in fact, what it read is a .021, which is fine,  
7 which is close enough given the regulations and given the  
8 practice, right? That's what it gave you back?

9 A. Sure. I agree.

10 Q. So that page you were just reading from describes a  
11 test of the calibration across multiple data points of .02,  
12 .04, .08, .1, and .3 with the results being minor variances  
13 that are within the acceptable range?

14 A. I think you might have left a data point off, but I  
15 could --

16 Q. Not if we're looking at the same one.

17 A. Yes.

18 Q. Given that, is there anything about this data sheet  
19 that suggest to you, and putting aside your background and  
20 belief that they were probably calibrating the machine  
21 because you think that's what they should be doing at this  
22 point, is there anything on that data sheet that tells you  
23 that what they were doing was calibrating the machine as  
24 oppose to doing a check of the preexisting calibration?

25 A. On that data sheet, no. On the packet, yes.

1 Q. What packet?

2 A. The packet that that sheet is part of. You  
3 indicated it's a work order. It says, one intox calibration  
4 check.

5 Q. A check, right?

6 A. Well, they perform a calibration.

7 Q. Check. It says the word check?

8 THE COURT: I believe that it says calibration  
9 check.

10 BY MR. INNES:

11 Q. Just one question along the lines of this piece of  
12 paper here. Is that what you're referring to 8/20/10? The  
13 wet calibration Chart 1, the Intoxilyzer 8000, right, Doctor?  
14 You got me?

15 A. No. One second. Yes.  
16 Q. You went down this target each .20 target and .40,  
17 right? At the end of that line it says wet stability checks,  
18 doesn't it? For each one of those targets?  
19 A. Where are you referring to?  
20 THE COURT: You want to show him real quick?  
21 MR. INNES: Sure.  
22 BY MR. INNES:  
23 Q. Yeah. We're on the same page. On that page after  
24 each target value .20 target, wet stability. It says checks,  
25 doesn't it?  
1 A. Sure. That's the word the manufacturer uses.  
2 Q. Fine. And for each of these values, it says checks  
3 at the end; isn't that correct?  
4 A. You are absolutely correct.  
5 MR. INNES: I have nothing further, Judge.  
6 BY MR. KELLY:  
7 Q. Doctor, were you here when Officer Novak testified?  
8 A. In part.  
9 Q. And she used the word calibration check?  
10 A. She also said she calibrated the instrument.  
11 Q. The question is --  
12 A. No. I don't know whether she used the word check.  
13 I can't remember that specific word from October.  
14 Q. Okay. So when you rely on the evidence, if you see  
15 a certificate of calibration from an officer, that's the  
16 final part of the verification that you use, correct?  
17 A. Yes. I'm using that police calibration  
18 certification provided that they have in their possession the  
19 calibration from the manufacturer.

...

11 THE COURT: I think the question from counsel  
12 of the Commonwealth, was that you indicated that the  
13 documentation that was contained in C-16 was a  
14 calibration of the machine and even though the  
15 documentation says calibration check, the question was  
16 what in that documentation led you to perform an opinion  
17 that it was, in fact, a calibration and not simply a  
18 calibration check?  
19 Is that the question?  
20 MS. KOTCHIAN: Yes, Your Honor.  
21 THE WITNESS: The fact that they used the  
22 levels that are mandated under the federal statute and  
23 that they covered a range of .02 to .30 percent and each

24 target value. It was done five times in the average  
25 report. So that is a calibration of the instrument.

1 BY MS. KOTCHIAN:

2 Q. And you reviewed -- the documents contained in C-16  
3 span a series of the years I think from 2009 to 2012; is that  
4 right?

5 A. I would agree with that without looking at that.

N.T., 12-12-2013, P. 63-68, 73-74.

Ultimately, Dr. Cohn concluded that the breath tests performed on the three defendants utilized a methodology for determining levels of intoxication that is generally accepted in the scientific community.

7 BY MS. KOTCHIAN:

8 Q. Do you have an opinion as to whether the results of  
9 this test would be generally accepted in the field of  
10 forensic toxicology and pharmacology?

11 A. Yes.

12 Q. What is your opinion?

13 A. It would be accepted.

14 Q. And what do you based that opinion on?

15 A. On the individual items on the breath ticket for  
16 this individual and based on the supporting documentation  
17 that was supplied documenting that the instrument met the  
18 certificate of qualification criteria.

...

10 BY MS. KOTCHIAN:

11 Q. And, Doctor, do you understand the methodology that  
12 was used in C-17, C-18, and C-19?

13 A. I do.

14 Q. And is that methodology generally accepted in the  
15 scientific community for evidential breath testing?

16 A. Absolutely.

N.T., 12-12-2013, P. 81-84.

Finally, the Defendants called Heather Harris, a forensic chemistry consultant and an adjunct professor at Arcadia University. N.T., 12-13-2013, Part 1, P. 4-5. Ms. Harris gave extensive testimony as to her qualifications and the operation of evidential breath testing devices.

N.T., 12-13-2013, Part 1, P. 4-11. The Court determined that Ms. Harris was qualified to testify as an expert in forensic chemistry, forensic analytical chemistry, and with regard to the calibration of infrared instruments, including but not limited to EBT, evidential breath testing instrumentation. Ms. Harris looked at various documents from CMI and the PPD.

25 Q. Okay. Those documents are the Philadelphia Police  
1 Department certification of calibration?

2 A. Yes.

3 Q. For both the Triple C and Triple F machine, right?

4 A. Yes. For a specific time range of December '07 to  
5 May of the 2013.

6 Q. As you outlined in your report?

7 A. Yes.

8 Q. As well as the CMI letter addressed to the  
9 Pennsylvania Under Intoxication Association and a letter  
10 addressed to the DA here, Ms. Kotchian?

11 A. Yes. There's also some documents -- service work  
12 orders from CMI that were there as well.

N.T., 12-13-2013, Part 1, P. 42-43.

Ms. Harris then elaborated that she did not receive any documentation regarding the initial calibration by CMI of the Intoxylizer 8000, Units CCC and FFF. She also noted that she did not receive tractability documentation which would have told her whether CMI calibrated the machine using solutions that were verified by independent manufacturers.

22 BY MR. INNES:

23 Q. Just to be clear, Ms. Harris. What you just spoke  
24 about is the calibration done of a virgin machine at CMI at  
25 the manufacturer; is that correct?

1 A. Yes.

2 Q. And we have not received those documents and you  
3 have not seen those documents?

4 A. I have not seen those documents.

5 Q. Besides what you mentioned, how about traceability  
6 documentation? Is that something that you need?

7 A. Yes. Traceability documentation is important. The  
8 regulations even cite the need for traceability in the Police

9 Department. So in the Police Department, we do have  
10 traceability. We have those independently verified  
11 solutions. We have one laboratory manufacturing the  
12 solution. It gets tested at another laboratory. At that  
13 time it goes down to the police station for use of the  
14 instruments. So that's traceability, those connections.

15 We don't have any of that information from CMI. So  
16 what we do not know is if even if CMI made their solutions  
17 in-house, if they made a solution incorrectly, let's say they  
18 made that .2 calibration solution incorrectly, you would then  
19 get an incorrect response on the instrument and your line  
20 would be flawed. We actually don't know if that occurred in  
21 this case because we have -- not only do we not have the  
22 calibration data, we don't have any information about the  
23 solutions that CMI actually used to perform that calibration.

N.T., 12-13-2013, Part 1, P. 44-45.

Unlike Dr. Cohn, Ms. Harris did not find the letters from CMI, dated January 4 and January 28,  
2013 to be reliable since they were prepared by counsel. N.T., 12-13-2013, Part 1, P. 46. She  
also opined that a machine that has only been calibrated or calibration checked at .05%, .10%,  
and .15% would not be reliable below .05% or above .15%.

9 Q. Now, moving on a bit. Do you have an opinion as to  
10 whether or not an instrument that is calibrated or  
11 calibration checked only between .05 and .150, whether the  
12 results of that machine either below .[0]50 or above .15 would  
13 be reasonably accepted -- generally accepted by the  
14 scientific community?

15 THE COURT: Are you asking if it's  
16 scientifically reliable?

17 THE WITNESS: My answer would be, no, it's  
18 accepted and it's not reliable simply because if you  
19 have no information about the underlying calibration and  
20 you have no quality control samples to tell you where  
21 the lines fail, because every line as an upper and lower  
22 limit -- the lower limit we call the limit of  
23 quantitation. But there's also an upper limit, at which  
24 point the line fails and this is a known fact in  
25 analytical chemistry that every line has that point of  
1 which it could fail.

2 So without any quality control data to tell us

3 where that line fails, we could say that it has  
4 demonstrated reliability at .05, .10, and .15 through  
5 that repeated check that's going on at the Police  
6 Department, but there's been no checks beyond those  
7 points.  
8         Again, because we're missing the original  
9 data, and we don't have the control checks, we don't  
10 know where that failure occurs on that line?

N.T., 12-13-2013, Part 1, P. 47-48.

Ms. Harris went on to explain that when a machine's calibration curve is plotted and is shown to be linear across the three calibration values (.05%, .10%, and .15%), it is still impossible to determine whether that linear curve extends beyond those three values unless the machine is calibration checked at higher and lower values.

3         THE WITNESS: So, what we are talking about  
4 here again is that initial calibration of feeding the  
5 instrument a concentration of solution and then getting  
6 a response. And so what you would expect to see is  
7 something like this and I suspect your algebra is coming  
8 back. So you get this kind of line. So what we don't  
9 know is anything about how this line was generated.

10         CMI has not provided information as to whether  
11 or not these concentrations are accurate. We don't know  
12 what the relation was between the concentration and the  
13 instrument response. So we have no evaluation of this  
14 line and haven't been provided any data that would even  
15 allow us to even plot this line that we just drew up  
16 here.

17         So with regard to what's really been happening  
18 at the Police Department, they have been checking at  
19 these three values. So what we've got is essentially a  
20 limitation here where you could say between these values  
21 we know that the line is working. But we don't know two  
22 things. We don't know what I'm going to writ as LOQ,  
23 which is limit of quantation. The line, you know, can't  
24 go down to zero because every analytical method has a  
25 lower limit, at which point, it can't determine  
1 concentration accurately anymore because the amount is  
2 so small. And so we have a lower limit and we're going  
3 to have a upper limit. This is inelegantly titled the

4 upper working limit. At some point the line is no  
5 linear. It would shoot up and shoot down. We don't  
6 know. That' would have to be experimentally. But at  
7 some point up here, the line fails.  
8 We don't have any data to actually tell us  
9 where is that point. If you test at .2 and the line  
10 continue to be linear, we could move that range over.  
11 If we tested at .3 and it's still held to the line, we  
12 could move that range over. But we don't have that  
13 data, so we don't have any information about what  
14 happened out here.

N.T., 12-13-2013, Part 1, P. 49-50.

Ms. Harris also addressed Exhibit C-16, the calibration documents from CMI, which Dr. Cohn testified as showing that the machine was calibrated above .15%. Ms. Harris found this documentation also to be lacking, testifying that she would still have doubts about the machine's accuracy above .15%. She directly rebutted Dr. Cohn's claim that the tests performed at CMI when the machine went in for servicing would qualify as a re-calibration; instead, she described them as calibrations checks, similar to what the PPD was doing back at the station.

17 THE COURT: Did you review any data, and I'm [referring]  
18 specifically to C-16 where there was testimony yesterday  
19 and you were here in the courtroom that the machine was  
20 calibrated at the manufacturer between .02 and .30? Did  
21 you review that data?

22 THE WITNESS: Was C-16 the work order packets?

23 THE COURT: The work order packets.

24 THE WITNESS: There was a piece of paper in  
25 there and I think it was the one that Dr. Cohn was  
1 referring to where it did have concentrations on there,  
2 but it did not have data that I would call calibration  
3 data. It didn't have instrument response in the sheet  
4 that they were talking about with the checks on it.

5 THE COURT: Is that your answer?

6 THE WITNESS: Yes. I don't know if I answered  
7 your question.

8 THE COURT: I mean, that was actually the  
9 foundation for my next question.

10 THE WITNESS: Yes.

11 MR. INNES: If I may, Judge, I would like to  
12 reflect that Dr. Cohn just walked back into the room.

13 THE COURT: Sure. If an instrument is  
14 calibrated at the factory along a linear curve between  
15 .02 and .30, as the testimony was yesterday, and then  
16 it's utilized, by in this case, the Police Department.  
17 The accuracy is checked before each use at those three  
18 levels of .05, .10, and .15. Under that scenario, would  
19 readings above .15 in your opinion be scientifically  
20 reliable?

21 ~~THE COURT~~ THE WITNESS]: If I assume the initial  
22 calibration was done correctly, everything checked on  
23 the initial calibration, I still would actually have  
24 doubt about the line above the .15 for a couple of  
25 reasons. Number one, that equipment has been packed up  
1 and either put on either a UPS truck or a plane or  
2 something and shipped out. It's a very sophisticated  
3 technology and I mentioned those filters earlier. Those  
4 have to be proper alignment for this to actually work  
5 properly. We've all received a package that's a little  
6 disheveled or a little messed up. That happening to  
7 these instruments, would trouble me with regard to the  
8 calibration.

9 If I had it my way, I would actually wipe it  
10 clean and recalibrate it.

11 THE COURT: For are each use?

12 THE WITNESS: Not for each use, but when the  
13 instrument arrived in my laboratory --

14 THE COURT: Or to Police Department.

15 THE WITNESS: Yes. I would do an initial  
16 calibration. I would wipe the manufacturer's  
17 calibration and recalibrate it there. There are  
18 actually states that do that. They order these  
19 instruments, but when it gets to their state, their  
20 state Police Department or their state laboratory would  
21 do what we're talking about here.

22 BY MR. INNES:

23 Q. Why do they do that?

24 A. They're doing that exactly because of what I just  
25 mentioned. These instruments are sophisticated and by  
1 jostling in an airplane or by a UPS driver, they could  
2 actually damage the interior workings of the instrument. I  
3 believe that it was discussed with Dr. Cohn yesterday with  
4 regard to a GC. We don't just buy it from the manufacturer  
5 and start using it. We do a whole project to see and to make  
6 sure that the instrument works properly, that it's going to

7 properly calibrate, that it's going to return to us accurate  
8 results. It's not a TV. You don't just take it out and turn  
9 it on.

10 Even if I assumed the that the calibration had been  
11 done properly at the factory, because of all of the things  
12 are coming into play with that instrument before it gets in  
13 the lab or the Police Department, if we're never checking  
14 this range, we don't know if it works. We just don't have  
15 any data to prove that it works.

16 THE COURT: So all that time you spent  
17 yesterday, hours and hours as to whether or not the  
18 machine was properly calibrated at the factory before it  
19 was sent to the Police Department, had no bearing upon  
20 your opinion as to whether or not levels above what is  
21 tested at the Police Department are scientifically  
22 reliable?

23 THE WITNESS: Correct. I didn't hear anything  
24 yesterday that would change what my interpretation of  
25 the data was and we don't have data for that section.

1 May I sit down?

2 THE COURT: If you're done, yes.

3 BY MR. INNES:

4 Q. Ms. Harris, I'm going to show you what's been marked  
5 as C-16. Have you seen those documents before?

6 A. Yes, I've seen these. I referred to them on my  
7 report.

8 Q. You reviewed them prior to your testimony today?

9 A. Yes.

10 Q. Okay. Anything in C-16 change your opinions about  
11 the scientific reliability -- the communities exception of  
12 the scientific reliability of the Intoxilyzer 8000 or the  
13 Triple C or Triple C machine?

14 A. No. What I just said still holds because I didn't  
15 see anything in this exhibit that actually said it was a  
16 calibration, and none of the data, according to my  
17 interpretation, actually represents the kind of data that you  
18 would expect to see in a calibration. It appears to be  
19 calibration checks.

20 Q. The page in the work order dated -- well, the  
21 invoice dated of the work order is 3/24/10. It's part of  
22 C-16? Would you take a look at that?

23 A. Yes.

24 Q. In that work order, there is a page called wet  
25 calibration that Dr. Cohn referred to?

1 A. Yes.

2 Q. You see that?

3 A. Yes.

4 Q. Could you read what the headline is on the page,  
5 please?

6 A. It says intoxilyzer 8000, Chart No. 1, wet  
7 calibration.

8 Q. The items on that page in your expert opinion, does  
9 it deal with calibration, calibration checks, certification  
10 of calibration?

11 A. I would say that this is a calibration checks. They  
12 are giving us information about the allowable tolerance,  
13 which is the plus or minus value you could apply to the  
14 concentration that you determine. They give us solution lot  
15 number information.

16 There is no data on here with regard to instrument  
17 response. There is data on the here with regard to what the  
18 actual raw values were when they did this check.

19 Q. Ms. Harris, I'm going to refer to the graft that you  
20 drew here. If someone blew in a .18, a .20, a .25, that is a  
21 quality above what had been -- the machine had been  
22 calibrated at, which is .15 --

23 THE COURT: When you say "calibrate," you mean  
24 the calibration was checked?

25 THE WITNESS: Yes.

1 BY MR. INNES:

2 Q. Would that at least mean that he had in his  
3 bloodstream .15, the highest of the range that had actually  
4 been checked?

5 A. Not necessarily. We don't have any information  
6 about instrument response above that range.

N.T., 12-13-2013, Part 1, P. 50-56.

Ultimately, Ms. Harris's views on breath test calibration protocol can be summarized thusly:

2 A. Every line -- yes, every line fails. Just  
3 as you have a lower limit where your instrument is  
4 no longer able to accurately quantitate values,  
5 you have an upper limit where the line no longer  
6 holds in a linear fashion. We don't know where  
7 that is. You have to determine that through  
8 experiment and then you have to have data to show  
9 where that's occurring.

10 Q. And would you want to determine that before  
11 you ran a sample through the instrument?

12 A. For me, yes, I would want to know the  
13 limitations of my calibration curve before I'm

14 using that for any kind of quantitative result.  
15 Q. Why?  
16 A. Because I need to know that this is accurate  
17 before I can extrapolate from it. Because in the  
18 context of an unknown there is no other data to  
19 tell me what the right answer is. So the only way  
20 I get at an answer is through this graph. And so  
21 I need to know that this graph is accurate.  
22 Otherwise, I don't know anything about the  
23 accuracy or reliability of the extrapolated  
24 results.

N.T., 12-13-2013, Part 2, P. 14.

Ms. Harris then went on to question Dr. Cohn's reliance on the Intoxilyzer 8000's presence on the list of NHTSA approved devices, since that list just validates the 8000 as a model and does not indicate anything about the CCC and FFF units that were utilized in this case. Finally, when questioned by the Court, she concluded that a machine would need to be zeroed out and recalibrated when received at the PPD in order for its readings to be considered scientifically accurate. Failing that, Ms. Harris would still need to see the specific initial calibration data from the factory or calibration checks from the PPD at values above .15%.

13 THE COURT: Yes, but I do have a  
14 question.  
15 Regardless of whether or not you saw  
16 the data or you didn't see the date or  
17 protocols and procedures from CMI as to  
18 whether or not these machines in question  
19 here, CCC and FFF, the dates indicated by  
20 Ms. Kotchian, whether or not you saw that  
21 data where Dr. Cohn testified these machines  
22 were calibrated at the manufacturer. Is it  
23 still your opinion to a reasonable degree of  
24 scientific certainty that once that  
25 instrument is received at the agency that's  
1 going to utilize it -- in this case the  
2 Philadelphia Police Department -- in order  
3 for any readings to be scientifically valid,  
4 according to your opinion, that machine

5 would have to be zeroed out and recalibrated  
6 once it is received at that agency in order  
7 to give scientifically reliable data with  
8 regard to evidential breath tests; is that  
9 correct?

10 THE WITNESS: Yes, Your Honor.

11 THE COURT: Okay.

21 Q. Assuming you weren't going to do that, does  
22 that change your -- assuming you weren't going to  
23 do that, you still would want to see if -- in  
24 fact, it's even more important to see the  
25 calibration data.

1 A. Yes, if I'm not going to recalibrate the  
2 instrument myself, what I would want to see is the  
3 initial calibration data. And then I would want  
4 to see the quality control at the concentration  
5 across the range of my calibration curve.

6 At that point if all the data checked out  
7 and said that yes, the instrument is working  
8 properly, then I believe it would be appropriate  
9 to put the instrument into use.

10 THE COURT: So it's either zeroed out  
11 or get all the data from the manufacturer  
12 that we don't have.

13 THE WITNESS: Yes, because as I  
14 mentioned earlier, the instrument is being  
15 put into a crate and shipped and we don't  
16 know what's happening to it. So it may have  
17 been in calibration at CMI and something  
18 could have happened to it. We don't know.  
19 And before it gets to the police department,  
20 and if you're going to use the initial  
21 calibration as it came to you, you need to  
22 at least check the ranges that you're going  
23 to put it into use for in the casework. And  
24 they did a limited check with these three  
25 values, but there are no other checks of any  
1 other values.

2 THE COURT: Can we still hold that  
3 opinion, Doctor, if the machine that is  
4 received by the Philadelphia Police

5 Department is checked with the traceable  
6 solution at those levels indicated? They're  
7 .05, .10, .05. And they reflect readings  
8 within the standard deviation for those  
9 levels. That would still be your opinion  
10 that you would need to test it along the  
11 entire linear line in order to get  
12 scientific reliable data above .15 or below  
13 .05?

14 THE WITNESS: Yes. I'm not a doctor.  
15 Just to make that clear.

16 THE COURT: I'm sorry. Did I say  
17 doctor? I meant Ms.

18 THE WITNESS: That's okay. But, yes,

19 in order to actually have scientific  
20 reliable results on the parts of the line  
21 outside of what has been tested, we need to  
22 see some kind of data. And if the quality  
23 control data can't be provided, at a  
24 minimum, we would need to see how that line  
25 was generated in those ranges.

N.T., 12-13-2013, Part 2, P. 19-202.

Despite all of this testimony, the simple fact is that the Intoxylizer 8000, Units CCC and FFF, both adhered to the statutory requirements and are therefore presumed admissible. All of the above testimony from Dr. Cohn and Ms. Harris raise issues solely as to the weight of the evidence. It is not for this Court to decide as to whether the procedures enshrined in statutes and regulations lead to test results that are scientifically reliable, and it is not for this court to decide in a pretrial motion whether a breath test that adheres to the statutory requirements and nothing more is accurate. The latter is a question for the trier of fact to be presented at trial.

The Defendants have argued that that the Supreme Court's decision in *Commonwealth v. Dyarman*, 73 A.3d 565 (Pa. 2013), directs this court to decide on the accuracy of these breath

tests pretrial. The Defense misreads *Dyarman*. The paragraph in *Dyarman* which refers to pretrial motions is referring to them with regard to challenges to the calibration or accuracy testing, not to the accuracy of the device. In short, pretrial motions are for determining whether the machines adhere to the statutory requirements for calibration and accuracy testing and are thus admissible, whereas the ultimate question of the machine's accuracy affects the weight of the evidence and should be challenged at trial.<sup>24</sup>

These machines adhered to the statutory requirements and the ample testimony regarding accuracy should be resubmitted at trial.

### III. Conclusion

#### A. Commonwealth v. Christiansen, Commonwealth v. Sterling

It was stipulated that Ms. Christiansen was tested on the Intoxilyzer 8000, Unit FFF on August 11, 2012. It is also stipulated that her lowest BAC reading exceeded 0.15%.<sup>25</sup> Counsel also agreed that Mr. Sterling was also tested on Unit FFF on August 20, 2012. His lowest BAC reading also exceeded 0.15%.<sup>26</sup>

With regard to the Intoxilyzer 8000, Unit FFF, on three (3) separate occasions, May 4, 2012<sup>27</sup>, September 26, 2012<sup>28</sup>, and May 15, 2013<sup>29</sup>, calibration tests were performed and the

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<sup>24</sup> “We also find appellant's challenge to the certificates does not involve confrontation issues under Melendez-Diaz; rather, it concerns the weight to be accorded to the test results. Pursuant to 75 Pa.C.S. § 1547(c), “tests . . . conducted by qualified persons using approved equipment, shall be admissible in evidence.” Id. Once the Commonwealth presented evidence the test was performed by a “qualified person,” on an “approved” device, which had been calibrated and inspected for accuracy within the period of time and in a manner in conformity with relevant regulations, the trial court properly admitted the test results. See id., § 1547(c)(1);6 see also N.T. Trial, 10/29/10, at 37–38. Appellant could have challenged the accuracy of the device by calling the author of the certificates or offering other evidence to show flaws in the device, but any proffered evidence would have only affected the weight of this evidence, not its admissibility. Had there been an actual concern about the calibration or accuracy testing, a pre-trial motion was available to address all such matters.”

*Commonwealth v. Dyarman*, 73 A.3d 565, 570 (Pa. 2013).

<sup>25</sup> See also Exhibit C-17.

<sup>26</sup> See also Exhibit C-18.

<sup>27</sup> Exhibit C-10 – Tests at 0.05%, 0.10% and 0.15%

<sup>28</sup> Exhibit C-11 - Tests at 0.05%, 0.10% and 0.15%

degree of accuracy was determined to be within the range specified in the Department of Health and Department of Transportation Regulations promulgated under Section 1547 (c) of the "Vehicle Code", the Act of June 17, 1976 (PL 162, No, 81)(75 Pa, C.S. 1547(e), as amended. Unit FFF was last serviced by CMI on May 2, 2012.<sup>30</sup>

Unit FFF, the unit upon which defendant Christensen was tested on August 11, 2012, was determined to be accurate to readings of 0.15% as evidenced by the Commonwealth's exhibits both before and after the test was performed upon her. It was also determined to be accurate to 0.30% approximately 8 months later when the City began testing accuracy to 0.30%. The same holds true for Mr. Sterling.

In light of the fact that there was no evidence to indicate that this instrument, FFF, was taken out of service for inaccuracies<sup>31</sup> between May 4, 2012 and May 16, 2013, this Court must, as a matter of law, presume the readings of both of these defendants' BAC to be accurate and, therefore, admissible against them under 75 Pa.C.S. § 1547 and 67 Pa. Code §§ 77.22-77.26, as the accuracy check was accurate to 0.30% within a one year period from the time of the administration of the tests upon them. To rule otherwise would be inconsistent with the intent of the statutory and code enactments addressing this very issue and, therefore, would be contrary to the clear intent of the aforesaid statute and code promulgations.

The Commonwealth's evidence in regard to both Ms. Christensen and Mr. Sterling is presumed to be both accurate and admissible, as the record supports that the Commonwealth can meet its prima facie burden in bringing the matter to trial. Since accuracy of the instrument is

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<sup>29</sup> Exhibit C-12 - Tests at 0.05%, 0.10%, 0.15%, 0.20% and 0.30%

<sup>30</sup> Exhibit C-16

<sup>31</sup> Officer Novak testified that both CCC and FFF were rotated in and out of use with other instruments, but not due to failure to pass accuracy checks.

only a presumption it is clearly subject to be rebutted by the defense, through cross-examination, expert testimony or any other means it sees appropriate, by attacking the weight of this evidence.

In light of the foregoing, the Motions to Suppress Evidence of BAC Readings of defendants Christensen and Sterling are denied.

B. Commonwealth v. Selden

It was stipulated that Ms. Selden was tested on the Intoxilyzer 8000, Unit CCC, on December 19, 2012. It is also stipulated that her lowest BAC reading exceeded 0.15%.<sup>32</sup>

Unit CCC, the unit upon which defendant Selden was tested on December 19, 2012, was determined to be accurate to readings of 0.15% as evidenced by the Commonwealth's exhibits both before and after the tests performed upon her. It was also determined to be accurate to 0.30% approximately 5 months later when the City began testing accuracy to 0.30%.

In light of the fact that there was no evidence to indicate that this instrument, CCC, was taken out of service for inaccuracies<sup>33</sup> between July 16, 2012 and May 16, 2013, this Court must, as a matter of law, presume the readings of Ms. Selden's BAC to be accurate and, therefore, admissible against her under 75 Pa.C.S. § 1547 and 67 Pa. Code §§ 77.22-77.26, as the accuracy check was accurate to 0.30% within a one year period from the time of the administration of her test. To rule otherwise would be inconsistent with the intent of the statutory and code enactments addressing this very issue and, therefore, would be contrary to the clear intent of the aforesaid statute and code promulgations.

The Commonwealth's evidence in regard to Ms. Selden's BAC is presumed to be both accurate and admissible, as the record supports that the Commonwealth can meet its prima facie burden in bringing the matter to trial. Since accuracy of the instrument is only a presumption it is

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<sup>32</sup> See also Exhibit C-19.

<sup>33</sup> See FN 31, supra.

clearly subject to be rebutted by the defense, through cross-examination, expert testimony or any other means it sees appropriate, by attacking the weight of this evidence.

In light of the foregoing, defendant Selden's Motion to Suppress Evidence of BAC Readings is also denied.

**BY THE COURT:**

  
\_\_\_\_\_  
**ANGELO J. FOGLIETTA**

COMMONWEALTH of PENNSYLVANIA

:

v.

:

SARAH L. CHRISTIANSEN

:

CP - 51 - CR - 0010429-2012

GINGER SELDEN

:

CP - 51 - CR - 0001727-2013

TERRENCE STERLING

:

CP - 51 - CR - 0005302 - 2013

**PROOF OF SERVICE**

I hereby certify that I am this day serving the foregoing Opinion and Order upon the person(s),

And in the manner indicated below:

**COUNSEL:**

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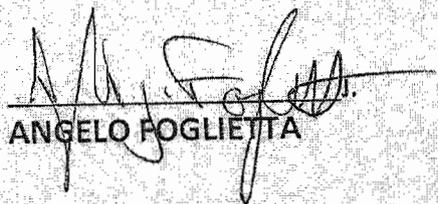
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TYPE OF SERVICE: FIRST CLASS MAIL

DATED: May 21, 2014



ANGELO FOGLIETTA