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WRITTEN TESTIMONY *SUPPORTING WITH AMENDMENTS* SB 1037 AND HB 1392.

Please accept this written testimony from the Maryland State's Attorneys' Association supporting, with amendments, Senate Bill 1037 and House Bill 1392.

These bills consist of two primary components: 1.) the "Drug Recognition Expert" (DRE) component; and 2.) the "5 nanogram *per se* component for impairment." The Maryland State's Attorneys' Association supports the DRE component but opposes the 5 nanogram per se impairment component. I will address each component in order.

I. Drug Evaluation and Classification Program (aka Drug Recognition Expert) – Many, many years ago the Maryland Legislature adopted Transportation Article §16-205.1 subsection (j), a part of the statute that is commonly known as the "DRE subsection." This subsection generally states that a blood test for drugs or controlled dangerous substances may only be requested, required or directed under certain provisions of §16-205.1 by an officer who has been trained as a sanctioned Drug Recognition Training Program by the National Highway Traffic Safety Administration.

There are currently only approximately 188 law enforcement officers in the state of Maryland who are certified as Drug Recognition Experts. To attain that designation, officers must go through a rigorous training consisting of a 24-hour pre-training; 72 hours of additional classroom training; they must complete field certifications; and pass a comprehensive final examination. In order to retain their certification, officers must participate in continuing education trainings; complete a recertification training every two years; maintain a log of all evaluations completed in training as part of any enforcement activities; and meet any other administrative requirements as established in the International Association of Chiefs of Police (IACP) Standards governing the Drug Evaluation and Classification Program, otherwise known as the DRE program. In

addition, the Maryland State DRE Coordinator may also place other standards on each DRE as deemed necessary.

The ultimate goal of the Drug Evaluation and Classification Program (DRE) is to help prevent crashes and avoid deaths and injuries by improving enforcement of drug-impaired driving violations. A certified DRE is specifically trained to conduct a detailed evaluation consisting of twelve steps and to look for other evidence that can be used to articulate an opinion as to sobriety, impairment or possible medical issues at play. They are able to reach reasonably accurate conclusions concerning the category or categories of drug(s) or medical conditions causing the impairment observed in the subject. Based on these informed conclusions, the DRE can request the collection and analysis of a blood sample to obtain corroborative, scientific evidence of the subject's drug use.

The way this works in a practical manner is, when a police officer detains someone for suspicion of drug-impaired driving, they contact their local DRE, who then usually has to get out of bed, get dressed, drive to the station and then observe and conduct the 11-step examination of the suspect, leading up the 12th step – the request for a blood sample. Even then, that blood sample is voluntary, except in the case of a fatal or life-threatening injury crash in which the subject was deemed to be the at-fault driver.

The Drug Recognition and Classification Program (DRE) is active in every state in the country and in many countries around the world. It has been in existence since the mid- 1980's and has been accepted by courts all across the country. To have the Maryland Legislature adopt the DRE program into Maryland Transportation Article §16-205.1, have the State go through all the time and expense of training officers to be DREs, along with the expense of all the overtime hours involved in the individual examinations and then make their ability to testify in court subject to the whims of every individual judge in the State makes absolutely no sense. If a lay person is allowed to testify as to their *opinion* on whether a person is impaired by alcohol, why shouldn't a highly-trained DRE be allowed to do likewise when it comes to drugs?

House Bill 1392 and Senate Bill 1037, if passed, would remove this impediment to providing a judge or jury important evidence regarding drug-impaired driving. It would allow a police officer qualified as an expert witness to testify on the ultimate issue of whether an individual was driving a vehicle or operating a vessel while impaired by drugs or combination of drugs or impaired dangerous substances if the police officer has successfully completed such a program.

The Maryland State's Attorneys' Association endorses and supports the DRE component of SB 1037 and HB 1392.

II. The Five Nanogram *Per Se* Component - We take a much different position when it comes to the second part of these bills. Were it to pass, SB 1037/HB1392 would make it a per se offense of drug impaired driving should the person have a Delta 9 THC concentration of five (5) nanograms per milliliter of blood. There is no scientific basis of fact linking five nanograms with impairment.

Unlike alcohol, where it has been shown that all persons are impaired in their ability to drive a vehicle once attaining a blood alcohol concentration of 0.08, there is no specific amount of THC by which all persons are impaired. The states that have chosen to set a per se level have done so based upon political decisions, not science-based decisions, which is why different states have set different levels as their *per se* levels.

The 5 nanogram level that was first adopted was loosely based on studies that used blood serum testing, not whole blood testing. Impaired driving statutes are nationally based upon whole blood measurements. Crime labs always report blood results in terms of whole blood. When it comes to alcohol concentration, serum results usually read from 12% to 20% higher than whole blood.

Measured blood levels of THC do not tell us much about whether the person is impaired by THC. THC effects all people differently. THC moves very quickly from the blood stream to the brain. Within minutes after one has stopped smoking cannabis, much of the THC will have moved to the brain, where it is now impairing the person. Marijuana THC concentrations fall to about 60% of their peak within 15 minutes and to about 20% of their peak within 30 minutes, while impairment lasts for 2-4 hours (Studies conducted by Kelly-Baker, 2014; Logan, 2014). As such, by the time a blood draw occurs from the individual who is suspected of marijuana impaired driving, the THC content in the blood has reduced dramatically (at least 80%) while the impairment remains. This occurs because the THC, which is lipophilic, seeks regions of the body higher in fat content such as the brain and as a result moves quickly out of the blood, which is high in water content. As a result, the THC quickly crosses the blood-brain barrier, impacting the functioning of the brain for several hours after it has dissipated from the blood.

The Maryland Annotated Code, Courts and Judicial Proceedings Article, §10-303(b)(2) states that for the purpose of a test or tests for determining drug or controlled dangerous substance content of the person's blood, the specimen of blood shall be taken within *4* hours after the person has been apprehended. Contrast this with the time limitations for the purpose of determining *alcohol* content, which is *2* hours from apprehension (C&J §10-303(a)(2). The reason for the two additional hours for determining drug/CDS concentration is because a DRE may need to be brought in to conduct the 11-step DRE examination and then transport the suspect to the hospital and find staff that can withdraw the blood. Remember that during this time - not to mention the time that elapsed between the suspect ingesting the cannabis and the time

in which they were apprehended – the THC content levels are rapidly dissipating from the person's blood. So just as a reading of 5+ nanograms of THC is not dispositive of whether a person is impaired, a reading of less than 5 nanograms is not dispositive of the suspect's *lack* of impairment at the time they were driving their vehicle.

The Maryland State's Attorneys' Association ***opposes*** the component of SB 1037 and HB 1392 relating to 5 nanograms being *per se* impairment.

Conclusion

The Maryland State's Attorneys' Association supports with amendments, SB 1037 and HB 1392. We support the component relating to the admissibility of DRE testimony and oppose the component relating to *per se* impairment of 5 nanograms per milliliter of blood.

Respectfully Submitted,

David Daggett,
Maryland State's Attorneys' Association