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May 16, 2016

The Honorable Lawrence J. Hogan, Jr.
Governor of Maryland
State House
100 State Circle
Annapolis, Maryland 21401

RE: House Bill 773, "Drunk and Drugged Driving – Evidence of Blood Test"

Dear Governor Hogan:

We have reviewed House Bill 773, "Drunk and Drugged Driving – Evidence of Blood Test," for constitutionality and legal sufficiency. In doing so, we have considered whether the bill violates the Confrontation Clause of the federal or State Constitution and have concluded that it does not. We also write to discuss how the bill should be applied to avoid other constitutional problems.

House Bill 773 amends Courts and Judicial Proceedings Article, § 10-304(c)(1). The bill retains the requirement that blood drawn for a test of alcohol concentration in the blood "shall be obtained by a qualified medical person using equipment approved by the toxicologist under the Postmortem Examiners Commission acting at the request of a police officer." However, it repeals current provisions which require the qualified medical person who obtained the blood to make a certified statement, and provide that the statement is prima facie evidence of the person's qualifications and that the blood was obtained in compliance with § 10-304. That certified statement can be admitted as substantive evidence without the presence or testimony of the qualified medical person. § 10-304(c)(1)(ii) and (iii)1. Other repealed provisions required that if the certified statement was to be offered in evidence without the testimony of the qualified person, the State had to give notice at least 30 days before trial, and a defendant who wanted the qualified medical person to appear and testify would have to give notice no later than 20 days before trial. § 10-304(c)(1)(iii)2 and (iv)1. Failure to give this notice would have the effect of waiving the right of the defendant to the presence and testimony of the qualified medical person. § 10-304(c)(1)(iv)4. The bill replaces these provisions with the following:

> If a law enforcement officer testifies that the officer witnessed the taking of a blood specimen by a person who the officer reasonably believed was a qualified medical person, the officer's testimony shall be sufficient evidence that the person was a qualified medical person and that the blood was obtained in compliance with this section, without testimony from the person who obtained the blood specimen.

House Bill 773, page 3, lines 14-20. Existing law further provides that:

> For the purpose of establishing that the test of breath or blood was administered with equipment approved by the toxicologist under the Postmortem Examiners Commission, a statement signed by the toxicologist certifying that the equipment used in the test has been approved by him shall be prima facie evidence of the approval, and the statement is admissible in evidence without the necessity of the toxicologist personally appearing in court.

§ 10-304(d)(1). This provision, which is not affected by the bill, also requires the defendant to give notice at least 20 days before trial if the defendant wants the toxicologist to be present and testify at trial as a witness. § 10-304(d)(2)(i). Existing law further provides that nothing in the section "precludes the right to introduce any other competent evidence bearing upon the date of the certificate or change in the equipment since the date of the certificate." § 10-304(f). This provision was also not affected by the bill.

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009), the Supreme Court held that a statute permitting admission in evidence of a certificate of a lab technician who tested a substance to determine whether it was a controlled dangerous substance without the presence or testimony of the lab technician, would violate the Sixth Amendment right of confrontation under the United States Constitution.[1] The Court held that the certificates were clearly within the core class of testimonial statements that could not be admitted without testimony. Specifically, the Court stated that:

> The fact in question is that the substance found in the possession of Melendez-Diaz and his codefendants was, as the prosecution claimed, cocaine—the precise testimony the analysts would be expected to provide if called at trial. The "certificates" are functionally identical to live, in-court testimony, doing

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[1] The Court of Appeals has construed the confrontation guarantee in Article 21 of the Declaration of Rights consistently with Supreme Court rulings on the Sixth Amendment. *Craig v. State*, 322 Md. 418 (1991).

> "precisely what a witness does on direct examination." *Davis v. Washington*, 547 U. S. 813, 830 (2006).

Melendez-Diaz, 557 U.S. at 310-311. Furthermore, the certificates were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," and "under Massachusetts law the sole purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance." *Id.* at 311.

The Court rejected claims that the reports should be admissible because they reflected "neutral scientific testing," noting that studies showed that forensic evidence was not immune from the risk of manipulation, and that confrontation is one means of assuring that such evidence is accurate. *Id.* at 318. The Court also rejected the argument that the certificates could be treated as business records, which are admissible in evidence under the hearsay rule, stating that the business record exception does not apply when the "regularly conducted business activity is the production of evidence for use at trial." *Id.* at 321. The Court noted, however, that notice and demand statutes like that in Maryland's current law do not violate the Confrontation Clause. *Id.* at 327.

Subsequently, in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), the Court addressed whether the Confrontation Clause permitted the prosecution to introduce a forensic laboratory report containing a testimonial certification through the testimony of a scientist who did not sign the certification nor perform or observe the test reported in the certification. The Court answered no, noting that such "surrogate testimony" could not convey what the testing analyst knew or observed about the events that the certification required, nor could questioning of a surrogate expose any lapses or lies on the part of the testing analyst. *Id.* at 661-662.

The reasoning of *Melendez-Diaz* has been extended to certificates regarding the qualifications of and procedures followed by persons who draw blood for alcohol concentration testing. In *State v. Sorensen*, 814 N.W.2d 371 (Neb. 2012), the court held that a certificate attesting to the procedures performed in making a blood draw was testimonial and could not be admitted into evidence without the testimony of the nurse who drew the defendant's blood despite that the police officer and the analyst who performed the testing testified. Similarly, in *State v. Lutz*, 820 N.W.2d 111 (N.D. 2012) the court held that a signed statement from the individual medically qualified to draw the blood sample that the blood sample was properly drawn was testimonial and was not admissible unless the nurse who drew the sample was available to testify. *See also City of Reno v. Howard*, 318 P.3d 1063, 1065 (Nev. 2014) (declaration of person who collects blood concerning the declarant's occupation, the identity of the person whose blood was tested, and that the sample was in the declarant's custody until it was delivered to another identified person was testimonial); *State, ex rel. Roseland v. Herauf*, 819 N.W.2d 546 (N.D. 2012) (signed statement from nurse who drew

blood testimonial and inadmissible if the nurse is unavailable to testify); *State v. Kent*, 918 A.2d 626, 628 (N.J. Super. Ct. 2007) (blood test certificate prepared by hospital employee who had extracted the blood was testimonial and not admissible if hospital employee is not available to testify); *State v. Renshaw*, 915 A.2d 1081, 1087 (N.J. Super. Ct. 2007) (same); *State v. Sickmann*, 2006 WL 3593042 (Minn. App. 2006) (unpublished) (certificate by person who drew the blood reflecting the person's qualifications and that the sample was drawn at the request of a police officer, was testimonial and admission of the certificate without the opportunity to question the person who drew the blood violated the Confrontation Clause).

House Bill 773, however, eliminates the certification statement requirement and provides for the testimony of a police officer. While the law continues to provide for the introduction of a report of the results of a blood test, Courts and Judicial Proceedings Article, § 10-306, the vast majority of cases to address the issue have held that testimony of the person who drew the blood is not necessary for the introduction of that report. Rather, with one exception, these cases have uniformly found that, where no testimonial statement from the person who draws the blood is to be admitted, the Confrontation Clause is not implicated and testimony from others, such as an officer who observed the blood draw, a toxicologist, or the analyst performing the test, can be sufficient to establish a chain of custody. *State v. Andrews*, 758 S.E.2d 707 (N.C. App. 2014) (unpublished); *McDaniel v. State*, 2014 WL 3919638 (Tex. App. Amarillo 2014) (not reported); *State v. Guzman*, 439 S.W.3d 482 (Tex. App. San Antonio 2014); *Adkins v. State*, 418 S.W.3d 856 (Tex. App. 14th Dist. 2013); *Mitchell v. State*, 419 S.W.3d 655 (Tex. App. San Antonio 2013); *State v. Molina*, 2012 WL 2890891 (N.M. App. 2012) (not reported); *State v. Frangella*, 2012 Ohio 1863, 2012 WL 1493758 (Oh. App. 2012); *Commonwealth v. Shaffer*, 40 A.3d 1250 (Pa. Super. 2012); *State v. Boyer*, 805 N.W.2d 736 (Wis. App. 2011) (unpublished); *State v. Nez*, 242 P.3d 481 (N.M. App. 2010); *Deeds v. State*, 27 So. 3d 1135 (Miss. 2009); *but see State v. Syx*, 944 N.E.2d 722 (Ohio Ct. App. 2010) (finding that, without the testimony of a person with first-hand knowledge of the blood draw, blood test results should not have been admitted into evidence). The cases have also noted that any "gaps in the chain of custody normally go to the weight of evidence and not to its admissibility." *See, e.g., Deeds v. State*, 27 So. 3d 1135, 1143 (Miss. 2009).

Another possible issue is raised by the provision that testimony that "the officer witnessed the taking of a blood specimen by a person who the officer reasonably believed was a qualified medical person, the officer's testimony *shall be sufficient evidence* that the person was a qualified medical person and that the blood was obtained in compliance with this section, without testimony from the person who obtained the blood specimen." (emphasis added). If this language is read to require the fact finder to accept the officer's testimony as establishing those facts, thus establishing an irrebuttable presumption, or shifting the burden of persuasion onto the defendant, it would, in our view, invade the fact finding function which, in a criminal case, the law assigns to the finder of fact. *Sandstrom v. Montana*, 442 U.S. 510, 523 (1979); *Graham v. State*, 151 Md. App. 466, 478-480 (2003).

The adequacy of a blood draw and the chain of custody is a matter that is within the purview of the finder of fact based upon the evidence presented. Thus, these matters also cannot be the subject of an irrebuttable presumption or a shift in the burden of persuasion, and applying the bill as an irrebuttable presumption would be unconstitutional. They may, however, appropriately be subject to a permissible inference. *County Court of Ulster County v. Allen*, 442 U.S. 140, 160-161 (1979) (permissive inference that all persons occupying a vehicle with an illegal firearm jointly possess it); *Diaz v. State*, 129 Md. App. 51, 63 (1999) (permissive inference that person in possession of a firearm with the manufacturer's mark obliterated is the person who obliterated the mark). Even a permissive inference, however, may be unconstitutional if "there is no rational way the trier of fact could make the connection permitted by the inference." *County Court of Ulster County*, 442 U.S. at 157; *Graham v. State*, 151 Md. App. 466, 485 (2003).

It is our view that the officer's testimony that the officer "witnessed the taking of a blood specimen by a person who the officer reasonably believed was a qualified medical person" could be used as a permissible basis for an inference that the person who drew the blood was qualified to do so. It is somewhat less clear that this testimony could serve as a basis for the conclusion that the blood was obtained in compliance with the law. As discussed above, however, compliance can also be shown by the testimony of the toxicologist, § 10-304(d)(1), and any other competent evidence can be introduced as well, § 10-304(f). In that circumstance, it is our view that the provisions could be upheld against challenge if interpreted as permissive inferences. We would recommend, however, that the provision be amended in a future session to clarify that it does not require the finder of fact to find that the person who drew the blood was qualified to do so or that the blood was obtained in compliance with the law, but can be considered in support of those conclusions.

Sincerely,

Brian E. Frosh
Attorney General

BEF/KMR/kk

cc: The Honorable John C. Wobensmith
Joseph M. Getty
Warren Deschenaux