IN THE DISTRICT COURT FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND	*	**CITATION NO.: XXX**
vs.	*	
XXX,	*	
Defendant		

* * * * * * * * * * * *

MOTION TO EXCLUDE THE BREATH TEST RESULTS BECAUSE OF THE FAILURE OF THE STATE TO PROVIDE NECESSARY DISCOVERY

THE BOTTOM LINE

If you want to save some time, the bottom line of this argument is that we are allowed to rebut the assumptions underlying the breath test result in this case by rule, by statute and under due process.[1]

But in order to rebut the assumptions, first we must know them. We asked the State to disclose those assumptions. The State has refused; and because the State has refused to disclose the assumptions underlying the conclusion reached by the Intoximeter, we are unable to contest the result.

That's not fair.

ARGUMENT

A BREATH TEST THAT IS ONLY RELIABLE AS TO MOST PEOPLE IS, BY DEFINITION, UNRELIABLE AS TO SOME PEOPLE

Before we discuss what the State must provide; first, we'll explain why they must provide it; and then lastly, we'll rebut the four most commonly proferred theories of State non-disclosure (they don't have it; even if they did, they are not required to provide

[1] What we want to know is how the machine calculated the result reported in this case. As used in this *Motion,* therefore, "assumptions" is merely a shorthand used to refer to each and every step used by the machine in calculating the result reported in this case.

it; it's too much work; and it's up to us to issue a subpoena for the individual and/or the information).

Now, to the argument.

The Source of the Defendant's Pre-Trial Right to Obtain Evidence and Testimony: the Due Process Clause and the 6th Amendment

A defendant's trial rights and his pre-trial right to discovery are inexorably interrelated, for it is the rights at trial that are dictated by the evidence that is obtained in discovery.[2] *Strickland v Washington, 466 US 668, 684-685 (1984) (*the Constitution guarantees a fair trial through the Due Process Clause, but it defines the basic elements of a fair trial through the several provisions of the 6th Amendment).

The defendant's 6th Amendment trial rights that are most implicated by his pre trial discovery rights are Cross Examination, Compulsory Process and Effective Assistance of Counsel. But those rights are meaningless unless the defendant is given access to the information necessary to make those trial rights meaningful. *See, eg, Carr v State, 284 Md 455, 472-473 , 397 A2d 606, 614-615 (1979)* (to deny defense counsel the information necessary for adequate cross examination amounts to a denial of due process); *Zaal v State, 326 Md 54, 602 A2d 1247 (1992)* (to deny the defendant the discovery necessary

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[2] Evidence that would be inadmissible at a trial is discoverable so long as it is reasonably calculated to lead to evidence that would be admissible,

> "At trial, "relevant evidence" means evidence having the tendency to make the existence of a fact that is of consequence to the determination of the action more probable or less probable than it would be w/out the evidence." Md Rule 5-401. The word "relevance" (as used in 5-401) includes what was previously meant by the terms "relevant" and "material." Evidence that is not relevant is not admissible. MD Rule 5-402. **This doesn't mean that evidence that is not admissible is not *discoverable***. The word "relevance" has a different meaning in the discovery context. When relevance is at issue in (the context of discovery in a criminal case), the standard is the same as in the civil context: ordinarily the information or documents should be deemed relevant if it is reasonably calculated to lead to the discovery of admissible evidence."

Cole v State, 378 Md 42, 61-62, 835 A2d 600, 610-612 (2003).

for effective cross examination would render the confrontation right an "empty formality")*; Kelly v State, 392 Md 511, 549, 898 A2d 419 (2005)* (*Raker, J, dissenting)* (the Confrontation Clause and the Compulsory Process Clause together grant defendants a constitutional right to present evidence and a defense. *See Washington v. Texas*, 388 U.S. 14, 19 (1967)).

The Due Process Right to Present a Defense

The constitutional right at issue in the context of pre trial discovery is the due process right to present a defense,

> **"**Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. **We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense. To safeguard that right, the Court has developed "what might loosely be called the area of constitutionally guaranteed access to evidence." United States v. Valenzuela-Bernal, 458 U. S. 858, 867 (1982).**

California v Trombetta, 467 US 479, 485 (1983).

Specifically, in this context, it is the right of the defendant to understand the nature of the State's evidence so that he might adequately prepare his defense,

> "Discovery related to scientific tests conducted by prosecution experts is controlled by Rule 4-263(b)(4). The general objectives of Maryland's criminal discovery rules are to assist the defendant in preparing his or her defense and to protect the accused from unfair surprise. The purpose of Rule 4-263(b)(4) is to allow the defense to prepare for expert testimony. **Defense counsel cannot prepare to evaluate or challenge a State expert's qualifications or testimony without an understanding of what tests the expert performed and how the expert performed them.** ***For this reason, no one disputes that the procedures such an expert actually employs are discoverable.*** In this case, Cole was allowed to examine the State's chemist in the course of a pre-trial motions hearing so as to determine what tests she performed and how she performed them. The question remaining is what further information Cole was entitled to receive, upon request, under the rule."

Cole v State, supra, 378 Md at 58, 835 A2d at 608-609.[3]

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[3] One of the things we are going to talk about later in this *Response* is whether and why we are entitled to the disclosure of the calculations actually made by the

The Scope of the State's Discovery Obligation in a Given Case Depends on the Nature of the Evidence at Issue

The scope of the State's discovery obligation in a given case depends on the evidence at issue and what the State must prove at trial while always keeping in mind that the defendant is presumed innocent and the State's burden is beyond a reasonable doubt. *Cole, supra, 378 Md at 65, 835 A2d at 613* (in deciding whether discovery is required "a court always must keep the applicable standard of proof in mind. Because the State's burden to prove its case "beyond a reasonable doubt" is such a demanding standard, even a small piece of evidence may make a difference to a fact-finder in its analysis).

Here, for example, the State must prove (among other things) that the equipment was approved, the operator was competent and the breath test result reported was reliable as to the defendant.

And, since, in the context of a pre-trial request for discovery, it is presumed that the defendant is innocent; it is presumed that the equipment is **not approved**, that the operator is **not qualified** and that **the reported result is unreliable as to him;** and the rules, statutes ands cases relating to discovery, therefore, require that the State provide to the defendant the information in its possession that is necessary to allow him to prove, for example, that the equipment is not approved, the operator is unqualified and the reported result is unreliable as to him.

The Rules, statutes and cases that dictate the scope of the State's discovery obligation in this context are Rules 4-262 (discovery in the District Court) and 5-702 (expert testimony); CJ §§ 10-304 (certification of equipment) and 10-307 (statutory

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EC/IR II in this case. In *Cole,* "no one disputed" that the defendant was entitled to that information. If the argument is that there is a difference between the way a expert analyzes a substance and the way the expert programs the machine (or tells the programmer how to write the program used) to analyze the substance, that's a distinction without a difference (and a distinction that is not recognized in the cases).

presumptions permitted where test result has been found to be reliable); *Cole v State, supra*, *378 Md 42, 835 A2d 600 (2003)* and *State v Graham, 233 Md App 439, 165 A3d 600 (2017)* (construing 4-262 and 4-263) and *Rochkind v. Stevenson, 471 Md. 1*, *236 A3d 630 (2020)* (discussing "analytical gap" problem that could exist in every breath test case in the context of the court's gatekeeping function and the sufficiency of evidence at trial).

The Discovery Required under Rule 4-262 (d)(2)(D)

In the context of a request for discovery relating to scientific evidence and testimony, the seminal case in Maryland is *Cole v State, supra, 378 Md 42, 835 A2d 600 (2003).*

Cole involved drug testing, but it cites to four breath test cases within the body of the opinion, C*ommonwealth v. Brosnick, 530 Pa. 158, 607 A.2d 725 ((1992), 378 Md at 60; McIlwain v. State, 700 So. 2d 586, 590 (Miss. 1997), id; State v. Mehl, 602 So. 2d 1383, 1387 (Fla. 1992)*, *id;* and *State v. Rowell, 517 So. 2d 799, 802 (La. 1988)*, *378 Md at 66.* And although the case itself is construing Md Rule 4-263 (b), the Circuit Court and the District Court Rules in this context (both then and now) are analytically indistinguishable.[4]

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[4] Md Rule 4-263 (b) as it existed at the time *Cole* was decided read

> ""Upon request of the defendant, the State's Attorney shall…produce and permit the defendant to inspect and copy all written reports or statements made in connection with the action by each expert consulted by the State, including the results of any physical or mental examination, scientific test, experiment, or comparison, and furnish the defendant with the substance of any such oral report and conclusion;"

Cole, 378 Md at 58 fn 13, 835 A2d 608.

Md Rule 4-262 (a)(2)(B) as it existed at the time *Cole* was decided read

> "Upon request of the defendant, the State's Attorney shall permit the defendant to inspect and copy ... (B) each written report or statement made by an expert whom the State expects to call as a witness at a hearing, other

So, in this context, what is the State required to provide, on request, by *Cole* under Rule 4-262 (d)(2)(D)?

All the Operator, Instructor and Maintenance Manuals

> "The operations of the [PG crime lab] generally are shielded from outsiders. The lab is inaccessible to anyone who is not a member of law enforcement, and the lab is not independently certified or audited. CDS may only be tested by certified chemists or analysts (and only members of law enforcement may apply to b/c certified). There is no provision in Md statutes, regulations or rules for independent testing of cds (by the Defendant). **Given that no outsider may observe the testing w/in the lab, it is understandable that the D would seek to obtain the lab's standard operating procedures in order to evaluate the sufficiency of those procedures and to determine if they were followed in the tests actually performed in a given case**

> than a preliminary hearing, or trial."

CONCLUSION: The Rules address identical concerns and any variance in wording is merely a distinction without any substantive difference. And, therefore, everything that is required to be provided by *Cole* under 4-263 is also required to be provided by *Cole* under 4-262. This conclusion is further buttressed by the fact that Rules 4-263 and 4-262 as they exist today are also analytically indistinguishable as to the information that is required to be provided.

The current Rule 4-263 (d)(8) states,

> "Without the necessity of a request, the State's Attorney shall provide to the defense: (8) As to each expert consulted by the State's Attorney in connection with the action: (A) the expert's name and address, the subject matter of the consultation, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion; (B) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and (C) the substance of any oral report and conclusion by the expert;

and the current Rule 4-262 (D)(2)(d) provides

> "On written request of the defense, the State's Attorney shall provide to the defense: (D) As to each State's witness the State's Attorney intends to call to testify as an expert witness other than at a preliminary hearing: (i) the expert's name and address, the subject matter on which the expert is expected to testify, the substance of the expert's findings and opinions, and a summary of the grounds for each opinion; (ii) the opportunity to inspect and copy all written reports or statements made in connection with the action by the expert, including the results of any physical or mental examination, scientific test, experiment, or comparison; and (iii) the substance of any oral report and conclusion by the expert.

We conclude that Rule 4-263 (b) (4) extends to the written standard operating procedures intended to be employed (by the State's expert) **when those procedures are relevant to a given case.** Standard operating procedures are an imp part of expert testimony because, like habit evidence (Rule 5-406), they tend to prove that the conduct of the expert on a particular occasion was in conformity w/ the written standard operating procedures . Should an expert testify that he or she followed the procedures in a given case, the D would understand how those tests were performed. **If the testimony, however, revealed that the standard operating procedures were not followed that might be exculpatory evidence that could make a meaningful difference to a fact finder.** *See Commonwealth v Brosnick, 530 Pa 158, 607 A2d 725 (1992) (*evidence discovered after trial that State had not followed own regulations regarding alcohol testing resulted in a new trial).

Access to lab information generally is significant for another reason. The validity of testing procedures and principles is assessed in the scientific community by publishing the data in a peer reviewed journal. Publication of the lab's work product and data used in scientific analysis, as well as independent replication and validation studies, are essential prerequisites to reliability." *State v. Schwartz, 447 N.W.2d 422, 427-28 (Minn. 1989)* (a DNA testing lab's test results were deemed inadmissible because the lab did not comply with appropriate standards and controls **or make its testing data and results available)**. *See generally McIlwain v. State, 700 So. 2d 586, 590 (Miss. 1997)* ("A chemical analysis…is deemed valid only when performed according to approved methods; performed by a person certified to do so; and performed on a machine certified to be accurate…. Where one of the safeguards is deficient the State bears the burden of showing that the deficiency did not affect the accuracy of the result."); *State v. Mehl, 602 So. 2d 1383, 1387 (Fla. 1992)* (the state followed administrative rules for testing blood alcohol content, and was therefore entitled to a presumption of accuracy).[5]

Cole, supra, 378 Md at 58-60, 835 A2d at 609-610.

All the Records relating to the Calibration of the EC/IR II for the month prior and the month following the breath test in this case

"Both the infrared spectrophotometer and the GCMS operate by comparing suspected CDS to a known calibration sample. **For this reason, calibration records are essentially part of the test results...This kind of written information is eligible generally for discovery when it is relevant in a given case."**

Cole, supra, 378 Md at 60, 835 A2d at 610.[6]

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[5] The specific request for this information is found at ¶ 6 of our *Request for Discovery*. We are entitled to all of that information.

[6] The specific request for this information is found at ¶ 7A and D of our *Request for Discovery*. We are entitled to all of that information.

All of the records related to the training and certification of the Breath Test Operator

"Although Mayo's testimony was not received formally as that of an expert in chemistry, she was allowed to give opinion testimony and the record indicates that she was viewed by both the trial judge and the jury as an expert in testing for CDS. Her qualifications, including her record in proficiency tests, also are relevant to the weight the fact-finder might give the test results based on its assessment of her competency. This kind of written information is eligible generally for discovery when it is relevant in a given case."

Cole, supra, 378 Md at 60, 835 A2d at 610.[7]

All of the Equipment's Maintenance Records and All of the records related to the training and certification of the Maintenance Technician (required by *State v Graham)*

In addition, in *State v Graham, 233 Md App 439, 165 A3d 600 (2017)*, the Court held that the defendant was entitled to all of the maintenance records of the equipment used in that case **under Rule 4-262**,[8]

"On October 13, 2015, Graham filed requests for discovery demanding that the State, **pursuant to Maryland Rule 4-262(d)(2)(D) and Cole v. State, 378 Md. 42, 835 A.2d 600 (2003),** provide the following documents and records: "[a] complete copy of the Baltimore City Crime Lab case file including but not limited to . . . results from any preliminary [drug] screening tests, gas chromatography ("GC"), gas chromatography and mass spectrometry analysis ("GC/MS"), Fourier transform infrared spectroscopy ("FTIR"), as well as . . . any reference standards and controls, and the results of any re-examinations conducted on any samples"; "[d]ocuments relat[ed] to [his] case . . . regularly kept in a place other than the case file"; "any other information," related to his case, "that the crime lab ha[d] in its possession [or] control"; **"all maintenance records pertaining to any GC or GC/MS machine used in [his] case"** that recorded maintenance conducted "for the relevant time period prior to the [drug testing that was] performed in [his] case"; copies of "[a]ny protocols[ ] and procedures" related to the drug testing done in his case; "[u]pdated curriculum vita [sic]" of any analyst involved in testing the drugs that were seized; and, five years of "proficiency tests . . . for any analyst involved in

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[7] The specific request for this information is found at ¶ 9 of our *Request for Discovery*. We are entitled to all of this information.

[8] When a case is transferred from the District Court to the Circuit Court, pursuant to a jury trial prayer filed at least 15 days before the scheduled date of trial in the District Court, the District Court discovery rules apply in the Circuit Court. *See* Md. Rule 4-301(b) & (c).

[his] case.

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In support of its contention that the circuit court erred in dismissing the charges against Graham under Rule 4-262 because of its failure to provide, before his circuit court trial, the information that Graham had previously demanded in his District Court discovery requests, **the State first claims that its failure to provide that information was not a discovery violation under Rule 4-262(i). We disagree.**

State v Graham, supra, 233 Md App at 444-445, 449, 165 A3d at 603-604, 606.[9]

The Discovery Required pursuant to CJ § 10-304 (f)

CJ § 10-304 (b)(1) provides that chemical breath tests are inadmissible absent a showing that the test was administered with equipment approved by the Toxicologist, *Casper v State, 70 Md App 576, 584, 521 A2d 1281, 1285 (1987)*; and CJ § 10-304 (f) gives to the defendant **the right** to show that the equipment approved for use was not the equipment that was used to test the breath in the case at issue,

"Nothing in this 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.**"

Id.

So the question becomes: does the term "equipment" as used in CJ § 10-304 (f) merely refer only to the machine itself or does the term also include, for example, the fuel cell and the software necessary "for the efficient operation" of the machine?

The answer is that the word "equipment" as used in CJ § 10-304 includes everything, except personnel, needed for efficient operation of the machine,

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[9] The specific request for this information is found at ¶ 7 B and ¶ 10 of our *Request for Discovery*. We are entitled to all of this information both by Rule and (as will be discussed more fully below) by statute.

including the fuel cell and the software. *Casper v State, 70 Md App 576, 584 fn 6, 521 A2d 1281, 1285 (1987),*

> "Chemical breath test results are inadmissible absent a showing that the test was administered with equipment approved by the State toxicologist.CJ § 10-304(b) (1984). The term "equipment" is not defined in statutes controlling the evidentiary use of test results. Thus, we visit the first rule of statutory construction and attribute to "equipment" its ordinary and generally understood meaning. **Webster reads equipment to mean implements used in an operation or activity. Ampules play a central role in the activity of determining a defendant's blood alcohol content. There can be no breathalyzer test without an ampule. Improperly constituted ampules produce inaccurate test results. Were the toxicologist's approval not to encompass this very central implement of a breath test, the assurance of reliability provided by that approval would be shallow indeed**. We agree with the many states that include ampules among the equipment that must be certified as a condition to admissibility of breath test results."

Casper, supra, 70 Md App at 584, 521 A2d at 1285; see also, Casper, 70 Md App at 584 fn 6, 521 A2d at 1285 (**EQUIPMENT usu. covers everything, except personnel**, **needed for efficient operation or service**); *Hyle v MVA, 348 Md 143, 148-149, 702 A2d 760, 762-763 (1997)* (Equipment covers everything, except personnel, needed for the efficient operation or service).

Just as ampules played a central role in the determining a defendant's blood alcohol content, so too does the fuel cell and the software incorporated within the EC/IR II play a central role in the analysis and the reporting of the defendant's breath test result. Just as there can be no breath test without an ampule; there can be no breath test without the fuel cell and the software.

Because the fuel cell and the software incorporated within the EC/IR are necessary for the "efficient operation" of the machine, they are included within the definition of "equipment" as that term is used in both CJ § 10-304 (b) and (f).

§ 10-304 (f) grants to us **the right** to show that the fuel cell and the software that were installed in the machine on the day of the test in this case are not the same fuel cell

and software that were incorporated in the machine on the day that it was approved for use in Maryland. All of the information requested in ¶¶ 7B and 10 of our *Request for Discovery* (fn 6 above) is discoverable.

The Discovery required under Md Rule 4-262 (d)(2)(e)

Md Rule 4-262 (d)(2)(e) requires that the State provide to the defendant, upon request, the opportunity to inspect all computer-generated evidence as defined in Rule 2-504.3(a).

Rule 2-504.3 (a) provides that "computer-generated evidence" means **"a conclusion formulated by a computer program."**

Computer generated evidence is divided into two categories: computer generated animations and computer generated simulations. "Computer generated animations*"* are visual depictions that serve to illustrate such things as an expert's opinion as to what occurred. *Animations,* therefore, are usually offered as illustrative evidence and usually the only foundation necessary is that required of other demonstrative evidence - the testimony of a knowledgeable witness that the animation fairly and accurately depicts what the proponent claims. *See, eg, generally, Bullock v Daimler Trucks North America LLC*, 819 F2d 1172, 1176 (USDC D Colorado)(2011).

"Computer generated simulations" on the other hand, are created by entering known data into a computer program, which analyzes the date according to the rules by which the program operates to draw conclusions about what happened. The program itself, rather than witness testimony, is the source of the evidence. *Simulations* are therefore usually classified as substantive evidence. Since a *simulation* is, as here, offered as substantive evidence, it requires a much more rigorous foundation because (the finder of fact) is being asked to accept the simulation for the truth of what it

asserts.

Thus a *simulation* must normally be authenticated by showing (1) the qualification of the expert who prepared the simulation; (2) the capability of the computer hardware and software used; (3) the calculations and processing of data were done on the basis of principles meeting the standards for scientific evidence under FedREvid 702; (4) **the data used to make the calculations were reliable, relevant, complete, and properly input;** and (5) the process produced an accurate result. 5 Federal Evidence § 9:26 (3d ed 2010) (citations omitted). *Id.* (Bold emphasis added).

Every court that has ever considered the matter, including in a 52 page opinion authored by Chief Judge Grimm, has held that the defendant is entitled, in discovery, to understand the processes by which the machine calculated the result so that he may challenge the evidence,

> "we treat computer generated models or simulations like other scientific tests and condition admissibility on a sufficient showing that (1) the computer is functioning properly; **(2) *the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party so that they may challenge them)*;** and (3) the program is generally accepted by the appropriate community of scientists."

Lorraine v Markel American Insurance Company, 211 Federal Rules Decisions 534, 560 (USDC D Maryland) (May 4, 2007) (Chief Magistrate Judge Grimm) (bold emphasis added).[10]

The calculations that the EC/IR II used in this case are required to be disclosed pursuant to Md Rule 4-262 (d)(2)(e) because the reported result is computer generated simulation evidence offered as substantive evidence. As such,

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[10] The specific request for this information is found at ¶ 7 C of our *Request for Discovery* (as we shall see this information is also required to be disclosed under CJ § 10-307 and under Rule 702 and *Rochkind v. Stevenson, 471 Md. 1, 236 A3d 630 (2020)*).

the defendant is entitled to disclosure of the calculations actually used to arrive at the conclusion reported by the EC/IR II "so that he may (first understand and then) challenge them."

The discovery required by CJ § 10-307

The question presented in *Brown v State, 171 Md. App. 489, 910 A2d 571 (2006)* was whether the presumptions established by CJ § 10-307 (b) - (g) constituted a mandatory irrebuttable presumption that violated the accused's due process right to be convicted only upon the State's proof of every element of the offense beyond a reasonable doubt, or whether, instead, the device was merely a rebuttable permissive inference that allows, but does not require, the trier of fact to find the existence of an element that the State must prove. *See, eg,* CJ § 10-307 (g),

> "If at the time of testing a person has an alcohol concentration of 0.08 or more, as determined by an analysis of the person's blood or breath, the person shall be considered under the influence of alcohol per se as defined in § 11-174.1 of the Transportation Article."

In an opinion authored by later Chief Judge Barbera, the Court began by observing that

> "The Due Process Clause of the Fourteenth Amendment requires the prosecution to prove beyond a reasonable doubt every element necessary to establish the crime charged. The State is not permitted to shift the burden of proof to the defendant of any element of an offense, but the State may use inferences and presumptions that allow the trier of fact to determine the existence of an element of the crime from the existence of one or more "evidentiary" or "basic" facts,"

171 Md App at 507, 910 A2d at 581; and that

> "the permissive inference or presumption is a common evidentiary device that allows, but does not require, the trier of fact to infer the elemental fact from proof by the prosecution of the basic fact, and that places no burden of any kind on the defendant,"

Id; but that

> "A mandatory presumption, by contrast, instructs the finder of fact that it must infer the presumed fact if the State proves certain predicate facts.A mandatory presumption may be either conclusive or rebuttable. A mandatory conclusive presumption "removes the presumed element from the case once the State has proved the predicate facts giving rise to the presumption." **A mandatory rebuttable presumption does not remove the presumed element from the case but nevertheless requires the trier of fact to find the presumed element unless the defendant persuades the trier of fact that such a finding is unwarranted. If such a presumption relieves the State of the burden of persuasion on an element of the offense, it violates due process.**"

Id, before finally observing that

> "A mandatory presumption is a far more troublesome evidentiary device. For it may affect not only the strength of the "no reasonable doubt" burden but also the placement of that burden; **it tells the trier that he or she must find the elemental fact upon proof of the basic fact, at least unless the defendant has come forward with some evidence to rebut the presumed connection** between the two facts."

Id.

Ultimately, the Court concluded that the presumptions established by CJ § 10-307 survived constitutional attack because they represented not a mandatory irrebuttable presumption; but, instead, a rebuttable permissive inference. *Brown, supra, 171 Md App at 511, 910 A2d at 583,* ("the statute can be read to create a permissive inference that allows, but does not require, the trier of fact to find the defendant was driving under the influence of alcohol or impaired by alcohol").

Absent an ability to rebut the reliability of the breath test as to him, the presumptions found within CJ § 10-307 (b) - (g) become, in effect, irrebuttable. Since an irrebuttable presumption violates due process, the calculations underlying the reported result must be disclosed because in order to rebut the reliability of the conclusion, first we must know how the conclusion was calculated.

The discovery required by Rule 702 and *Rochkind v. Stevenson, 471 Md. 1*

The breath test result in this case is reliable as to some people (and, thus, the

evidence would satisfy *Frye-Reed*); the State, however, has to date (and despite our written request) failed to produce **any** evidence that the breath test result is reliable as to us (and, thus the evidence is inadmissible under *Rochkind*).

Why?

Because unless you know how the breath test result was calculated in the individual case, you'll never know whether the reported result suffers from an "analytical gap" (meaning, there is a disconnect between the result that should have been reported and the result that was actually reported).

Under *Rochkind,* the burden is on the State, as the condition precedent to the admissibility of any breath test result, to prove that an analytical gap does **not** exist in the individual case.[11]

And it is the duty of the Court to act as the gatekeeper and suppress the breath test result where, as here, that burden is not met.

THE EC/IR II IS DESIGNED TO REPORT UNRELIABLE TEST RESULTS

What do you know about a breath test calculation that is only reliable as to most people (or that is only reliable only as to the "average" person)? If a reported result is only reliable as to most people, it is, as a matter of fact, logic, and law, unreliable as to some people.

Take just some of the known assumptions that are incorporated into every

[11] Under *Frye-Reed*, once the evidence was shown to be reliable generally, the evidence is admissible and the burden shifts to the Defendant to show that the evidence is unreliable as to her. *Rochkind* flips it. The burden is on the State, up front and as a condition precedent to admissibility, to show the evidence is reliable **as to the Defendant**.

reported breath test result: temperature, volume, pressure and partition ration.[12] All of them are variable in a human subject.[13]

Assume that the range of measurement in a human subject for each of the listed assumptions is between 1-5; next, assume that the program run by the EC/IR II incorporates a value of "3" for each because that's the assumption that will yield a reliable result for most people; finally, assume that Jack has a value of "1" for each and Jill has a value of "3." The calculation would look like this:

Jack Jill EC/IR II

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[12] Two points on the assumptions underlying the calculations incorporated into every breath test result reported by an EC/IR II.

First, there's a lot more than four assumptions incorporated into the calculation. The only case that I'm aware of that involved an exploration of how a breath test machine actually calculates a result was a New Jersey case (*State v Chun*, *194 NJ 54 (2007)*) which involved a Draeger product. In the Draeger, there were 53,000 lines of code, 20,000 of which contain critical instructions. Any measurement that requires a decision tree as complicated as "if, but only if, X" followed by "if, but only if, Y" repeated 20,000 times is gonna have a lot of room for error.

Next, it is useful to observe that the *Chun* case essentially asked if the Draeger was generally capable of reporting a reliable result. That's *Frye/Reed*. *Rochkind* asks a different question. *Rochkind* asks, assuming the general reliability of the process, is the measurement reliable ***in this case.*** **That's a completely different question.**

Second, minor variations in the assumptions underlying the calculation actually performed can and does lead to major differences in the reported result. The reason is because of the math involved in any breath test calculation. Alcohol is defined as the number of grams of alcohol per 210 liters of breath. TR § 11-103.2 (a)(2). 210 liters of breath is 210,000 milliliters. The breath test sample chamber in an EC/IR II has a volume of 81 cubic centimeters. 1 cubic centimeter equals 1 milliliter; therefore the size of the sample chamber in an EC/IR II is 81 milliliters. 210,000 divided by 81 = 2,592; thus, every error in the measurement is going to be multiplied 2, 592 times. The net of it is minor errors in calculation make a big difference in the reported result.

[13] Just to pick one example, the partition ratio in a human subject can vary from 1700:1 to 2500:1. That's a pretty big range (and would make a pretty big difference in the math).

temperature	1	3	3
volume	1	3	3
pressure	1	3	3
partition ration	1	3	3
total value	4	12	12

The reported breath test is reliable as to Jill but unreliable as to Jim.

That's the fact pattern (it's called the "analytical gap") that caused the Maryland Supreme Court to reject *Frye/Reed* and adopt *Daubert* in *Rochkind*.

The possibility that the fact pattern exists *in this case* (and the fact that the court cannot perform the gatekeeping function that is required under *Rochkind* without a finding that the "analytical gap" doesn't exist **in this case**) is what makes disclosure of the calculations (and the assumptions underlying those calculations) both discoverable by the defense pre-rial, *see, eg, Cole, supra, 378 Md at 66, 835 A2d at 614* **(**Cole was not required to demonstrate, before even gaining access to the desired information and documents, that the test results were inaccurate or the procedures were faulty) and necessary at trial as a condition precedent to the admissibility of the evidence. *Eg, Williams v State, 254 A3d 556, 575 (2021),*

> *"*The circuit court should consider the challenged evidence in the posture of an initial determination on its admissibility for which the proponent bears the burden of proof by a preponderance of the evidence, rather than as a motion to exclude."

The calculations that the EC/IR II actually made in this case must be disclosed, therefore, under both *Rochkind* and Rule 5-702 so the Court and the defendant can determine whether the "analytical gap" that has the potential to exist in every breath test case actually exists in this case.

MD Rule 5-702: The requirement of a "sufficient factual basis"

In 1994, a year after the Supreme Court issued its opinion in *Daubert*, the Supreme Court of Maryland adopted Rule 5-702,

> "Expert testimony may be admitted, in the form of an opinion or otherwise, if the court determines that (there is) ...(3) **a sufficient factual basis exists to support the expert testimony.***"*

236 A3d at 642.

In *Rochkind v Stevenson, 454 Md 277, 164 A3d 254 (2017) ("Stevenson I"),* the Court closely examined the third prong of Rule 5-702 - "a sufficient factual basis." Judge Atkins, writing for the Court, noted that a "sufficient factual basis" includes two sub-elements: (1) an adequate supply of data and (2) **a reliable methodology.** Absent either element, the opinion is "mere speculation or conjecture." *236 A3d at 642. See also, State v Savage, supa, 455 Md at 184, 166 A3d at _____ (Adkins, J, concurring*) (**any evaluation of whether a conclusion is generally accepted must include an inquiry into whether the methodology used was reliable**). *236 A3d at 643.*

The Supreme Court Adopts *Daubert*

The impetus behind the Court's decision to adopt *Daubert* in *Rochkind* was a "desire to refine the analytical focus when a court is faced with admitting or excluding expert testimony." *236 A3d at 647. Frye* centered on whether scientific principles were generally accepted in a relevant scientific community. *Id. Daubert*, by contrast, refocused the attention away from acceptance of a given methodology and centers instead on **the reliability of the methodology used to reach a particular result**. *236 A3d at 648.*

The problem with *Frye-Reed*, as the Court saw it, was that it gave trial courts a stated "end" - reliable methodology - without providing the "means" with

which to achieve it. *236 A3d at 648-649.* To constitute a reliable methodology, **"an expert opinion must provide a sound reasoning process for inducing its conclusion from the factual data"** and **must have "an adequate theory or rational explanation of how the factual data led to the expert's conclusion."** *236 A3d at 649.*

The *Rochkind* factors, in the Court's opinion, therefore, provide guidance on ***how*** to determine if scientific reasoning is, indeed, sound, and whether a scientific theory adequately justifies the expert's conclusions. *Id.*

The Judges's Role under *Rochkind*

Under *Rochkind*, judges are charged with gauging only threshold reliability - not the ultimate validity - of a particular methodology. *Id.*[14] *236 A3d at 652,*

> *"*To the extent that our decision necessitates change in Maryland courts, we fully endorse Judge Grimm's observations in Horn. **The shift to Daubert**
>
> **may mean, in a very real sense, that "everything old is new again"** with respect to some scientific and technical evidentiary matters long considered settled.
>
> * * *
>
> [J]udges, lawyers and expert witnesses will have to learn to be comfortable refocusing their thinking **about the building blocks of what truly makes evidence** that is beyond the knowledge and experience of lay persons useful to them in resolving disputes. The beneficiaries of this new approach will be the jurors that have to decide increasingly complex cases. Daubert, Kumho Tire, and now Rule 702 have given us our marching orders, and it is up to the participants in the litigation process to get in step.**"**

Id.

The *Rochkind* Factors

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[14] Without an understanding on how the conclusion was reached, the Court cannot perform it's gatekeeping function under *Rochkind.* How are you ever going to determine whether an "analytical gap" matters in a given case unless you first know whether it exists?

The *Rochkind* factors that are persuasive in interpreting Rule 5-702 include (but are not limited to, and as relevant here):

> (7) **whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion.**

236 A3d at 650.[15]

The test is flexible and **the focus is on the methodology used, not the conclusions reached;** for a court may always conclude that there is "simply too great an analytical gap between the data and the opinion proffered." *236 A3d at 651.*

The Calculations the EC/IR II actually made in this case must be disclosed under Rule 5-702

The calculations that the EC/IR II actually made in this case must be disclosed, therefore, under both *Rochkind* and Rule 5-702 so the Court and the defendant can determine whether the "analytical gap" that has the potential to exist in every breath test case actually exists in this case (and absent disclosure the test result is inadmissible).

The Calculations the EC/IR II actually made in this case must be disclosed under Md Rule 4-262 (d)(2)(e)

Md Rule 4-262 (d)(2)(e) requires that the State provide to the defendant, upon request, the opportunity to inspect all computer-generated evidence as defined in Rule 2-504.3(a).

Rule 2-504.3 (a) provides that "computer-generated evidence" means **"a conclusion formulated by a computer program."**

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[15] Nobody disputes that the breath testing technology utilized by the EC/IR II can yield a reliable result for some people and nobody disputes that the technology can yield an unreliable result in the individual case. Under *Frye-Reed*, the result is admissible because it's generally reliable; under *Rochkind*, the evidence is inadmissible because the State has failed to prove that it is reliable in this case. It's the State's burden and they haven't met it. It's that simple.

Computer generated evidence is divided into two categories: computer generated animations and computer generated simulations. "Computer generated animations*"* are visual depictions that serve to illustrate such things as an expert's opinion as to what occurred. *Animations,* therefore, are usually offered as illustrative evidence and usually the only foundation necessary is that required of other demonstrative evidence - the testimony of a knowledgeable witness that the animation fairly and accurately depicts what the proponent claims. *See, eg, generally, Bullock v Daimler Trucks North America LLC*, 819 F2d 1172, 1176 (USDC D Colorado)(2011).

"Computer generated simulations" on the other hand, are created by entering known data into a computer program, which analyzes the date according to the rules by which the program operates to draw conclusions about what happened.[16] The program itself, rather than witness testimony, is the source of the evidence. *Simulations* are therefore usually classified as substantive evidence. Since a *simulation* is, as here, offered as substantive evidence, it requires a much more rigorous foundation because (the finder of fact) is being asked to accept the simulation for the truth of what it asserts.

Thus a *simulation* must normally be authenticated by showing (1) the qualification

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[16] The reported result is merely an opinion based on a series of assumptions - no different that if the State put on an expert to opine as to his or her opinion as to Paul's blood alcohol content at the time of driving based on whatever assumptions and calculations the expert thought relevant (and, of course, pre trial, we would be entitled to disclosure of those calculations and assumptions and, at trial, to cross examine the expert and to offer our own expert to rebut the expert's conclusions). The benefit of the technology is that it allows the machine to quickly ask and answer a series of hypothetical questions based on scientific principles and to render an opinion based on the information provided. Like every other opinion based on scientific principles, the opinion is only good if the assumptions that form the opinion are valid.

of the expert who prepared the simulation; (2) the capability of the computer hardware and software used; (3) the calculations and processing of data were done on the basis of principles meeting the standards for scientific evidence under FedREvid 702; (4) **the data used to make the calculations were reliable, relevant, complete, and properly input;** and (5) the process produced an accurate result. 5 Federal Evidence § 9:26 (3d ed 2010) (citations omitted). *Id.* (Bold emphasis added).

Every court that has ever considered the matter, including in a 52 page opinion authored by Chief Judge Grimm, has held that the defendant is entitled, in discovery, to understand the processes by which the machine calculated the result so that he may challenge the evidence,

> "we treat computer generated models or simulations like other scientific tests and condition admissibility on a sufficient showing that (1) the computer is functioning properly; **(2)** ***the input and underlying equations are sufficiently complete and accurate (and disclosed to the opposing party so that they may challenge them)*****;** and (3) the program is generally accepted by the appropriate community of scientists."

Lorraine v Markel American Insurance Company, 211 Federal Rules Decisions 534, 560 (USDC D Maryland) (May 4, 2007) (Chief Magistrate Judge Grimm) (bold emphasis added).[17]

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[17] The specific request for this information is found at ¶ 7 C of our *Request for Discovery* (as we shall see this information is also required to be disclosed under CJ § 10-307 and under Rule 702 and *Rochkind v. Stevenson, 471 Md. 1, 236 A3d 630 (2020)*)

> 7C. In this case, the EC/IR recorded the Defendant's breath test results (as greater than .08), I want to know what the State thinks those numbers are relevant to the Defendant. Please provide all writings, including all memorandum, letters, emails, reports, printouts and every written correspondence of any kind, which references or lists each and every assumption, instruction and choice that the Intoximeter used in this case to calculate, record and report or details how the machine calculated the result in this case; and

The calculations that the EC/IR II used in this case are required to be disclosed pursuant to Md Rule 4-262 (d)(2)(e) because the reported result is computer generated simulation evidence offered as substantive evidence. As such, the defendant is entitled to disclosure of the calculations actually used to arrive at the conclusion reported by the EC/IR II "so that he may (first understand and then) challenge them."

THE USUAL SUSPECTS: THE STATE'S THEORIES OF NON DISCLOSURE REBUTTED

The State hasn't explained why it has simply ignored our requests, but permit me to address the three most commonly proferred theories of non disclosure: (1) "we don't have it;" (2) "even if we did, we don't have to provide it;" and (3) "if we responded to all these discovery requests, we wouldn't have time for anything else" (or) "it's too much work."

> All writings, including all memorandum, letters, emails, reports, printouts and every written correspondence of any kind, which references the margin of error or measurement of uncertainty for each and every one of the assumptions listed above that the Intoximeter used in this case utilized to calculate, record and report the defendant's breath test results in this case;
>
> (The theory of this request is that there is an inherent conflict between a breath testing statute that requires individual culpability ("the person") and a "reasonable man" breath test software program. Think of the result reported in this case as representing nothing more than an opinion of the manufacturer, adopted by the State, masquerading as a scientific fact. Consider the known assumptions of every calibration/accuracy check on any EC/IR: fixed temperature, volume, pressure, and partition ratio (are supposed to) yield a .08. The problem is that all of the above assumptions are variable in a human subject and represent the assumptions/choices of the manufacturer. Based on information and belief, there are approximately 20,000 "critical instructions, assumptions, and choices that the manufacturer has incorporated - and the State has adopted - into the Defendant's reported result. We are entitled to rebut those assumptions. But first, we must know them.
>
> (The breath test result in this case is, under the Rules, categorized as computer generated opinion evidence offered for the truth of the matter asserted (ie, substantive evidence) Rule 4-262(d)(2)(e).

(1) We don't have it ("Party in Possession" defined)

"We don't possess the requested information" is a "we're not the party in possession" objection. Helpfully, there is a Rule (and a rationale) that directly addresses this objection.

The "Party in Possession" Rule (Md Rule 4-262 (c)(2))

Due Diligence

> "The State's Attorney ...shall exercise due diligence to identify all of the material and information that must be disclosed under this Rule."

Md Rule 4-262 (c)(1)

Scope

> "The obligations of the State's Attorney..extend to material and information..that are in the possession or control of ...any other person who either reports regularly to the attorney's office (or has reported) in regard to a particular case."

Md Rule 4-262 (c)(2).

The rationale

The rationale for the rule is agency,

> "It would not be unreasonable therefore to charge the prosecutor and his agents who have the duty of preparing and presenting the case, with knowledge of all seemingly pertinent facts related to the charge which are known (to them)..."

Eg, State v Giles, *239 Md 458, 470, 212 A2d 101, 108 (1965)*.

The information requested might actually be possessed by any one of eight separate individuals and/or Agency's, each of whom both regularly reports to the Office of the State's Attorney and who has actually reported to the Office in the context of this case

There are 8 separate places where the documents and information we have requested might be located: (1) The Office of the State's Attorney; (2) MCPD Records; (3) MCPD Breath Test Supervisor; (4) MCPD Breath Test Technician; (5) MCPD Breath Test Operator; (6) the arresting officer; (7) the Chemical Test for Alcohol Unit ("CTAU," a division of the State Police and located in Pikesville - the individuals in that Unit provide the training for breath test operators and maintenance technicians and collect (and hopefully analyze) the uploaded data from every

Intoximeter in the State); or (8) the Office of the State Toxicologist.

MCPD (Including the arresting officer, the breath test operator, maintenance technician and MCPD breath test supervisor)

It has been clear since at least 1964 that information in the hands of the police agency (or in the hands of the individual police officers) involved in the prosecution of the case is in the hands of the prosecution. *See, eg, Barbee v Warden*, *331 F2d 842, 846 (4th Cir 1964)* (the police are part of the prosecution and the disclosure requirement applies to them).

Toxicologist/CTAU

In the context of a DWI prosecution, not only does the State Toxicologist and the members of the CTAU each "regularly report" to the Office of the State's Attorney; they are a witness in the case -at least in every DWI prosecution where, as here, the accused has chosen to contest the reported breath test result.

The Toxicologist certifies the equipment and the simulator solution; the individuals within the CTAU certifies the operator. All three of the certifications must be proven in the State's case-in-chief as a condition precedent to the admission of the breath test result.[18] However, the fact that each of the certifications is made pursuant to affidavit rather than in court testimony doesn't make the affiant any less of a witness in the case.

Conclusion

Because each of the individuals and agencies listed above both "regularly report" to the Office of the State Attorney in the context of a prosecution for DWI and have reported to the Office in the context of this case, the Officer of the State's Attorney is the "party in possession" of the requested information and documents and it is, therefore, the party obligated to respond to our Request for Discovery. Md Rule 4-262 (c)(2).

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[18] Even in a test refusal case, the State must be prepared to show that it had both approved equipment and a certified operator available to provide the requested test. *Cf, MVA v Usan, 486 Md 352, 308 A3d 715, 729 (2024) (Biran, J., concurring)* (can't offer test officer has no ability to give).

(2) Even if we had it, we are not obligated to provide it

The State's next objection is usually tethered to the three statutory prerequisites to the admissibility of a breath test at trial: (1) that the test was administered within 2 hours of the defendant's apprehension; (2) that the test was administered by a qualified person and (3) that the equipment was approved. *Caspar v State, 70 Md App 576, 591 (1987)*; CJ §§ 10-303, 10-304 and 10-306.

Because those prerequisites are demonstrated through evidence at trial, so the argument goes, the State must provide that evidence to the defense upon request; but beyond that evidence, the State has no additional discovery obligations as it relates to the breath test results.

However, this objection conflates the admissibility of evidence at trial with the discovery of evidence pre trial. The admissibility of evidence at trial doesn't dictate the discoverability of evidence pre trial; for example, evidence that would be inadmissible at trial is still discoverable (at least so long as it is reasonable calculated to lead to the discovery of admissible evidence at trial). *Cole v State, 378 Md 42, 835 A2d 600, 608 (2001).*

Moreover, disclosure of proof of the statutory predicate has never been enough. Preliminary questions of "relevance" are always at issue with regard to scientific evidence and testimony. In order for such evidence to be admissible it must first be shown that the underlying scientific principle or technique is sufficiently reliable to produce trustworthy results. This inquiry is separate and distinct from, and preliminary to, the statutory predicate for admissibility. The evidence then will be admissible if (but only if) it is shown that the person using the technique was qualified to do so and that any procedures were properly followed, on properly working equipment. *See, generally,* <u>*Maryland Practice, Maryland Evidence State and Federal*</u>,

Lynn McLain, § 401.4 (explaining relevance, reliability, and the prerequisites to admissibility of scientific evidence and testimony, in the context of Maryland's *Frye-Reed* standard).[19]

Take something as simple as calibration. There is no statutory requirement that the EC/IR used in this case be within calibration at the time of testing (or even calibrated at all, ever). But no reasonable person would or could legitimately argue that such a device actually out of calibration would or did yield a reliable measurement. (What's the argument: that the device incapable of measuring the known is capable of measuring the unknown?).[20] Clearly, as a condition precedent to admissibility, there is the requirement that the actual procedure used be reliable to a reasonable degree of scientific certainty within the relevant scientific community (here, analytical chemistry).

Conclusion

As explained in the body of this *Motion*, every piece of information and evidence that we have requested is properly discoverable by Rule, statute, case law and constitution.

(3) If we responded to every request for discovery we wouldn't have time to do anything else (the "burden of production" argument)

The State's "burden of production" objection is essentially "if we had to respond to this level of dicovery in every breath test case, we wouldn't have time for anything else." The Court of Appeals addressed the "burden of production" argument in the context of a request for production of scientific evidence in *Cole v State*. After first noting that "irrelevant matters are clearly not discoverable," the *Cole* court observed that

> "[t]he only burden on the State appears to be the burden of physically delivering the documents and information. While such a small burden usually will outweigh a defendant's request for irrelevant information it is insufficient to overcome (Cole's)

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[19] Of course, the statutory predicate could be construed to include these notions of due process; but that is a far cry from claiming that the only requirement is that the State Toxicologist once signed her name.

[20] In every breath test case, the "unkown" is the alcohol in the breath, the "known" is the standard to which it is compared.

> interest in learning the procedures employed by the Laboratory that analyzed the substances."

*Cole, 378 Md at __, 835 A2d at 613 (2001)***.**

Now take the two statements together: (1) irrelevant matters are not discoverable and (2) the State's burden of production only trumps a request for irrelevant documents. What do you get? The State's burden of production as it relates to "relevant" areas of defense inquiry is a non factor.[21]

(4) It's up to the Defendant to issue a subpoena for the requested information

The last objection is perhaps the easiest. Wrong rule, wrong theory. A subpoena is a device used to secure evidence and testimony at trial; a discovery request is a device used to secure the information and evidence necessary to prepare for trial. First, discovery, then subpoena.[22]

THE REMEDY: 1ST SUPPRESSION, THEN WERKHEISER

Because the State has not shown that an "analytical gap" does not exist between the breath test result that should have been reported in this case and the result

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[21] The *Cole* court's answer to the burden of production was to put the documents in a file folder and supplement as needed,

> "During oral argument, Cole's appellate counsel suggested an alternative where single copies of the lab's standard operating procedures and other such manuals even could be delivered to the public defender's office and/or the local Bar Library for examination by interested members of the private defense bar, as needed, thus eliminating the need to provide this information individually in each case where it might be sought. These master copies would need be annotated only as changes occur."

Cole, 378 Md 42, 835 A2d 600, 613 fn 21 (2023).

The same is true here. There are only approximately 8-10 breath test machines in the County. How tough is it to create and maintain 8-10 file folders?

[22] For example, CJ § 10-304 (d)(2) permits the defendant to subpoena the toxicologist at trial while CJ § 10-304 (d)(4) permits the State or the Attorney General to file a motion to quash. It is that only that evidence that is discovered by the defense pre trial that provides him with the information sufficient to overcome a State Motion to Quash.

that was reported, the result is inadmissible.

However, here, Andrew agreed to take the breath test; and because he agreed to take the breath test, the State had a statutory obligation to provide to him a reliable breath test. *Cf, Werkheiser v State, 299 Md 529, 533 (1984) (*the use of the word "shall" (in TR § 16-205.1 (d)(1)) imposes a mandatory duty upon police officers); *Lowry v State, 363 Md 357, 371 (2001)* (in *Werkheiser*, we held that the provisions of section 16-205.1(d) and 10-305(b) made (a blood test) mandatory); *Lowry v State, supra, 363 Md at 376 (Cathell, J, dissenting)* (I agree that (§ 16-205.1) does impose a mandatory duty upon officers to provide a test for alcohol concentration when a detained person consents to the taking of the test); and the remedy for the failure to provide that test is that Andrew is entitled to an inference that, had a reliable test been given, the result would have shown that he was not drunk,

> "[In *Werkheiser*], the police officer failed to direct that a blood test be administered because he was unaware of the statutory requirement, under the facts of that case, that he procure such a test. We held that the provisions of section 16-205.1(d) and 10-305(b) made such a test mandatory. **We held that "the appropriate remedy available . . . [under the circumstances present in Werkheiser] would be to allow an inference that had the test been administered, the result thereof would have been favorable to him**."

CONCLUSION

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For all of the above stated reasons, the breath test result in this case must be suppressed and Andrew is entitled to an inference that, had a reliable test been given, it would have shown that he was not drunk.

BY: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this the 6th day of May 2025 a copy of the foregoing was efiled with the State's Attorney for Montgomery County, District Court Division.

PAUL HOWARD KENT

IN THE DISTRICT COURT FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND	*	**CITATION NO.:**	**1JC0XBZ**
			1JD0XBZ
vs.	*		**1JF0XBZ**
ANDREW FELIPE,	*		
Defendant			

* * * * * * * * * * * * *

ORDER

Upon consideration of the Defendant's Motion to Suppress and any response thereto, it is by the District Court of Montgomery County Maryland, this _____ day of _____, 2025

ORDERED: That the Defendant's Motion is GRANTED.

_____

JUDGE