

IN THE DISTRICT COURT FOR MONTGOMERY COUNTY, MARYLAND

STATE OF MARYLAND

*

CITATION NO.: XXX

vs.

*

XXX,

*

Defendant

* * * * *
MOTION TO SUPPRESS THE BREATH TEST BECAUSE THE EQUIPMENT WASN'T APPROVED AND THE OPERATOR WASN'T CERTIFIED

The question raised by this argument is whether xxx may be punished with a suspension of xxx license or otherwise sanctioned for refusing a test that the officer had no ability to give. *Eg, State v Loscomb, 291 Md 424, 435, 435 A2d 764 (1981)* (CJ § 10-309 exclusionary rule applies whenever there is a failure to comply with the procedural requirements of TR § 16-205.1); *Meanor v State, 364 Md 511, 774 A2d 394, 404 fn 7 (2001)* (“we construe § 10-309(a) as still triggered by a violation of the "subtitle," including § 16-205.1"); *Hyle v MVA, 348 Md 143, 702 A2d 760 (1997)* (license may not be suspended for refusing a blood test where no qualified person was available to administer the breath test)¹; *MVA v Usan, 486 Md 352, 308 A3d 715, 729 (2024) (Biran, J., concurring)* (can’t offer test officer has no ability to give); *Raley v Ohio, 360 US 423, 438 (1959)* (due process violated where State actors affirmatively misled defendants).

¹ Hyle had been arrested on suspicion of drunk driving, taken to a District police station and was there asked to submit to a breath test. *Id, 702 A2d at 761*. He agreed; however, because there was no breath test operator available to administer the test, he was told that he would be transported to a nearby Hospital for a blood test as permitted by CJ 10-305 (a) (1) (iii) (where the equipment for administering the breath test is unavailable, the licensee may be asked to submit to a blood test). *Id*. He refused. *Id*. The question presented in *Hyle* was, whether where the machine is available but there is no qualified operator to administer the test, the licensee who had agreed to take the breath test may nevertheless be suspended for refusing the blood test. *Id* The SCM held that the license should not be suspended under those circumstances. *Id*. Here, of course, under a proper advisement, Xxx would have been in exactly the same position as the Licensee in *Hyle*. Xxx would have been told, for example, that if xxx agreed to take the breath test xxx license could not be suspended (or be otherwise punished for refusal) because there was no breath test operator available to administer the test.

Before I get to the argument, however, first I'll state the relevant facts and next I'll explain why misadvice in the context of TR § 16-205.1 and the administrative case is dispositive to the exclusion of (either) the breath test result or refusal in the criminal case.

Statement of the Relevant Facts

On xxx, at approximately xxx, xxx was stopped by xxx of the xxx for swerving within his lane and related offenses. On contact, xxx observed what he characterized to be indicia of impairment. Based on these observations, xxx asked xxx to submit to Standardized Field Sobriety Tests. Xxx failed to perform the tests to xxx's satisfaction and xxx was placed under arrest.

Xxx transported xxx to xxx where he played for xxx an audio recording of the DR-15 *Advice of Rights*. Xxx agreed to take the breath test.

The Relevant Statutes:

Courts and Judicial Proceedings ("CJ") §10-302 states "[i]n a prosecution for a violation of ... § 21-902 of the Transportation Article, a test of the person's breath or blood may be administered for the purpose of determining alcohol concentration..."

CJ § 10-309(a)(1)(i) provides "[a] person may not be compelled to submit to a test or tests provided for in this subtitle."²

CJ § 10-309(a)(1)(ii) contains the statutory exclusionary rule, "[e]vidence of a test or analysis provided for in this subtitle is not admissible in a prosecution for a violation of § 21-902 of the Transportation Article... if obtained contrary to the provisions of this

² *Transportation Article* ("TR") § 16-205.1 (b) (1) contains identical language, "Except as provided in subsection (c) of this section, a person may not be compelled to take a test." The two statutes are *in pari materia* and "must be construed harmoniously in order to give full effect to each enactment." *Lowry v State*, 363 Md. 357, 368-69, 768 A.2d 688, 694 (2001) (quoting *State v. Loscomb*, 291 Md. 424, 435, 435 A.2d 764, 770 (1981)).

subtitle.”

The Relationship between CJ § 10-309 and TR § 16-205.1

When a person is detained on suspicion of driving while under the influence of alcohol, Maryland law places a mandatory duty upon the detaining officer to request the person submit to a test to determine alcohol concentration. *Eg, Lowery v State*, 363 Md 357, 371-372, 768 A2d 688, 695-696 (2001). § 16-205.1(b)(1) specifies that a detaining officer "shall advise" a detained person of the administrative sanctions from refusing a test or blowing at or above a specified alcohol concentration. *Owusu v MVA, supra*, 461 Md at 698-699, 197 A3d at 42,

“[i]n Maryland, a prerequisite to the MVA's suspension of a driver's license after a hearing is a finding that the police officer "requested a test after the person was fully advised of the administrative sanctions that shall be imposed...."

MVA v Smith, 458 Md. 677, 692-693, 183 A.3d 211, 220 (2018).

Specifically, TR § 16-205.1 (b)(2) requires that the detaining officer must, at a minimum, advise the suspect of the administrative sanctions that shall be imposed for a blows over .08 and .15, as well as the potential consequences of a breath test refusal in the criminal case. TR § 16-205.1 (b)(2).³

If the officer fails to comply with any of the procedural requirements associated with § 16-205.1, or if the officer fails to “fully advise” the suspect of the consequences of her breath test choice, the CJ § 10-309 exclusionary rule applies and the results of the breath test result are inadmissible. *See, eg, Funes v. State*, 2020 Md. LEXIS 304, 26-27 (filed June 30, 2020) (citing *State v. Loscomb*, 291 Md. 424, 431, 437, 435 A.2d 764

³ It is true that (both TR § 16-205.1 (b) and CJ § 10-309) require certain information to be provided to a suspected drunk driver. But (neither) statute mandates that “this and only this” advice shall be given; and (neither) statute mandates how the advice is to be communicated. What (each statute) does mandate is that, regardless of what advice is given and how the information is communicated, the person may not be compelled to take the test.

(1981) ("[T]he results of the chemical test administered [are] inadmissible in prosecutions for violations of any law concerning a person accused of driving while intoxicated or impaired" when "there has been a failure to comply with the procedural requirements of [TR] § 16-205.1"); *Dejarnette v State*, 478 Md 148, 167, 272 A3d 376, 386 (2022),

“From the plain language of the statutes in Subtitle 3 of Title 10 of the Courts and Judicial Proceedings Article, it is clear that CJ § 10-309(a)(1)(ii) operates as a statutory exclusionary rule, pursuant to which evidence of a breath test or analysis in a prosecution for violation of TR § 21-902 must be excluded where such evidence is "obtained contrary to the provisions of th[e] subtitle." Stated differently, breath test results are not admissible if obtained contrary to the provisions in Subtitle 3 of Title 10 of the Courts and Judicial Proceedings Article. As such, for evidence of a breath test to be admissible, among other things, the specimen of breath must be taken within two hours after the person accused is apprehended, see CJ § 10-303(a)(2), the breath test must be administered by a qualified person, see CJ § 10-304(b)(1), and the report of the breath test results must include three specified pieces of information, including that the result of the test is as stated in the report, see CJ § 10-306(a)(2). If any of these provisions, **or any other provision of Subtitle 3**, is not complied with, then breath test results are not admissible pursuant to CJ § 10-309(a)(1)(ii).”

Now, to the argument.

ARGUMENT

I XXX HAD NO ABILITY UNDER THE *REGULATIONS OF THE MVA* TO GIVE A BREATH TEST AND ANY ADVISEMENT THAT NEGLECTED THAT FACT IS INCOMPLETE, INDUCING, AND MADE IN BAD FAITH

A. In the context of an administrative hearing pursuant to TR § 16-205.1, the only approved breath testing equipment (and the only certified operators) under the *Regulations* of the MVA is that equipment (and those operators) that have been approved and certified by the State Toxicologist in the Office of the Chief Medical Examiner

MVA COMAR 11.11.03.01 declares that

“This chapter contains administrative procedures governing suspensions of driver's licenses for licensees who have refused a properly requested test or who have submitted to a test which showed a 0.08 or more alcohol concentration, under Transportation Article, §16-205.1, Annotated Code of Maryland (and) this chapter includes procedures for administrative hearings in contested cases under the Maryland Vehicle Law, which are in accordance with the Maryland Administrative Procedure Act, State Government Article, §10-201 et seq., and Transportation Article, §12-201 et seq., Annotated Code of

Maryland.”⁴ (Exhibit 1, MVA COMAR *Regulations*)

MVA COMAR 11.11.03.08 (B)(1) states that

“Each hearing shall be conducted in accordance with State Government Article, §§10-201—10-214, and Transportation Article, §§12-201—12-208, Annotated Code of Maryland. Id.

State Government Article § 10-214(b) requires that

“In a contested case, the Office is bound by any agency regulation... to the same extent as the agency is or would have been bound if it were hearing the case.

MVA COMAR 11.11.03.08(b)(5) provides that

“For the purpose of determining the accuracy of the test result indicating the alcohol concentration of the licensee, the breath testing instrument shall conform to the requirements set forth in COMAR 10.35.02.08.B(2).” Id.

COMAR 10.35.02.08.B(2) avers that

“**At the time of approval by the Toxicologist**, the instrument shall be on the most recently updated Conforming Products List of Evidential Breath Alcohol Measurement Devices published in the Federal Register by the National Highway Traffic Safety Administration of the Department of Transportation.”⁵ (Exhibit 2,

⁴ **Please note that**, as with the public laws of the State, **the contents of the Maryland Register and the Code of Maryland Regulations shall be judicially noticed.** CJ § 10-203 (a)(2).

⁵ First, as used here, "Toxicologist" means the Chief Toxicologist or State Toxicologist in the Office of the Chief Medical Examiner under the Post Mortem Examiners Commission. COMAR 10.35.02.02 (B)(12).

Next, the phrase "at the time of approval" expressly incorporates by reference all the steps to approval (and re-certification) contained elsewhere in the *Regulations* of the State Toxicologist in the Office of the Chief Medical Examiner. *See, eg,*

- (A)(1) The Toxicologist shall approve all instruments to be used in the State for the purpose of testing breath for alcohol content pursuant to Courts and Judicial Proceedings Article, §§10-302 and 10-304;
- (A) (2) An agency shall only use an instrument that has been approved by the Toxicologist; (b)(1);
- (B)(1) The Toxicologist shall certify approval of each instrument before it is used in the State;
- (B)(3) On at least an annual basis, the Toxicologist or his representative shall

Office of the Chief Medical Examiner (“OCME”) *Regulations*)

11.11.03.08(B) was promulgated pursuant to a statute (*Courts and Judicial Proceedings* § 10-304) that was enacted to protect the Licensee’s due process interest in only having his license suspended based on reliable test results

The context of this argument is under a statute and under a set of procedures that are intended to protect the Licensee. The purpose of the § 16-205.1 suspension is to protect the public; the purpose of the § 16-205.1 procedures prior to suspension is to protect the Licensee.

Indeed, no individual is better protected under Maryland law than the suspected drunk driver. He alone must be told: (i) that he may refuse consent to search and (ii) the consequences of refusal; and, significantly, (iii) the test of voluntariness in the context of a request to submit to a breath (or blood) test in this context is not the 4th Amendment test of voluntariness but the *Johnson v Zerbst* test of waiver of a trial right, *eg, MVA v Smith, 458 Md 677, 183 A3d 211, 220 (2018)* (waiver must be knowing and voluntary); (further) (iv) (at least in the criminal case) he must be allowed a face-face consultation with his lawyer and (v) is allowed to collect relevant, probative exculpatory evidence *prior* to consenting to search (for example, consultation with his lawyer may include privately conducted SFST’s and a PBT, *see Brosan v Cochran; 307 Md 662, 672-675 (1986)* and (vi) the arresting officer is precluded by statute from participating in the search, CJ 10-304 (b)(2) and (c)(2).⁶ In addition, at the implied consent hearing, he is entitled to

recertify approval of each instrument;

(D)(1) The Toxicologist shall approve the alcohol reference solution or alcohol gas standard to be used as validation tests;

(D)(2) Validation tests shall be performed contemporaneously with each evidentiary breath test using an approved alcohol reference solution or alcohol gas standard

(E)(1)-(4) Initial Certification of Instrument Approval;

(F)(1)-(2) Periodic Recertification of Approval

(G)(1) - (13) Evidentiary Breath Test Method (result invalid if not followed)

⁶ CJ § 10-304 (b)(2) states that “the officer arresting the individual may not administer the test of breath;” and (c)(2) requires that “the test of blood shall be conducted by a

all the protections attendant to a contested case under the Maryland APA. TR § 12-206.

Here, of course, we are dealing with the procedures prior to suspension; and a statute and procedures enacted pursuant to that statute which are designed to protect the due process interests of the licensee in only having his license suspended based on reliable test results. *See, generally, Borbon v MVA, 345 Md 267, 279 (1997)* (“The General Assembly's purpose for requiring approval of the test equipment was to gain some assurance that the equipment used would measure with reasonable accuracy the breath alcohol of licensees who were believed to have committed alcohol related driving violations. The legislative purpose would be defeated by approving equipment on which the great majority of licensees apprehended for alcohol related driving violations would be physically unable to produce a sufficient breath sample.”); *MVA v Lytle, 374 Md 37, 75, 71 (2003)* (“The Code of Maryland Regulations establishes extensive procedures for checking the accuracy of the test instruments employed to implement § 16-205.1...The requirements that the test instruments be maintained and tested regularly and that the test administrator take the lowest of two or three readings rounded down to the second decimal place to arrive at the official "test result" as promulgated in the COMAR are intended to ensure the scientific accuracy of the certified test result used as evidence at the administrative hearing”); *MVA v Hyle, supra, 702 A2d at 766,*

“If this Court interpreted equipment to encompass a qualified technician, a great deal of discretion would be given to police. For example, a police department could schedule a trained technician only during certain hours thereby forcing defendants to submit to a blood test whenever the police department chooses not to schedule a technician for duty...A decision otherwise would give the police the discretion to select a more invasive blood test over a breath test. This may be the very reason that the legislature decided to include the term “equipment” and not qualified person in CJ 10-305 (a) (3).”

qualified person using equipment approved by the toxicologist in the Department of State Police Forensic Sciences Division in a laboratory approved by the toxicologist.”

Finally, the COMAR procedures relating to the approval of the equipment and certification of the operator was thought to be so essential to scheme of this statute that the question of whether the State Police would continue to adhere to the *Regulations* of the toxicologist in the Office of the Chief Medical Examiner was specifically asked (and answered by the representatives of the State Police in the affirmative) at the hearings on SB 216 (2022) (amending CJ § 10-304 and transferring the authority to approve equipment and certify operators from the Office of the Chief Medical Examiner to the Department of the State Police). *See*, https://mgaleg.maryland.gov/mgaweb/Committees/Media/false?cmte=jpr&ys=2022RS&clip=JPR_1_13_2022_meeting_2&billNumber=sb0216 beginning at minute mark 59:40 - 1:01:23 (question of Senator Sydnor),

Sen Snyder	So this (bill) essentially transfers any regulatory authority to the State Police?
Dan Katz (MSP)	(shakes head yes)
Sen Sydnor	Okay, I see you shaking your head. And, just out of curiosity, would those <i>Regs</i> that are currently in place, do you'all see the State Police just kind of wholeheartedly just kind of...I guess the proposal would go out and just take whatever is currently in place and these are still gonna be the rules ; how does that work? ⁷

⁷ In line with the CJ § 10-304 (b) (2) and (c)(2) prohibition against the seizing officer from also being the searching officer and the general distrust of placing too much discretion in the hands of the police that is stated in the quote from *Hyle*, it's important to note that under the APA, the toxicologist does not have the last word on whether her *Regulations* may issue,

“SG §§ 10-110 and 10-111 require that a unit desiring to adopt a regulation, other than as an emergency measure, publish the proposed regulation in the Maryland Register and send a copy of it to the Joint Legislative Committee on Administrative, Executive, and Legislative Review (AELR Committee) for that Committee's review.

As noted, the APA requires that proposed regulations be submitted to the AELR

Katz

We don't anticipate there being any major changes. I mean, we'll evaluate that, but it's a system that has worked, it just doesn't make sense how it is set up.

The MVA (and therefore the OAH) is "bound" by 11.11.03.08B(5) because the Regulation was properly promulgated and published and has not been rescinded

The MVA (and therefore the OAH) is "bound" by 11.11.03.08B(5) because the Regulation was properly promulgated and published and has not been rescinded (and therefore the Regulation has the "force and effect of law"). *See, eg, Comptroller v Miller, 169 Md App 321, 346 (ACM 2006)* (properly promulgated COMAR regulations carry the force and effect of law); *Hopkins v. Maryland Inmate Grievance Comm'n, 40 Md. App. 329, 335-36, 391 A.2d 1213 (1978)* (quoting *United States v. Heffner, 420 F.2d 809, 811 (4th Cir.1970)* (Properly promulgated regulations have the force of law, binding the agency as well as other affected persons); *Danaher v. Dep't of Labor, Licensing & Regulation, 148 Md. App. 139, 174 (2002)* ("an agency of the government must scrupulously observe rules, regulations, or procedures which it has

Committee for its review. Although the Committee may not veto a proposed regulation, it may hold hearings, get public input, and object to the proposal. SG § 10-111.1(b) directs the Committee, in deciding whether to oppose a proposed regulation, to consider whether the regulation is in conformity with the statutory authority of the agency and whether it "complies with the legislative intent of the statute under which the regulation was promulgated."

The ability of the Committee to oppose the regulation is important, because if it does object, the unit has but three options: it may withdraw the proposed regulation, it may amend the regulation, which essentially requires starting the process anew, or it may submit the proposal to the Governor with a statement explaining why it refuses to withdraw or amend the proposal. *See Delmarva Power v. PSC, 370 Md. 1, 27, 803 A.2d 460, 475 (2002)*. The Governor may consult with the Committee and the unit in an effort to resolve the conflict and, after notice to the presiding officers of the Senate and House of Delegates, may instruct the unit to withdraw or amend the regulation or may approve the regulation. A proposed regulation opposed by the Committee may not be adopted and is not effective unless approved by the Governor."

Evans v State, 396 Md 256, 914 A2d 25, 77-80 (2006).

established. When it fails to do so its action cannot stand and courts will strike it down."); *Pollock v Patuxent Institution Board of Review*, 374 Md 363, 823 A2d 626, 628 (2003) (Accardi doctrine adopted and is applicable to administrative hearings in Maryland).

So what's the problem?

The problem is that the Toxicologist in the Office of the Chief Medical Examiner is the wrong toxicologist. Since 2022, she has not been authorized to either approve equipment or to certify an operator. *See, CJ § 10-304 (a)(3) and (b)(1)*,

“(a)(3) “Qualified person” means a person who has received training in the use of the equipment in a training program approved **by the toxicologist in the Department of State Police Forensic Sciences Division** and who is either a police officer, a police employee, or a person authorized by the toxicologist in the Department of State Police Forensic Sciences Division;

and

(b)(1) The test of breath shall be administered by a qualified person with equipment approved **by the toxicologist in the Department of State Police Forensic Sciences Division** at the direction of a police officer.

Somebody had an obligation to tell somebody something

Somebody had an obligation to tell somebody something. At the very least, the Xxx in this case gave Xxx the impression that xxx had a reliable breath test to give xxx. That impression and those statements to that effect were false.⁸ If that's not

⁸ When a person is detained on suspicion of driving while under the influence of alcohol, Maryland law places a mandatory duty upon the detaining officer to request the person submit to a test to determine alcohol concentration. *Eg, Lowery v State*, 363 Md 357, 371-372, 768 A2d 688, 695-696 (2001). § 16-205.1(b)(1) specifies that a detaining officer "shall advise" a detained person of the administrative sanctions from refusing a test or blowing at or above a specified alcohol concentration. *Owusu v MVA, supra*, 461 Md at 698-699, 197 A3d at 42,

“[i]n Maryland, a prerequisite to the MVA's suspension of a driver's license after a hearing is a finding that the police officer "requested a test after the person was fully advised of the administrative sanctions that shall be imposed...."

MVA v Smith, 458 Md. 677, 692-693, 183 A.3d 211, 220 (2018).

operating in bad faith (and playing “gotcha” with the licensee), then I don’t know what is.

See, eg, Usan v MVA, 486 Md 352, 377 (Biran, J, concurring),

“The issues properly before an administrative law judge ("ALJ") in a test refusal case include "[w]hether the police officer requested a test after the person was fully advised ... of the administrative sanctions that shall be imposed[.]" TR § 16-205.1(f)(7)(i)(3). This Court has held that an officer who "in any way" induces a

Specifically, TR § 16-205.1 (b)(2) requires that the detaining officer must, at a minimum, advise the suspect of the administrative sanctions that shall be imposed for a blows over .08 and .15, as well as the potential consequences of a breath test refusal in the criminal case. TR § 16-205.1 (b)(2).

If the officer fails to comply with any of the procedural requirements associated with § 16-205.1, or if the officer fails to “fully advise” the suspect of the consequences of her breath test choice, the CJ § 10-309 exclusionary rule applies and the results of the breath test result are inadmissible. *See, eg, Funes v. State, 2020 Md. LEXIS 304, 26-27 (filed June 30, 2020) (citing State v. Loscomb, 291 Md. 424, 431, 437, 435 A.2d 764 (1981) (“[T]he results of the chemical test administered [are] inadmissible in prosecutions for violations of any law concerning a person accused of driving while intoxicated or impaired” when “there has been a failure to comply with the procedural requirements of [TR] § 16-205.1”); Dejarnette v State, 478 Md 148, 167, 272 A3d 376, 386 (2022),*

“From the plain language of the statutes in Subtitle 3 of Title 10 of the Courts and Judicial Proceedings Article, it is clear that CJ § 10-309(a)(1)(ii) operates as a statutory exclusionary rule, pursuant to which evidence of a breath test or analysis in a prosecution for violation of TR § 21-902 must be excluded where such evidence is "obtained contrary to the provisions of th[e] subtitle." Stated differently, breath test results are not admissible if obtained contrary to the provisions in Subtitle 3 of Title 10 of the Courts and Judicial Proceedings Article. As such, for evidence of a breath test to be admissible, among other things, the specimen of breath must be taken within two hours after the person accused is apprehended, see CJ § 10-303(a)(2), the breath test must be administered by a qualified person, see CJ § 10-304(b)(1), and the report of the breath test results must include three specified pieces of information, including that the result of the test is as stated in the report, see CJ § 10-306(a)(2). If any of these provisions, **or any other provision of Subtitle 3**, is not complied with, then breath test results are not admissible pursuant to CJ § 10-309(a)(1)(ii).”

motorist into refusing a test has not "fully advised" the motorist. *Forman v. Motor Vehicle Admin.*, 332 Md. 201, 217-18, 223-24, 630 A.2d 753 (1993). In my view, a motorist who refuses an alcohol test may, in an appropriate case, raise the lack of capacity to conduct a drug test as part of a broader inducement argument. For this reason, it behooves law enforcement agencies, in the first instance, to document the availability of a DRE at the time an officer, who only suspects impairment based on drugs, requests an alcohol test. And MVA would be well advised to present such documentation at an administrative hearing in an alcohol test refusal case where a motorist raises the lack of capacity to conduct a drug test as part of an inducement argument;"

See also, eg, Raley v US, 423, 437-438 (1959) (This case is more than that; here the Chairman of the Commission, who clearly appeared to be the agent of the State in a position to give such assurances, apprised three of the appellants that the privilege in fact existed, and by his behavior toward the fourth obviously gave the same impression...Here there were more than commands simply vague or even contradictory. **There was active misleading.**).

B AT THE TIME OF THE REQUEST IN THIS CASE, THE TOXICOLOGIST IN THE DEPARTMENT OF STATE POLICE FORENSIC SCIENCES DIVISION HADN'T APPROVED ANY EQUIPMENT NOR CERTIFIED ANY OPERATOR EITHER

At the time of the request that Xxx submit to the breath test, the toxicologist for the State Police hadn't approved any equipment or operators either.

Why?

Because the approval and the certification by her (both the toxicologist for the Office of the Chief Medical Examiner and the State Police happen to be women) was pursuant to expired *Regulations*. And, any approval or certification pursuant to expired *Regulations* is rendered a legal nullity by statute and as a matter of Maryland administrative law. *SG § 10-111 (b)(4)(iii)* ("If the unit does not adopt the regulation finally before the time limit expires, the status of the regulation reverts to its status before the emergency adoption"); *See also Evans v State*, 396 Md 256, 349-350, 914 A2d 25, 80(2006) (because the DOC's Execution

Operations Manual constituted regulations under the APA and “were not adopted in conformance with the requirements of the APA, [the EOM] is ineffective and may not be used until such time as they are properly adopted]”).

All approvals and certifications of the toxicologist with the State Police prior to 11/25/2024 was made pursuant to an expired Regulation

The EC/IR II (Serial Number xxx) used in this case was approved on 8/9/2024; the simulator solution was approved on 5/1/2024.⁹ At that time, all equipment approval and operator certifications issued by the toxicologist with the State Police were issued pursuant to *Emergency Regulations* that had expired on 7/21/2023. Exhibit 3.¹⁰

Because the approval and the certification was rendered pursuant to an expired Regulation, they are of no force or effect. Because the approval and the certification had no force or effect, xxx had no ability to provide to xxx a breath test using approved equipment and manned by a certified operator; and because xxx had no ability to provide xxx with a breath test, the MVA could not suspend xxx license for refusing a test that cannot be given and xxx cannot be punished criminally for refusal.

THE REMEDY IS EXCLUSION OF THE BREATH TEST RESULT AND FOR A WERKHEISER INFERENCE

The remedy, under either one of two theories is exclusion of the breath test result: (1) because, under well settled Maryland administrative law, xxx had no approved breath testing machine (nor a certified operator) with which to give xxx a test; and (2) by falsely giving xxx the impression that xxx had a valid breath test to give, the xxx in this case impermissibly induced a blow (by telling xxx that xxx could be punished both criminally and

⁹ We have not received any information relating to the certification of the breath test operator (xxx); but based on information and belief, xxx was certified sometime in 2024.

¹⁰ The purpose of promulgating Emergency Regulations that are valid for 6 months is to give the agency sufficient time to promulgate permanent *Regulations*. The permanent *Regulations* weren't promulgated nor published until 11/25/2024. Exhibit 4.

administratively for refusing).

Moreover, here, because xxx agreed to take the breath test, the State had a statutory obligation to provide to xxx 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, 71 (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 xxx is entitled to an inference that, had a reliable test been given, the result would have shown that xxx 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

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

Respectfully submitted,

PAUL HOWARD KENT
Attorney for Defendant
20 Courthouse Square, #209
Rockville, MD 20850

