## SUPERIOR COURT OF THE STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE 1 THE CIRCLE, SUITE 2 GEORGETOWN, DE 19947 (302) 856-5257

July 12, 2012

Martin J. Cosgrove, Jr., Esquire Department of Justice 114 East Market Street Georgetown, DE 19947 Michael R. Abram, Esquire 5 West Market Street Georgetown, DE 19947

Re: State v. David W. Gillespie Def. ID# 1111001471

Dear Counsel:

The defense filed a motion to have 21 Del. C. §4177(g) declared unconstitutional. Briefing was completed on June 25, 2012. This is the Court's ruling denying the motion.

The defense reports the blood alcohol concentration ("BAC") test results for Gillespie evidence a concentration of .08%. The legal limit for BAC in the State of Delaware pursuant to the Driving Under the Influence statute is .08% (21 Del. C. §4177(a)(4) and (5)).

Gillespie argues that since all scientific measuring devices have a margin of error, it is just as likely that his actual BAC was less then .08%. He argues that 21 Del. C. § 4177(g) is unconstitutional because the test results from the testing equipment "shall be deemed to be the actual alcohol or drug concentration in the person's blood, breath or urine without regard to any margin of error or tolerance factor inherent in such tests." The defense asks that this language be declared unconstitutional so that he may argue to the trier of facts that a .08% reading is not accurate and subject to a margin of error. The short answer is that the Legislature was free to set the alcohol limit at any limit. What defeats the defendant's position is that statutes are presumed to be constitutional. *Hoover v. State*, 958 A.2d 816 (Del. 2008). The Legislature specifically recognized that there may be a margin of error, and, therefore, the Legislature recognized that an individual may have a BAC of less then .08% but still be convicted of Driving Under the Influence.

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The Legislature recognized that wherever the line was drawn there would be individuals testing at that exact point, and therefore, they chose to address the margin of error argument as such: it is illegal to drive at .08% minus the margin of error.

I am satisfied that the issues concerning margins of error pertaining to the method of testing has been addressed by The Honorable Jan R. Jurden in *Disabaino v. State*, 808 A.2d 1216 (Del. Super. 2002), and the Supreme Court in *Rebarchak v. State*, 825 A.2d 239 (Del. 2009).

I am satisfied that the defendant has not established that the statute's language as to margin of error is unconstitutional because it violates the equal protection of the law guaranteed by the 14<sup>th</sup> Amendment of the United States Constitution. The statute sets the floor or bottom line for a driver's BAC level and is applicable to all drivers. Mr. Gillespie and others similarly situated are not to be treated any differently than other persons charged under the statute.

The fact that different testing devices may have differing margins of error thereby producing different results is not a violation of equal protection so long as the testing device is operating within the known margin of error during its accuracy testing. Defendant basically is asking this Court to rewrite the statute to require that the law requires a BAC of .08% <u>plus</u> the margin of error. The Court shall not do this. Nor shall the Court allow the defense to make a margin of error argument to the jury that would contradict the statute. The defendant has no constitutional right to make an argument to the jury that the jury can ignore the law.

The Motion to Suppress is denied. Final case review is set for August 22, 2012 with trial on August 27, 2012. IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

THG:tll

cc: Prothonotary's Office