## 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

June 29, 2012

Mark J. Cutrona, Esquire Department of Justice 114 E. Market Street Georgetown, DE 19947 E. Stephen Callaway, Esquire Office of the Public Defender 14 The Circle, 2<sup>nd</sup> Floor Georgetown, DE 19947

RE: State v. William E. Smith ID No. 1203012042

Dear Counsel:

On June 20, 2012, the State filed a Motion in Limine as to the introduction of the "before and after" testing of the Intoxilyzer used at Delaware State Police Troop 5. Final case review is set for July 3, 2012, with trial on July 12, 2012. These dates require a prompt, although brief, decision from the Court. The deadline for the defense to note its opposition was June 28, 2012.

The State argues that the accuracy testing of the Intoxilyzer instrument is admissible pursuant to the business record exception as contained in D.R.E 803(6). Historically, such records were introduced as business records without the testimony of the person who actually conducted the test. The Intoxilyzer log book containing the test results was admitted as a business record as proof that if the tested device was working accurately both before and after the test in question, then a logical inference was that it was working properly on the date of the test in question.

The State argues that neither *Crawford v. Washington*, <sup>1</sup> *Melendez-Diaz v. Massachusetts*, <sup>2</sup> nor *Bullcoming v. New Mexico*, <sup>3</sup> require a ruling that the "before and after" instrument logs are testimonial. Therefore, the person who conducted the "before and after" test is not a necessary witness under the confrontation clause.

<sup>&</sup>lt;sup>1</sup>124 S.Ct. 1354 (2004).

<sup>&</sup>lt;sup>2</sup>129 S.Ct. 2527 (U.S. 2009).

<sup>&</sup>lt;sup>3</sup>131 S.Ct. 2705 (U.S. 2011).

I agree. Regardless of the evidentiary rule that may allow certain evidence to be admissible, that evidence must be presented in a manner that complies with the confrontation clause if the evidence is testimonial.

Testimonial evidence is evidence or a statement that was created with the primary purpose to be used against a specific defendant in his or her trial to prove an element or elements of the offense.

Forensic reports generated as a result of a laboratory analysis generally require the person conducting the test or analysis to be subject to cross examination.<sup>4</sup>

The issue in this case is not the admission of the test results, but whether the confrontation clause requires the person who is testing a scientific device to ensure it is operating properly must be subject to confrontation or cross-examination.

If the "before and after" accuracy tests are considered testimonial, thereby requiring the incourt testimony of the person conducting the test, then, taken to its logical extension, the introduction of DNA testing would require the live testimony of all persons involved in the calibration and accuracy testing of the laboratory devices or scientific devices used in the actual tests of the unknown substance.

I hold that the test conducted to check the general operating condition of a device is not testimonial. The accuracy of the equipment may be an issue as to admissibility, but the admissibility ruling can be made on the evidence introduced pursuant to the business record exception as contained in D.R.E. 803(6).

The confrontation decisions do not change the long-standing use of D.R.E. 803(6) as a vehicle to establish the good working order of the testing device.

The State's Motion in Limine is granted.

IT IS SO ORDERED.

Very truly yours,

/s/ T. Henley Graves

THG/jfg

cc: Prothonotary

<sup>&</sup>lt;sup>4</sup>But not always as shown in the difficult analysis of the facts in *Williams v. Illinois*, 131 S. Ct. 3090 (2012).