The Wilson Law Firm
WHEN RESULTS MATTER

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March 5, 2010

Judge [redacted]
[redacted] County Circuit Court
[redacted] County Courthouse
[redacted]
[redacted] Va [redacted]

re: Commonwealth v. [redacted]
DUI - 2nd Offense Within 5 Years
Case No.: [redacted]

Fundamentally, the concept before the Court is Mr. [redacted] Sixth Amendment right of confrontation. Specifically, the issue before the Court is the admissibility of the certificate of analysis without live testimony regarding the foundational requirement that the machine in question was "tested and found to be accurate within the last six months" as was required by 18.2-268.9 at the time of the alleged offense.

Issue #1
At the Time of the Alleged Offense Virginia Law Required Live, In-Court Testimony Establishing the Machine Used Had Been Tested and Found to be Accurate Within the Previous Six Months

Crawford v. Washington
541 U.S. 36, 2004

In 2004, the United States Supreme Court decided Crawford v. Washington, and

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in doing so completely changed the way courts handle hearsay evidence and the right of confrontation. In Crawford, the Court held that the Sixth Amendment right of confrontation guarantees an accused the right to confront those who bear testimony against him, and that the old Ohio v. Roberts method of analyzing the admissibility of testimonial evidence based on subjective perceived indicia of reliability was incorrect and inappropriate. Instead, the Court made it clear that the correct analysis regarding the admissibility of testimonial evidence was whether the witness had been subjected to the crucible of cross examination. Specifically, in Crawford the United States Supreme Court held:

> "a witness's testimony against a defendant is thus inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination."

In the years following Crawford, courts across the nation seemed determined to avoid applying the Crawford holding whenever possible, as evidenced by the creative, perhaps even specious, reasoning employed to find a myriad of reasons why the holding in Crawford did not apply to a given situation. The list of reasons given as to why the holding in Crawford wasn't applicable in a particular case included arguments such as: analysts aren't accusatory witnesses, or analysts are somehow different from other witnesses, or there is a difference between normal testimony and testimony regarding scientific testing, or affidavits are like business records, or the defendant could have subpoenaed the witness who would be testifying against him and waived the right of confrontation by failing to do so, or honoring the Crawford reasoning would simply make prosecuting cases too burdensome.

Section 18.2-268.9 of the Code of Virginia, as it existed at the time of the alleged offense before the Court (December 2008), required proof that the machine in question had been tested and found to be accurate within the last six months before the certificate of analysis could be admitted into evidence at trial and used to convict an accused. At that time, the certificates of analysis contained an attestation clause which included language purporting to satisfy this foundational requirement. Despite the United States Supreme Court holding in Crawford, clearly stating the testimony of a witness is inadmissible unless the witness is present at trial and subject to cross-examination, or the witness is unavailable and

the accused had a prior opportunity to cross-examine the witness, Virginia courts were among those courts across the nation reasoning their way around Crawford and allowing certificates of analysis to be admitted at trial without live, in-court testimony regarding the foundational requirements set forth in 18.2-268.9.

Melendez-Diaz v. Massachusetts
557 U.S. _____ #07591, 2009

In June of 2009, the U.S. Supreme Court decided Melendez-Diaz v. Massachusetts, reaffirming the Court's decision in Crawford v. Washington five years earlier. In doing so, U.S. Supreme Court in Melendez-Diaz addressed and rejected, one by one, what the Court itself described as "...**a potpourri of analytic arguments" made "in an effort to avoid this rather straightforward application of our holding in Crawford.**" (Emphasis added)

In August of 2009, following the U.S. Supreme Court holding in Melendez-Diaz, which rejected the reasoning Virginia courts had used to avoid the holding in Crawford, and faced with the fact that Virginia was actually going to have to bring witnesses to court to testify and be cross-examined, Virginia called a special session of the General Assembly to figure out how to deal with this development. Shortly thereafter, emergency legislation was passed which sought to get around the right of confrontation set out in the Sixth Amendment and made clear in Crawford and Melendez-Diaz by, among other things, removing the language requiring machines be tested and found to be accurate within the past six months from §18.2-268.9.

Yes, Virginia was so determined to avoid bringing witnesses to court to testify and be cross-examined, that Virginia's General Assembly changed the wording of various statutes and moved language from one statute to another in an attempt to get evidence admitted in criminal trials without affording the accused the opportunity to cross-examine the witnesses who otherwise would have been required to come to court and testify.

However, the emergency legislation fails to accomplish the apparent intended goal of avoiding the Sixth Amendment, Crawford and Melendez-Diaz. The General Assembly simply moved the language in question from §18.2-268.9 to §9.1-1101 of the Code of Virginia. Specifically, §9.1-1101 of the Code of Virginia states:

> "The Department ***shall*** test the accuracy of equipment used to test the blood alcohol content of breath at least once every six months. ***Only equipment found to be accurate shall be used to test the blood alcohol content of breath.***" (Emphasis added)

Virginia's emergency legislation still mandates (1) the Department of Forensic Science shall test the accuracy of the equipment at least every six months and (2) only equipment found to be accurate can be used. Therefore, presumably testimony establishing those facts still needs to be presented during a criminal trial before a certificate of analysis can be admitted into evidence and used to convict an accused.

Grant v. Commonwealth
54 Va. App. 714, 2009

In September of 2009, the Virginia Court of Appeals decided Grant v. Commonwealth, which dealt with Virginia statutes as they existed prior to the passage of the emergency legislation. **In Grant, the Commonwealth conceded, and the Court of Appeals held, "the attestation clause is testimonial...."** (Emphasis added) In addition, in Grant the Virginia Court of Appeals stated it was clear:

> "...the General Assembly intended that the certificates be self-proving" and that "the attestation clause on the certificate of analysis...was designed to be used exactly like the certificate as issue in Melendez-Diaz - to prove facts essential to the prosecution that would otherwise have to be proved by live, in-court testimony...."

In Grant, the Virginia Court of Appeals went on to state:

> "...while there is no constitutional requirement that the factual predicates in Code 18.2-268.9 be established prior to the admission of the results of the test, **once the General Assembly conditions the validity and admissibility of the breath-test result on the proof of**

> **those facts, the Commonwealth must prove those facts through live, in-court testimony and not by affidavit."** (Emphasis added)

Virginia courts now have to decide what effect, if any, moving the language requiring machines be tested and found to be accurate within the last six months from §18.2-268.9 to §9.1-1101 had any impact on relieving the Commonwealth of the burden to prove that fact by live, in-court testimony. However, the Commonwealth has conceded, and it is clear from Crawford, Melendez-Diaz and Grant, that at the time of this alleged offense §18.2-268.9 required the Commonwealth to present such proof and to do so by live, in-court testimony subjected to cross-examination.

If the Court believes moving the language requiring breath test machines be tested and found to be accurate from §18.2-268.9 to §9.1-1101 did not relieve the Commonwealth of the burden to present that evidence by live, in-court testimony, then we need go no further. Since that evidence was not presented, the certificate of analysis cannot be admitted into evidence.

However, if the Court believes moving the language in question from §18.2-268.9 to §9.1-1101 did relieve the Commonwealth of the obligation to present that evidence through live, in-court testimony, the Court must decide whether that change in the law can be applied retroactively to the case before the Court.

Issue #2

If Virginia's Statutory Reorganization Relieves the Commonwealth of the Burden to Present Evidence Which Was Required at the Time of the Offense, It Is an Ex Post Facto Law and Retroactive Application of the Law Is Prohibited

Assuming arguendo that the Court believes moving the language in question from §18.2-268.9 to §9.1-1101 does act to relieve the Commonwealth of the obligation to present that evidence through live, in-court testimony (proof which was undeniably and admittedly required prior to the statutory changes), Mr. [redacted] submits that the impact of the statutory changes cannot be applied retroactively.

Calder v. Bull
3 U.S. 386, 1798

At the time of the alleged offense, Mr[redacted] was entitled to proof, in the form of live, in-court testimony, establishing that the machine in question had been tested and found to be accurate within the last six months before the certificate of analysis could be used to convict him. The Commonwealth cannot be relieved of that burden by a subsequent change in the rules of evidence - as that would be an *ex post facto* law prohibited by both the United States Constitution and the Virginia Constitution. As stated by the Supreme Court of Virginia in McClain v. Virginia (189 Va 847, 1949), the U.S. Supreme Court set out the classic definition of an *ex post facto* law in Calder v. Bull. Specifically, in Calder v. Bull, the U.S. Supreme Court divided *ex post facto* laws into four categories, the fourth of which was:

> "Every law that alters the legal rules of evidence, and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender."

The law as it existed at the time of the alleged offense required the Commonwealth to present live, in-court testimony regarding the machine in question having been tested and found to be accurate within the six months preceding the alleged offense in order to have the certificate of analysis admitted into evidence at trial and convict an accused. The statutory changes in August of 2009 seek to alter the rules of evidence by eliminating the requirement for testimony regarding the machine being tested and found to be accurate as a predicate for admissibility of the certificate of analysis. Such a change in the rules of evidence would allow admission of the certificate of analysis and conviction on less evidence than was required at the time of the alleged offense. Since the legislative change in question purports to alter the rules of evidence and accept less, or different, testimony than the law required at the time of the commission of the alleged offense in order to convict the accused, it is an *ex-post facto* law and cannot be applied retroactively.

In sum, assuming arguendo that the statutory reorganization was effective in relieving the government of the obligation to present evidence which it was

required to present at the time of the alleged offense, it is an *ex post facto* law and retroactive application of that law is prohibited. Thus, the law as it existed at the time of the alleged offense controls and since no testimony was presented at trial regarding the testing or accuracy of the machine in question, the certificate of analysis cannot be admitted into evidence.

Issue #3

Assuming the Certificate of Analysis Is Not Admitted Into Evidence, the Remaining Evidence Presented at Trial Fails to Prove Mr. [redacted] Guilt Beyond A Reasonable Doubt

When evaluating the evidence in a Virginia DUI case it is important to remember that since Virginia's DUI law addresses the condition of the accused at the time of driving, DUI prosecutions in Virginia are circumstantial evidence cases. A blood or breath test result is circumstantial evidence of what the BAC of the accused was at the time of driving. Similarly, driving behavior of the accused, observations by the officer, performance on various dexterity and coordination exercises, etc. are offered by the government as circumstantial evidence of impairment. The government routinely offers circumstantial evidence for which there are numerous innocent explanations, and then asks the Court to ignore the many explanations consistent with innocence and accept the singular explanation consistent with guilt. As the Court well knows, and as set out in the Model Jury Instruction, exactly the opposite is required when the Commonwealth is relying on circumstantial evidence. In circumstantial evidence cases, in order to secure a conviction evidence must be consistent with guilt and inconsistent with innocence, and the Commonwealth must exclude every hypothesis consistent with innocence.

In the case before the Court, the only testimony at trial came from Trooper [redacted], and undoubtedly it creates a strong suspicion that Mr. [redacted] was driving under the influence of alcohol, perhaps even a probability. After all, Mr. [redacted] was seated behind the wheel of a car stopped in the middle of the interstate and he appeared to be dozing off when Trooper [redacted] approached the vehicle.

On the other hand, it was 5:12 a.m., an hour of the morning at which it is reasonable to expect people to be exhausted, especially if they have been up all night. In addition, Trooper [redacted] testified that Mr. [redacted] told him the passenger was driving when the vehicle experienced mechanical problems, and

that Mr. [redacted] got behind the wheel in an attempt to move the vehicle, but was unable to do so because it was disabled - thus explaining how Mr. [redacted] came to be behind the wheel in a vehicle which was stopped in the middle of the road. There was no testimony regarding whether Trooper [redacted] asked Mr. [redacted] whether he had worked that day, what time he got up, when he last slept, how much he had slept in the last 24 hours, or how long they had been stranded at that location. It is indisputable that fatigue will impact both mental and physical abilities, and since the Commonwealth must exclude every reasonable explanation for the evidence, this information would be helpful to the Court in evaluating whether Mr. [redacted] was simply tired as opposed to impaired by alcohol. Mechanical failure and fatigue due to the hour of the day are reasonable explanations, consistent with innocence, which have not been excluded by the Commonwealth, for why the vehicle was stopped in the middle of the road and Mr. [redacted] was dozing off at 5:12 a.m.

<u>An Odor Commonly Associated With Alcoholic Beverages Was Coming From the Vehicle</u>

Trooper [redacted] testified there was a strong odor of an alcoholic beverage coming from the vehicle and that Mr. [redacted] acknowledged having some drinks earlier.

However, in a DUI prosecution, the presence of the odor often associated with alcoholic beverages in a vehicle isn't probative of the driver's condition unless it can be identified as coming from the driver - specifically, the driver's breath - as opposed to the breath of a passenger in the vehicle, containers in the vehicle, a spill on the clothing of the driver or passenger, a wine bottle that broke in the vehicle on the way home from the grocery store, or some other innocent explanation. In the case before the Court, there was a passenger in the vehicle with Mr. [redacted] and Trooper [redacted] offered no testimony regarding any investigation or attempt to connect the odor to Mr. [redacted] by excluding the passenger and the vehicle as the source of the odor. There was no testimony regarding an inquiry by Trooper [redacted] into whether the passenger had been drinking, and if so, how much, and how long ago. There was no testimony regarding any inspection of the vehicle by Trooper [redacted] for open containers, empty containers, spills, etc. There wasn't even any testimony regarding whether the odor followed Mr. [redacted] and continued to be detectable after Mr. [redacted] exited the vehicle. There was simply no testimony from Trooper [redacted] connecting

the odor in question to Mr. [redacted].

Mr. [redacted] Acknowledged Having Drinks Earlier

If a DUI suspect denies drinking alcoholic beverages, the presence of the odor associated with an alcoholic beverage may be evidence of dishonesty or an attempt to hide the consumption. However, when a DUI suspect acknowledges drinking, as Mr. [redacted] did, if the odor of an alcoholic beverage is present on the driver's breath, it merely corroborates the driver's statement. However, in this case, there was no testimony about the odor of an alcoholic beverage being present on Mr. [redacted] at all, much less on his breath. The only testimony before the Court is that an odor was coming from the vehicle.

The Odor Coming From the Vehicle Was "Strong"

The characterization by an officer of the odor associated with an alcoholic beverage as a "strong" odor is totally subjective and self-serving, without foundation, and without any means to measure, corroborate or substantiate - which has always left me curious about the reasoning behind offering such evidence. Perhaps officers and prosecutors think courts will take a blind leap and draw the unsubstantiated conclusion that since a given officer described a given odor as "strong" the person was likely impaired.

As the Court knows, officers do not objectively measure the odor associated with an alcoholic beverage, and there is no scale one can use to objectively categorize a given odor as "slight," "moderate" or "strong." Furthermore, no evidence was presented to try and support the proposition that as the degree of impairment increases, so does the relative strength of the odor of an alcoholic beverage coming from a person. We all subjectively perceive smells and odors, and it isn't unusual for one person to perceive an odor as a strong one, while someone else would describe it as a slight odor, and someone else might not smell it at all.

However, as previously stated, Trooper [redacted]'s subjective perception about the relative strength of the odor coming from the vehicle is not probative of Mr. [redacted] condition because the odor was never connected to Mr. [redacted]. Moreover, in the absence of testimony about the odor in question continuing to be detectable after Mr. [redacted] exited the vehicle, a reasonable conclusion, consistent

with innocence, is that there was no such odor.

Red & Glassy Eyes

Trooper [redacted] gave typical boilerplate testimony regarding the alleged condition of Mr. [redacted] eyes.

Of course, much like the perceived odor of an alcoholic beverage, the degree to which someone's eyes appear red or glassy is a subjective perception. There was no photographic evidence presented in this trial enabling the Court to view first hand the condition of Mr. [redacted] eyes on the day in question. Moreover, even if Mr. [redacted] eyes were red and glassy, although alcohol consumption is one thing that can cause such a condition, life tells us that there are countless other things which can cause redness of the eyes, such as: fatigue, allergies, smoke, shift work, wearing contact lenses, frequent use of eye drops, etc. Some people have eyes which are naturally more red than others. There was no testimony about any investigation or attempt by Trooper [redacted] to exclude any of the other possible causes of the perceived condition, or to support the conclusion the Commonwealth wants the Court to draw - that the perceived condition was the result of alcohol consumption. There wasn't even any testimony addressing whether or not Mr. [redacted] eyes looked different during the trial than they did on the night of the arrest.

It was after 5:00 a.m. when Trooper [redacted] encountered Mr. [redacted], and Mr. [redacted] was dozing off, so if Mr. [redacted] eyes were unusually red, a reasonable hypothesis, consistent with innocence, which has not been excluded by the Commonwealth, is that the condition was related to fatigue and not the consumption of alcohol. Furthermore, in the absence of testimony establishing that Mr. [redacted] eyes appeared different at the time of his arrest than they did at the time of trial, it is entirely possible, and consistent with innocence, that the condition of Mr. [redacted] eyes on the night of the arrest - what Trooper [redacted] subjectively perceived as red and glassy - is actually the normal condition of Mr. [redacted] eyes.

Mr. [redacted] Provided His License and Registration As Requested

The Court has likely heard testimony about how one suspected of DUI was asked

to provide his/her license and registration but failed to do so. In some cases the suspect provides one document and completely forgets about the other. In other cases the person provides one correct document along with a second incorrect document. In other cases the suspect passes over one or both of the documents several times without realizing it. In other cases the person fumbles with the wallet or purse, perhaps even dropping it. In other cases the suspect simply fails to provide anything at all.

However, in the case before the Court, there was no testimony about Mr. [redacted] providing one but not the other, or providing an incorrect document, or passing over either document, or fumbling with his wallet. To the contrary, Trooper [redacted] testified that Mr. [redacted] provided both documents as requested. Such behavior, being indicative of normal cognitive awareness and physical dexterity, is consistent with innocence, and inconsistent with being intoxicated from alcohol.

Trooper [redacted] Curiously Vague Testimony
Regarding Mr. [redacted] Performance
On Dexterity and Coordination Exercises

Trooper [redacted] testified on direct examination that he administered three exercises to Mr. [redacted]: the Walk and Turn (WAT), the One Leg Stand (OLS) and the Finger Dexterity. On cross-examination, Trooper [redacted] testified he was "certain" those were the only three exercises given and that he specifically remembered giving the instructions for each of the three exercises to Mr. [redacted].

Trooper [redacted] then followed his razor sharp testimony regarding which three exercises he asked Mr. [redacted] to perform with curiously vague testimony concerning Mr. [redacted] actual performance on those three exercises. Specifically, Trooper [redacted] testified he couldn't remember any specifics regarding Mr. [redacted] performance - on any of the three exercises. Interestingly, Trooper [redacted] went on to testify that although he didn't remember how Mr. [redacted] performed on any of the three exercises, he was somehow certain Mr. [redacted] was unable to perform any of them correctly.

Trooper [redacted] Inconsistent & Contradictory Testimony
Regarding the Finger Dexterity Exercise: "My DUI Report is Wrong"

On direct examination Trooper [redacted] testified the three exercises he administered to Mr. [redacted] were the WAT, the OLS and the Finger Dexterity. On cross-examination Trooper [redacted] testified he was "certain" those were the three exercises Mr. [redacted] was asked to perform and that he specifically remembered giving the instructions for each exercise.

However, on cross-examination, Trooper [redacted] also testified that following the arrest of Mr. [redacted], he completed a DUI Report form which included, among other things, fill-in-the-blank areas to record how the suspect performed on the exercises which were given. Although he had testified repeatedly, under oath, that he was "certain" he administered the Finger Dexterity exercise to Mr. [redacted], when confronted with the DUI Report he filled out in this case, Trooper [redacted] had no choice but to acknowledge that his testimony regarding the Finger Dexterity exercise was contradicted by his DUI Report. Trooper [redacted] DUI Report made no mention of Mr. [redacted] being asked to perform the Finger Dexterity exercise, or his inability to do so correctly. Although seemingly caught off guard by the inconsistency, Trooper [redacted] stood by his testimony - insisting his DUI Report was wrong and that he was "certain" the Finger Dexterity exercise was one of the ***three*** exercises Mr. [redacted] was asked to perform. Trooper [redacted] offered no explanation to the Court as to why he would not have completed the section on the DUI Report relating to the Finger Dexterity exercise if he had actually asked Mr. [redacted] to perform that exercise.

Maybe Trooper [redacted] asked Mr. [redacted] to perform the Finger Dexterity exercise and then for no apparent reason, failed to fill out that section of the DUI Report. Maybe the DUI Report Trooper [redacted] filled out on the day in question is correct and despite Trooper [redacted] adamant and repeated testimony about being "certain" he asked Mr. [redacted] to perform this exercise, he is simply wrong. It seems safe to say we don't know what happened on the day in question. What we do know is that Trooper [redacted] sworn testimony regarding something about which he repeatedly claimed to be "certain" is inconsistent with, and contradicted by, his own DUI Report.

<u>Trooper [redacted] Inconsistent and Contradictory Testimony Regarding the Alphabet Backwards Exercise: "My DUI Report is Correct"</u>

Trooper [redacted] testified he was "certain" the ***three*** exercises he asked Mr. [redacted]

to perform were the WAT, the OLS and the Finger Dexterity, and he specifically remembered giving the instructions for each. When confronted with the fact that his DUI Report didn't include any reference to the Finger Dexterity exercise being given, Trooper [redacted] maintained he was "certain" it was one of the ***three*** exercises he administered.

However, when again confronted with his very own DUI Report for this case, Trooper [redacted] was again forced to acknowledge that his testimony was contradicted by his DUI Report. In addition to making no mention of the Finger Dexterity exercise being administered (something Trooper [redacted] testified he was "certain" he did), Trooper [redacted] DUI Report indicated he asked Mr. [redacted] to recite the Alphabet backwards (something Trooper [redacted] did not mention when offering his crystal clear testimony about the exercises he was "certain" he asked Mr. [redacted] to perform). Having no way to reconcile his unwavering testimony that he only gave ***three*** exercises with his DUI Report which indicated he administered an Alphabet exercise, Trooper [redacted] stated his DUI Report was correct on this issue and that he did also administer the Alphabet exercise.

At this point, Trooper [redacted] testimony was inconsistent with, and contradicted by, both his DUI Report *and* his own testimony that he had give only ***three*** exercises. Again, Trooper [redacted] offered no explanation regarding how to reconcile the inconsistencies and contradictions between his DUI Report and his testimony.

Maybe Mr. [redacted] was asked to perform the Alphabet exercise and Trooper [redacted] was wrong when he repeatedly testified he was "certain" the ***three*** exercises he asked Mr. [redacted] to perform were the WAT, the OLS and the Finger Dexterity. Maybe Mr. [redacted] wasn't asked to perform the Alphabet exercise and Trooper [redacted] was wrong when he filled out the section of the DUI Report relating to the Alphabet exercise. Again, it seems safe to say we don't know what happened on the day in question. What we do know is that Trooper [redacted] sworn testimony regarding something about which he repeatedly claimed to be "certain" was again inconsistent with, and contradicted by, both the DUI Report he filled out and his own testimony.

Trooper [redacted] Falsely Certified
That Mr. [redacted] Refused to Submit to Breath Testing

Virginia law contains what is often referred to as an Implied Consent provision which essentially states that by driving on a highway in Virginia one impliedly consents to submit to blood or breath testing if arrested for DUI within three hours of driving. If a person refuses to submit to testing that person is charged with the separate offense of Unreasonably Refusing to Submit to Breath or Blood Testing. Procedurally, when someone initially refuses to submit to testing, Virginia law requires the person be read a form which explains the consequences of refusing to submit to testing. If the person again refuses to submit to testing, Virginia law requires the officer to fill out the form certifying that the form was read and the person refused to submit to testing. The officer must then appear before a magistrate and acknowledge, under oath, that the Implied Consent form was read to the subject.

In the case before the Court, Mr. [redacted] agreed to submit to breath testing and a result was obtained by Trooper [redacted] However, for reasons which remain a mystery, Trooper [redacted] filled out the form, falsely certifying that he had advised Mr. [redacted] of Virginia's Implied Consent law and that Mr. [redacted] refused to submit to testing. When confronted with this document, Trooper [redacted] had no choice but to admit he was wrong. Disturbingly, Trooper [redacted] offered absolutely no explanation as to why he would have filled out a form certifying that he read the form to Mr. [redacted] and Mr. [redacted] refused to submit to testing, when in fact, that never occurred.

Trooper [redacted] Failed to Correctly Fill Out the Section of the Administrative License Suspension Form Indicating the Length of the Suspension

Virginia law contains an Administrative License Suspension provision which applies in various types of cases. In a DUI case, the suspension is triggered by an arrest coupled with either a qualifying breath test or a charge of Refusal. The arresting officer is to complete a fill-in-the-blank form giving notice to the accused that his/her license/privilege to drive in Virginia is suspended. At the top of that form there are spaces to put information identifying the accused, and below that, there are various boxes to check which indicate, inter alia, the length of the suspension for the particular case. In a DUI case, the officer would check a box indicating a 7-day

suspension, a 60-day suspension, or a suspension lasting until trial.

In the case before the Court, Trooper [redacted] failed to check any of the boxes regarding the length of the suspension. As with the other inconsistencies and mistakes, Trooper [redacted] offered no explanation as to why he would have failed to correctly complete that portion of the Administrative License Suspension form.

Trooper [redacted] Failed to Correctly Fill Out the Section of the Administrative License Suspension Form Indicating the Basis of the Suspension

When completing the Administrative License Suspension form, in addition to checking a box to indicate the *length* of the suspension for that particular case, officers are also required to check a box indicating the *basis* for the suspension for that particular case.

In the case before the Court, in addition to failing to indicate the length of the suspension for Mr. [redacted], Trooper [redacted] also failed to check any of the boxes regarding the basis of the suspension. Again, Trooper [redacted] offered no explanation as to why he would have failed to correctly complete that portion of the Administrative License Suspension form.

Trooper [redacted] Incorrectly Noted the Time of the Administrative License Suspension as 5:12 a.m.

At the bottom of the Administrative License Suspension form, there are blanks for the officer to sign and indicate the time of day.

In the case before the Court, in addition to failing to check the appropriate boxes to indicate both the length of the suspension and the basis for the suspension, Trooper [redacted] also incorrectly noted the time of day as 5:12 a.m. As the Court recalls, 5:12 a.m. was the time Trooper [redacted] initially observed the vehicle stopped in the middle of the road. Typically, at least an hour passes between an arrest and a breath test, and the form in question would have been completed after the breath test result was obtained. Again, Trooper [redacted] offered no explanation as to why he would have incorrectly noted the time as 5:12 a.m., when it was likely closer to 6:30 a.m.

Why did Trooper [redacted] fill out a form certifying Mr. [redacted] had refused to submit

to testing when that never occurred? Why did Trooper [redacted] fail to check a box indicating the length of the Administrative License Suspension? Why did Trooper [redacted] fail to check a box indicating the basis of the Administrative Licence Suspension? Why did Trooper [redacted] incorrectly note the time when he signed the Administrative License Suspension form? We don't know because no explanations were offered. We only know that in addition to giving inconsistent and contradictory testimony, Trooper [redacted] made several unexplained errors in his paperwork related to this case.

Ambiguous Evidence Regarding Trooper [redacted] Observations,
The Internally Inconsistent and Contradictory Testimony From Trooper [redacted]
Regarding Dexterity and Coordination Exercises,
and the Multiple Unexplained Mistakes by Trooper [redacted]
Amount to A Reasonable Doubt Requiring A Verdict of Not Guilty

Trooper [redacted] was the Commonwealth's only witness at trial, so the Commonwealth's case rests entirely upon Trooper [redacted] testimony. Therefore, the Court must examine Trooper [redacted] testimony as a whole to see whether the Court can determine factually what Trooper [redacted] says happened on the day in question, and then the Court must decide how much confidence the Court has in the accuracy and reliability of that testimony. In order to find Mr. [redacted] guilty, the Court must find Trooper [redacted] testimony both factually accurate and legally persuasive to the exclusion of all reasonable hypotheses consistent with innocence. I submit that the Court cannot even begin to evaluate the weight of the evidence in an attempt to decide whether it rises to the level of proof beyond a reasonable doubt, because Trooper [redacted] factual testimony regarding what happened on the day in question was replete with inconsistencies and contradictions, making it impossible to know what actually took place.

Mr. [redacted] vehicle was disabled and stranded in the middle of the road. It was 5:12 a.m. and Mr. [redacted] understandably appeared to be tired. There was no testimony regarding any inquiry into when he last slept, for how long, etc. to help the Court assess the degree to which fatigue was responsible for Mr. [redacted] exhaustion. Mr. [redacted] acknowledged having drinks earlier, but that is in no way probative of his condition at the time he was interacting with Trooper [redacted] There was an odor of alcohol coming from the vehicle but there was no testimony regarding any attempt to connect the odor to Mr. [redacted] There was a passenger in the vehicle and there was

no testimony that the odor followed Mr. [redacted] and continued to be detectable on him after he exited the vehicle. In the absence of such testimony, the Court should conclude that there was no such odor on Mr. [redacted] Trooper [redacted] testified Mr. [redacted] eyes appeared red and glassy, but it was after 5:00 a.m., and again, there was no testimony about any attempt by Trooper [redacted] to exclude the numerous innocent causes and isolate alcohol as the cause. No photographic evidence was presented to enable the Court to independently assess the condition of Mr. [redacted] eyes. There was not even any testimony regarding whether Mr. [redacted] eyes looked different during the trial than at the time of the arrest. All of this circumstantial evidence is ambiguous and consistent with innocence. Therefore, the Commonwealth has failed to exclude reasonable hypotheses consistent with Mr. [redacted] innocence, as required in circumstantial evidence cases.

Following this ambiguous testimony, Trooper [redacted] gave detailed and precise testimony about the three specific exercises Mr. [redacted] was asked to perform. Trooper [redacted] even told the Court he specifically remembered giving the instructions for each exercise to Mr. [redacted] - an obvious attempt to show the Court how clear his recollection of the day in question was. However, the true level of clarity of Trooper [redacted] recollection was quickly exposed when he gave curiously vague testimony that he couldn't remember any details concerning Mr. [redacted] performance on any of the three exercises.

Interestingly, on the heels of testimony that he has absolutely no memory of how Mr. [redacted] performed on any of the three exercises, in what seemed like a desperate attempt to salvage the case, Trooper [redacted] offered the baseless and unsubstantiated testimony that he was "certain" Mr. [redacted] failed to perform all three exercises correctly. If Trooper [redacted] doesn't remember how Mr. [redacted] performed on any of the exercises, how could he know that Mr. [redacted] failed to perform them correctly? Interestingly, Trooper [redacted] had the DUI Report he filled out on the day of the arrest with him while he was testifying, and presumably his DUI Report included how Mr. [redacted] performed on each exercise he was asked to perform. Trooper [redacted] could have referred to his DUI Report to refresh his recollection regarding how Mr. [redacted] performed on each exercise and then shared that information with the Court. However, for reasons which we will never know, Trooper [redacted] did not to do so, leaving the Commonwealth to rely upon the blanket, vague and unsubstantiated assertion that Mr. [redacted] failed to perform all exercises correctly.

In addition to the vague and unsubstantiated testimony regarding Mr. [redacted] poor performance as a whole, the lack of clarity of the events in question was further exposed by Trooper [redacted] inconsistent and contradictory testimony regarding the specific exercises administered.

Trooper [redacted] testified he was "certain" the three exercises he asked Mr. [redacted] to perform were the Walk and Turn (WAT), the One Leg Stand (OLS) and the Finger Dexterity. However, the DUI Report form which Trooper [redacted] completed following the arrest, made no mention of the Finger Dexterity exercise ever being administered. Trooper [redacted] offered no explanation as to why he would have failed to include results for the Finger Dexterity exercise in the DUI Report if he asked Mr. [redacted] to perform it. Nevertheless Trooper [redacted] stuck with his story, insisted the DUI Report was wrong, and said he was "certain" the Finger Dexterity was one of the ***three*** exercises he administered to Mr. [redacted]

Trooper [redacted] lack of memory of the events in question continued to be revealed by his testimony - or lack thereof - regarding the Alphabet exercise. After initially testifying he was "certain" the ***three*** exercises he asked Mr. [redacted] to perform were the WAT, the OLS and the Finger Dexterity, and after being forced to acknowledge his DUI Report made no mention of the Finger Dexterity exercise being given, and after steadfastly maintaining he was "certain" those were the ***three*** exercises he had given, when confronted with his DUI Report Trooper [redacted] again had to acknowledge his testimony was inconsistent with, and contradicted by, his DUI Report. Trooper [redacted] DUI Report indicated he asked Mr. [redacted] to recite the Alphabet backwards - an exercise Trooper [redacted] did not include in his razor sharp testimony regarding the ***three*** exercises he was "certain" he administered.

Interestingly, unlike the discrepancy regarding Finger Dexterity exercise where Trooper [redacted] said the DUI Report was wrong, with the discrepancy regarding the Alphabet exercise Trooper [redacted] said the DUI Report was correct. Of course, if the DUI Report was correct about the Alphabet exercise, it means Trooper [redacted] was wrong when he repeatedly testified about being "certain" the WAT, the OLS and the Finger Dexterity were the three exercises he administered.

Maybe Mr. [redacted] was asked to perform the Finger Dexterity exercise and for some mysterious reason Trooper [redacted] failed to complete that portion of the DUI Report. Or maybe the DUI Report is correct on this issue and Trooper [redacted] was wrong

when he testified he was "certain" he administered the Finger Dexterity exercise.

Despite a contradictory DUI Report indicating Trooper [redacted] asked Mr. [redacted] to recite the Alphabet backwards, maybe Trooper [redacted] was correct when he repeatedly testified he was "certain" he only administered the WAT, the OLS and the Finger Dexterity exercises. Maybe Trooper [redacted] for unknown reasons, completed the section of the DUI Report relating to the Alphabet exercise even though that exercise was never administered. Or maybe the DUI Report is correct and Trooper [redacted] was wrong when he repeatedly testified he was "certain" he only administered the WAT, the OLS and the Finger Dexterity exercises.

It is safe to say we cannot know what happened on the day in question. Trooper [redacted] testimony regarding dexterity and coordination exercises was inconsistent and contradicted by both his DUI Report and other parts of his own testimony. Due to those inconsistencies and contradictions in Trooper [redacted] testimony, *we don't know how many exercises* Trooper [redacted] asked Mr. [redacted] to perform, and *we don't know which exercises* Trooper [redacted] asked Mr. [redacted] to perform. And because Trooper [redacted] chose not to use his DUI Report to refresh his recollection regarding Mr. [redacted] performance and then share those details with the Court, instead opting to stick with the vague and unsubstantiated blanket assertion that although he couldn't remember any details, he was somehow certain Mr. [redacted] couldn't perform any of the exercises correctly, *we don't know how Mr. [redacted] performed* on any of the exercises.

In addition to his inconsistent and contradictory testimony, Trooper [redacted] also made numerous mistakes with the paperwork associated with this case. Perhaps most disturbing is the fact that Trooper [redacted] completed a form falsely certifying that Mr. [redacted] refused to submit to breath testing. Trooper [redacted] also failed to complete the portions of the Administrative License Suspension form relating to both the *length* of the suspension and the *basis* for the suspension. Trooper [redacted] also incorrectly noted the time on the Administrative License Suspension as 5:12 a.m. As with the inconsistencies and contradictions in his testimony, Trooper [redacted] offered no reason or explanation for any of these mistakes.

We don't know what exercises Trooper [redacted] did or didn't administer, and we don't know how Mr. [redacted] performed. What we do know is that Trooper [redacted] testimony regarding things about which he claimed to be "certain" was inconsistent

with, and contradicted by, other parts of his own testimony during the trial, as well as by the DUI Report he filled out on the day in question. The Court cannot disregard the parts of Trooper [redacted] testimony which were exposed as being inconsistent and contradictory, and accept with full confidence whatever is left. If this sort of vague, evasive, inconsistent and contradictory testimony were offered by a non-officer citizen witness, I submit the Court would not hesitate to dismiss it, and Trooper [redacted] should be held to the same standard. Maybe Trooper [redacted] had the details of Mr. [redacted] case confused with another case when he filled out his DUI Report. Maybe Trooper [redacted] had the details of Mr. [redacted] case confused with another case when he was testifying. Maybe Trooper [redacted] was tired when he filled out the paperwork in this case and that contributed to his cognitive deficiencies. We cannot know why Trooper [redacted] testimony was inconsistent and contradictory - we just know it was. And we can't know why Trooper [redacted] made the numerous unexplained mistakes he made - we just know he did.

In light of the above-referenced vagaries, inconsistencies, contradictions and unexplained mistakes, the Court cannot have sufficient confidence in the accuracy and reliability of the evidence before it to find it rises to the level of proof beyond a reasonable doubt, and the Court should enter a verdict of not guilty.

Respectfully submitted,

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