STATE OF MICHIGAN
IN THE MICHIGAN SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee.

v.

ALTON FONTENOT, JR.,

Defendant-Appellant.

MSC No. 162211
COA No. 350391
Circuit Case No. 2019-175232-AR

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***AMICUS CURIAE* BRIEF**

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[1] It should be noted that this is not the Evidential Breath Test Log from the case at bar, but taken from another recent case wherein Mr. Geir signed off as the technician performing the calibration tests.

INTRODUCTION[2]

The Court of Appeals placed heavy reliance upon *People v Nunley,* 491 Mich 686 (2012). However, the majority opinion failed to see the distinguishing aspects of this case, which are quite voluminous.

Furthermore, it should be noted that a case dealing with these specific issues are of great public significance, given the recent conviction of David John, which involves falsification of the exact same documents which are sought to be admitted through the testimony of the individual performing the testing and verification of the Datamaster. It should also be pointed out and emphasized that the Michigan State Police Department has admitted that David John did in fact falsify these documents.

Also notable is that the information regarding falsifying 120-day calibration documents likely would have been revealed sooner had these records not been admitted under the business records exception, thus, requiring the individual performing these calibrations to testify in court. Additionally, the individual, Geir, performing the calibration of the specific machine in question, has previously testified that he used an expired test kit on a prior occasion.[3]

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[2] Attorney Alyssa McCormick authored this brief in full, while Attorneys Michael Komorn and David Rudoi authored this brief in part. Attorney David Rudoi made a monetary contribution to the submission in the brief in the form of paying filing costs with the Michigan Supreme Court efiling services. No further monetary contribution was made. (MCR 7.212(H)(3))

[3] *People v Fontenot,* ___ Mich App ___; ___ NW 2d ___ (2020) (Docket No. 350391).

Furthermore, this issue is of great public importance as 30,896 individuals in the State of Michigan were arrested for OWI 2019.[4] A number of these could potentially be overturned given the recent convictions concerning falsifying records in relation to the 120 calibrations as well as the evidentiary breath testing logs. Further, by allowing the 120-day logs to be admitted under the business records exception, thus allowing the keeper of records to testify, rather than the individual performing the verifications on the machine, this could possibly lead to the conviction of innocent individuals due to falsifying of records, or calibration tests not being performed properly. As discussed more *infra,* these verifying procedures are very in depth and have the potential to result in inaccurate results if the processes are not properly performed.

Moreover, prior to the Court of Appeals Opinion in this case, there was no case law that addresses this specific issue- whether the 120-day certifications are testimonial in nature and whether they fall under the business records exception to hearsay. Thus, this Honorable Court's input and direction is absolutely necessary to resolve this issue.

I. CONFRONTATION CLAUSE AND TESTIMONIAL EVIDENCE IN GENERAL

The Confrontation Clause of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right… to be confronted with the witnesses against him…"[5] The Michigan Constitution mirrors this right. The

[4] https://www.michigan.gov/documents/msp/2019_Drunk_Driving_Audit_FINAL_APPROVED_6-29-20_695564_7.pdf

[5] US Const, Am VI

Confrontation Clause is "primarily a functional right" in which the right to confront and cross-examine a witness is aimed at truth-seeking and promoting the reliability in criminal trials.[6] The specific protections the Confrontation Clause provides apply "only to statements used as substantive evidence." *Id.* In particular, one of the core protections of the Confrontation Clause concerns hearsay evidence that is "testimonial" in nature.[7] The United States Supreme Court has held that the introduction of out-of-court testimonial statements violates the Confrontation Clause; thus, out-of-court testimonial statements are inadmissible unless the declarant appears at trial or the defendant has had a previous opportunity to cross-examine the declarant. *Id.* at 53-54. Addressing what constitutes a testimonial statement, the United States Supreme Court explained in *Crawford* that "testimony" is a "solemn declaration or affirmation made for the purpose of establishing or proving some fact."

A. THE DATAMASTER LOGS ARE TESTIMONIAL IN NATURE, THUS INVOKE THE CONFRONTATION CLAUSE

In *Nunley,* the Court held that the Michigan Department of State (DOS) certificate of mailing were not testimonial, stating:

> because the circumstances under which it is generated would not lead an objective witness reasonably to believe that the statement would be available for use at a later trial. Instead, the circumstances reflect that the creation of a certificate of mailing, which is necessarily generated *before* the commission of any crime, is a function of the legislatively authorized administrative role of the DOS independent from any investigatory or prosecutorial purpose. Therefore, the DOS certification of mailing may be

[6] *People v Fackelman,* 489 Mich 515; 802 NW 2d 552 (2011)
[7] *Crawford v Washington,* 541 US 36, 61, 124 S Ct. 1354, 158 L Ed 2d 177 (2004).

admitted into evidence absent accompanying witness testimony without violating the Confrontation Clause.

In this case, the individual signing off on the logs would reasonably believe that the logs would be available for use at a later trial as the logs are specifically used by the prosecution to establish the essential element that the Defendant was in fact operating a motor vehicle with a BAC greater than or equal to .08. This is done through the evidentiary breath testing logs which are used to confirm the120-day calibration and maintenance evidencing that the machine is in proper working order and producing accurate results to show the judge that the test is admissible and the jury that the test is reliable to support the State's theory.

Furthermore, the individual would reasonably believe this as they are attesting that they serviced, inspected and checked the machine and that it is in proper working order, rather than doing a minuscule job such as creating a proof of service once a week. Rather, they are taking several steps to verify and test this machine, which takes specific and specialized training. Moreover, as distinguishable from *Nunley,* the purpose behind servicing the machine is not independent from any investigatory or prosecutorial purpose. Although the ***alleged*** purpose behind maintaining these logs would seem to be to comply with the "administrative rules," the true purpose is to ensure the reliability and the ability to have the Datamaster results admitted into evidence in order to secure a conviction of a Defendant. Furthermore, the sole purpose behind the Police Department is to serve, protect, and enforce the rules and regulations of this state, and

to assist in the prosecution of those who violate said laws. To say that the purpose of maintaining these logs is to comply with "administrative rules" is ludicrous.

A reading of the administrative rules with respect to the administration of Breathalyzer tests ***indicate that their purpose*** is to ***ensure the accuracy*** of those test. *People v Willis.*[8] (Emphasis added).

In *Nunley,* the Court in part relied upon the fact that the notice of mailing for a suspended license was a "routine, objective cataloging of an unambiguous factual matter, documenting that the DOS has undertaken its statutorily authorized bureaucratic responsibilities." *Id.* at 707. In this case, Geir's actions are not routine and do not report an unambiguous factual matter. He is engaged in a scientific method in performing these tests and calibrations on these machines. Furthermore, these tests and calibrations require a specific and specialized training to ensure that the test and calibration are done properly and correctly to ensure that the test results are accurate and reliable, and thus able to be admitted into evidence to support the State's assertion that the accused was operating with a BAC greater than or equal to .08. The steps taken by Geir are more analytical and involved more than a proof of service which is automatically generated.

In *Nunley,* the Court stated, "at the time the certificate was created, there was no expectation that defendant would violate the law by driving with a revoked driver's

[8] 180 Mich 31, 35, 446 NW 2d 562 (1989).

license and therefore no indication that a later trial would even occur. Thus, the Court of Appeals majority wrongly assumed that 'the certificate of mailing is testimonial because it will be used for the purpose of proving or establishing some fact at trial.'" This cannot be said in the case at bar. When the certificates in this case were created there was a reasonable expectation that an individual at some point in time would be accused with OWI based on the results of that data master machine and that this information would be necessary in trial. Moreover, in light of the recent Datamaster scandals in the State of Michigan, as well as Geir's previous testimony that he used an expired kit in another case, it was reasonable that his testimony is needed at trial. Additionally, these logs, or certificates, are generally turned over at the time of discovery, therefore it is reasonable that they would be used at a later trial. Furthermore, the steps taken to ensure that this machine is properly working entails more than a proof of service that is created. Therefore, it is a reasonable expectation that an individual would challenge the reliability of this test.

The Datamaster logs, and the Defendant's confrontation of the witness that performs these 120-day calibrations, is specifically aimed at "truth-seeking and promoting reliability" in his criminal trial. Not only has the individual performing these maintenances testified previously that he performed these tests with expired tests kits, but there recently have been a major concern in the State of Michigan as to whether the tests have actually been performed at all. Furthermore, these logs are aimed at reliability

in that they were properly calibrated and in correct working order at the time the test was performed, which goes directly towards an ***essential*** element of the alleged crime. To say that the calibrations and logs are not testimonial in nature is to say that any scientific or specialized knowledge is not subject to cross-examination.

Furthermore, these logs are testimonial in that the individual performing the calibration is ***declaring and affirming*** that the machine is in proper working order in order to establish ***the fact*** that the results in any given case are in fact accurate and admissible.

US Legal defines "substantive evidence" as evidence offered to support a fact in issue, as opposed to impeachment or corroborating evidence. In this case, the fact in issue would be whether the Defendant was operating a motor vehicle with a BAC equal to or greater than .08. Therefore, not only would the physical Datamaster result performed on the Defendant be substantive evidence to support the People's position, but the fact that the machine was properly calibrated and in proper working order is also required foundation needed to admit the evidence to support the assertion that the result was reliable and thus, accurate.

In *Nunley,* when addressing the issues of *Melendez-Diaz*[9], the Court stated:

> In *Melendez-Diaz*, the United States Supreme Court considered whether "certificates of analysis" were testimonial when they reported the results of a forensic analysis showing that the material seized and connected to the defendant was cocaine. The Court characterized the certificates as "quite

[9] *Melendez-Diaz v Massachusetts,* 557 US 305; 129 S Ct 2527; 174 L Ed 2d 314 (2009).

> plainly affidavits," which fall within the core class of testimonial statements and are defined as "declaration[s] of facts written down and sworn to by the declarant before an officer authorized to administer oaths" and "are incontrovertibly a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Given that the fact at issue was whether the substance found in the defendant's possession was, as the prosecution claimed, cocaine, then this was the testimony that the analysts would have expected to provide if called as witnesses at trial. The certificates were thus "functionally identical to live, in-court testimony, doing 'precisely what a witness does on direct examination.'"
>
> In addition, the Court reasoned that the certificates were "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial," given that "under Massachusetts law the *sole purpose* of the [certificates] was to provide prima facie evidence of the composition, quality, and the net weight of the analyzed substance."

When applied to the case at bar, the 120-day check stamp states: "**I HAVE INSPECTED, SERVICED, AND CHECKED THIS INSTRUMENT FOR ACCURACY AND CERTIFY THAT IT'S IN PROPER WORKING ORDER.**"[10] (Emphasis added). It is understood that these logs are done for two purposes; establishing the fact that the results of the Datatmaster are correct and reliable, as the person servicing the machine has undertaken the proper steps to calibrate the machine and have done them correctly; and for the purpose of satisfying the statutory requirements. However, the purpose behind this statutory requirement is to establish that the proper steps have been taken to calibrate the machine to ensure its reliability to avoid conviction of individuals who

[10] See Exhibit A.

are in fact innocent of the alleged crime. Therefore, this is arguably equivalent to a certificate or affidavit.

Further, the acts of signing and placing the stamp on the logs are done under circumstances that would lead an objective witness to believe that the statement would be used at trial, as it is reasonable the accused would seek to challenge the reliability of the test and that it was calibrated correctly. Additionally, the individual is aware the certificates were used to provide prima facie evidence of the quality and reliability of the results that are produced, as these results are used, just as a certificate of analysis, is used to satisfy a critical element to the crime alleged, in this case, operating a vehicle with a BAC greater than or equal to .08. Moreover, the 120-day certificates are functionally identical to the live, in-court testimony, doing precisely what a witness does on direct examination. Namely, that the test and calibration was done, and it was done properly to ensure the machines results are reliable.

In *Nunley,* the Court, when discussing *Melendez-Diaz,* continued, stating:

> Further, the analysts were aware of the [certificates] evidentiary purpose, since that purpose- as stated in the relevant state-law provision- was reprinted on the [certificates] themselves. (Internal citations omitted).

Mich Admin Code R 325.2653(3) states:

> Approved evidential breath alcohol test instruments shall be inspected, verified for accuracy, and certified as to their proper working order within 120 days of the previous inspection by either an appropriate class operator who has been certified in accordance with R 325.2658 or a manufacturer-trained representative approved by the department.

Therefore, Geir is aware of the evidentiary purpose of the certification as the Mich Admin Code R 325.2653(3) states the relevant state law provision, which is almost identical to the stamp Geir places, and signs on the 120-day Datamaster certifications.

R 325.2654(2) states:

> (2) After repair or service and before being placed in service, evidential and preliminary breath alcohol test instruments shall be verified for accuracy in accordance with the provisions of R 325.2653 and records of verification shall be kept as required by the department.

A full reading of R 325.2653 provides the processes and approved controlled devises that are authorized to be used. Therefore, reading together, these rules suggest that the logs or certifications are required to be kept for the purposes of verifying the results of the machine and verifying that it is in proper working condition, not the alleged sole purpose of conforming with administrative rules.

Furthermore, the use of the word "***evidential***" seems to suggest that these instruments and results are to be used for evidence purpose, therefore are testimonial in nature. Additionally, these 120-days logs are titled "Evidential Breath Testing Accuracy Check Log."[11] Therefore, supporting the assertion that these verifications are not done in the normal court of business, but for preparing evidence for trial to show the test is accurate and in proper working order.

[11] See Exhibit A Evidential Breath Testing Accuracy Check Log.

In *Bullcoming v New Mexico*[12], The United States Supreme Court considered whether "the Confrontation Clause permits the prosecution to introduce a forensic laboratory report containing a testimonial certification—made for the purpose of proving a particular fact—through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification." The Court rejected the argument that the testimony of a "surrogate" expert was a constitutionally permissible substitute for the testimony of the analyst who had actually conducted the test, as discussed more below. It should be noted, however, it regular practice in OWI trials wherein the keeper of the records testifies to have the verification logs admitted into evidence.

In *Williams v Illinois*[13], the United State Supreme Court addressed whether portions of the expert testimony from a forensic specialist violated the defendant's right of confrontation. Specifically, the expert testified that a DNA profile produced by an outside lab using semen from vaginal swabs from the victim matched a DNA profile produced by the state police lab using a sample of the defendant's blood. The defendant argued that any testimony from the expert implicating what had taken place at the outside lab violated the Confrontation Clause. The lead opinion concluded that the expert's testimony concerning the outside lab did not run afoul of the Confrontation Clause for two reasons. First, the outside statements were related by the expert only for

[12] *Bullcoming v New Mexico,* 564 US __; 131 S Ct 2705; 180 L Ed 2d 610 (2011).
[13] 567 US __;132 S Ct 2221; __ L Ed 2d __ (2012).

the purpose of explaining the assumptions on which the expert's opinion relied; and not offered for the truth of the matter asserted. Second, even if the report that the outside lab produced had been admitted, it was not a testimonial document. As to the second reason, the lead opinion emphasized that the report was not prepared for the primary purpose of accusing a targeted individual. The dissenting opinion concluded that the out-of-court statements were testimonial under *Melendez-Diaz* and *Bullcoming,* noting that although it is relevant to inquire whether the primary purpose was to establish "past events potentially relevant to later criminal prosecution," *Crawford* and its progeny do not suggest that "the statement must be meant to accuse a previously identified individual." (Internal citations omitted).

In this case, the State is attempting to offer the testimony of the keeper of the logs to testify and admit the certifications into evidence. However, this individual has no personal knowledge as to the steps taken to ensure the reliability of these results and was not present when these tests were performed. Therefore, pursuant to MRE 603, this witness lacks personal knowledge to confirm that these tests were not only done but done correctly. Further, pursuant to MRE 402, this individual's testimony is irrelevant to the case at hand. From information and belief, the State has made no offer of proof that this testimony will be relevant or that it will assist the trier of fact in determining whether the Datamaster calibration was done properly to ensure the reliability of the results. Therefore, this "surrogate" witness cannot testify to admit these documents.

Furthermore, these certificates are being offered for the truth of the matter asserted, that being that the calibration and tests were done and done properly, and that the machine is producing accurate results, therefore, to support the assertion that the results are correct and reliable. Additionally, although the certificates were not prepared for "the primary purpose of accusing a targeted individual," they were prepared for the primary purpose of accusing a targeted ***group*** of individuals, those being individuals accused of operating with a BAC greater than or equal to .08. Lastly, the primary purpose of the statement is to establish past events potentially relevant to a later criminal prosecution, namely the past event that the Datamaster machine was working properly and producing results that are accurate to be used at an accused's later prosecution, which is relevant to support the conviction.

II. STEPS TAKEN DURING THE 120-DAY CALIBRATION CHECK

The 120-day calibration check entails a technician using a water-based alcohol simulator in the attempt to replicate the human process of delivering an acceptable breath sample. The theory of replicating this process relies on "Henry's Law." It is assumed that every subject who delivers a sample of breath from the deep lung region will deliver breath sample that closely represents the subject's blood alcohol levels.

There are four primary assumptions involved in the measurement of a breath sample by an infrared device for the ***presence of and amount of alcohol***.

One crucial assumption is that the temperature of a subject sample will be consistent at 93.2 degrees Fahrenheit (34 degrees centigrade). This is a highly sensitive part of the 120-day calibration procedure but is also of grave importance for an accurate assessment of the instrument's calibration.

During the calibration procedure, a technician, with an amount of training that is necessary to understand the steps involved, uses a pre-mixed, water-based solution, also known as a "wet bath," with ethyl-alcohol (beverage alcohol) at a known concentration. The technician then heats the simulator to replicate the temperature of human breath (93.2-degree Fahrenheit), and introducing the sample into the instrument.

Further, the technician is required to check the instrument's accuracy at various points, 04; .08; and .20, which are along the instruments range of use. Additionally, the technician uses a device in an attempt to introduce radio frequency, that mimics a cellphone's signal. The technician then initiates the instrument's process to analyze and report its Direct Current ("DC") output, followed by programing the instrument to check its "calibration factors." This practice can only assess the instrument's bias and cannot prevent or minimize the uncertainty in the result produced by a subject sample from human factors or errors during the application of the test.

Each of these procedures are critical to the accuracy of the results. If a technician slightly strays from one of the requirements, the results will be skewed and inaccurate. For example, during the process of replicating the human breath temperature, if the

technician heats it one centigrade higher or lower than required, the result will have an 8% error rate. This number drastically grows the further the sample temperature is from the requirement.

III. THE DATAMASTER LOGS DO NOT FALL UNDER MRE 803(6)

MRE 806(3) states:

> A memorandum, report, record, or data compilation, in any form, of acts, transactions, occurrences, events, conditions, opinions, or diagnosis, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or date compilation, all as shown by the testimony of the custodian or other qualified witness, or by certification that complies with a rule promulgated by the supreme court or statute permitting certification, ***unless the source of information*** or the method of circumstances of preparation indicate ***lack of trustworthiness***. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. (Emphasis added).

"The business records exception is based on the inherent trustworthiness of business records. But the trustworthiness is undermined and can no longer be presumed when the records are prepared in anticipation of litigation." *People v Jambor.*[14] "Even though proffered evidence may meet the literal requirements of [MRE 803(6)], however, the presumption of trustworthiness is rebutted where 'the source of information or the method or circumstances of preparation indicate lack of trustworthiness."' *People v Shuell.*[15]

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[14] *People v Jambor (On remand),* 273 Mich App 447, 482; 729 NW 2d 569 (2007).
[15] *People v Shuell,* 435 Mich 104; 457 NW 2d 669 (1990).

The purpose of the administrative rules pertaining to blood alcohol level breath tests is to ensure that the tests are accurate, and failure to comply with the rules therefore renders the accuracy of those questionable. *People v Boughner.*[16] The United States Supreme Court has indicated that the business record exception is inapplicable "if the regularly conducted business activity is the production of evidence for use at trial" or "calculated for use essentially in the court, not in the business." *Melendez-Diaz,* 557 US at 321-322. Importantly, "the reliability of the testing device" remains a prerequisite of breath tests. *People v Kozar.*[17]

Statements made by third parties in an otherwise admissible business record cannot properly be admitted for their truth unless they can be shown independently to fall within a recognized hearsay exception. *Woods v City of Chicago.*[18] The fact that a third-party hearsay is contained in an otherwise-admissible business record does not cleanse it of the "untrustworthy" hearsay taint. *State v Reynolds.*[19]

In this case, Geir has previously testified that he used an expired kit while performing the 120-day calibration test. Therefore, the source of the information potentially lacks trustworthiness. Without having the technician who performing these tests appear in court to testify to the steps taken, the trier of fact will take these logs for face value and assume that these calibration techniques were done correctly.

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[16] *People v Boughner,* 209 Mich App 397, 338-339; 531 NW 2d 746 (1995).
[17] *People v Kozar,* 54 Mich App 503, 509 n 2; 221 NW 2d 170 (1974).
[18] *Woods v City of Chicago,* 234 F3d 979, 986 (CA 7, 2000).
[19] *State v Reynolds,* 746 NW 2d 837, 842-843 (Iowa, 2008).

Moreover, as previously discussed, these calibration logs are prepared in anticipation of litigation as these logs are used to support the State's position that the machine was properly calibrated and in proper working order to establish that the accused was operating a vehicle with a BAC greater than or equal to .08. Therefore, these 120-day certifications cannot reasonably fall within the business records exception.

Additionally, Geir is not an employee of the Michigan State Police. Further, his calibration certifications do not independently fall within a recognized hearsay exception. Therefore, these records do not fall within the business records exception, and therefore, Geir is required to testify for the admission of these records.

Moreover, the fact that there have been recent convictions for falsifying these documents, shows that these records cannot merely be relied upon without some sort of foundation made by the technician performing these calibration checks.

CONCLUSION AND REQUESTED RELIEF

WHEREFORE, Amicus Curiae respectfully requests that this Honorable Court grant Defendant-Appellant Fontenot's Application for Leave to Appeal; reverse the Michigan Court of Appeals decision and reinstate the prior order of the lower court regarding the foundation requirement to admit the logs.

Respectfully submitted,

Dated: December 28, 2020

/s/ Alyssa L. McCormick
Alyssa L. McCormick (P82522)

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served via efiling upon counsel for all parties to the above cause and to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on December 28, 2020.

/s/ Alyssa McCormick
Alyssa McCormick

/s/ Michael A. Komorn
Michael A. Komorn (P47970)

/s/ David A. Rudoi
David A. Rudoi (P75169)