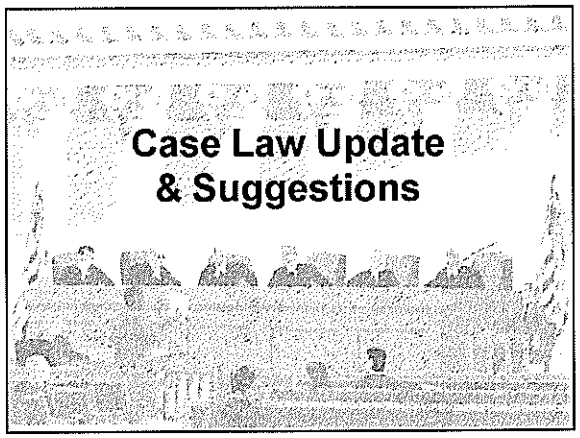
**2013 APAAC**
**Summer Conference**
DUI Legal Updates & Reminders




## Blood – Search Warrants

- General rule – need warrant to draw blood if suspect refuses.
- Exigency exception is based on totality of the circumstances.

*Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

Seeing Challenges to Medical Blood Draws & Breath Tests

## *McNeely* Medical Blood Draw Challenges

- If DOV prior to April 7, 2013 - Good Faith
  - *US v. Davis*
- The Medical Draw Itself Creates an Exigency
  - Warrant requires 2 needle punctures
  - Contamination
  - Possible interference with medical care

## Reasonableness of Search

Buccal swab search for DNA sample, after arrest for serious offense, was reasonable under 4th Amendment.

*Maryland v. King*, 133 S.Ct. 1958 (2013)

## Good Language in *King*

Example:

"buccal swab is a far more gentle process than a venipuncture to draw blood . . . requires no 'surgical intrusions beneath the skin.' . . . The fact than an intrusion is negligible is of central relevance to determining reasonableness. . . ."

*King*, 133 S.Ct. at 1969.

## Minimal Intrusion = Reasonable

"The minimal intrusion . . . from "merely [ ] sampling off of an additional portion of the defendant's blood" seems preferable to a second needle puncture . . . . *See* ***Cocio, 147 Ariz. at 286-87, 709 P.2d at 1345-46***."

*Lind v. Superior Court,*
191 Ariz. 233, 237 (App. 1998).

## Juvenile Blood Draws

- 4th Amendment requires a juvenile's consent be voluntary to allow a warrantless blood draw.
- Will impact the voluntariness & implied consent analysis for blood draws in adult DUI cases.

*State v. Butler* (*Tyler B.* RPI) 661 Ariz. Adv. Rep. 33 (2013).

## *Tyler B.* Challenges

- Distinguish your case:
  - Adults vs. Juveniles
  - Parents contacted
  - Defendant is mature, familiarity with system
  - No handcuffs, resistance etc.
  - Voluntary consent – verbal & by conduct
- Use Pelander's warning opinion "might well engender dubious involuntariness claims . . ."
- Consent can be voluntary for 4th Amend. in cases that would not be under 5th. Use this point.

## *Tyler B.* Challenges

- Summarize legal standard. Pelander example
- Remember: did not find even a juvenile blood draw under facts of *Tyler B.* was as a matter of law involuntary. Only trial court did not clearly abuse discretion.
- Challenge premise for future litigation

## Stop of Vehicle Brake Light

No violation of ARS § 28-939 for vehicle to have brake light at top rear of vehicle not working when other two are.

Officer did not have grounds for stop when didn't observe any other traffic infractions nor articulate any other basis for stop.

***State v. Fikes*, 228 Ariz. 389 (App. 2011).**

## Stop of Vehicle Tail Light

Officer who observed, vehicle with only one tail light working did not have grounds to stop for tail light statute, (§ 28-925) but did have grounds to stop for safety concerns.

***State v. Becerra*, 231 Ariz. 200 (App. 2013).**

## Stop of Vehicle

- Court may consider any observed traffic violation as basis for stop.
- Analysis is not limited to violations that were relied upon by officer who made the stop if basis is testified to in court.

*State v. Whitman*, 661 Ariz. Adv. Rep. 9 (App. 2013)

## Stop of Vehicle Reminders

- **Community Caretaking**
  - ***Becerra***
  - ***State v. Organ***, 225 Ariz. 43 (App. 2010).
  - ***State v. Mendoza-Ruiz***, 225 Ariz. 473 (App. 2010).
- **Provide ALL Reasons/Support for Stops**
  - ***Whitman***
  - **Avoid *Livingston* situations**

## Prescription Drug DUIs

- Defendant's burden to prove prescription drug defense
  - Must prove taking the drug exactly as prescribed
  - Preponderance standard

*State v. Bayardi* (*Fannin*, RPI), 230 Ariz. 195 (App. 2012).

## Carboxy THC DUIs

- Per Se Drug Statue A.R.S. § 28-1381(A)(3) applies to Carboxy THC.

*STATE v. HARRIS* (*Shilgevorkyan*, RPI), 232 Ariz. 75 (App. 2013).

## DUI Sentencing

Under A.R.S. § 13-116, fines, surcharges & assessments on one DUI count must be concurrent to those for all DUI counts if they arise out of the same act of driving (APC).

*State v. McDonagh*, 660 Ariz. Adv. Rep. 6 (App. 2013).

## DUI Sentencing

- DUI sentence in effect at time of new offense controls – even if prior conviction had different sentence.

*State v. Stefanovich*, 662 Ariz. Adv. Rep. 8 (App. 2013)

## Sentence – Ignition Interlock

- A.R.S. § 28-1382(I) – allowing suspension of 21 days jail for extreme DUI if defendant installs an interlock device, is not retroactive to cases with DOVs prior to 12/31/11.

*State v. Harris* (*Maxwell,* RPI) 232 Ariz. 33 (App. 2013).

## DUI Sentence – Home Detention

- Home detention available only if HD program has been authorized or established in county/city.
- Not eligible for home detention unless first serve at least of 20% of initial jail term.

*Scheerer v. Munger,* 230 Ariz. 137 (App. 2012).

## *Cooperman* Update

# Legislative Update

## Dangerous Drugs - Synthetics

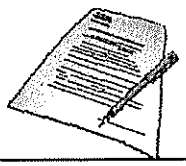
HB 2327

- Expands drug schedule to include chemical configurations typical of synthetic cannabinoids & bath salts.
- Illegal to possess or drive with in system
- NOTE: Some AZ Crime Labs cannot test for in blood/urine yet

**Effective date April 3, 2013

*Amends A.R.S. § 28-1304*

# Signed This Session



## Ignition Interlock Devices

### HB 2182

- Removes ability to be placed on continuous alcohol monitoring in lieu of ignition interlock for medical reasons.
- Prohibits from operating employer's vehicle without IID

***Effective date 9/13/2013*

*Amends A.R.S. § 28-1401; 28-11404; 28-3319*

## Sentencing

### HB 2309

Broadens victim's rights for juvenile offenses to include all misdemeanors, petty offenses & local criminal ordinances.

***Effective date 9/13/2013*

*Amends A.R.S. §§ 8-381; 13-3423; 12-16.08*

## Felony Sentencing

### HB 2309 cont.

- Lowers mitigated sentencing range for class 6 felony category one repetitive offenders from .3 to .25 years.
- Raises aggravated sentencing range for class 6 felony category one repetitive offenders from 1.8 to 2 years.
- Lowers mitigated sentencing range for class 3 felony category two repetitive offenders from 3.3 to 3.25 years.

***Effective date 9/13/2013*

*Amends A.R.S. § 13-703*

## Railroad Crossings

### HB 2373

- Prohibits driver from proceeding through RR crossing when any condition makes it unsafe.
- Specifies when a driver, who suspects false activation or malfunction of a RR crossing signal with no gate, is allowed to proceed after stopping .
- Prohibits driver from making U-turn or turning to go in opposite direction on a RR track or crossing.

***Effective date 9/13/2013*

*Amends A.R.S. § 28-851*

## Railroad Crossings

### HB 2373

Pedestrians may not:

- Enter or remain in area between RR track & railroad sign or signal if RR grade crossing is active;
- Occupy or remain on RR crossing if the RR sign or signal is not active, except to cross on a designated walkway;
- Remain in area between RR signs or signals, RR gates, or rail crossing arms if RR grade crossing is active.

***Effective date 9/13/2013*

*Amends A.R.S. § 28-851*

## Stopped School Busses - Lights

### HB 2170

- **Added requirement that school busses display stop signal & flashing lights on <u>private</u> roads when passengers enter/ leave bus.**
- **[Did not add private roads to requirement to stop for a school bus]**

***Effective date 9/13/2013*

*Amends A.R.S. § 28-857*

# Thank You

**Beth Barnes**
**Traffic Safety Resource Prosecutor**
**beth.barnes@phoenix.gov**

Michael K. Jeanes, Clerk of Court
*** Electronically Filed ***
04/04/2013 8:00 AM

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2012-000688-001 DT

04/03/2013

HONORABLE KAREN POTTS

CLERK OF THE COURT
J. Calhoon
Deputy

STATE OF ARIZONA
WILLIAM G MONTGOMERY

LISA MARIE MARTIN

v.

HIGHLAND JUSTICE COURT (001)
HONORABLE DANIEL DODGE (001)
MARGARET HYLAND (001)

JOHN W BALDRIDGE

REMAND DESK-LCA-CCC

RULING

The Court has considered the State's Petition for Special Action and Appendix thereto, Real Party in Interest Margaret Hyland's Response and Appendix thereto, the State's Reply, the State's Motion to Strike Appendix Exhibit 1 and Pages 12-14 of Hyland's Response to Petition for Special Action, Hyland's Response thereto, and the oral argument of counsel. In essence, the State seeks an order reversing the Justice Court's ruling precluding the admission of the numerical value of Real Party in Interest's blood alcohol concentration ("BAC") by retrograde extrapolation as calculated by the State's expert. In making this ruling, the Justice Court relied on its "gatekeeper" function under newly amended Ariz.R.Evid. 702.

Real Party in Interest is charged with: (1) Count 1, driving while under the influence of an intoxicating liquor and being impaired to the slightest degree, in violation of A.R.S. §28-1381(A)(1); (2) Count 2, driving with a BAC of .08 or more within two hours of being in physical control of her vehicle, in violation of A.R.S. §28-1381(A)(2); and (3) Count 3, driving with a BAC of more than .15 but less than 0.20 (extreme DUI) within two hours of being in physical control of her vehicle, in violation of A.R.S. §28-1382(A)(1).

Real Party in Interest filed a Motion in Limine to Preclude the Admission of Numerical Value of Her Blood Alcohol Test prior to trial on the grounds that because the blood was drawn

more than two hours after Real Party in Interest was in physical control of the vehicle, the State would have to introduce, through a qualified expert, legally sufficient relation-back/retrograde analysis evidence of her BAC. And, Real Party in Interest argues, the State's expert in this case did not have sufficient facts/data upon which to base such an expert opinion rendering that opinion inadmissible under newly amended Ariz.R.Evid. 702. The Justice Court set an evidentiary hearing in order to determine if the expert opinion to be offered by the State met the criteria of Ariz.R.Evid. 702.

Rule 702 provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable scientific principles and methods;
> (d) and the expert has reliably applied the principles and methods to the facts of the case.

Real Party in Interest first argues that the Justice Court abused its discretion by setting a pretrial evidentiary hearing (commonly referred to as a "Daubert hearing") to evaluate the expert testimony of Criminalist Erin Boone, the State's designated expert. The Arizona Supreme Court has made clear that "trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue." *Ariz. R. Evid. 702, Comment to 2012 Amendment.* The decision to have a Daubert hearing on the admissibility of the expert testimony under Rule 702 is firmly within the sound discretion of the Justice Court. *Arizona State Hospital/Arizona Community Protection and Treatment Center v. Klein, __ P.3d __, 2013 WL 433003 (App. 2013)*("Whether to set a pretrial hearing to resolve such a dispute is peculiarly within the discretion of the superior court...") Like the Superior Court in *Klein*, there is nothing to indicate that the Justice Court in this case abused its discretion in holding a Daubert hearing in regard to the expert testimony in issue. Indeed, it would have been difficult for the Justice Court to determine if this particular expert met the requirements of Rule 702 without examining the expert's opinion and the factual basis of that opinion.

In this case, the State's expert, Erin Boone, is a Criminalist employed by the Arizona Department of Public Safety Crime Laboratory who has a Bachelor of Science degree in chemistry. She also has seventeen years of experience in two separate law enforcement crime laboratories conducting alcohol analysis and toxicology, is certified by the Department of Public Safety to conduct blood proficiency testing, and has testified as an expert in forensic alcohol analysis over 200 times. *State's Appendix to Petition for Special Action, Exhibit 4, Transcript of Proceedings, 12:3-14:6.* Ms. Boone's credentials are not contested.

Ms. Boone testified at the Daubert hearing that she analyzed the blood sample drawn on the Real Party in Interest, Margaret Hyland, 2 hours and 53 minutes after the time of driving. *Id. at 14:11-15:23*. Ms. Boone performed a retrograde extrapolation of this blood sample. A retrograde extrapolation is taking an alcohol concentration from one point in time and estimating what it will be at another point in time. *Id. at 14:5-9*.

Ms. Boone conducted a retrograde extrapolation of the .188 alcohol concentration for 70 minutes earlier in time, which brought the concentration within the two hour time frame mandated by A.R.S. §§28-1381(A)(2) and 1382(A)(1), *i.e.* as alleged in Counts 2 and 3. *Id. at 16:10-17:21*. Ms. Boone applied a range of elimination rates to the alcohol concentration in order to reach a BAC 70 minutes earlier. *Id. at 16:18-17:12*. An elimination rate is how fast the body eliminates alcohol. *Id.* The elimination rates used by Ms. Boone in this case ranged from a low of .010, and average of .018, and a high of .030 per hour. *Id.* Using this analysis, Ms. Boone concluded that Ms. Hyland had an alcohol concentration 70 minutes prior to the blood draw of .199 using the low elimination rate, .209 using an average eliminate rate, and .223 using a high elimination rate. *Id. at 17:13-21*.

Ms. Boone testified that she did not need an eating history for Ms. Hyland to conduct this analysis because Ms. Hyland had been in custody for 2 hours and 53 minutes during which time she had not consumed anything, rendering it past the time that Ms. Hyland would have been still absorbing alcohol into her bloodstream. *Id. at 17:23-19:16*. Thus, Ms. Hyland was in an elimination phase wherein the body is breaking down the alcohol and getting it out of the body faster than it is being absorbed, making the consumption of food a non-factor. *Id.*

Ms. Boone admitted that she did not consider Ms. Hyland's weight, height, age, gender, the time at which she stopped drinking, what she had to eat, or her metabolism rate in rendering her opinions. *Id. at 24:4-23*. Ms. Boone further concluded that Ms. Hyland had fully absorbed the alcohol for her analysis, based upon the fact that the percentage of the general population who would still be in the absorption phase if no food had been consumed food for the past 2 hours and 53 minutes would be less than two percent, based upon studies recognized and relied upon by the scientific community. *Id. at 34:1-15.* Ms. Boone also testified that absorption rates vary among individuals, depending upon the nature of food consumed, stress, drinking patterns and the type of drink consumed, the contents of one's stomach, and others. *Id. at 38:14-39:19*.

Ms. Hyland's expert, Mr. Beardsley, testified that there are two types of retrograde analysis, classical and subtractive. *Id. at 42:21-43:13*. The analysis used by Ms. Boone was classical. Subjective takes into account the person's weight, gender, food consumption, and alcohol consumption. *I*d. He also testified that it takes 10-20 minutes to reach a post-absorption rate for the average person on an empty stomach; for others, it could take up to 45 minutes, and

for persons who have consumed a large amount of food having cream or fatty content it can take much longer. *Id. at 45:16-25*. Mr. Bearsley cited a time of 4 hours as the longest time he's seen for a person to reach post-absorption and that person had consumed a couple of pounds of food. *Id. at 44:7-17*. The longest average time to post-absorption Mr. Beardsley had seen based upon scientific data was two hours with most averages under an hour. *Id. at 46:1-4*.

Based upon the foregoing, Ms. Hyland argues that the data upon which Ms. Boone based her analysis does not meet the criteria of Rule 702(c) and (d) in that her opinion is not based on sufficient facts or data nor is it the product of a reliable scientific method. Indeed, Ms. Hyland claims the facts upon which it is based is "speculative". The Court disagrees for several reasons.

First, both experts recognized that there are two methods of performing a retrograde analysis as recognized by the scientific community. In this case, the State's expert used one of those methods. The use of one method over another is not a reason to preclude that method; indeed it for the trier of fact to determine, under the facts and circumstances of the case, the weight to be given to the methods used after considering the testimony of the expert and the unique facts of the case. Here, the Comments to Rule 702 expressly recognize the difference between the gatekeeper function and the weight of the evidence:

> The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue. **The amendment is not intended to supplant traditional jury determinations of credibility** and the weight to be afforded otherwise admissible testimony, **nor is the amendment intended to** permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or **prohibit testimony based on competing methodologies within a field of expertise. The trial court's gatekeeping function is not intended to replace the adversary system**. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.
>
> A trial court's ruling finding an expert's testimony reliable does not necessarily mean that contradictory expert testimony is not reliable. **The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Where there is contradictory, but reliable, expert testimony, it is the**

**province of the jury to determine the weight and credibility of the testimony.**

*Comments to Ariz.R.Evid. 702 (emphasis added).* The Court finds that the Justice Court overstepped its gatekeeper function in this case by supplanting the role of the trier of fact in determining the weight of competing but reliable expert testimony.

Second, the claim that Ms. Boone's testimony was based upon "speculation" is not supported by the record. Rather, Ms. Boone used a broad range of average elimination rates and reached conclusions about the time it takes to reach post-absorption based upon scientific studies. Indeed, her rates fell within 98% of the population--hardly a speculative number. By precluding Ms. Boone's testimony, the Justice Court chose one competing but reliable method over another.

Third, the Court also finds that the standard used by the Justice Court, clear and convincing evidence, is not the proper standard in determining if the testimony of Ms. Boone is admissible. Rather, the standard is preponderance of the evidence.

The Court finds that the Justice Court order precluding the testimony of Ms. Boone under Ariz.R.Evid. 702 was an abuse of discretion.

The Court further finds that Exhibit 1, the Affidavit of Chester Flaxmayer, was improperly included in Ms. Hyland's Appendix to Response to Petition for Special Action because it was not part of the lower court record. Thus must be stricken from the record, together with any reference or argument relating to such Affidavit.

IT IS ORDERED granting the State's Petition for Special Action and reversing the Justice Court's November 13, 2012 Order granting the Defendant's Motion to preclude admission of numeric value of the blood alcohol concentration test.

IT IS FURTHER ORDERED striking the Affidavit of Chester Flaxmayer, attached as Exhibit 1 to Ms. Hyland's Appendix to Response to Petition for Special Action.

/S/
HONORABLE KAREN A. POTTS
JUDGE OF THE SUPERIOR COURT

# Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

**Comment to 2012 Amendment**

The 2012 amendment of Rule 702 adopts Federal Rule of Evidence 702, as restyled. The amendment recognizes that trial courts should serve as gatekeepers in assuring that proposed expert testimony is reliable and thus helpful to the jury's determination of facts at issue. The amendment is not intended to supplant traditional jury determinations of credibility and the weight to be afforded otherwise admissible testimony, nor is the amendment intended to permit a challenge to the testimony of every expert, preclude the testimony of experience-based experts, or prohibit testimony based on competing methodologies within a field of expertise. The trial court's gatekeeping function is not intended to replace the adversary system. Cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence.

A trial court's ruling finding an expert's testimony reliable does not necessarily mean that contradictory expert testimony is not reliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. Where there is contradictory, but reliable, expert testimony, it is the province of the jury to determine the weight and credibility of the testimony.

This comment has been derived, in part, from the Committee Notes on Rules—2000 Amendment to Federal Rule of Evidence 702.

http://www.azcourts.gov/Portals/21/MinutesCurrent/R100035.pdf