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IN THE SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff/Petitioner/ Appellant/Petitioner, vs. JOSEPH COOPERMAN, Defendant/Respondent/ Appellee/Respondent,	)	**SUPREME COURT NO.** _____ Court of Appeals: Division 2 **NO. 2 CA-CV 2011-0197** Pima County Superior Court No. CR 2011 7903 Tucson City Court Cause No. TR 10061595 **STATE'S** **PETITION FOR REVIEW**

THE STATE submits its Petition for Review,17B A.R.S., AR-CAP, Rule 23, because the Arizona Court of Appeals, Division Two, decision was an abuse of discretion and in direct contradiction with two Division One cases.

INTRODUCTION

Division Two's opinion in this case eviscerates prior decisions by Division One in *Guthrie v. Jones,* 202 Ariz. 273, 43 P.3d 601 (App. 2002), and *State v. Storholm,* 210 Ariz. 199, 109 P3d. 94 (App. 2005). *See attached*, *State v. Cooperman*, 230 Ariz. 245, 282 P.3d 446 (App. 2012). Division Two decided that even where there is no utilization of the statutory presumption, A.R.S. 28-1381(G)(3), a defendant may offer partition ratio evidence. *Id.,* at ¶¶ 13-17, 282 P.3d at 450-51. This ignores the *permissive* language of that statute, and the balance achieved in *Guthrie*. The opinion further admits hypothetical physiological variables, inexorably intertwined with the partition ratio, despite *Storholm's* determination that "individual idiosyncracies [*sic*]" are irrelevant and inadmissible cases under A.R.S. §28-1381(A)(2) and (A)(1), with no presumption. *Cooperman*,, at ¶¶ 26-30, 282 P.3d at 454-55. This is a fundamental split.

ISSUES PRESENTED FOR REVIEW

1. In *Guthrie,* Division One held that in DUI (A)(2) prosecutions individual partition ratio evidence is irrelevant and inadmissible, but if in DUI (A)(1) prosecutions, the State uses breath test results and the presumption of impairment in (now) §28-1381(G), that same evidence may be relevant and admissible to rebut that presumption. *Id.*, at ¶ 18, 43 P.3d, at 605. Subsequently, in. *Storholm*, the court stated that "[i]ndividual idiosyncracies [*sic*] or environmental factors" are irrelevant in a prosecution under A.R.S. §28-1381(A)(2). *Id.* at 200-201, ¶10, 109 P.3d, at 95-96. The State did not utilize the statutory impairment presumption. Did Division Two err in holding that a defendant charged with DUI, §28-1381(A)(1) may offer evidence on partition rations, when breath alcohol results are not being linked to impairment?

2. Did Division Two further err in holding that although partition ratio evidence is inadmissible in an (A)(2) case, that part of "partition ratio's" makeup - hematocrit, breathing patterns, breath and body temperature - is admissible?

FACTS AND HISTORY MATERIAL TO THE ISSUES PRESENTED

The Defendant, Joseph Cooperman, was arrested by Tucson Police Department officers for driving under the influence, A.R.S. §28-1381(A)(1). After duplicate breath tests, the he was also cited for having a BrAC at or above .08, A.R.S. § 28-1381(A)(2). *See Appendix* (*App.*), *Citatation*.

The State filed a motion to preclude evidence about breath/blood conversion, partition ratios, breath or body temperature, breathing patterns, and hematocrit. *See App., State's Motion, dated May 20, 2011, as amended, Transcript* (*Tr*) *at p. 30, lns 15-18*. The Defendant responded. *See App., Defendant's Response, dated May 26, 2011.*

At the August 16, 2011, hearing Mr. Flaxmeyer, the defense expert, agreed that the Intoxilyzer 8000 reports an alcohol value which represents a breath and a blood concentration. *See App., Transcript* (*Tr*) *at p. 98*. He said a properly done test requires taking a deep breath and immediately blowing into the instrument. *See Tr at p. 104, lns 20-23*. Mr. Flaxmeyer agreed that no studies show how viral induced body temperatures would impact the amount of breath alcohol; nor if water bath induced temperature variations have the same impact. *See Tr at 110-111.* As for breathing patterns he stated:

> If an individual has been holding their breath ... and they stop that behavior, they exhale ... inhale a new breath and then immediately

> exhale ... into the instrument, that breath should no longer be affected ....
> .... *because the breath that was affected is now gone*."

See Tr, at p. 131. (*Emphasis added*).

Mr. Flaxmeyer agreed with Mr. Slonecker's[1] testimony that officers are taught to have defendants breath accordingly. *Id.* He agreed that the Cowan study did not find a close correlation between breath alcohol readings and temperatures. *See Tr at pp. 132-133.* He also agreed that there is no effect where people had "normal" body temperatures. *See Tr at pp. 135-136*. He did not consider partition ratio to be "scientifically relevant." *See Tr at p. 125*.

On August 30, 2011, the trial court ruled that if the State relies upon an Intoxilyzer result in any way, then partition ratio evidence will be relevant and admissible. *See App., Order dated August 30, 2011*. It said that "other factors" can impact the breath test results, independently of their relationship to partition ratio; and that *Guthrie* does not preclude admission of them on the (A)(2) charge, as they are "stand alone" factors. The court found that these factors and their impact on both charges, given the presumption, are admissible; and that their variability makes them relevant. It stated that breath results are based on certain presumptions and may not be accurate if the presumptions are not correct. Thus, defendants could introduce

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[1] Michael Slonecker is the State's Criminalist/expert witness.

testimony about any factors that might impact the tests' accuracy. Lastly, the trial court said where the partition ratio is relevant, the State will get a limiting jury instruction for its use on the (A)(1) charge. *Id.*

The State filed a Petition for Special Action in superior court. *See App., State's Special Action, filed November 9, 2011.* That court accepted jurisdiction, but denied relief. *See App., Superior Court Ruling, dated November 15, 2011.* The State filed a notice of appeal. *See App., State's Notice, dated November 17, 2011.* The parties filed briefs, and on August 14, 2012, Division Two affirmed the ruling of the superior court. *See Cooperman attachment.* The State now files its Petition for Review.

REASONS WHY REVIEW SHOULD BE GRANTED

1. *Cooperman* Creates an Irreconcilable Difference Between The Divisions.

Division Two's opinion finds that the statutory presumption is "raised" *whenever* the State introduces evidence of an alcohol concentration of 0.08 or more. *Cooperman*, at ¶ 25, 282 P.3d at 453-54. However, the plain language of Guthrie is that "partition ratio evidence", and logically any physiological variable, *may* become relevant *only where* the State seeks to *take advantage of* the statutory presumption. *Guthrie*, at ¶¶ 13-14, 43 P.3d 604.

Division Two carries "relevance" further, stating that the Defendant presented competent expert testimony that various physiological factors, apart from partition

ratio evidence, can impact the ability of the Intoxilyzer to measure a defendant's breath alcohol. *Cooperman,* ¶¶26-30*,* 282 P.3d 454-55. But Division One in *Storholm,* stated "Because A.R.S. §28-101(4) permits alcohol concentration to be shown by *either* breath or blood we held that it is irrelevant ... under §28-1381(A)(2) whether the defendant's partition ration .... varied from the standard ... *because of individual idiosyncracies* [*sic*] or environmental factors..." *Id*., at ¶ 10, *citing Guthrie*, 202 Ariz. at 277, 43 P.3d at 605. (*Emphasis added*). *Cooperman's* consideration of hypothetical "physiological variables" is inappropriate and creates a fundamental difference between the Divisions that is ripe for review.

2. The *Cooperman* Opinion Misconstrues *Guthrie* and Misapprehends the Nature of the Statutory Presumption in A.R.S. §28-1381(G)(3).

Arizona defines alcohol concentration as "grams of alcohol per 100 milliliters of blood" or "grams of alcohol per 210 liters of breath." A.R. S. § 28-101(2). Those are *two* equally viable methods to measure alcohol concentration - a pivotal factor to *Guthrie*. Here, there were only breath tests, which is critical when comparing California's statute, at issue in *People v. McNeal*, 46 Cal 4th 1183 (2009). The Arizona statute is *permissive*, whereas that of California is mandatory- *"[i]t shall be presumed that the person was under the influence..", see Cal. Code §23512(a).*

Division One, in *Guthrie v. Jones, supra*. held that:

In a per se DUI prosecution under A.R.S. § 28-1381(A)(2), evidence of

> variation in individual partition ratios is irrelevant and inadmissible. In a traditional DUI prosecution under § 28-1381(A)(1), however, when the State uses breath test results to take advantage of the § 28-1381(H) (now § 28-1381(G)) presumption, partition ratio evidence may be relevant to rebut that presumption and thus admissible.

Id., at ¶18, 43 P.3d at 605. Partition ratios are irrelevant because the violation is proven with a breath alcohol concentration, without any conversion. *Id.*, at ¶ 10, 43 P.3d at 603.

The exception is when the State establishes an alcohol concentration in order to use the statutory presumption to establish that a defendant was under the influence because of his BAC level. *Id.*, at ¶13, 43 P.3d at 604. The implicit logic is that *if* the State utilizes the breath test and the presumption, then fundamental fairness requires permitting the defendant to counter with "physiological variables" affecting the breath/blood ratio. This intent is made apparent within *Guthrie*:

> Under subsection (A)(1), the State need not prove that a defendant's alcohol concentration was at or above any particular level; it need prove only that the defendant was 'impaired to the slightest degree' as a result of being 'under the influence ...' The State may elect, however, to establish alcohol concentration *in order to take advantage of a statutory presumption*.
>
> * * *
>
> We come then to the question whether, when the State elects to employ breath test results ... the defendant may respond by introducing partition ratio evidence to counter ... We answer that question in the affirmative....
>
> One means to prove that a particular defendant was not under the influence ... despite a breath alcohol reading exceeding .10 is to establish that the defendant's individual partition ratio differed from the standard 2100:1 ratio

> ... [E]vidence that a particular defendant's ratio is significantly greater is relevant, for it would have a tendency *to rebut the presumption that the defendant was 'under the influence' at a certain breath alcohol concentration*. (Citation omitted.)

Guthrie, at ¶¶ 113, 14 & 16, 43 P.3d, at 604. (*Emphasis provided*).

Each time "presumption" appears in *Guthrie*, it references A.R.S. §28-1381(G)(3)(of the three presumptions available), and the state's use of it, to prove that the defendant was impaired. *Cooperman* is logically inconsistent in concluding that *any party*, other than the State, could "use" the *presumption of intoxication*; or that it always "arises" simply because the State introduces evidence of a breath alcohol concentration above .08, on the (A)(2) charge. *Id*., ¶¶ 14-17, 282 P.3d, at 451. If the Defendant "uses" a presumption, it would be A.R.S. §28-1381(G)(1) to help prove *non-impairment* with an alcohol concentration below 0.05, then there is nothing for the defense to rebut. (G)(1) is not what triggers the "rebuttal" discussed in Guthrie. While jurors might disregard the State's evidence of alcohol concentration on an (A)(1) charge, and are free to disregard the permissible presumption under (G)(3); when that statutory presumption is invoked *Guthrie* says it should be balanced by allowing the defendant to introduce partition ratio evidence.

The opinion cites to *McNeal, supra*., and says that a defendant charged under §28-1381(A)(1) is "[e]ntitled to introduce reliable evidence challenging the state's alcohol concentration..." *Cooperman*, at ¶24, 282 P.3d at 453. As for the possibility

of a defendant introducing his individual partition ratio, and whether it would be relevant to his breath results, Mr. Flaxmeyer stated:

> The problem is if I am a defendant, unless the police officer draws blood in close proximity to the time.... I can't prove it was the same value....

See Tr at p. 125. The trial court asked "scientifically would it be relevant?" Mr. Flaxmeyer specifically stated: " *I don't believe it is.*" *Id.* (*Emphasis added*).

The California Supreme Court, in *People v. McNeal, supra*., recently addressed in the California Court of Appeals case, *People v. Vangelder*, 197 Cal. App.4th 1, 172 Cal.Rptr.3d 321 (2011), is distinguishable. The State notes that despite the Defendant's essential reliance upon *Vangelder,* there are significant differences between the Arizona and California presumption statutes. In *Vangelder* there were breath *and* blood tests. The California court said the issue was "[w]hether the trial court prejudicially erred in refusing to allow scientific testimony to be presented that would have raised doubts about the reliability of the ... breath testing devices, with respect to the physiological variables that can affect the sample of breath or air taken." *Vangelder at* pp. 11-12, 27, Cal.Rptr.3d, at 828-29. However, it did this against the backdrop of the California statute, which differs markedly from Arizona's.

Section 23152(a), of the California Code provides:

> "[T]he amount of alcohol *in the person's blood* at the time of the test, as shown by chemical analysis of that person's *blood, breath or urine shall give rise to the following presumptions ... (3)* if there was at the time 0.08

> percent or more *in the person's blood it shall be presumed that the person was under the influence .....*"

Vangelder, at 11, fn 5, 127 Cal.Rptr.3d, at 829. (*Emphasis added*.) California law requires conversion to the *blood* alcohol content, *and* it contains a mandatory presumption. No such conversion, or presumption, exists in Arizona.

Lastly, the California Court of Appeals stated the following:

> [T]he trial court was mistaken ... that this expert testimony was completely irrelevant ... to rebut the breath test result for either the per se or generic DUI counts. [T]his expert provided enough of a foundation to explain ... the breath test samples were not representative ... *which was ultimately to be converted into a blood- alcohol reading through the use of the partition ratio*.

Vangelder, at 19, 127 Cal.Rptr.3d, at 835. (*Emphasis added*).

This is a significant because the state laws are so different. *People v. McNeal,* 46 Cal 4th, 1183, 210 P.3d 420 (2009) is distinguishable for the same reason, and thus Division Two's reliance upon *McNeal* is misplaced.

Division Two, also relies upon *State v. Hanks,* 772 A.2d 1087 (Vt. 2001), which reasoned: "Evidence on the variability of partition ratios would simply reveal ... that the breath test result is based on a statutorily accepted conversion ... but that result is not unassailable with respect to demonstrating impairment." *Id*. But the flaw is that the state in *Hanks did* ask for the statutory inference of impairment, unlike here. *Id*., at 94, 772 A.2d, at 1088. If there is no use of the presumption of impairment, there is

nothing to "rebut." Notably, their supreme court reasoned that rebuttal of that presumption required more than a theoretical possibility, it required specific evidence that the presumed fact was not true in a particular case. *Id*, at 99, 772 A.2d, at 1092.

Another error that Division Two made is that it misconstrues the net import of both *Guthrie's* and *Storholm's* exclusion of physiological variances. Despite the trial court's conclusion that the variables are "stand alone factors," even Mr. Flaxmeyer agreed that one *could not* parse out the difference when he looked at partition ratio. His comment was that they were subsumed into the larger potential error of the partition ratio." *See Tr at p.135, ln 2-5.* Mr. Flaxmeyer agreed that partition ratio involves many more factors than breath or body temperature. *Id*. The court of appeals affirmed this point in *State v. Storholm*. It said *Guthrie* not only held that "evidence on variations in partition ratios . . . was irrelevant in a prosecution under . . . (A)(2). . .," but that, "[b]ecause A.R.S. § 28-101(2) permits alcohol concentration to be shown either by breath or blood . . . we held that it is irrelevant in a prosecution under . . . (A)(2) whether the defendant's partition ratio . . . varied from the standard 2100:1 ratio because of individual idiosyncracies (*sic*) or environmental factors." *Storholm*, at ¶10, 200-201, 109 P.3d at 95-96, *citing Guthrie*, at 277, 43 P.3d at 605. The court did point out that a defendant may use a blood alcohol test as evidence to rebut an (A)(2) charge based on breath test results. *Storholm.,* at ¶12, 201, 109 P.3d, at 96.

Division One reasoned that only when the State utilizes the statutory presumption to establish that a defendant was "impaired to the slightest degree," is an association created between breath and blood alcohol concentrations. Only then *may* a defendant *counter* the statutory presumption, with his particular partition ratio, which cannot be parsed from the other "physiological factors." Otherwise, it is irrelevant - as there would be nothing for the defendant to "rebut." Division Two has turned this upside-down.

3. *Cooperman* Utterly Ignores That The Defendant's Physical State At The Time Of The Breath Tests Is Not Relevant To The Accuracy Of The Intoxilyzer.

Any lack of correlation between blood and breath alcohol levels is irrelevant in a prosecution for (A)(2). *State v. Esser*, 205 Ariz. 320, 325, 70 P.3d 449, 454 (App. 2003), *citing Guthrie v. Jones, supra,* ¶¶ 1-2, 43 P.3d 601, ¶¶ 1-2. Dr. Dubowski, a leading scholar in the field of alcohol research, states that variances in alcohol partition exist, and the ability to determine if the subject is post-absorptive is often impossible. *See Tr at p. 65. All of these factors make it impossible or infeasible to convert alcohol concentration of breath or urine to the simultaneous blood alcohol concentration.* (*Emphasis added*). Dubowski, K. M. *Pharmacology of Alcohol: Impairment of Driver Performance*. Journal of Studies on Alcohol, Supp. No. 10, p105-106, 1985. *See Tr, at pp. 40, 58 & 65.* Much of the testimony, at the August 16, 2011, hearing, centered on how hypothetical physical variables "could possibly" affect

the results of a breath test, compared to a blood test, if the defendant had an elevated body or breath temperature, or hypo/hyper ventilation, or hematocrit. The proffered general evidence had no basis in fact for this particular defendant, as there was no indication that his breath tests were affected by any of the discussed variables. *Id.* At no point was there any testimony from Mr. Flaxmeyer to the contrary. Therefore they are not relevant.

Given this lack of proof, any general evidence of body or breath temperature, or breathing patterns or hematocrit, on the comparison of simultaneous breath and blood testing - which was not done by this Defendant - should have been excluded. Contrary to Division Two's conclusion, there is no evidence here tending to make any fact related to the accuracy of these breath tests more probable than not.

4. *Cooperman* Fails To Recognize That Relevant Evidence May Be Excluded.

A court need not cease its inquiry at relevancy and admissibility. Rules 401 and 402 are tempered by Rule 403. Rule 403 provides that "evidence may be excluded if its probative value is substantially outweighed by a danger of ....unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time...." In *Guthrie*, Division One said that evidence that a *particular* defendant's ratio is greater, is relevant because it would have a tendency to rebut the presumption that *the* defendant was impaired at a certain breath alcohol level. *Id.*, at 276, ¶16, 43 P.3d, at 604.

Because *Guthrie* used the words "*particular*" and *individual,*", rather than "a" or "any", in addressing relevancy, logic dictates that any defendant who wishes to challenge the "standard" or "generally accepted" 2100:1 ratio[2], must present evidence of his or her *own individual* ratio at the time of the test.

The probative value of any *other* evidence, *e.g*. "hypothetical" factors, is substantially outweighed by the danger of unfair prejudice, and could only serve to confuse the issue and or mislead the jury, and waste time. This Defendant offered only general evidence on breath and body temperature, breathing patterns, hematocrit, and their "possible" effects on breath testing. However, applying the logic of *Guthrie*, such testimony should not be allowed unless there is specific evidence of the individual Defendant's own characteristics at the time of the test.

CONCLUSION

The issues presented establish that Division Two has created an irreconcilable, and logically inconsistent, rift between the Divisions. Division Two allows defendants to use expert testimony regarding a variety of generally possible factors affecting partition rations, in direct contravention to both decisions from Division One.

The problem is that such testimony is necessarily tied to the conversion of

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[2] During the hearing the actual ratio was established to be closer to 2300 - 2400:1, which would necessarily mean that breath *under-estimates* blood alcohol concentration by approximately 10%. *See TR*, at p.23.

breath to blood alcohol concentrations, or allows in hypothetical individual physiological, or environmental characteristics that the Defendant's own expert said can't be parsed out from the partition ratio. Both *Guthrie* and *Storholm* held that this is irrelevant in both DUI and BAC prosecutions, *unless* 1) the State uses the breath test results with the statutory presumption that the Defendant is "impaired to the slightest degree" in an A.R.S. § 28-1381(A)(1) prosecution; or 2) an adequate foundation is laid indicating that *this particular* Defendant has been independently tested and actually does fall within the portion of the population that differs significantly from the statical population norm of 2100 to 1. Neither occurred here, so no partition ratio evidence, or "physiological variables" should have been allowed. There is now an irreconcilable difference between the two divisions of the Arizona Court of Appeals.

RESPECTFULLY SUBMITTED this __13th__ day of September, 2012.

STATE OF ARIZONA

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Superior Court Docket No. CR 20117903
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