CITY OF TUCSON

OFFICE OF THE CITY ATTORNEY

CRIMINAL DIVISION

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October 1, 2012

A.P.A.A.C. Council
1951 W. Camelback Rd., Suite 202
Phoenix, AZ 85015

RE: *State v. Cooperman*

Dear Council Members:

I am asking for APAAC's help in convincing the Arizona Supreme Court to take our petition for review of the Arizona Court of Appeals, Division Two's recent decision in *State v. Cooperman*, 230 Ariz. 245, 282 P.3 446 (App. 8-14-2012). I believe that *Guthrie v. Jones*, 202 Ariz. 273, 43 P.3d 601 (App. 2002), and *State v. Storholm*, 210 Ariz. 199, 109 P.3d 94 (App. 2005), stand for the principal that evidence of partition ratio, breathing patterns, breath and body temperature, and hematocrit should be excluded from all A.RS. § 28-1381(A)(2)/DUI-BAC trials, and all (A)(1) DUI trials when the State does not ask for the presumption of impairment in A.R.S. §28-1381(G(3). *State v. Cooperman* turns this upside down and would admit this type of evidence in every DUI (A)(1) case, and arguably even in the DUI-BAC (A)(2) cases. Our case is not fact-specific, but rather a question of the legal interpretation of the holdings in *Guthrie* and *Storholm;* and more broadly, the type of evidence that is too speculative to be admitted in trial, absent any testimony regarding the defendant's specific characteristics on each of these types of evidence.

I believe this is a matter of state-wide concern for all those jurisdictions where breath tests are given as evidence of impairment and the per se, over .08% BAC charges in DUI cases. I hope the council will move forward and approve this request and submit an *amicus curiae* brief on the State's behalf. APAAC's voice would be greatly appreciated in our effort to convince our supreme court that Division One got it right in *Guthrie*, and *Storholm*, and that Division Two got it wrong in *Cooperman*. APAAC's support would lend great weight to our assertion that this issue is one of state-wide importance in DUI enforcement.

My office filed a petition for review to the Arizona Supreme Court on September 13th. The defendant's response is due on October 14, and the way I read CAP, Rule 23(e) and Rule 16(a)&(b)(1), an amicus brief would be due within 21 days after the response is filed, which would be on Monday, 11-5-2012.

Attached please find the materials we sent to the Arizona Supreme Court.

If I can answer any questions, or further discuss the situation with you, please contact me at your convenience.

Thank you,

Baird S. Greene
Deputy City Attorney

103 E. ALAMEDA, SUITE 501 • P.O. BOX 27210 • TUCSON, AZ 85726-7210
(520) 791-4104 • FAX (520) 791-5509 • TTY (520) 791-2639
www.cityoftucson.org