RESPONSE TO MOTIONS IN LIMINE

The defense moved to preclude the State from presenting evidence of the victims' injuries and damages, evidence concerning the signs of intoxication and impairment, and expert testimony on the effects of alcohol on the human body. While the officer cannot testify that the defendant was "drunk," he can describe the signs of impairment he observed. The fact that the officer administered a preliminary breath test is admissible even though the results of the test are not admissible. The victims should be allowed to testify about their injuries and property damage because such testimony is probative and is not unfairly prejudicial. Expert testimony about the effects of alcohol on the human body is necessary because jurors do not all know that everyone's ability to drive is adversely affected by alcohol at .08 BAC and do not all understand "divided attention."

The State of Arizona, by and through undersigned counsel, respectfully moves this Court to deny the defendant's motions to preclude the State from presenting testimony on any injuries or damages suffered by witnesses, limiting testimony regarding the defendant's intoxication or impairment, or presenting expert testimony on the effects of alcohol in the human body. The following Memorandum of Points and Authorities supports this motion.

MEMORANDUM OF POINTS AND AUTHORITIES

A. The defendant is not entitled to limit testimony regarding the signs and symptoms of intoxication or impairment he displayed.

The defendant asks this Court to completely preclude the State from presenting any testimony from the police officer, or any other witness, concerning the signs and symptoms of intoxication that the defendant displayed. In *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121 (1984), the Arizona Supreme Court held that a police officer could not testify in the form of an opinion that a defendant was intoxicated, under the influence of alcohol, or drunk. However, *Fuenning* made it clear that the officer could explain if he was familiar with the signs and symptoms of intoxication, tell what those

signs and symptoms were, and testify whether the defendant displayed them. The officer was only prohibited from parroting the words of the statute as a legal conclusion.

In this case, the State will not offer any evidence that violates or offends the rule set forth in *Fuenning*. The police officers will testify that they smelled an odor of alcohol on the defendant's breath; that his speech was slurred; that his eyes were watery and bloodshot; that he was unsteady on his feet; and that he appeared to have difficulty standing. The officers will not "parrot" the words of the statute and will not testify that the defendant was under the influence of alcohol when they observed him; they will merely testify as to what they saw, heard, and smelled. The jury will be free to draw its own conclusions from the officers' testimony. Therefore, this Court should deny the defense's motion to preclude the officers' testimony.

B. The defendant is not entitled to suppression of the fact that he took a preliminary breath test (PBT).

While performing the standard Field Sobriety Testing on the defendant, Phoenix Police Officer Pallas requested the defendant to perform a preliminary breath test (PBT). The defendant consented. The State is aware that the results of this PBT test are irrelevant and inadmissible. However, the State does intend to offer the fact that the officer administered the test to the defendant. The administration of the PBT is relevant because it is probative of the defendant's consciousness of guilt.

C. The defendant is not entitled to exclude the State's evidence concerning the injuries or damages suffered by witnesses.

The defendant asks this Court to preclude the State from presenting any testimony concerning injuries and/or vehicular damages suffered by any witness, claiming that such testimony would be unfairly prejudicial under Rule 403, Ariz. R. Evid.

He argues that this evidence does not relate to the charges, relying on *State v. Schurz*, 176 Ariz. 46, 859 P.2d 156 (1993). But *Schurz* does not support the defendant's argument. In *Schurz*, the Arizona Supreme Court said:

> Although relevant, evidence may be excluded under Rule 403 if its probative value is substantially outweighed by the danger of unfair prejudice. Unfair prejudice "means an undue tendency to suggest decision on an improper basis," Fed. R. Evid. 403, Advisory Committee Note, such as emotion, sympathy or horror.
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> But not all harmful evidence is unfairly prejudicial. After all, evidence which is relevant and material will generally be adverse to the opponent. The use of the word "prejudicial" for this class of evidence, while common, is inexact. "Prejudice," as used in this way, is not the basis for exclusion under Rule 403.

Id. at 52, 859 P.2d at 162.

In this case, the State must prove beyond a reasonable doubt that the defendant was driving a vehicle while he was impaired by alcohol. An automobile accident in which the defendant rear-ended the victim is probative both as to the fact of driving and the fact of impairment.

Further, the State contends that vehicular damages and physical injuries are probative to lay a foundation to show that the witnesses' testimony is not affected by any impairments, emotions, or confusion. The witnesses must be allowed to set the scene to explain why they were present at the site of the collision. They must also be allowed to testify concerning their injuries and damages to show that those injuries and damages are consistent with what they remembered and that their injuries would not hinder the witnesses' perception or memory. None of the injuries in this case would cause loss of memory, blackouts, or confusion as to what they saw, heard, or

experienced at the time of the offense. Therefore, this Court should deny the motion to preclude the State from presenting such evidence.

D. The defendant is not entitled to preclude the State's expert testimony concerning the effects of alcohol on the human body.

The defendant argues that the State may not present expert testimony concerning the effects of alcohol on the human body. The defense relies solely on *State v. Salazar*, 173 Ariz. 399, 844 P.2d 566 (1992). In *Salazar*, the defendant attempted to elicit testimony from an expert as to the general effects of alcohol on the human body and a person's ability to reason. The defendant wanted to present this testimony for two reasons -- first, to corroborate his own testimony, and second, to show that alcohol might affect a person's ability to reason, which in turn might tend to show that the defendant was unable to form the specific intent to commit first-degree murder. The *Salazar* Court relied on language from *State v. Hicks*, 133 Ariz. 64, 71, 649 P.2d 267, 274 (1982), that "the effect of alcohol intoxication is an area within the common knowledge and experience of the jury, and therefore, no expert testimony is needed to assist the trier of fact." *State v. Salazar*, 173 Ariz. at 407-08, 844 P.2d at 574-75. However, *Hicks* clearly was limited to the issue of "psychiatric testimony relating to the effect of alcohol upon the ability to form specific intent." *Hicks*, 133 Ariz. at 71, 649 P.2d at 274.

This case is clearly distinguishable from *Salazar* and *Hicks* on several grounds. First, the crimes in those cases were specific intent crimes, so under the law in effect at that time, intoxication could be used as a defense to the intent element. In this case, *mens rea* is not an element of the charge for which the defendant is being prosecuted, and voluntary intoxication is not a defense. Second, while jurors may be generally

aware of “the effect of alcohol intoxication,” jurors are not generally aware of the effect of alcohol intoxication upon the ability to drive a motor vehicle.

Third, the State should be allowed to present expert testimony concerning the fact that an individual’s ability to drive a motor vehicle is impaired when the person’s blood alcohol content [BAC] meets or exceeds .08%. The meaning of “.08%” is clearly not within the common knowledge and experience of the jury, and the fact that everyone is impaired at that BAC is information that can only be obtained from the testimony of an expert in this case. In *State v. DeWolf*, 152 Ariz. 327, 328, 723 P.2d 218, 219 (App. 1986), the trial court allowed a criminalist to testify that “at or above a level of .08, it’s dangerous to operate a motor vehicle for anybody.” On cross-examination, defense counsel asked the criminalist if he was saying “that at a .08 every person in the world is impaired? Is that what you’re telling us?” The criminalist replied, “Yes.” The *DeWolf* Court held that the criminalist’s evidence concerning the effect of having a .08% BAC was admissible as “other competent evidence” bearing on the question of whether a defendant was “under the influence of intoxicating liquor.”

Fourth, not all of the jurors may be licensed to drive, and not all of the jurors may drink. If any juror does not both drink alcohol and drive a motor vehicle, he or she would lack any knowledge of how alcohol affects an individual’s ability to drive a car. Only an expert’s testimony could give this information to any such juror.

Finally, jurors are not necessarily familiar with the term “divided attention” or its relationship to driving. The State’s expert should be permitted to testify about how alcohol affects a person’s ability to divide his attention, and how divided attention relates to driving.

CONCLUSION:

For the foregoing reasons, the State requests this Court to deny all of the defendant's motions in limine.