



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



**STATE OF ARIZONA v. HON. BERNSTEIN/HERMAN  
CV-14-0057-PR**

**PARTIES:**

*Petitioners:* Real parties in interest Doreen Herman, Michael Dinola, Mara Hall, Ramsey Tohannie, Kymberly Crowley, Kelly Day, Keith Porter, Jason Quan, Robert Farinas, Armen Aslanyan, and Shyla Rotmil (in the consolidated cases)

*Respondent:* State of Arizona

*Amici curiae:* (1) Scottsdale Lincoln Health Network; (2) City of Scottsdale

**FACTS:**

Petitioners are charged with aggravated DUI offenses based on blood alcohol content (“BAC”) measurements conducted by the Scottsdale Crime Lab (“SCL”). At each arrest, police officers drew two vials of blood from each person, with the second vial retained for the driver’s independent testing, but independent testing is not an issue in these cases. Each person’s BAC results exceeded the .08 threshold for proving a DUI offense, and all but one test exceeded the .15 threshold for proving extreme DUI. As summarized by the court of appeals:

To test the blood, the SCL used a Clarus 500 gas chromatograph serial number 650N9042003 manufactured by PerkinElmer (the 2003 Instrument), an autosampler, a personal computer and a printer. Stated simply, after calibration, several dozen vials are placed in the carousel of the 2003 Instrument. The vials contain blood samples (each individual has two samples tested at a time, with the second sample called a replicate) along with control samples. The vials are sampled, one by one, and analyzed by the 2003 Instrument, a process that takes several hours. The data are then processed (creating graphs showing the chemical properties of the compounds tested for called chromatograms) and results are calculated and printed. The output is checked for consistency with expected results, control samples and quality controls, and replicates are checked to make sure that results are within plus or minus five percent of each other according to SCL protocol. A second analyst then performs a technical review, which is followed by an administrative review.

The 2003 Instrument was put in service in August 2009 and, since that time, has analyzed approximately 21,000 samples. Defendants allege the 2003 Instrument has several unresolved flaws. These allegations have resulted in substantial motion practice in the Superior Court as well as a prior special action by the State in which this court accepted jurisdiction and granted relief [footnote

omitted] and now this special action by the State. As relevant here, Defendants moved to preclude the State from introducing into evidence at trial the SCL BAC test results, claiming the results were inadmissible under Arizona Rule of Evidence 702.

At Defendants' request, the Superior Court held evidentiary hearings lasting parts of 17 days. After considering testimony, exhibits and related argument, the Superior Court issued a lengthy, detailed Minute Entry dated August 21, 2013 (and clarified on November 11, 2013). The Minute Entry first found that the State had shown by a preponderance of the evidence that the SCL BAC test results complied with Ariz. R. Evid. 702(a), (b) and (c). The Minute Entry then found the State had failed to show that “the expert has reliably applied the principles and methods to the facts of the case” as required by Ariz. R. Evid. 702(d). More specifically, the Minute Entry states that “the principles and in particular, the methods [of the SCL BAC testing] were not properly applied.” Accordingly, the Minute Entry found “the blood tests and results as to each” Defendant were not admissible.

Opinion ¶¶ 2-4.

The State filed a special action seeking relief from the Minute Entry and, at the State's request, the court of appeals stayed the cases pending resolution of the petition. The court considered the parties' briefs and appendices, the amicus briefs and oral argument. Then the court wrote: “Accepting jurisdiction and finding that, under the legal standard discussed below, the SCL BAC test results are admissible under Arizona Rule of Evidence 702, the court grants the State's request for relief, vacates the Minute Entry finding the SCL BAC test results were not admissible under Arizona Rule of Evidence 702, vacates the stay entered pending resolution of this special action and remands these cases for further proceedings.”

The legal standard for admission of the scientific evidence, referred to by the appellate court, focused narrowly on each specific defendant's case and whether the expert reliably applied the principles and methods to the facts of the case. It gave prominence to the accuracy of the evidence of each individual's own BAC results to be introduced at trial, rather than the broader principles and methods applied by SCL analysts.

#### **ISSUES:**

1. Did the Court err by holding that Rule 702(d) challenges are excluded from judicial gatekeeping scrutiny under Arizona law?
2. Did the Court err in using the accuracy of the results as the criteria for a gatekeeping analysis instead of using the trustworthiness of the methodology used to generate the results?
3. Did the Court err in substituting its own judgment for the trial court's without finding that the trial court's decision constituted an abuse of discretion?

## DEFINITIONS:

(1) Arizona Rule of Evidence 702(d), as amended January 2012, provides that, “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 . . . [among other things] . . . the expert *has reliably applied the principles and methods to the facts of the case.*” (Emphasis supplied)

(2) “Daubert Factors.” In *Daubert*, the U.S. Supreme Court set forth several “non-exclusive factors for determining whether scientific evidence is admissible,” including (1) whether the scientific methodology has been tested; (2) whether the methodology has been subjected to peer review; (3) the known or potential rate of error; (4) whether the methodology has general acceptance; and (5) the existence and maintenance of standards controlling the technique’s operation. *Ariz. State Hosp. v. Klein*, 231 Ariz. 467, 473 ¶ 27, 296 P.3d 1003, 1009 (App. 2013) (quoting *Daubert* for first four factors); *State v. Bible*, 175 Ariz. 549, 586 n. 32; 858 P.2d 1152, 1189 n. 32 (1993) (quoting *Daubert* for fifth factor). These factors are relevant to whether the party offering scientific evidence has made a proper showing for its admission. The court of appeals found the State satisfied its showing of all five *Daubert* factors in the SCL cases. Other factors also may be relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. See Federal Rules of Evidence, Rule 702, Advisory Committee Notes to 2000 amendment.

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