No. 127824

IN THE
SUPREME COURT OF ILLINOIS

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| PEOPLE OF THE STATE OF ILLINOIS, | ) | On Appeal from the Appellate Court of Illinois, Second Judicial District, No. 2-19-1059 |
| Plaintiff-Appellee, | ) | |
| | ) | There on Appeal from the Circuit Court of the Seventeenth Judicial |
| v. | ) | Circuit, Boone County, Illinois, No. 18 CF 89 |
| | ) | |
| LAURA EPSTEIN, | ) | The Honorable John H. Young, |
| Defendant-Appellant, | ) | Judge Presiding. |

**BRIEF OF PLAINTIFF-APPELLEE**
**PEOPLE OF THE STATE OF ILLINOIS**

Kwame Raoul
Attorney General of Illinois

Jane Elinor Notz
Solicitor General

Katherine M. Doersch
Criminal Appeals Division Chief

Jason F. Krigel
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7942
eserve.criminalappeals@ilag.gov

*Counsel for Plaintiff-Appellee*
*People of the State of Illinois*



**ORAL ARGUMENT REQUESTED**

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## POINTS AND AUTHORITIES

## NATURE OF THE CASE

Defendant Laura Epstein appeals from the appellate court's judgment, which reversed the trial court's interlocutory ruling excluding evidence of defendant's blood alcohol content (BAC) after arrest. No question is raised on the pleadings.

## ISSUES PRESENTED FOR REVIEW

1. Whether the trial court abused its discretion in excluding evidence of defendant's BAC after arrest under Illinois Rule of Evidence 403 because the probative value of that evidence was not substantially outweighed by any risk of unfair prejudice or misleading the factfinder.

2. Whether defendant's other arguments — that the admission of her BAC after arrest violates due process by creating an irrebuttable presumption of guilt and, if admitted, it should be accompanied by a limiting instruction to the jury — are (a) not properly before the court and (b) meritless.

## STATEMENT OF FACTS

In March 2018, a Boone County grand jury indicted defendant on three counts of aggravated driving under the influence of alcohol (DUI) in violation of 625 ILCS 5/11-501(a), all arising from a single traffic stop. A49-50.[1] Each count alleged a different theory for proving DUI: that defendant drove

[1] Defendant's PLA and Appendix are cited as "PLA" and "A," with page numbers for latter referring to the numbers in the lower right-hand corner of the page.

(1) "while under the influence of alcohol," in violation of subsection (a)(2); (2) "while her blood alcohol concentration was .08 or more," in violation of subsection (a)(1); and (3) "under the combined influence of alcohol, other drug or drugs, or intoxicating compound or compounds to a degree that renders the person incapable of safely driving," in violation of subsection (a)(5). *Id.* And each count was aggravated pursuant to subsection (d)(1)(K) based on the allegations that defendant had a previous DUI conviction and "was transporting a person under the age of 16" during the offense. *Id.*

The case comes before this Court on interlocutory appeal after the trial court granted defendant's motion to exclude evidence that her BAC following her arrest was .107. No evidence has yet been presented to a factfinder, but defendant's motion acknowledged that police stopped her around 10:00 p.m. on July 14, 2017, after a witness reported that she was driving erratically with her four-year-old son "hanging out of a window" of the vehicle. A57. Defendant refused a breathalyzer test. *Id.* And after she failed a series of field sobriety tests, police arrested her, obtained a search warrant, and brought her to a hospital, where blood and urine samples were collected at around 2:30 a.m., approximately 4.5 hours after the traffic stop. *Id.* Testing by the Illinois State Police Crime Lab showed that defendant's BAC at the time of collection was .107 (Post-Arrest BAC). *Id.*

Defendant argued in her motion that her Post-Arrest BAC should be excluded pursuant to Illinois Rule of Evidence 403 because it "cannot be used

to determine intoxication at the time of driving," A51, and thus is substantially more unfairly prejudicial than probative, A51-52.[2] In support, defendant attached the report of her retained pharmacology expert, James Thomas O'Donnell, A56-60, who had interviewed defendant and reviewed the police report, police video footage of the traffic stop and subsequent field sobriety testing, and records relating to defendant's blood testing, A56. O'Donnell also testified at a pre-trial hearing. A143-76.

O'Donnell testified that defendant retained him to perform a "retrograde extrapolation," which is the process of using a person's known BAC test result to calculate that person's BAC at an earlier point in time. A151-52. As O'Donnell explained, this process can be used to extrapolate the person's BAC only if the BAC had "peaked" before the earlier point in time, meaning that the person was no longer absorbing alcohol into their blood stream. A153-55. Absorption of alcohol usually occurs rapidly and is complete within an hour of consuming a beverage. A155-56. Food in the stomach and other factors can slow absorption somewhat. *Id.* In some instances, it can take up to two hours for alcohol to be absorbed, but such cases are "outliers." *Id.* Signs of intoxication, such as slurred speech, altered balance, confusion, and mood swings, are most apparent shortly after absorption is complete. A158-59. After absorption is complete, alcohol is

[2] The motion also asserted that the test results should be excluded based on a defective chain of custody. A54. The trial court rejected that argument, A200-01, and defendant does not dispute that ruling in this appeal.

then eliminated from the blood at a predictable rate, which makes retrograde extrapolation possible. A154-55.

O'Donnell did not dispute that the test result accurately reflected defendant's Post-Arrest BAC, but he opined that he could not perform a retrograde extrapolation because he believed that the level of alcohol in defendant's blood had not reached its peak at the time of the stop. A57-58, 152-54. Based on his interview with defendant and his observations from the traffic stop video, O'Donnell concluded that defendant had not absorbed "sufficient alcohol" to be legally impaired while she was driving. A59-60, 155. Defendant told O'Donnell that she had attended a "Pool Party" earlier that evening, where she drank "two (filled to the brim) cups of vodka and cranberry club." A57. She drank both drinks "within that last hour she was there, completing the second drink immediately before leaving," and police stopped her 15 to 30 minutes later. *Id.*

O'Donnell observed from the video that when defendant was first pulled over, she seemed "emotional and agitated" (which O'Donnell attributed without explanation to her being "scared by the process as well as the traffic on the highway"), and had "difficulty finding her driver['s] license and insurance card" (which defendant apparently attributed to "everything f[alling] on the floor" when she opened the glovebox). *Id.* According to O'Donnell, defendant did not initially slur her speech while answering questions, exited the car without swaying or losing her balance, and

"cooperated" with the officer while he administered the horizontal gaze nystagmus (HGN) field sobriety test (although O'Donnell did not mention the results of that test). *Id.* But she failed to successfully complete any of the additional field sobriety tests and, within 30 minutes following the traffic stop, "appeared noticeably intoxicated." *Id.* O'Donnell first noticed defendant slurring her speech at 10:21 p.m., and her speech was obviously slurred by 10:30 p.m. *Id.*

"[B]ased on the timeline" that defendant provided O'Donnell — what she drank and when — and the signs of intoxication that O'Donnell believed increased over the course of the traffic stop based on his review of the video, he opined that alcohol was still being absorbed into defendant's system during the stop. A57-58. Accordingly, O'Donnell opined that no retrograde extrapolation to determine defendant's BAC while driving was possible. A57-58, 152-55.

The prosecution cross-examined O'Donnell about the basis for his opinion. Although O'Donnell relied on defendant's account of what she had been drinking, he conceded that defendant had lied to the police officer about how much alcohol she had consumed, telling the officer she had not been drinking at all. A168. O'Donnell also testified that his conclusion that defendant had not reached peak BAC at the time of the traffic stop rested on his impression that she did not show signs of intoxication at the beginning of the video but did at the end. A155, 160-61. O'Donnell admitted, however,

that his clinical practice largely concerned "other drugs and the toxicities associated with other drugs," and so he "did not see alcohol intoxicated patients very often." A159. And he conceded that defendant in fact showed a number of signs consistent with intoxication immediately prior to and during the traffic stop. A165-68. He agreed that there is "no question she was driving erratically" and that her driving "could be" an indication of intoxication. A165. But O'Donnell discounted this possibility based on defendant's statements to him that her erratic driving was attributable to her child "jumping around in the back seat and [her] trying to control the child." *Id.* Similarly, O'Donnell conceded that in speaking to the police officer during the traffic stop, defendant "didn't complete her thoughts," but he speculated that this might have been because defendant was "upset" or "anxious." A166. And O'Donnell acknowledged that the officer asked defendant "How was the pool party?" and she answered "Not much," but he declined to say whether he believed that was an appropriate response. A167. O'Donnell testified that if defendant in fact had finished absorbing the alcohol at the time of the traffic stop so that she had reached "peak" BAC when she was stopped, then it would be possible to calculate a retrograde extrapolation. A173-75. In that scenario, defendant's BAC would have been over .08 at the time she was driving. *Id.*

The trial court granted defendant's motion to exclude defendant's Post-Arrest BAC as more prejudicial than probative. A224-26; *see also* A233-35

(denying People's motion for reconsideration). The trial court acknowledged that the evidence is probative, but excluded it because O'Donnell opined that it is not possible to conduct a reliable retrograde extrapolation of defendant's BAC at the time of the traffic stop from her Post-Arrest BAC. A225-26; *see* A235 (denying motion to reconsider because post-arrest BAC could not be used to reliably "determine the BAC at the time of arrest"). The trial court relied on *People v. Floyd*, 2014 IL App (2d) 120507, which held that, under the circumstances of that case, the prosecution's retrograde extrapolation was "inherently unreliable" and should have been excluded from evidence. A225-26.

The People filed a notice of appeal and certificate of impairment, A71-75, and the appellate court reversed, A1-9. The appellate majority concluded that the trial court abused its discretion when it excluded defendant's Post-Arrest BAC. A8-9. The majority reasoned that any potentially unfair prejudice would not substantially outweigh the probative value of defendant's Post-Arrest BAC. *Id.* For starters, the court explained, the People are not required to present retrograde extrapolation evidence in order to admit a defendant's post-arrest BAC. A6. When evidence shows that a defendant's BAC is above .08 following an arrest, a factfinder may properly weigh that evidence and the other circumstances surrounding the arrest to determine whether the defendant's BAC was above .08 at the time she was driving. *Id.* The appellate majority found *Floyd* — which concerned the admissibility of

retrograde extrapolation, rather than the defendant's post-arrest BAC itself — to be inapposite. A6-7.

The dissent would have affirmed the trial court's ruling. A9-17. In the dissent's view, the trial court's exclusion of defendant's Post-Arrest BAC was a proper act of discretion because the evidence could not be used to reliably determine defendant's BAC while driving, without also introducing a retrograde extrapolation. *Id.*

This Court granted defendant's PLA, and defendant elected to stand on the PLA and did not submit an additional brief.

## STANDARD OF REVIEW

The trial court's order excluding defendant's BAC after arrest under Illinois Rule of Evidence 403 is reviewed for an abuse of discretion. *People v. Becker*, 239 Ill. 2d 215, 234 (2010).

## ARGUMENT

The appellate court correctly reversed the order excluding evidence of defendant's Post-Arrest BAC under Illinois Rule of Evidence 403 because the probative value of that evidence is not substantially outweighed by the risk of unfair prejudice. The evidence that defendant's Post-Arrest BAC was substantially above the legal limit is probative of both the fact that she had consumed alcohol before driving and the fact that her BAC was above the legal limit four hours before her test sample was collected — especially considering the corroborative evidence that she drove erratically, showed signs of intoxication while speaking with the officer, and failed various

roadside sobriety tests. Because the evidence of defendant's Post-Arrest BAC was not likely to inflame the passions of the jury against her, its admission posed no risk of unfair prejudice.

Although defendant frames her argument, and the circuit framed its ruling, in terms of unfair prejudice, both appear to be based on the concern that the Post-Arrest BAC is unreliable and will mislead the factfinder. Such concern is unwarranted. Illinois juries routinely rely on post-arrest BAC evidence in DUI cases. Further, in finding that defendant's Post-Arrest BAC was not indicative of her BAC at the time of the traffic stop, the trial court credited the testimony of defendant's expert that defendant was still absorbing alcohol at the time of the stop. But the expert's opinion was based on his impression of the video of the traffic stop (which no factfinder had yet seen) and defendant's statements to him about what she drank and when (which no factfinder had yet heard). Accordingly, whether the expert's opinion was credible and defendant's Post-Arrest BAC therefore unreliable was a question for the factfinder at trial, to be answered after considering all of the other trial evidence concerning defendant's consumption of alcohol, her condition during the traffic stop, and the circumstances surrounding her arrest.

To the extent that petitioner objects to the admission of her Post-Arrest BAC on due process grounds or argues that consideration of the evidence should be cabined by a limiting instruction, those arguments are

forfeited because she raised them in neither the trial nor appellate court. Moreover, contrary to petitioner's assertions, allowing the factfinder to consider defendant's Post-Arrest BAC and determine the appropriate weight to place on that evidence does not violate due process by creating an irrebuttable presumption that she was driving while impaired or with a BAC above the legal limit. Defendant will be free to contest the validity of an inference drawn from her Post-Arrest BAC about her BAC while driving. And no limiting instruction is necessary, for defendant's Post-Arrest BAC would not be admitted for a limited purpose.

## I. The Evidence of Defendant's Post-Arrest BAC Is Admissible Under Rule 403 Because Its Probative Value Is Not Substantially Outweighed by Any Risk of Unfair Prejudice or Misleading the Factfinder.

Evidence is relevant and "generally admissible" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Ill. Rs. Evid. 401 & 402. Rule 403 provides a limited exception to this rule, granting a trial court discretion to exclude relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." Ill. R. Evid. 403.

In weighing the probative value of a piece of evidence against the risk of unfair prejudice, "'[t]h[e] scale. . . is not evenly balanced.'" *People v. Dea*,

353 Ill. App. 3d 898, 904 (4th Dist. 2004) (Steigmann, J., specially concurring) (quoting T. Mauet & W. Wolfson, Trial Evidence 5 (1997)). Because the risk of unfair prejudice or other considerations must "substantially outweigh" any probative value, Ill. R. Evid. 403, there is a "presumption" in favor of admissibility even under Rule 403, and exclusion is an "extraordinary remedy" that should be used "sparingly." *See* 22A Fed. Prac. & Proc. Evid. § 5221 (2d ed.) (collecting cases and treatises); *see also*, *e.g.*, *United States v. Claxton*, 766 F.3d 280, 302 (3d Cir. 2014) ("Rule 403 creates a presumption of admissibility," and "[e]vidence should not be excluded under Rule 403 'merely because its unfair[ ] prejudicial effect is greater than its probative value," but "only if its unfairly prejudicial effect 'substantially outweigh[s]' its probative value.'" (quoting *United States v. Cross*, 308 F.3d 308, 323 (3d Cir. 2002)); *United States v. Seals*, 419 F.3d 600, 612 (7th Cir. 2005) (Posner, J., concurring) ("By making relevant evidence excludable only if its probative value is *substantially* outweighed by competing considerations. . . , Rule 403 establishes a presumption in favor of the admissibility of relevant evidence.") (emphasis in original); *accord Dea*, 353 Ill. App. 3d at 904.[3]

[3] Although Rule 403 codifies the Illinois common law balancing test, it "is virtually the same as" Federal Rule of Evidence 403, *People v. Moore*, 2020 IL 124538, ¶ 39, which this Court previously endorsed as properly articulating the rule in Illinois, *People v. Walker*, 211 Ill. 2d 317, 337-38 (2004) ("when deciding whether to exclude certain evidence" under Illinois common law, like Federal Rule of Evidence 403, "the proper consideration is whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice"). Accordingly, this Court looks to precedent interpreting the federal rule as persuasive authority in Illinois. *See id.* at 336-38 (following

The evidence of defendant's Post-Arrest BAC is admissible under Rule 403 because its high probative value is not substantially outweighed by any risk that it will unfairly prejudice or mislead the jury.

### A. Defendant's Post-Arrest BAC Is Highly Probative.

As the trial court recognized, defendant's BAC after arrest — .107 — is probative. A203. Defendant's elevated BAC makes it more probable that she had been drinking before she got in the car and drove erratically, that she was intoxicated when she was pulled over, and that her BAC was above .08 while she was driving.

Indeed, defendant's own expert testified that if defendant had finished absorbing alcohol by the time of the stop — which the factfinder might well find if, based on its own independent viewing of the traffic stop video and the other evidence at trial, it determines that she did not appear to grow increasingly intoxicated as the stop went on, *see infra* § I.C.2 — then her Post-Arrest BAC of .107 would show that her BAC at the time of the stop was over .08. A173-75. Therefore, defendant's Post-Arrest BAC is presumptively admissible under both Rules 402 and 403, and the trial court had discretion to exclude it only if its probative value was substantially outweighed by the

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the United States Supreme Court's interpretation of Federal Rule of Evidence 403) (citing *Old Chief v. United States*, 519 U.S. 172 (1997)); *see also People v. Thompson*, 2016 IL 118667, ¶ 40 (this Court "may look to federal law . . . for guidance" when interpreting Illinois Rules of Evidence that are similar to the federal rules).

risk of unfair prejudice or some other relevant consideration. Ill. Rs. Evid. 402 & 403.

### B. Defendant's Post-Arrest BAC Does Not Pose an Unacceptable Risk of Unfair Prejudice.

When a party seeks exclusion of evidence as unfairly prejudicial, she must do more than show that the evidence will be harmful to her case. *Old Chief*, 519 U.S. at 193 ("'Unfair prejudice' as used in Rule 403 is not to be equated with testimony simply adverse to the opposing party. Virtually all evidence is prejudicial or it isn't material. The prejudice must be 'unfair.'") (quoting *Dollar v. Long Mfg., N.C., Inc.*, 561 F.2d 613, 618 (5th Cir. 1977)). Unfair prejudice in this context generally "means 'an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror.'" *People v. Lewis*, 165 Ill. 2d 305, 329 (1995) (quoting *People v. Eyler,* 133 Ill. 2d 173, 218 (1989)). In other words, evidence is unfairly prejudicial under Rule 403 if it "cast[s] a negative light upon a defendant for reasons that have nothing to do with the case on trial." *People v. Pelo*, 404 Ill. App. 3d 839, 867 (4th Dist. 2010), *overruled in part on other grounds by People v. Veach*, 2017 IL 120649; *see also United States v. Loughry*, 660 F.3d 965, 974 (7th Cir. 2011) ("Evidence is unduly prejudicial if it creates a genuine risk that the emotions of the jury will be excited to irrational behavior, and the risk is disproportionate to the probative value of the offered evidence.").

The evidence of defendant's Post-Arrest BAC poses no danger of unfair prejudice at all, much less a danger that substantially outweighs its probative value. Unlike evidence of gang membership, prior bad acts, or the like, the evidence that defendant's Post-Arrest BAC was .107 does not tend to inflame the passions of the jury and thereby goad them to convict based on considerations other than the sufficiency of the evidence at trial. *Pelo*, 404 Ill. App. 3d at 867 (prejudice is unfair if it tends to "cast a negative light upon a defendant *for reasons that have nothing to do with the case on trial*.") (emphasis added). Here, the question of whether defendant consumed alcohol to the point of intoxication is precisely the issue that the factfinder will be asked to decide. Her Post-Arrest BAC is probative only of that issue and therefore is not unfairly prejudicial.

### C. Defendant's Post-Arrest BAC Does Not Pose an Unacceptable Risk of Misleading the Jury.

Although defendant frames her arguments, and the trial court framed its ruling, in terms of unfair prejudice, the basis of both appears instead to be a concern that the probative value of defendant's Post-Arrest BAC is substantially outweighed by a risk that it will mislead the jury. *See* PLA at 11-12; A52; A203; Ill. R. Evid. 403. Defendant contends that her Post-Arrest BAC is an "unreliable" basis on which to determine her BAC while driving yet will be relied upon by the factfinder for that purpose. PLA at 11-14. She does not question the accuracy of the test results themselves. Instead, her argument rests on O'Donnell's opinion that he cannot use defendant's Post-

Arrest BAC to perform a retrograde extrapolation of defendant's BAC at the time of the traffic stop. PLA at 2. But defendant's argument is incorrect for three reasons.[4]

### 1. Illinois law does not make retrograde extrapolation a foundational requirement for admitting a defendant's post-arrest BAC.

First, Illinois law does not require that the People provide a retrograde extrapolation as foundation to admit test results showing that defendant had a BAC over .08 after her arrest. Illinois courts have repeatedly held that a factfinder may properly infer that a person drove with a BAC over the legal limit based on evidence that, following a reasonable delay, the police tested the driver's BAC and found that it was still above the limit. *See People v. Torruella*, 2015 IL App (2d) 141001, ¶¶ 40-42; *Vill. of Bull Valley v. Winterpacht*, 2012 IL App (2d) 101192, ¶ 13; *People v. Call*, 176 Ill. App. 3d 571, 578-79 (4th Dist. 1988); *People v. Borst*, 162 Ill. App. 3d 830, 836 (2d Dist. 1987); *People v. Newman*, 163 Ill. App. 3d 865, 868 (3d Dist. 1987); *People v. Kappas*, 120 Ill. App. 3d 123, 129 (4th Dist. 1983).

Such an inference is reasonable because, as defendant's own expert explained, alcohol is absorbed into the body at a "rapid" pace, usually within an hour. A155-56. Once the alcohol is fully absorbed and a person reaches

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[4] The dissent criticized the appellate majority for permitting the admission of evidence "that does not establish beyond a reasonable doubt defendant's BAC at the time she was driving," A17, ¶ 51, but this confuses the threshold for admission with the burden of proof at trial. *See Jackson v. Virginia*, 443 U.S. 307, 318-19 (1979). A piece of evidence is not inadmissible merely because it is not independently sufficient to prove guilt beyond a reasonable doubt.

their "peak" BAC, the blood concentration begins to decline at a steady rate. A154-55; *see also Missouri v. McNeely*, 569 U.S. 141, 169 (2013) (noting the "biological certainty" that "[a]lcohol dissipates from the bloodstream at a rate of 0.01 percent to 0.025 percent per hour"). Accordingly, a factfinder may reasonably infer that a driver's BAC while driving "was similar to, if not higher than" her BAC after a traffic stop. *Winterpacht*, 2012 IL App (2d) 101192, ¶ 15. No retrograde extrapolation is required. *Id.*

Therefore, the trial court's reliance on *Floyd* — which found an expert's retrograde extrapolation to be unreliable and inadmissible "based on the specific circumstances of" that case, 2014 IL App (2d) 120507, ¶¶ 24-25 — was misplaced. The People proffered no retrograde extrapolation here, and as explained, none is required to admit defendant's Post-Arrest BAC.

Moreover, the "specific circumstances" that convinced the *Floyd* court that the proffered extrapolation was unreliable are not present here. Floyd was given a single breathalyzer test an hour and a half after driving that showed a BAC below the legal limit (.069). *Id.* ¶ 9. The People's expert testified that through retrograde extrapolation, he determined that Floyd's BAC was between .082 and .095 around the time she was driving. *Id.* The appellate court found that calculation unreliable because the expert lacked knowledge about certain "necessary factors," such as what Floyd had been eating or drinking that evening. *Id.* ¶ 24. But here, in contrast to the facts in *Floyd*, defendant's BAC remained well over the limit four hours later, so no

retrograde extrapolation was necessary to show that defendant drank to the point of intoxication. *See Winterpacht*, 2012 IL App (2d) 101192, ¶ 13 (extrapolation evidence may be necessary when testing shows BAC below legal limit, "[b]ut no such evidence is necessary when the tested level is above the statutory limit").[5]

**2. The factfinder must be permitted to weigh the credibility of O'Donnell's opinion.**

Second, the trial court's exclusion of defendant's Post-Arrest BAC on the ground that it cannot support an inference that her BAC while driving was above the legal limit improperly removed that issue from the factfinder's consideration at trial. "While the trial court must rule on any legal questions on the evidence, it must not infringe on the jury's role as the finder of fact." *People v. Lara*, 2012 IL 112370, ¶ 49. "If the court unduly limits the evidence available, it seriously undermines the fact finder's ability to perform its role in deciding credibility issues, weighing the evidence and drawing reasonable inferences, and resolving evidentiary conflicts," which, "in turn, impairs the fact finder's ability to dispose of the case properly." *Id.* In particular, "factual disputes presenting credibility questions or requiring evidence to be

[5] *State v. Eighth Judicial Dist.*, 267 P.3d 777 (Nev. 2011), which affirmed the exclusion of an unreliable retrograde extrapolation, *id.* at 936-38, and which is cited by defendant, PLA at 13, is similarly inapposite because the People do not seek to admit any extrapolation evidence here. Although the Nevada court went on, in an unreasoned, two-sentence footnote, to also affirm the exclusion of post-arrest BAC test results, *id.* at 937 n.5, that portion of the decision is unpersuasive. As explained, a factfinder can properly infer from such results that a driver's BAC was at a similar level or higher when driving.

weighed should not be decided by the trial judge as a matter of law." *Spidle v. Stewart*, 79 Ill. 2d 1, 10 (1980).

The trial court here improperly infringed on the role of the factfinder by excluding defendant's Post-Arrest BAC based on the court's acceptance of O'Donnell's opinion. O'Donnell opined that defendant had not reached her peak BAC when police stopped her (and that her BAC after arrest therefore was not indicative that her BAC exceeded the legal limit while driving) based on (1) an interview with defendant, in which she told him that the only alcohol she drank was consumed within an hour and a half prior to the traffic stop, A57, 168; and (2) his observation of the traffic stop video, which suggested to him that defendant was not yet intoxicated when the stop began, A155, 165-66. Specifically, O'Donnell concluded that defendant had not reached peak BAC at the time of the traffic stop because he thought she did not appear intoxicated at the beginning of the video and appeared increasingly intoxicated as the officer conducted roadside sobriety tests. A160-61. Thus, whether defendant's Post-Arrest BAC is indicative of her BAC while driving depends on whether the factfinder concludes that the evidence shows that in fact defendant *did* drink only immediately before driving and *did* grow increasingly intoxicated as the traffic stop progressed.

The factfinder must be allowed to reach their own conclusions on these matters based on the totality of the evidence at trial, which likely will include not only the video of the traffic stop that O'Donnell watched, but also

evidence of defendant's drinking earlier in the evening (which defense counsel suggested includes both extensive witness testimony and evidence of defendant's bar tab, A184); and the testimony of the arresting officer about defendant's statements and demeanor throughout the stop, the results of the HGN test that he administered, and her performance on the various other roadside sobriety tests. If the factfinder disagrees with O'Donnell and determines that defendant did not grow increasingly intoxicated during the course of the stop, then the factfinder could discredit his opinion and conclude that defendant was no longer absorbing alcohol at that point. In that case, as O'Donnell testified, there is no question that defendant's Post-Arrest BAC of .107 shows that her BAC was also above the legal limit while she was driving. A173-75.

Because this case comes to the Court on interlocutory appeal, the People have not yet had an opportunity to present the entirety of its case in chief, but the limited record still provides ample reason to believe that a factfinder might not agree with O'Donnell's impressions from the video and therefore might find defendant's Post-Arrest BAC indicative of her BAC while driving. O'Donnell acknowledged that defendant was driving erratically, had difficulty conversing with the police officer, and was emotional and agitated. A57, 165-66. O'Donnell conceded that these facts were consistent with intoxication — indeed, he testified that such signs of intoxication are most apparent shortly after absorption is complete, A158-59, meaning that

defendant likely had already reached peak BAC — but he rejected that interpretation based on defendant's statements to him during the interview, and even though she had lied to police about not drinking, *see* A167-68.

A reasonable factfinder thus might well disagree with O'Donnell's interpretation and conclude that defendant's erratic driving was the result of intoxication, not a child jumping in the backseat, A165; her agitation was the result of intoxication, not being "scared by the process as well as the traffic on the highway," A57; her difficulty in passing her driver's license and proof of insurance to the police was evidence of impaired coordination due to intoxication rather than an overstuffed glovebox, *id.*; and her response to the officer's questions with incomplete thoughts and a non sequitur was evidence of confusion caused by intoxication, A167. Similarly, a factfinder might well disagree with O'Donnell's impressions of defendant's level of intoxication based on the video of the traffic stop; his ability to hear slurred speech or see stumbling is no greater than a factfinder's. Indeed, he admitted that his clinical experience with alcohol intoxication is limited. A159.

For that reason, defendant's suggestion that O'Donnell's testimony was "unimpeached" because the People offered no evidence of their own at the pre-trial hearing is mistaken. PLA at 2, 10. As explained, the People's cross-examination revealed the questionable bases of O'Donnell's opinion. And the People were not obligated to present the entirety of their case in chief at the pre-trial hearing. At bottom, O'Donnell's opinion that defendant's Post-

Arrest BAC was not indicative of her BAC while driving rested on his interpretation of evidence that has not yet been, but should be, put before the factfinder at trial, so that the factfinder can fulfill its role by making credibility determinations and assigning weight to evidence.

**3. Defendant's argument leads to absurd results.**

Third, defendant's argument would lead to absurd results. If the Post-Arrest BAC in this case must be excluded, then one of the following must be true: either (1) BAC test results taken pursuant to a warrant are categorically inadmissible under Rule 403, inasmuch as they always reflect a different BAC than would have been present at the time of the earlier stop; or (2) such post-warrant BAC testing is not categorically inadmissible, but defendant's particular Post-Arrest BAC is inadmissible because of the circumstances of her case (that is, that she reported to her own expert that she drank immediately before the traffic stop).

The former, categorical rule would create an incentive for intoxicated motorists to simply refuse to take a breathalyzer test and instead demand that police obtain a warrant, safe in the knowledge that any subsequent testing would be inadmissible to establish their BAC while driving. Such a development would effectively eliminate criminal liability under subsection (a)(1), which requires proof of a BAC above .08, because "[e]nforcement of BAC limits [ ] requires prompt testing." *Mitchell v. Wisconsin*, 139 S. Ct. 2525, 2536 (2019). But BAC limits are a critical law enforcement tool for combatting the "carnage" of irresponsible and drunk driving. *Id.* at 2535-36;

*see also People ex rel. Hartrich v. Harley-Davidson*, 2018 IL 121636, ¶ 19 (recognizing "the seriousness of the public safety threat created by the commission of a DUI"). Indeed, the enactment of such limits around the country "corresponded with a dramatic drop in highway deaths and injuries." *Mitchell*, 139 S. Ct. at 2536.

The latter rule, permitting suppression based on a defendant's own self-serving hearsay statements, would also have far-reaching consequences. A defendant could avoid liability under subsection (a)(1) simply by stating that she had consumed alcohol immediately before getting behind the wheel. By analogy, a defendant might argue for exclusion of evidence that his fingerprints or DNA were discovered at a crime scene because his expert will opine that there is no way to determine whether the evidence was left on the day of the crime or sometime earlier. The defendant need only represent to the expert that he visited the crime scene the day before to provide a basis for such opinion. Surely, the exclusion of such strongly probative evidence on these grounds would be an abuse of discretion. So, too, the exclusion of the evidence here was an abuse of discretion, given its probative force in showing that defendant drove while intoxicated.

* * *

In sum, the Court should affirm the appellate court's judgment because the trial court erred in excluding defendant's Post-Arrest BAC under Rule 403.

## II. Defendant's Other Arguments Are Forfeited and Meritless.

In her PLA, defendant raises a number of other issues that were not included in her motion before the trial court or in her appellate court brief. She argues that the admission of the Post-Arrest BAC violates due process by "creating an un-rebuttable presumption" that her BAC was over the legal limit, PLA at 3-7, and "permit[ting] a jury to assume guilt based on unreliable evidence and effectively eliminat[ing] the State's requirement to prove defendant guilty beyond a reasonable doubt," PLA at 7, and that the appellate court violated due process by "reweighing the unimpeached and uncontradicted expert testimony," PLA at 10, and "mischaracteriz[ing]" defendant's arguments, PLA at 10-11. She also argues that, if the BAC evidence is admitted, "justice requires" that certain limiting instructions be given to the jury. PLA at 7-10. Defendant's discussion of these issues is limited to her PLA's statement of points relied upon in seeking review, *see* PLA at 1-16; the argument section of her PLA consists of a single paragraph noting that this Court's supervisory authority is unlimited and arguing that "[t]he General Importance of the Questions supports this Court's decision to review the matter." PLA at 19.

To the extent that the PLA presents them, defendant's arguments that the admission of her BAC after arrest violates due process are forfeited because she never raised them in any court below. *See People v. Dorsey*, 2021 IL 123010, ¶¶ 68-69 (argument raised for the first time in this Court is forfeited). In the trial court, defendant argued only that her BAC after arrest

should be excluded under Rule 403 and because of a defect in the chain of custody. A51-55, 163-67. And in the appellate court, defendant omitted her chain of custody argument and argued only that her BAC after arrest should be excluded on the basis that it was more prejudicial than probative under Rule 403. A1-9.

Forfeiture aside, defendant's due process arguments are also meritless. Although it is true that a *mandatory* presumption that defendant was driving while under the influence would shift the burden of proof to defendant and therefore violate due process, *People v. Ziltz*, 98 Ill. 2d 38, 43-44 (1983), the admission of the Post-Arrest BAC evidence here would create no such presumption. The People still have the burden to prove each element of the charged offenses beyond a reasonable doubt, which includes proving beyond a reasonable doubt that defendant drove with a BAC at or above .08. *In re Winship*, 397 U.S. 358, 364 (1970). Defendant's argument appears to be that, as a practical matter, the BAC test results are "unrebuttable" because no retrograde extrapolation is possible to show that defendant was not intoxicated at the time she was driving. PLA at 3-7. But simply because certain evidence is admissible does not mean that a factfinder is required to credit the evidence or to draw the inference urged by the People. Defendant will be free to rebut the BAC evidence. Indeed, defendant presumably will call O'Donnell at trial for precisely this purpose. The factfinder can then weigh O'Donnell's opinion testimony against the People's evidence that she

was intoxicated when driving and assign the BAC evidence the appropriate weight.

Defendant cites no relevant precedent for the propositions that the appellate court violated due process by holding that O'Donnell's testimony was insufficient to exclude the BAC evidence under Rule 403 or by "mischaracteriz[ing]" her argument on appeal. PLA at 10-11. The lack of such authority provides another basis for rejecting the argument as forfeited. *See Vancura v. Katris*, 238 Ill. 2d 352, 369-70 (2010) (party's brief must include "[b]oth argument and citation to relevant authority" on pain of forfeiture).

Nor is there any basis in the record for these allegations. As explained, O'Donnell's opinion was thoroughly impeached on cross-examination. At bottom, defendant simply argues that the appellate court failed to afford the trial court sufficient deference when reviewing its ruling for an abuse of discretion and disagreed with her view of the evidence. But an appellate court does not violate due process simply by disagreeing with the trial court's ruling, even if it does so erroneously. Nor does an appellate court violate due process by rejecting a defendant's characterization of the evidence of her Post-Arrest BAC as "inherently unreliable" and rejecting her legal conclusion that "its probative value was substantially outweighed by the danger of unfair prejudice." PLA at 11. And, as explained, *see supra* § I, the appellate court correctly held that the trial court erred in excluding the BAC

evidence under Rule 403 because that evidence is relevant and any potential risk of unfair prejudice or misleading the factfinder does not substantially outweigh its probative value.

Any argument about jury instructions is similarly unpreserved and unripe for review. *People v. P.H.*, 145 Ill. 2d 209, 219 (1991) ("A controversy is ripe when it has reached the point where the facts permit an intelligent and useful decision to be made."). This case remains in the pre-trial stage. The case may ultimately be resolved short of an actual trial, such as through plea negotiations. Or defendant may opt for a bench trial, in which circumstance, no jury instructions will be necessary. More to the point, defendant has proposed no jury instructions to the trial court, the People have made no objections to any instructions, and the trial court has made no rulings about instructions. This Court need not weigh in on the propriety of such hypothetical instructions in this interlocutory appeal. *See People v. Bass*, 2021 IL 125434, ¶ 29 ("Courts of review . . . will not render advisory opinions.").

And at this stage, defendant has not demonstrated any need for the trial court to give instructions to limit a potential jury's consideration of her Post-Arrest BAC. Defendant does not suggest any language for an instruction. But a jury can and should consider the BAC as it would any other evidence. As explained, Illinois juries routinely consider BAC evidence

without the need for a retrograde extrapolation. *E.g., Winterpacht*, 2012 IL App (2d) 101192, ¶ 15.

## CONCLUSION

This Court should affirm the judgment of the appellate court.

May 11, 2022

Respectfully submitted,

Kwame Raoul
Attorney General of Illinois

Jane Elinor Notz
Solicitor General

Katherine M. Doersch
Criminal Appeals Division Chief

Jason F. Krigel
Assistant Attorney General
100 West Randolph Street, 12th Floor
Chicago, Illinois 60601-3218
(773) 590-7942
eserve.criminalappeals@ilag.gov

*Counsel for Plaintiff-Appellee*
*People of the State of Illinois*

**RULE 341(c) CERTIFICATE OF COMPLIANCE**

I certify that this brief conforms to the requirements of Rules 341(a) and (b). The length of this brief, excluding the pages containing the Rule 341(d) cover, the Rule 341(h)(1) table of contents and statement of points and authorities, the Rule 341(c) certificate of compliance, and the certificate of service is 27 pages.

/s/ Jason F. Krigel
Jason F. Krigel
Assistant Attorney General

## PROOF OF FILING AND SERVICE

Under penalties as provided by law pursuant to Section 1-109 of the Code of Civil Procedure, the undersigned certifies that the statements set forth in this instrument are true and correct. On May 11, 2022, the foregoing **Brief of Plaintiff-Appellee People of the State of Illinois** was filed with the Clerk of the Supreme Court of Illinois using the court's electronic filing system, which will serve a copy on the following parties at the email addresses below:

Christopher J. Taylor
Post Office Box 72
Oswego, Illinois 60543
taylorlawpc@att.net

Patrick Delfino
Edward R. Psenicka
Stephanie Hoit Lee
State's Attorney's Appellate Prosecutor
2nddistrict.eserve@ilsaap.org

Tricia Leigh Smith
Boone County State's Attorney's Office
tsmith@boonecountyil.org

/s/ Jason F. Krigel
Jason F. Krigel
eserve.criminalappeals@ilag.gov