NO. 127824

IN THE

SUPREME COURT OF ILLINOIS

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

REPLY BRIEF OF DEFENDANT-APPELLANT

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ARGUMENT

I. The Defendant does not Forfeit any Arguments Raised in the PLA

A. The Defendant May Raise Any Issues Properly Presented by the Record to Sustain the Judgment of the Trial Court as the Appellate Court Reversed the Judgment of the Trial Court, and the Defendant Appealed the Judgment of the Appellate Court and Filed the PLA Which Is the Before this Court.

The Brief of Plaintiff-Appellee People of the State of Illinois (hereinafter referred to as "State's Brief" or "St.'s Br.") cites *People v. Dorsey*, 2021 IL 123010, ¶¶ 68-69 for their assertion, 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." (St.'s Brief 9-10, 23-24). It is well settled, however, that where the appellate court reverses the judgment of the trial court, and the appellee in that court brings the case to this court as appellant, as in the instant case, that party may raise any issues properly presented by the record to sustain the judgment of the trial court, even if the issues were not raised before the appellate court. *Gallagher v. Lenart,* 226 Ill.2d 208, 232, 314 Ill.Dec. 133, 874 N.E.2d 43 (2007). Although defendant asserts all issues are properly before this Court, in the event this Court feels otherwise, the rule of forfeiture is "an admonition to the parties and not a limitation on the jurisdiction of this court," *People v. Normand,* 215 Ill.2d 539, 544, 294 Ill.Dec. 637, 831 N.E.2d 587 (2005).

B. The PLA Cites Relevant Authority for Points in the PLA.

The State argues "defendant cites no relevant precedent for the propositions that the appellate court violated due process by holding O'Donnell's testimony was insufficient to exclude the BAC evidence under Illinois Rule of Evidence 403 or by

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"mischaracterizing her argument." (St.'s Br. 25 references PLA at 10 -11). First, defendant does not allege the appellate court violated due process "by holding O'Donnell's testimony was insufficient to exclude the BAC evidence under Rule 403." Second, relevant authority for the proposition that the majority opinion violated defendant's due process is in the Petition for Leave to Appeal (hereinafter referred to as "PLA") which incorporates by reference, the relevant authority of Justice McLaren in the dissenting opinion of the appellate court order (A009-A017) (hereinafter referred to as "dissenting opinion") (A009-A017; ¶ 35- ¶ 51). (PLA Page 3 of 19). Justice McLaren succinctly articulated many of the points and references relevant to the instant case and is authoritative. Rather than restate the well explained reasoning of the dissenting opinion, which is part of the record, in a separate brief, defendant elected to use the PLA for her brief incorporating the dissenting opinion.

The majority opinion violated defendant's due process rights inclusive of the following ways as stated in the dissenting opinion (A009-A017):

> The majority misapplies the rules and tenets of appellate review in order to allow the State to introduce "inherently unreliable" and prejudicial evidence to a jury. (¶ 36) …While correctly noting that "[a] trial court's balancing of probative value and prejudicial impact is reviewed for an abuse of discretion" (*supra* ¶ 28), the majority then inexplicably seeks the bright-line guidance of "any case addressing whether a four-hour delay is so excessive as to render a BAC test inadmissible, particularly where the trial court did not find the delay was unreasonable." (¶37)… Applying what is in actuality "a *de novo* review of a fact- intensive inquiry suited not to bright lines but to balancing leads to nothing more than an imposition of this court's judgment over that of the trial court." *Rockford Financial Systems, Inc. v. Borgetti*, 403 Ill. App. 3d 321, 324 (2010). (¶ 37)…

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The majority sets up and knocks down a straw man of "admissibility." (¶ 37)… The majority later concludes, "Neither the lack of extrapolation evidence, nor the delay in obtaining the BAC, affected the admissibility of the BAC test result." *Supra* ¶ 31. (¶ 37-¶ 38)… The majority's "analysis" and findings regarding admissibility is counterfactual, irrelevant, and misleading. (¶ 39) …The result of the majority's misapplication of review is that the State would be allowed to serve up to the jury the results of a test administered four hours after defendant was arrested, a test for which no explanation could be provided as to how the test related defendant's BAC at the time she was driving (¶ 42) …The majority is doing nothing more than imposing its own judgment over the trial court's reasoned judgment. (¶ 43) …The majority issues its own edict instead of considering whether no reasonable person would agree with the trial court's exercise of discretion. It accomplishes this by reweighing the expert testimony and giving it no weight whatsoever, in essence giving the State the benefit of, not a *de novo* review, but a *de novo* hearing. See *Jones v. Board of Fire & Police Commissioners*, 127 Ill. App. 3d 793, 801 (1984) (*de novo* hearing is a new proceeding, "the same as if it had not been heard before and as if no decision had been previously rendered." (¶ 43) … how can the majority not realize that it is forcing the defendant to present a defense to refute, not real evidence, but guess, speculation, and conjecture that are the antithesis of the presumption of innocence? (¶ 44) …In essence, O'Donnell opined that it is virtually impossible to prove beyond a reasonable doubt that the defendant was guilty without extrapolation testimony. How is refusing to allow such prejudice to occur an abuse of discretion? (¶ 44) …The majority, conflating the weight that a jury may give to evidence with the purposes for which the evidence may be admitted (¶ 48)… The majority has nullified defendant's presumption of innocence by allowing the jury to find defendant guilty based on admissible, but unreliable, evidence without foundational expert extrapolation opinion, that does not establish beyond a reasonable doubt defendant's BAC at the time that she was driving. Defendant will be put in the position of having to defend against extrapolation evidence that was not, and could not, be presented to the jury. I submit that the majority has failed to give any credence to the totality of the evidence of record. The majority has invaded the province of the trial court's exercise of discretion by disregarding the expert testimony upon which the trial court exercised its discretion. It has committed both procedural and substantive error and effectively made extrapolation evidence an obsolete vestige of scientific expertise. (¶ 51)

II. The State Is Unable to Meet the Abuse of Discretion Standard .

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"The admission of evidence is within the sound discretion of a trial court, and a reviewing court will not reverse the trial court absent a showing of an abuse of that discretion." *People v. Becker,* 239 Ill. 2d 215, 234 (2010). A trial court abuses its discretion where its decision is fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it. *People v. King,* 2020 IL 123926, ¶ 35. The State's Brief acknowledges the standard of review in the instant case is for an abuse of discretion, (St.'s Br. 8), however, the State's Brief lacks any argument whatsoever that alleges the trial court's decision in the instant case was fanciful, arbitrary, or unreasonable to the degree that no reasonable person would agree with it.

This is so because the trial court's decision to exclude the inherently unreliable BAC test result was well reasoned and as applied to the facts of the instant case, the law and precedent required the trial court to grant the defendant's Motion to Exclude Evidence. No reasonable person could find otherwise. In fact, as stated by Justice McLaren in the Dissenting Opinion:

> For a trial court to allow the admission of such "inherently unreliable" evidence, the relevance of which the trial court found to be outweighed by its prejudicial effect, would be an abuse of discretion, if not an outright abdication of its role in presiding over a trial. See *People v. Lambert*, 288 Ill App. 3d 450, 462-63 (1997)…. (A013 ¶ 42).

In fact, the State's Brief acknowledges another reasonable person agreed with the trial court:

> "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

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> of discretion because the evidence could not be used to reliably determine defendant's BAC while driving, without also introducing a retrograde extrapolation." (St.'s Br. 8)

Arguably, the State concedes they are unable to meet this standard of review as Justice McLaren has agreed with Judge Young and the State had no alternative but to waive and/ or forfeit any argument on this issue. Pursuant to Supreme Court Rule 341(h)(7), "Points not argued are forfeited and shall not be raised in the reply brief, in oral argument, or on petition for rehearing."

III. The State's Position that an Inherently Unreliable BAC Test Result, Should Be Admissible at Trial is in Direct Conflict with Legal Precedent and the Laws of the State of Illinois.

The State is not required to provide a retrograde extrapolation as foundation to admit test results showing that defendant had a BAC over .08 after arrest. (St.'s Br. 15). The State agues for an absolute right for admission of the BAC test result, determined to be "inherently unreliable," for the factfinder to "properly infer that a person drove with a BAC over the limit based on evidence that, following a reasonable delay, the police tested the driver's BAC and found it was … above the limit." (St.'s Br. 15).

The majority opinion granted the State's request (A009) and further held *Floyd's* discussion of admissibility of such evidence is not controlling with evidence of a BAC test result above .08. "The appellate majority found Floyd- which concerned the admissibility of retrograde extrapolation, rather than the defendant's post-arrest BAC itself to be inapposite." (St.'s Br. 7-8 citing A006-A007).

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The State's Brief asserts, "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." (St.'s Br. 8). The appellate majority ruled if a BAC was above the legal limit, as in the instant case, "regardless of the presence or lack of extrapolation evidence, the BAC remains probative." (A007). Because the State is not required to offer extrapolation evidence as a foundational requirement for admission of the BAC result, the appellate majority held, "Accordingly, Floyd's discussion of the admissibility of such evidence is not controlling." (A007). The appellate majority further ruled, "Neither the lack of extrapolation evidence, nor the delay in obtaining the BAC, affected the admissibility of the BAC test result." (A009).

A. BAC Test Result Evidence is subject to the Balancing Test of Rule of Evidence 403.

The appellate majority acknowledges "otherwise admissible evidence must meet the criteria of Rule 403…Although an otherwise reliable BAC test result of 0.08 or higher is generally admissible, …. such evidence remains subject to Rule 403." (A008 at ¶ 28). Reason would follow that if a 0.08 or higher BAC test result was *generally* admissible, there would be times, it is not admissible. Additionally, if the majority opinion referred to an "otherwise reliable BAC", reason would also follow an *unreliable* BAC would not be admissible. It appears the majority opinion contradicts themselves in this regard.

The State did not conduct a balancing test pursuant to Illinois Rule of Evidence 403

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in the record as their position has been they had an absolute right to admit a BAC test over the legal limit. The State's Brief now admits, "… 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 risk of unfair prejudice or some other relevant consideration. Ill. Rs. Evid. 402 & 403." (St's Br. 12-13).

Specifically, the State argues 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 (St's. Br. 10); A. Defendant's post-arrest BAC is highly probative (St's. Br. 12); B. Defendant's post-arrest BAC does not pose an unacceptable risk of unfair prejudice (St's. Br. 13); and C. Defendant's post-arrest BAC does not pose an unacceptable risk of misleading the jury (St's. Br. 14). Throughout the State's argument (State's Brief 8-15) in this section on the balancing test, the State fails to cite any authority that would prohibit the trial court from granting the Motion to Exclude the inherently unreliable BAC test result evidence in the instant case.

The State alleges the BAC test result evidence has "*high* probative value" and is "*highly* probative", (St's. Br. 12), when the trial court never determined the BAC was *highly* probative. The trial court stated the BAC was probative. (A203, A225).

The State has been clear, "This is charged in multiple ways, Your Honor. And in the jury instructions themselves it also talks about using the BAC, the test result, and the

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different ways that the jury can use that result in their deliberations." (A221). If the State admits the above .08 inherently unreliable BAC test result, a jury will assume there is a reason they are being presented the BAC test result and the jury will not feel entitled to just disregard the test. Furthermore, the risk of misleading the jury and for unfair prejudice resulting from the admission of the unreliable BAC test result evidence is high. The necessity for the trial court to have the broad discretion regarding the admissibility of evidence is paramount to protect due process. A trial court shall ensure the evidence is relevant and reliable, *Decker v. Libell*, 193 Ill. 2d 250, 254 (2000) and conduct the balancing test of Rule of Evidence 403 to ensure the probative value outweighs the danger of unfair prejudice, confusion of the issues, or misleading the jury. This Court has held:

> "They say that the nature of our court system requires that law established by this court's decision be followed when the question decided arises again before a court. If precedent is not judicially respected, the uniformity and stability of decision, which is essential to the proper administration of justice, will be destroyed *Decker v. Libell*, 193 Ill. 2d 250, 254 (2000)

The State apparently disagrees with this Court's ruling in *Decker* that the trial court is responsible to ensure the evidence is reliable as the State argues "whether the expert's opinion was credible and defendant's Post-Arrest BAC therefore unreliable was a question for the factfinder at trial." (St.'s Brief 9). The trial court is in a superior position to assess the value of potentially prejudicial or misleading evidence. A juror may not even understand the context of the evidence, yet alone be able to determine the proper weight to give such evidence.

The State further alleges, any concern for unfair prejudice, and/ or that the Post-

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Arrest BAC is unreliable and will mislead the factfinder is unwarranted as Illinois juries routinely rely on post-arrest BAC evidence in DUI cases. …" (St.'s Brief 9). Whether juries routinely rely on post-arrest BAC test results does not lessen the procedural violations by the fact the State is willing to present to juries an unreliable BAC test result for them to rely on as well.

The State disputes an unreliable BAC test result would cause a prejudicial effect (St.'s Br. 13) and indicates "Virtually all evidence is prejudicial or it isn't material." (St.'s Br.15). Unfair prejudice was described in The State describes "unfair prejudice" from an *People v. Lewis*, 165 Ill. 2d 305, 329 (1995) which was also cited by the State (St's Br. 13):

> "Relevant evidence is evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable than it would be without the evidence. (People v. Monroe (1977), 66 Ill.2d 317, 322.) *However, even when evidence is relevant, it may, in the trial court's discretion, be excluded if its prejudicial effect substantially outweighs its probative value.* (People v. Eyler (1989), 133 Ill.2d 173, 218.) In this context, prejudice means " 'an undue tendency to suggest decision on an improper basis, commonly an emotional one, such as sympathy, hatred, contempt, or horror.' " Eyler, 133 Ill.2d at 218, quoting M. Graham, Cleary Graham's Handbook of Illinois Evidence § 403.1 (4th ed. 1984)." *People v. Lewis* at 329.

In the instant case the prejudicial effect clearly substantially outweighs its probative value. An admission of a BAC test result evidence above .08 carries a presumption of impairment under 625 ILCS 5/11-501(a)(2) and will be dispositive of guilt under 625 ILCS 5/11-501(a)(1) despite the defendant's expert opined to a reasonable degree of scientific certainty the defendant was not impaired at the time of

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driving (A160, A058) and that the BAC test result is unreliable to determine BAC level at the time of driving. (A176).

The State argues the defendant's inherently unreliable BAC poses no danger of unfair prejudice at all. (St. Brief 14). The State attempts to distinguish evidence of gang membership, prior bad acts, or the like with defendant's BAC test result evidence indicating the BAC test result evidence does not inflame the passions of the jury and thereby goat them to convict based on considerations other than the sufficiency of evidence. (St. Br. 14). The State misstates the legal comparison when they allege, "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." (St. Brief 14). Rather the issue in the instant case is whether the defendant was intoxicated *when she was driving*, not four hours or more after she was driving. The BAC test result has been determined by science to be of no use to determine any level of blood alcohol at the time defendant was driving. (A176, A202).

The State alleges the BAC test result does not pose an unacceptable risk of misleading the jury. (St.'s Br.14). The State asserts that Illinois law does not require the State to complete a retrograde extrapolation as foundation to admit over the limit BAC test results. (St.'s Br.15). In the instant case, a retrograde extrapolation cannot be completed at all and the BAC test result in the instant situation is unreliable to determine

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BAC at the time of arrest, over four hours earlier. To allow such a BAC test result to be admissible will be misleading to a jury. As cited in Floyd, the evidence, "invited the jury to convict her due to a reaction to a supposedly high BAC rather than proof beyond a reasonable doubt that defendant was driving under the influence." See State v. Eighth Judicial District Court, 267 P.3d 777 at 781 (Nev. 2011) (Armstong), People v. *Floyd*, 2014 IL App (2d) 120507, ¶ 24.

B. Despite Not Presenting Any Evidence at the Motion to Exclude Hearing, the State Wishes to Reweigh the Expert's Unrebutted Scientific Opinions

The State argues Dr. O'Donnell testified that *if* defendant had finished absorbing alcohol at the time of the traffic stop, it would be possible to calculate a retrograde extrapolation. (St.'s Br. 6). The State presents this same hypothetical scenario, several times in State's Brief suggesting the fact finder may disregard the unrebutted scientific evidence of the expert that found defendant still in the absorption phase at the time of the stop and the fact finder may determine defendant had a BAC over .08 at the time of the stop. (St.'s Br. 6, 12, 18, 19). This same hypothetical example is assumedly the alleged "People's cross examination" that "revealed the questionable bases of O'Donnell's opinion." (St.'s Br. 20). In response to this hypothetical situation presented by the State at the hearing on the Motion to Exclude, Dr. O'Donnell opined,

> "..there's no way to extrapolate it, and no one can say what the BAC was at 10:00 am (sic), whether it's above or below .08. I can't say it and I challenge any expert to say it with the facts in this case. You want to ask a hypothetical, you can get all kinds of answers. If you look at the facts, the facts dictate and limit

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what you can do with this information." (A176 lines 13-20).

The State's Brief focuses on reweighing the unrebutted scientific opinion of Dr. O'Donnell. (St.'s Br. 8-9, 12, 14, 18-21). The State argues the expert opinion was based on his "impressions" (St.'s Br. 9) and "belief" (St.'s Br. 4). The State's Brief does not dispute that the BAC test result in the instant case is inherently unreliable, but argue, "whether the expert's opinion was credible and defendant's Post-Arrest BAC therefore unreliable was a question for the factfinder at trial" (St.'s Br. 9). The State disputes:

> "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." (St.'s Br. 20).

The State was certainly not obligated to present their entire case in chief at the Motion to Exclude hearing, however, if the State had *any* evidence to rebut the findings or scientific opinions of Dr. O'Donnell, the trial court provided ample opportunity for the State to present the evidence as summarized below:

> On July 12, 2019, the trial court asked the State, "do you have any other witnesses or evidence in your case in chief opposing the motion to exclude?" (A179 lines 7-9); the court stated "—but I don't know if the State has other witnesses or other experts or something else—" (A189 line 24, A190 line 1); and "I'm going to rule on the directed verdict in a week, but hypothetically let's say I deny it, then Attorney Sirens says we have our own State's expert that's going to say something different and I'm going to have to hear from them." (R192 lines 1-6). On July 19, 2019, the trial court stated, "I've ruled on the motion for directed verdict, but if the State wishes to have additional presentation, I'd pick some other dates" to which the State responded, "may I have time to speak to my office about that?" The trial court agreed (A204 lines 12-19) and granted the State the time requested (A206 lines 10-16) for the State to determine if "I think I need to bring

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in witnesses." (A206 lines 15-16). On August 23, 2019, the State confirmed they were not going to present any additional witnesses or evidence. (A213 lines 20-24 and A214 lines 1-2).

C. It is the Responsibility of the Trial Court as Gatekeeper to Bar Unreliable Evidence.

The State argues, "whether the expert's opinion was credible and defendant's Post -Arrest BAC therefore unreliable was a question for the factfinder at trial." (St.'s Br. 9). The State attempts to support their position with the following precedent from this Court:

> "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. … Spidle v. Steward, 79 Ill. 2d 1, 10 (1980). 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. That limitation, in turn, impairs the fact finder's ability to dispose of the case properly." People v. Lara, 2012 IL 112370, ¶ 49 In particular, "factual disputes presenting credibility questions or requiring evidence to be weighed should not be decided by the trial judge as a matter of law." *Spidle v. Stewart*, 79 Ill. 2d 1, 10 (1980). (St.'s Br. 17-18).

In *Lara*, this Court agreed the trial court must first "rule on any legal questions on the evidence" and then the trial court must not infringe on the jury's role as finder of fact. *People v. Lara*, 2012 IL 112370, ¶ 49. The trial court's responsibility to rule on the evidence occurs first, and then assuming the evidence is reliable, relevant, and passes the balancing test of Illinois Rule of Evidence 403, presented to the fact finder "to perform its role in deciding credibility issues, weighing the evidence and drawing reasonable inferences, and resolving evidentiary conflicts." (*Id.*,¶ 49).

In *Spidle v. Stewart*, the evidentiary issue before this Court was the manner in which

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the expert in that case answered the specific question, "whether he meant fistula formation after hysterectomies is usually a result of negligence or whether there is an equal probability that they occur despite the exercise of due care." *Spidle v. Stewart*, 79 Ill. 2d 1, 10 (1980). Both cases cited in the State's Brief did not involve the issue of "inherently unreliable" evidence being presented to the fact finder. In fact, the State's Brief failed to cite any case where the trial court properly allowed the admission of "inherently unreliable" evidence to presented to the factfinder.

D. The Trial Court Correctly Relied on *Floyd* and Found the "Inherently Unreliable" BAC Test Result Inadmissible.

People v. Floyd, served as precedent that "inherently unreliable" evidence, such as an extrapolation calculation, should not be presented to the factfinder. The *Floyd* court determined

> "…because the extrapolation evidence invited the jury to convict defendant on the basis of a supposedly high BAC, the potential for prejudice from admitting that evidence was high. Because the prejudicial effect of the extrapolation substantially outweighed the probative value, the trial court abused its discretion in admitting the evidence. See generally McKown, 236 Ill.2d at 314, 338 Ill.Dec. 415, 924 N.E.2d 941 (noting that the admissibility of scientific evidence is subject to the balancing of probative value and the risk of unfair prejudice)." People v. Floyd, 2014 IL App (2d) 120507, ¶ 27

The State alleges:

> "…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." (St.'s Brief 16).

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The trial court in the instant case determined if the extrapolation calculation is "inherently unreliable," which is the language from Floyd, the potential for prejudice from admitting the test is high. (A203). The trial court further found, "I do not believe it is the correct legal position that the higher statutory reading means that the test result automatically is admitted…" (A203). The trial court correctly determined the testing and the extrapolation in the instant case is inherently unreliable. (A235). To present the unreliable BAC test result evidence would be to allow the jury to convict the defendant on an improper basis. *People v. Floyd* 2014 IL App (2d) 120507, ¶ 24.

E. Discretion and Bright Line Tests are Antithetical.

The State attempts to distinguish the evidence of an "extrapolation calculation" with the evidence of a BAC test result (St.'s Br. 15, 16) arguing the State does not need to complete a retrograde calculation as a BAC test result over .08 is always admissible. (St.'s Br. 15). The State also argues if the post arrest BAC test result in the instant case must be excluded' then "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." (St.'s Br. 21) and therefore intoxicated motorists will refuse breathalyzer and demand that police obtain a warrant knowing that subsequent testing would be inadmissible. (St.'s Br. 21). This argument suggests a level of clear thinking that is inconsistent with the concept of intoxication. It is highly unlikely that an intoxicated person would have the ability to analyze a legal issue in the manner set forth in

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the State's argument.

The science of BAC testing and retrograde calculations has provided greater opportunity for the State to efficiently protect the public from the dangers of impaired drivers, and the requirement that the evidence be reliable will not influence the vast majority of those arrested. The delay from a traffic stop arrest until the time when a BAC test may be completed is immaterial for most. As cited by the State:

> "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)." (St.'s Br. 15).

The cases cited by the State, however, are distinguishable from the instant case, in that none of those cases contained a finding by the trial court that the test evidence was "inherently unreliable".

Despite the holding in the majority opinion (A001 ¶1), the issue of delay in the time between the arrest and the test, nor the value of the BAC affected the trial court's determination the evidence was "inherently unreliable". The trial court ruled,

> "Let me make some findings and observations about what I'm not deciding here today. There's been some comment as to whether four hours is reasonable or unreasonable. I'm not making any findings. I'm not aware of any case law that makes some kind of bright line reasonable or unreasonable. I'm not making comments about that. I would only note that, frankly, in *Floyd* there was a gap, and it was only because of the emergency room being busy. It was a fortuitous gap. So I'm not making any ruling about that. But to the extent, Mr. Taylor, if you're

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> saying that four hours is unreasonable, I'm not finding that…..I think the test is probative. The expert didn't say anything about the results of the test. The expert's opinion is that you could not do any extrapolation calculation. It would be inherently unreliable, and that's what I found it to be. At this point I have an expert that says that the test is unable to be used to do retrograde extrapolation…I don't think it is the correct position that the higher statutory reading means that the test result automatically is admitted; and. Therefore, based upon what's in front of me … I'm going to grant the motion to exclude." (A226).

As stated by Justice McLaren in the Dissenting Opinion,

> "Illinois courts have long recognized that discretion and bright-line tests are antithetical. See, *i.e.*, *Floyd*, 2014 IL App (2d) 120507, ¶25 ("[W]e further emphasize that *we are not creating a blueprint or a bright-line rule* for the admissibility of retrograde extrapolation evidence. *** Whether the State produces a reliable extrapolation will depend on the specific circumstances of each case." (Emphasis added.) (A010).

IV. Allowing the State to Introduce Inherently Unreliable Evidence to Prove an Element of their Case Violates Defendant's Due Process.

The State asserts allowing the factfinder to determine the weight of the BAC Test Result does not violate due process as "Defendant will be free to contest the validity of an inference drawn from her Post-Arrest BAC about her BAC while driving." (St.'s Br. 10). With the admission of the above the legal limit BAC test result evidence, the defendant is able to attack the testing, but the defendant is unable to disprove the presumption that arises under 625 ILCS 5/11-501.2 and the defendant will likely be forced to persuade the jury unable to prove her innocence under 625 ILCS 5/11-501 (a)(1).

The State's Brief has been selectively using the word' "inference" and avoiding reference to the "presumption." This Court has distinguished the definition of "inference"

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with "presumption: in *State v, Funches*, 818 N.E.2d 342, 346-347; 212 Ill.2d 334; 288 Ill.Dec. 654 (2004).

> "An inference is a factual conclusion that can rationally be drawn by considering other facts. Thus, an inference is merely a deduction that the fact finder may draw in its discretion, but is not required to draw as a matter of law. M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 302.2, at 81 (8th ed.2004); 1 C. Fishman, Jones on Evidence § 4:1, at 299-300 (7th ed.1992). The fact finder is free to accept or reject the suggested inference; no burden is placed on the defendant. *Allen,* 442 U.S. at 157, 99 S.Ct. at 2224, 60 L.Ed.2d at 792; *People v. Watts,* 181 Ill.2d 133, 142, 229 Ill.Dec. 542, 692 N.E.2d 315 (1998); see *People v.* 347*347 *Frazier,* 123 Ill.App.3d 563, 572, 79 Ill.Dec. 27, 463 N.E.2d 165 (1984). "Inferences are by their nature permissive, not mandatory." 1 C. Fishman, Jones on Evidence § 4:1, at 299 (7th ed.1992).
>
> In contrast, a presumption is a rule of law that requires the fact finder to take as established the existence of a fact, *i.e.,* the presumed fact, after certain other facts, *i.e.,* basic facts, have been established, unless sufficient evidence is introduced tending to rebut the presumed fact. M. Graham, Cleary & Graham's Handbook of Illinois Evidence § 302.1, at 79 (8th ed.2004); 1 R. Steigmann, Illinois Evidence Manual § 3:01, at 65-66 (3d ed.1995); 1 C. Fishman, Jones on Evidence § 4:2, at 301-02 (7th ed.1992). *State v, Funches*, 818 N.E.2d 342, 346-347; 212 Ill.2d 334; 288 Ill.Dec. 654 (2004).

Thus, the admission of the unreliable BAC test result in the instant case, shifts the burden of production and burden of persuasion to the defendant to present sufficient evidence to rebut the presumed fact.

CONCLUSION

The Court should reverse the judgment of the Appellate Court.

Dated: August 3, 2022

Respectfully Submitted,

By: /s/ Christopher Taylor

Christopher J. Taylor

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RULE 341(c) CERTIFICATE OF COMPLIANCE

I certify that this Reply Brief of Defendant-Appellant conforms to the requirements of Supreme Court Rule 315(a)-(d) and Supreme Court Rules 341-343. The length of this reply, excluding the cover page, Table of Contents, and Certificate of Compliance is 18 pages.

Dated: August 3, 2022 /s/ Christopher Taylor

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