

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED  
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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
FILED: 11/06/2012  
RUTH A. WILLINGHAM,  
CLERK  
BY: sls

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

STATE OF ARIZONA, ex rel., WILLIAM G. )	Court of Appeals
MONTGOMERY, Maricopa County )	Division One
Attorney, )	No. 1 CA-SA 12-0226
)	)
Petitioner, )	Maricopa County
)	Superior Court
v. )	)
)	No. CR 2010-126788
THE HONORABLE JERRY BERNSTEIN and THE )	CR 2010-158681
HONORABLE PHEMONIA MILLER, )	CR 2011-113050
Commissioners of the SUPERIOR COURT OF )	CR 2011-116266
THE STATE OF ARIZONA, in and for the )	CR 2011-132750
County of MARICOPA, )	CR 2011-152826
)	CR 2011-161795
Respondent Commissioners, )	CR 2012-108508
)	CR 2012-110698
DOREEN HERMAN; MARA HILL; KEITH )	CR 2012-112612
PORTER; MICHAEL DINOLA; RAMSEY )	CR 2012-112620
TOHANNIE; ARMEN ASLANYAN; ROBERT )	)
THOMPSON; JASON QUAN; TOBERT R. )	DEPARTMENT C
FARINAS; CYMBERLY CROWLEY; SHYLA )	)
ROTMIL, )	<b>DECISION ORDER</b>
)	)
Real Parties in Interest. )	)

This special action came on regularly for conference on October 30, 2012 before Presiding Judge Philip Hall, Judge Peter B. Swann, and Judge Samuel A. Thumma.

At approximately 6:30 p.m. on March 2, 2010, Officer Tupouniua Mataele of the Scottsdale Police Department observed

the vehicle Real Party in Interest Doreen Herman<sup>1</sup> was driving repeatedly drift into another lane of traffic. Officer Mataele initiated a traffic stop and, upon making contact with Herman, the officer observed that Herman had rapid speech, bloodshot eyes, and an odor of alcohol. The officer administered field sobriety tests and Herman showed several signs of impairment. Herman then submitted to a portable breath test, with a result of .158. After being placed under arrest for driving under the influence of alcohol, Herman agreed to provide a blood sample. It was later determined that Herman's Illinois driver license was suspended/revoked at the time of her arrest.

The samples of Herman's blood were submitted to the Scottsdale Crime Lab (SCL) for analysis. On March 11, 2010, SCL Criminalist Lynette Kogler reported that testing of Herman's blood demonstrated a blood alcohol concentration (BAC) of .192. On February 14, 2011, Herman was indicted on two counts of aggravated driving under the influence. Because Criminalist Kogler was no longer employed by the SCL at that time, the State requested that it retest Herman's blood. On August 25, 2011, SCL Criminalist Richard Bond reported that testing of Herman's blood demonstrated a BAC of .180.

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<sup>1</sup> Although eleven cases have been consolidated for this special action, the appellate record only includes factual information regarding Real Party in Interest Doreen Herman's case, CR 2010-126788.

After her indictment, Herman requested that the SCL disclose all information relating to her case as well as information pertaining to the other subject testing conducted within the "same batch." The State disclosed "extended blood packets" from the March 11, 2010 analysis and the August 25, 2011 re-analysis. These extended blood packets contained all of the chromatograms from Herman's tests, the controls and calibrations from the batch data, and redacted information relating to all of the other subject tests that were performed within the same batch. Herman then requested the control and calibration data from 2009, 2010, and 2011, which the SCL provided.

Following these disclosures, Herman filed several motions to suppress the blood alcohol evidence, alleging the SCL's Gas Chromatograph Instrument (GCI) is unreliable. At a July 26, 2012 hearing on the motion to suppress, Herman informed the superior court that she needed all subject test data for 2011 to determine the accuracy and reliability of the GCI. In response, the State argued that the disclosure of unknown subject samples would not assist in determining the accuracy of the GCI's testing because the subject samples are unknown samples. Instead, the State explained that the only means of determining whether the "instruments are working properly and the methods

are proper are all of those calibrations and controls with known data." The State also asserted that locating, printing, redacting, and scanning all of the subject test data for 2011 would take weeks to complete and therefore place a great burden on the SCL's limited resources for information that would not assist in determining the accuracy of GCI's testing.

On August 27, 2012, the respondent Commissioners ordered the State to produce "all subject test chromatograms . . . and notes made by the analysts and staff regarding those test results and chromatograms for the year of 2011, from the Scottsdale Police Crime Lab." The respondent Commissioners further ordered that "sanctions shall issue" if the disclosures were not produced by October 1, 2012. The State filed a motion to reconsider, which the respondent Commissioners denied. The State failed to comply with the October 1, 2012 disclosure deadline and the respondent Commissioners set a show cause hearing for October 12, 2012 to determine whether the State should be held in contempt for failing to comply with discovery orders.

The State filed a petition for special action seeking relief from the respondent Commissioners' disclosure order and to stay the show cause hearing. We granted the State's request for a stay. Because we conclude that the respondent

Commissioners abused their discretion in entering the disclosure order, and because the State has no equally plain, speedy, or adequate remedy by appeal, we accept jurisdiction and grant relief. Ariz. R.P. Spec. Act. 1(a); *State v. Bernini*, 222 Ariz. 607, 610-11, ¶ 8, 218 P.3d 1064, 1067-68 (App. 2009); *State v. Fields*, 196 Ariz. 580, 581, ¶ 1, 2 P.3d 670, 671 (App. 1999).

"A trial court has broad discretion over discovery matters, and we will not disturb its rulings on those matters absent an abuse of that discretion." *Fields*, 196 Ariz. at 582, ¶ 4, 2 P.3d at 672. "Although a trial court is in the best position to rule on discovery requests, it abuses its discretion when it misapplies the law or predicates its decision upon irrational bases." *Id.* (internal quotation omitted).

As set forth in Arizona Rules of Criminal Procedure (Rule) 15.1(b)(3), the State must disclose all reports "prepared by a law enforcement agency *in connection with the particular crime* with which the defendant is charged." (Emphasis added). Here, the State complied with the Rule 15.1(b)(3) mandate by disclosing the extended blood packets from the March 11, 2010 analysis and August 25, 2011 re-analysis performed on Herman's blood.

Pursuant to Rule 15.1(g), however, a defendant may obtain a court order requiring the State to disclose reports and

information not connected to the crime with which the defendant is charged only upon a showing of "substantial need" for the information and that the defendant "is unable without undue hardship to obtain the substantial equivalent by other means." *Fields*, 196 Ariz. at 582, ¶ 4, 2 P.3d at 672. "Information is not discoverable unless it could lead to admissible evidence or would be admissible itself." *Id.*

The State does not contend that the 2011 subject testing data is available to Herman by any other means. Therefore, the narrow question before us is whether Herman has demonstrated a "substantial need" for the information.

Herman contends that the 2011 subject testing data is necessary so that the defense can determine the accuracy and error rate of the GCI and thereby preclude the admission of and/or impeach her BAC results. As argued by defense counsel and acknowledged by the State, the GCI has an intermittent computer software defect.<sup>2</sup> The SCL has attempted to address the

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<sup>2</sup> At oral argument, defense counsel asserted that they need the 2011 subject testing data to determine whether the testing of any of the duplicate subject samples fell outside the standard of plus or minus 5%. Although defense counsel argued in its response to the petition that the 2011 subject testing data is necessary to determine whether the GCI is accurate in its measurement by a standard of plus or minus 5%, this specific argument, regarding possible variances exceeding 5% between duplicate subject samples, was not raised in the written briefing. Likewise, based on our review of the special action record, this claim was not clearly articulated in the trial

problem, but has been unable to resolve it. As a result of this software defect, the GCI periodically experiences a "data drop" during testing, which interrupts the test and produces no BAC result. As SCL criminalist Jennifer Valdez testified, the SCL does not account for "data drops" when calculating its uncertainty budget because no BAC result is produced during those interrupted tests.<sup>3</sup> Instead, the SCL's uncertainty budget is based solely on the GCI's level of accuracy during successful tests, that is, tests that yield an actual BAC result.

Herman broadly contends that all of the GCI's test results are unreliable, but has not explained how the GCI's periodic<sup>4</sup>

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court. Regardless of the merits of this argument, it is unrelated to the "data drop" issue. Therefore, we need not, and do not, determine whether this argument could support the disclosure order if properly raised in the trial court.

Moreover, defense counsel mentioned in the trial court and in its special action briefing that there was an instance of mislabeling of vials following a data drop. Though such an error could be critical to an *individual* defendant whose vial is mislabeled, we perceive no need for *statistical* evidence pertaining to such errors.

<sup>3</sup> An uncertainty budget identifies and quantifies various sources of uncertainty and is used "to show the levels of uncertainty associated with [the State's] chosen means of measuring BAC levels." Todd F. LaNeve, *The Legality of Search and Seizure in DUI Cases*, 2012 WL 3058355 (2012 ed.); see also 2 Fitzgerald, *Intoxication Test Evidence* § 56:11 ("The 'final uncertainty budget'") (2d ed. June 2012).

<sup>4</sup> As set forth in Valdez's affidavit, the GCI has experienced a data drop on seven occasions during 2009, 2010, and 2011.

data drops, which produce no result, render her BAC test results less reliable. Although the software defect has caused repeated testing anomalies, "none of the anomalies alleged has been shown to impair the reliability of the test [results]." *Bernini*, 222 Ariz. at 611, ¶ 10, 218 P.3d at 1068. Moreover, Herman has not alleged that her individual test results are inaccurate as a result of the software defect. See *id.* at 612, ¶ 14, 218 P.3d at 1069 ("Defendants failed to establish 'how, or even if, the alleged [software] deficiencies affected their test results.'") (quoting *Fields*, 196 Ariz. 580, ¶ 7, 2 P.3d at 673). In the absence of an explanation of how the periodic data drops affect the accuracy of Herman's BAC results, Herman's motion to produce all 2011 subject data "can only be viewed as an attempted 'fishing expedition,'<sup>[5]</sup> which the rules do not permit." *Fields*,

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<sup>5</sup> Herman relies heavily on the affidavits of her scientific experts to establish the necessary link between the GCI's software defect and the reliability of her test results. In his affidavit, Chester Flaxmayer stated:

24. The only way to check the state's assertions that none of these [software] problems matter is to review all the GC data from individual runs, including normal batch data and the Scottsdale P.D. Crime Lab Ethanol Calibration and Control Summary with the chromatograms for all defendant's samples.

25. While many will try to claim that such data is a "fishing expedition" or an attempt at gaining some delay; from a scientific perspective, all the data is required for a reviewing forensic scientist to be able to determine if the equipment is working and



196 Ariz. at 583, ¶¶ 3, 9, 2 P.3d at 673 (granting State special action relief from court order permitting defendants to videotape crime lab that allegedly "failed to follow scientifically acceptable procedures in connection with blood analyses" when the defendants' failed to explain how the alleged lab deficiencies affected their individual test results); *State v. Wallace*, 97 Ariz. 296, 300, 399 P.2d 909, 912 (1965) ("The defense has no right to go upon a tour of investigation, in the hope that they will find something to aid them . . . and if it appears that the request for such inspection is merely a fishing expedition to see what may turn up it should be denied.") (internal quotations omitted); see also *State v. Velasco*, 165 Ariz. 480, 486-87, 799 P.2d 821, 827-28 (1990) (explaining defendants are entitled to a reasonably reliable test, not a perfect test).

Herman also asserts that the 2011 subject test data is "potentially *Brady*<sup>[6]</sup> material." As discussed above, Herman has

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that the results from such equipment are reliable, especially in the face of such spotty disclosure.

Upon review of the expert affidavits presented to the superior court, we conclude that none of the experts explained how the software defect may have led to inaccurate BAC results in these cases. In the absence of such an explanation, no substantial need for the data disclosure was established.

<sup>6</sup> *Brady v. Maryland*, 373 U.S. 83 (1963).

failed to explain how evidence that the GCI periodically experiences data drops and thereby fails to produce test results undermines the accuracy and reliability of her test results. In the absence of such an explanation, there is no basis to conclude that the subject test data contains exculpatory evidence. Moreover, "none of the defendants has challenged the accuracy of the [SCL's] test results through independent testing of the blood samples each was apparently offered or provided, although this would be the best evidence of the only material issue, the accuracy of the reported BACs." *Fields*, 196 Ariz. at 583, ¶ 9, 2 P.3d at 673.

Under these circumstances, we conclude the respondent Commissioners abused their discretion by ordering the State to disclose all 2011 subject testing data. Accordingly,

**IT IS ORDERED** accepting jurisdiction of Petitioner's special action petition.

**IT IS FURTHER ORDERED** granting Petitioner's request for relief and vacating the respondent Commissioners' order to disclose the 2011 subject testing data.

**IT IS FURTHER ORDERED** vacating the interlocutory stay entered by this court on October 12, 2012 and extended on October 30, 2012.

/s/  
PHILIP HALL, Presiding Judge