

No. 89290-3
Court of Appeals No. 67456-1-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

BRETT BALLOW AND LESLIE FAUSTO,

Appellants,

vs.

STATE OF WASHINGTON,

Respondent.

BY RONALD R. CARPENTER

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STATE OF WASHINGTON

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR KING COUNTY

AMICUS MEMORANDUM IN SUPPORT OF REVIEW
WASHINGTON ASSOCIATION OF CRIMINAL DEFENSE
ATTORNEYS

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I.
ARGUMENT WHY REVIEW SHOULD BE GRANTED

This case raises a question of first impression in Washington: How should the insights into the uncertainty of measures made by forensic scientists best be conveyed to the trier of fact in order to improve the accuracy of legal fact finding? It is also a question of substantial public importance. RAP 13.4(b)(4). The measurements at issue in this case are related to blood alcohol concentrations obtained in DUI prosecutions. Washington's Administrative Office of the Courts reports that between January 2013 and August 2013, 21,634 persons were charged with DUI in this State.

In 2009, the National Academy of Science published its groundbreaking Report, "Strengthening Forensic Science in the United States: A Path Forward." The Academy acknowledged the fact that science had advanced criminal investigation. But it also acknowledged that:

Those advances, however, also have revealed that, in some cases, substantive information and testimony based on faulty forensic science analyses may have contributed to wrongful convictions of innocent people. This fact has demonstrated the potential danger of giving undue weight to evidence and testimony derived from imperfect testing and analysis. Moreover, imprecise or exaggerated expert testimony has sometimes contributed to the admission of erroneous or misleading evidence.

National Research Council, *Strengthening Forensic Science in the United States: A Path Forward*, (National Academies Press 2009).

Most judges are not scientists. But it is their duty to ensure that jurors clearly understand the limits of the scientific evidence that is being presented. Most lawyers are not scientists either, but it is their duty to make sure that the jury understands both the strengths *and the weaknesses* in the scientific evidence that will be introduced. As that attached statement of interest by two prominent professors states, “the legal community is beginning to realize the importance of measurement error”, which injects “an unavoidable element of uncertainty in every measurement.”

Regrettably, the decision below does not advance the goal of insuring that forensic testing presented to juries be reliable. As the appellate court acknowledged, evidence that is admissible under *Frye* must pass the two-part test under ER 702: (1) whether the witness is qualified as an expert and (2) whether the expert testimony is helpful to the trier of fact. But the appellate court also concluded that “the district court implicitly imposed a new foundational requirement for BrAC tests admissibility, beyond that required by *Frye*.” *State v. King Cnty. Dist. Court W. Div.*, 175 Wn. App. 630, 641, 307 P.3d 765, 770 (2013).

The appellate court did not explain how it can ever be “helpful” to the trier of fact to present forensic evidence as accurate when that may not be so. Thus, the subject needs further consideration by this Court.

Arguably, it is well within *Frye* to require the proponent of the forensic evidence to acknowledge the limits of its accuracy in discovery and to the trial judge considering its admissibility. And as the attached letter points out, the science of measurement affects a wide range of cases.

This Court should accept review to explore how trial courts should consider the issue of the probable range of error in forensic measurements and how forensic experts should be required to express this uncertainty when presenting the findings in the courts of this state.

II. CONCLUSION

This Court should grant the petition for review.

DATED this 24th day of October, 2013.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by First Class United States Mail, postage prepaid, one copy of the foregoing brief on the following individuals:

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10/24/13
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September 16, 2013

The Honorable Justices of the Washington Supreme Court
The Washington Supreme Court
415 12th Avenue, S.W.
Olympia, Washington 98501-2314

RE: **State of Washington v. King County District Court et al.**

Dear Justices:

We are writing to urge you to review the decision by the Washington Court of Appeals in *State of Washington v. King County District Court et al.*, #67456-1-1 (filed July 29, 2013). We believe the case poses an issue of significant public importance, both in Washington and across the country.

We write as scholars of scientific evidence, having studied the subject for decades. We are authors of the three foremost treatises on scientific evidence. Professor Imwinkelried is a coauthor of *Scientific Evidence*, and Professor Kaye is the lead author of *The New Wigmore on Evidence: Expert Evidence* and was a founding author of *Modern Scientific Evidence: The Law and Science of Expert Testimony*. We have contributed to government publications such as the Federal Judicial Center's *Reference Manual on Scientific Evidence*, the National Institute of Standards and Technology's report on *Latent Print Examination and Human Factors: Improving the Practice Through a Systems Approach*, and the report of the Legal Issues Working Group of the National Commission on the Future of DNA Evidence.

During our study of scientific evidence, we have come to appreciate the crucial role that measurement plays in expert analysis. In speeding cases, prosecutors present testimony about a vehicle's speed. In traffic accident cases, accident reconstruction experts rely on measurements of the length of skid and yaw marks. In homicide cases, toxicologists measure the concentration of toxins found in cadavers to determine the cause of death.

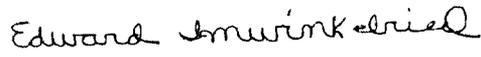
The importance of accurate measurements is perhaps most evident in drunk driving prosecutions. Previously, prosecutors relied on measurements of blood or breath alcohol concentration (BAC) to trigger presumptions of intoxication. Today most jurisdictions have enacted *per se* statutes. In Washington, a driver whose BAC exceeds .08 is guilty of a crime even if driving ability was not impaired. Under a *per se* statute, the case turns on the trier of fact's decision as to whether the BAC measurement is accurate.

Yet, scientists and statisticians recognize that there is an unavoidable element of uncertainty in every measurement. No matter how precise the measuring device appears to be and no matter how carefully the analyst uses the device, the true value is not necessarily equal to the measured one. The numerical value reported by the analyst is inevitably an

resolved on an ad hoc basis under Rule 403 rather than by any general rule. You can make your own informed judgment after full briefing and argument by the parties.

However, we strongly believe that you ought to accept and decide this case on the merits. A significant percentage of the citizenry will one day receive a citation for drunk driving, and the question of the accuracy of the measurement of the subject's BAC arises in every such case. Moreover, the question of the accuracy of measurement is not confined to drunk driving prosecutions. The same essential issue arises in a wide range of cases involving forensic evidence. Modern metrology—the science of measurement—provides valuable insights into the uncertainty of such measurements. This case gives the Court the opportunity to consider how those insights should be best conveyed to the trier of fact to improve the accuracy of legal factfinding.

Very truly yours,



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