No. 14-10183

In The

Supreme Court of the United States

DREW RIZZO,

Petitioner,

v.

COMMONWEALTH OF PENNSYLVANIA,

Respondent.

On Petition For Writ Of Certiorari To The Superior Court Of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

WHETHER THE CONFRONTATION CLAUSE PERMITS THE PROSECUTION TO INTRODUCE TESTIMONIAL STATEMENTS OF A NON-TESTIFYING FORENSIC ANALYST ABOUT AN ALLEGED MISTAKE IN THE LABORATORY MANUAL THROUGH THE IN-COURT TESTIMONY OF AN ANALYST WHO DID NOT HAVE PERSONAL KNOWLEDGE OF THE ALLEGED ERROR.

LIST OF PARTIES

DREW RIZZO
COMMONWEALTH OF PENNSYLVANIA

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The Superior Court of Pennsylvania affirmed the convictions on September 17, 2014, attached at page 1. The decision of the Supreme Court of Pennsylvania denying the petition for allowance of appeal on March 11, 2015 is attached at page 26.

JURISDICTION

The Supreme Court of Pennsylvania denied the petition for allowance of appeal on March 11, 2015. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

STATEMENT OF THE CASE

A. Nature of the Case, Course of Proceedings, and Disposition in the Court Below

On July 20, 2012, following a trial without a jury, petitioner Drew Rizzo, was found guilty of Driving Under the Influence of Alcohol – General Impairment/ Incapable of Safe Driving, Driving Under the Influence. of Alcohol – High Rate of Alcohol, Careless Driving, Duties at Stop Signs and Turning Movements and Required Signals.[1] Rizzo was found guilty on July 20, 2012 after a two-day bench trial before the Honorable Diane E. Gibbons. Rizzo was sentenced on July 24, 2012. Rizzo filed a timely post sentence motion on August 2, 2012. This was denied by the Honorable Diane E. Gibbons on November 28, 2012. Rizzo filed a Notice of Appeal on December 28, 2012. Rizzo filed a Concise Statement of Matters Complained of on

Appeal on January 18, 2012. The Trial Court issued an opinion on February 13, 2013. Mr. Rizzo's convictions were affirmed by the Superior Court of Pennsylvania on September 17, 2014.[2] A timely

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[1] 75 Pa.C.S. §3802(a)(l); 75 Pa.C.S. §3802(b); 75 Pa.C.S. §3714(a); 75 Pa.C.S. §3323(b); 75 Pa.C.S. §3334(a).

[2] The Honorable Judge Strassburger filed a concurring and dissenting opinion. Specifically, he dissented because he concluded that the trial court erred by admitting hearsay evidence with respect to Szpanka's testimony of how she found out about the error in the Standard Operating Procedures.

petition for allowance of appeal in the Supreme Court of Pennsylvania was denied on March 11, 2015.

B. STATEMENT OF THE FACTS

On October 25, 2011, Officer Smeltzer observed a black sedan travel through a stop sign without stopping. RR. 7:1-13. The vehicle then turned into a parking lot without using a turn signal. RR. 8:1-6. The officer activated his emergency lights and conducted a traffic stop. RR. 8:9-14. While interacting with the driver, Drew Rizzo, the officer noticed Rizzo's eyes were bloodshot, glassy, and heavy-lidded, the officer smelled an odor of alcohol, as well. RR. 9:13-18.

Due to these observations, Officer Smeltzer asked Rizzo to step out of his vehicle to perform field sobriety tests. RR. 10:21-24. The first test was the heel-to-toe walk. RR. 12:2-7. Officer Smeltzer instructed Rizzo to take six steps forward, turn, and take six steps back. RR. 12:12-17. Officer Smeltzer testified that he was trained in the Standardized Field Sobriety Tests (SFSTs), and that there are eight clues to look for on the walk and turn test. RR. 24:11-16. Officer Smeltzer candidly admitted that he does not know what those eight clues are and that he does not conduct the heel-to-toe walk in accordance with his training. RR. 24:15-16; 26:9-12. Further, Officer Smeltzer testified that he relies on his own subjective interpretation of the tests to determine how the participant did. RR. 26:13-16. The second test

conducted was the finger to nose test, which is not a recognized SFST. RR. 26-27:20-i. Officer Smeltzer testified that he is not aware of the test ever being validated as an accurate indicator of impairment. RR. 27:2-5.

The third test was the "one-legged stand." RR. 14:1. Officer Smeltzer testified that the one leg stand test is a recognized SFST, which has set instructions and set clues to look for. RR. 28-29:21-5. He further testified that the test must be administered and graded in the proper standardized manner, and he did not complete the test in the proper standardized manner. RR. 29:15-20. Officer Smeltzer then arrested Rizzo and had Officer Bickhardt take him to St. Mary's hospital. RR. 41-42:22-6. Officer Bickhardt testified that Rizzo's blood was drawn, sealed, and he transported it back to headquarters. RR. 47-48:24-19.

Joanne Szpanka, a forensic analyst with the Buck's County Crime Lab, testified for the Commonwealth to establish the Blood Alcohol Content (BAC). RR. 61:1-8. She testified that Rizzo's BAC was .105%. RR. 67:6-7. She testified that the sample was tested using a headspace gas chromatograph with flame ionization. RR. 71:10-14. When calibration samples and control samples are run through the headspace gas chromatograph, an internal standard is put into the samples. RR. 87:1-5. The exact same amount of internal standard is put in each sample. RR. 87:6-10. The internal standard serves as a yardstick to make sure everything is kept consistent. RR. 87:16-18.

Since the same amount of internal standard is placed in every sample, there should be a similar area for the internal standard peak every time. RR. 87:19-25. There is an inverse relationship between the area of the internal standard and the area of the alcohol. RR. 88:1-4. This means that if the internal standard is low, the BAC is going to be higher. RR. 88:5-7. Szpanka testified that the internal standard in Rizzo's sample was in fact lower and that lower internal standard can artificially inflate the BAC of his sample. RR. 87:13-23. Szpanka testified that the average internal standard peak area of the calibrators was 272,582. RR. 84:7-9. She further testified that the area of the internal standard of the first test performed on Rizzo's sample was 193,393 and the area on the second test was 198,171. RR. 84:18-23. When Szpanka inputted the average internal standard of 272,582 into Rizzo's calibration curve, she found a BAC of .077%. Szpanka authenticated the Bucks County Crime Laboratory's procedures, which were entered into evidence as Defense Exhibit 1. RR. 73-74:12-7; 92:6-13. On page six of the procedures there is a section entitled "acceptance criteria for reporting results." RR. 75:2-4. This section lists what is required in order to report out a valid result. RR.75:5-8. Szpanka testified that it is necessary that the criterion in this section is met before she can report out a valid result. RR. 75:9-16. Szpanka testified that the policy states that "the internal standard peak area for all samples and controls must be within 25 percent of the average internal standard peak area of the calibrators." RR. 75-76:24-4. She testified that

Rizzo's sample had to have been within 25% of the average of the calibrators or the result is not valid. RR. 76:5-11. She testified that the average internal standard was 272,582. RR. 84:7-9. She testified that 25% of 272,582 was 204,437. RR. 84:10-12. She further testified that the area of the internal standard of the first test performed on Rizzo's sample was 193,393 and the area on the second test was 198,171. RR. 84:18-23. She then testified that both of Rizzo's samples were below the 25% requirement. RR. 84-85:24-1.

Szpanka verified the accuracy of the laboratory's procedures on July 19, 2012. RR. 75-76:24-11. It was asked of Szpanka, "You would agree that that [referring to number 3 under the acceptance criteria] states the internal standard peak area for all samples and controls must be within 25 percent of the average internal standard peak area of the calibrators. Is that accurate?" RR. 75-76:21-3. Szpanka replied, "Yes." RR. 76:4. Then it was asked of her, "So, in other words, the peak area of Mr. Rizzo's samples have to be within 25 percent of the average of the calibrators; correct?" RR. 76:5-7. She replied, "Correct." RR. 76:8. However, shortly thereafter, and well before the close of business, the Honorable Diane E. Gibbons declared a recess until 10:00 am on July 20, 2012. RR. 78-79. After resuming trial on July 20, 2012, Szpanka testified that upon reviewing the standard operating procedures for the laboratory, she found a clerical error. RR. 85:4-6. At this point, defense counsel

objected based upon hearsay and was overruled. RR 85:6-9. Szpanka then testified that the laboratory practice has always been that the average area for the internal standards must be within 50% of the samples. RR.85:15-17. Szpanka then testified that the standard operating procedure admitted into evidence as Defense Exhibit 1 was signed off on by Doctor Siek, the head of the laboratory. RR. 86:16-19. Dr. Siek is the one who is ultimately responsible for all policies and procedures. RR. 86:20-22. Dr. Siek signed off on the 25%. RR. 86:23-25. She further testified that she is not aware of the Bucks County Crime Lab ever having a written policy that a 50% difference in internal standard peak area is acceptable. RR. 98:22-25.

During closing arguments the following dialogue occurred between the Court and defense counsel:

> MR. BARROUK: Your Honor, this witness testified clearly yesterday that the policy of the lab was 25 percent. That's a written policy. It was approved by the laboratory director, Dr. Siek. We haven't heard anything about any written policy to the contrary. Suddenly after a day-long recess, this number changes to 50 percent. We don't know whether or not that came from –
>
> THE COURT: Do you have any – if you had evidence from Dr. Siek that – he was available, and you know this was an issue, we would have had evidence. that he approved 25 percent.

MR. BARROUK: Your Honor, we –

THE COURT: The only evidence I have is her testimony, which is it's not 25 percent. That's an error. It's 50 percent.

MR. BARROUK: Your Honor, respectfully, Defense Exhibit 1 is a copy of the standard operating procedures from Dr. Siek saying it's 25 percent.

THE COURT: She is saying that's an error.

MR. BARROUK: Well, Your Honor, how would I possibly know it's an error on the standard operating procedures that was provided by them to me and signed off on by their laboratory director?

THE COURT: Well, the fact that a document you could have called Dr. Siek. You could have explored this. But right now the only evidence you have on the record is a piece of paper and she's saying that piece of paper is incorrect. So the only way to prove that was, in fact, what Dr. Siek was approving is to have Dr. Siek say, yeah, that's what I approved

. . . .

THE COURT: Out of curiosity, why did you not call the lab director and ask that question?

MR. BARROUK: Why didn't I call the lab director? Because I had –

THE COURT: Because I thought we were trying to find out what actually happened here, as opposed to the aha moment.

MR. BARROUK: I wasn't trying for an aha moment, your honor. I was provided standard operating procedures from that laboratory. The laboratory's standard operating procedures that were provided to me said that it was 25 percent. I have no reason to question every single thing on their standard operating procedures that they would put down inaccurate information. I had standard operating procedures that were signed off on by the lab –

THE COURT: Well, you followed up everybody, you required everybody to be here for chain of custody. You followed, you know you had no reason to doubt that either.

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REASON FOR GRANTING THE WRIT

THE TRIAL COURT ERRED IN ALLOWING AND RELYING ON THE ANALYST TO TESTIFY ABOUT THE INACCURACY OF LABORATORY PROCEDURES CONVEYED TO HER BY ANOTHER ANALYST

The Sixth Amendment's Confrontation Clause gives the accused "[i]n all criminal prosecutions . . . the right . . . to be confronted with the witnesses against him."

In *Crawford v. Washington*, 541 U.S. 36, 59, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), this Court held that the Clause permits admission of "[t]estimonial statements of witnesses absent from trial . . . only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." The point of Clause is to regulate "the manner in which [the prosecution's] witnesses give testimony in criminal trials." 541 U.S. at 43. Specifically, the Clause requires the prosecution to follow the common-law method of "open examination of witnesses viva voce" at trial. 3 William Blackstone, Commentaries on the Laws of England *373 (1768). The prosecution is required to present "live testimony" from its witnesses "in court subject to adversarial testing." *Crawford*, 541 U.S. at 43.

As Sir Matthew Hale explained roughly three centuries ago, the "Opportunity of confronting the adverse Witnesses" arises from the "personal Appearance and Testimony of Witnesses." Matthew Hale, The History of the Common Law of England 258 (1713). This Court echoed this sentiment in one of its earliest confrontation opinions, making clear that confrontation entails a "personal examination" of "the witness," "subjecting him to the ordeal of cross-examination." *Mattox v. United States*, 156 U.S. 237, 242, 244 (1895). Subjecting someone else to cross-examination obviously is not a substitute for such "personal" questioning. After all, even Sir Walter Raleigh, whose "notorious" trial in 1603 served as a rallying cry for the right to confrontation, *Crawford*,

541 U.S. at 44, was "perfectly free to confront those who read Cobham's confession in court." *Id*. at 51.

In light of the text, history, and constitutional purpose, this Court has repeatedly held that the prosecution violates the Confrontation Clause when it introduces a witness's testimonial statements through the in-court testimony of a different person. *See Davis v. Washington*, 547 U.S. 813, 826 (2006) (finding violation because "a note-taking policeman recite[d] the unsworn hearsay testimony of the declarant") (emphasis omitted); *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527, 2546 (2009) (Kennedy, J., dissenting) ("The Court made clear in *Davis* that it will not permit the testimonial statement of one witness to enter into evidence through the in-court testimony of a second."); *Crawford*, 541 U.S. at 68 (finding violation because "the State admitted Sylvia's testimonial statement against petitioner, despite the fact that he had no opportunity to cross-examine her") (emphasis added).

In *Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 129 S.Ct. 2527, 174 L.Ed.2d 314 (2009), this Court declined to create a "forensic evidence" exception to *Crawford*, holding that a forensic laboratory report, created specifically to serve as evidence in a criminal proceeding, ranked as "testimonial" for Confrontation Clause purposes. Absent stipulation, the Court ruled, the prosecution may not introduce such a report without offering a live witness competent to testify to the truth of the report's statements. 129 S.Ct. 2527. Finally, in *Bullcoming v. New Mexico*, 131 S.Ct. 2705,

180 L.Ed.2d 610 (2011), this Court held that the Confrontation Clause does not permit the prosecution to introduce a forensic laboratory report containing a testimonial certification, made for the purpose of proving a particular fact, through the in-court testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification.

The foundational rule of the Confrontation Clause – which has been established for centuries and applies across every kind of testimony – is that if the prosecution wishes to introduce a witness's testimonial statements, then the defendant is entitled to be confronted with that particular witness. Confrontation of a particular witness serves four primary purposes: (1) it enables cross-examination concerning the witness's factual assertions, his believability, and his character; (2) it guarantees that the witness gives his testimony under oath; (3) it allows the trier of fact to observe the witness's demeanor; and (4) it ensures that the witness testifies in the presence of the defendant. Confrontation with the out of court statement of the author of the laboratory manual thwarts these objectives.

The trial court here erred by allowing Joanne Szpanka, a forensic analyst with the Buck's County Crime Lab, to testify that Josh Folger, another analyst with the Buck's County Crime Lab, made a typo in drafting the laboratory's procedures, over defense counsel's hearsay objection. Szpanka, on the first day of trial, testified that the internal operating

procedures, admitted as Defense Exhibit 1, were correct. Soon after Szpanka made this testimony, the Honorable Diane E. Gibbons declared a recess until 10:00 am the next morning. That following morning, Szpanka testified that there was a typo in the internal operating procedures. Defense counsel objected on the basis of hearsay. Szpanka did not author the procedures, nor did she approve them, and in fact, she was simply supposed to have followed them. Szpanka testified that she did not make the mistake. She testified that Josh Folger made the mistake. But Josh Folger did not testify.

The Honorable Diane E. Gibbons wrote in her opinion that the testimony was not hearsay because "[t]here is no evidence on the record that the witness's knowledge of the error came from out-of-court statements of a third party." February 13, 2013 Order at 7. However, the record makes it clear that the only way Szpanka could possibly be aware of an error in the procedures is through hearsay. The procedures were drafted by Josh Folger and signed off on by Dr. Siek, the laboratory director. As such it is only Folger or Dr. Siek who could make an assertion that there was an error in the procedures they drafted and approved. This position is further bolstered by the fact that on her second day of testimony, Szpanka testified that "it had come to [her] attention" that there was an error in the procedures. RR. 85:4-6. Additionally, Szpanka testified about how the mistake was made by Folger over defense counsel's second objection to hearsay on the same issue. She testified that Folger used a prior

method from another laboratory as a template. RR. 93:1-5. She could not have known how or why he made the mistake unless someone else told her. Accordingly, it is clear that Szpanka was testifying to an out-of-court statement made by someone other than herself. In order for the trial court to believe Szpanka's testimony that there was an error in the standard operating procedures, the court had to accept that a mistake was made. Since Szpanka did not make this mistake, she could not testify to the mistake. She was not the author of the procedures and she did not approve the procedures. Therefore, her statement that there was a typo in the laboratory procedures was inadmissible hearsay.

This statement does not fall under an enumerated exception, and it was offered for the truth of the matter asserted. The purpose of this statement was to convince the fact-finder that there was an error in the procedures. Therefore, the purpose of the statement was to convince the fact-finder of the truth of the statement. Szpanka's testimony was offered for the truth of the matter asserted because she testified that there was an error in the laboratory's procedures in order to prove the truth of that statement and her later statements that the internal standard must be within 50%, not the 25% that is written in the procedures. Szpanka testified to the typo in the procedures in order to establish that there was in fact a typo in the procedures. Therefore, her statement was being offered for the truth of the matter asserted. As such, it was inadmissible hearsay.

The error of admitting hearsay evidence prejudiced Rizzo, the evidence was not cumulative of other untainted evidence, and the evidence of guilt was not so overwhelming that the error could not have contributed to the verdict. Szpanka testified that Rizzo's sample fell within the 50%, but not within the 25%. This hearsay testimony was therefore vital in Rizzo's case. As Judge Strassburger aptly stated in his dissenting opinion, "the testimony with respect to which percentage was proper – the one used by the laboratory in practice or the one stated in its own [standard operating procedures] – was critical in this case. Moreover, the BAC goes directly to the heart of the DUI – high rate of alcohol charge, as the Commonwealth must prove that [Rizzo's] BAC fell within .10 to .16. Thus, any error with respect to the laboratory's standards as to how to calculate BAC was not harmless." *Commonwealth of Pennsylvania v. Drew Rizzo*, 60 EDA 2013 (9/17/2014) (Strassburger, J, dissenting opinion at 3-4).

> Pennsylvania law §75-1547(c)(2)(i) states that "[c]hemical tests of blood or urine, if conducted by a facility located in this Commonwealth, shall be performed by a clinical laboratory licensed and approved by the Department of Health for this purpose using procedures and equipment prescribed by the Department of Health or by a Pennsylvania State Police criminal laboratory. For purposes of blood and urine testing, qualified person means an individual who is authorized to perform those chemical tests under the act of

> September 26, 1951 (P.L.1539, No. 389), known as The Clinical Laboratory Act." 35 P.S. §1161.1(s) states that" [t]he Department of Health shall have the power, and its duty shall be, to adopt rules and regulations for the proper enforcement of . . . any other matters it deems advisable for the protection of the public and for carrying out the provisions of this act." The term of director is defined as "[t]he person designated by the registrant to be responsible for the daily technical and scientific operations of the laboratory including choice and application of methods, supervision of personnel and reporting of findings." 28 Pa.ADC §1.1 "[T]he director shall be responsible for the proper performance of all tests in the laboratory. He shall direct and, supervise such tests and be responsible for the work of subordinates. He shall be responsible for the continuous application of quality control procedures to the work in accordance with recommendations and directives of the Department. Laboratory records of all work performed shall indicate the name of the director, and be signed by or otherwise indicate the person who actually performed the test". 28 Pa.ADC §1.22.

By allowing the testimony of Ms. Szpanka about the hearsay statements of Josh Folger to be admitted, the Trial Court effectively rendered moot the statutory scheme making the laboratory director responsible for the proper performance of tests and continuous application of quality control. Accordingly, it is only Dr. Siek who could properly testify that the written

laboratory procedures he approved were incorrect. Presenting the non-testifying witness's testimonial statements through the in-court testimony of what might be called a "surrogate witness" thwarts all four "elements of confrontation" that this Court has identified: (a) "cross-examination"; (b) the giving of testimony under oath; (c) "observation of [the declarant's] demeanor by the trier of fact"; and (d) "physical presence" of the defendant during the witness's testimony. *Maryland v. Craig*, 497 U.S. 836, 846 (1990). Allowing the analyst's testimony of the manual author's statements prevents scrutiny of the "honesty, proficiency, and methodology" of the manual writer, *Melendez-Diaz*, 129 S.Ct. at 2538, in the form guaranteed by the Sixth Amendment: live testimony in front of the accused and the trier of fact, with an opportunity for cross-examination.

CONCLUSION

Petitioner Drew Rizzo respectfully requests this Court grant this Petition for Writ of Certiorari and address whether the trial court erred by admitting testimonial hearsay over defense counsel's objection. Szpanka was not the author of the procedures and she did not approve the procedures. She could not know if a mistake was made or how the mistake was made without someone else telling her. Since someone else made the statements to her, it was inadmissible hearsay. This evidence was not harmless error since it went to the heart of the crime charged. This

Court should grant this petition and correct this injustice.

Respectfully submitted,

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**NON-PRECEDENTIAL DECISION –
SEE SUPERIOR COURT I.O.P. 65.37**

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
DREW RIZZO,	:	No. 60 EDA 2013
Appellant	:	

Appeal from the Judgment of Sentence,
July 24, 2012, in the Court of Common Pleas
of Bucks County Criminal Division at
No. CP-09-CR-0001450-2012

BEFORE: FORD ELLIOTT, P.J.E., OTT AND STRASSBURGER,* JJ.

MEMORANDUM BY FORD ELLIOTT, P.J.E.:**FILED SEPTEMBER 17, 2014**

Appellant appeals from the judgment of sentence of 30 days' to 6 months' imprisonment after being convicted following bench trial of driving under the influence (DUI – general impairment), driving under the influence (DUI – high rate of alcohol), careless driving, stop signs and yield signs, and turning movements and required signals.[1] Finding no error on review, we affirm.

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* Retired Senior Judge assigned to the Superior Court.

[1] 75 Pa.C.S.A. §§ 3802(a)(1), 3802(b), 3714(a), 3323(b), and 3334(a), respectively.

The trial court accurately presented the factual background:

> In the early morning hours of October 25, 2011, Officer Brad Smeltzer of the Morrisville Borough Police Department was patrolling the 400 block of South Pennsylvania Avenue in Morrisville Borough, Bucks County, Pennsylvania. *N.T. 7/19/12, pp. 6-7.* At approximately 12:33 AM, Officer Smeltzer observed a black sedan drive through a stop sign located on the southbound ramp of Route 1 and proceed south on Pennsylvania Avenue. *N.T. 7/19/12, p. 7.* The driver of the vehicle then made a left turn into a parking lot without using the turn signal. *N.T. 7/19/12, pp.* 7-8. The officer thereafter activated his overhead emergency lights and effectuated a traffic stop. *N.T. 7/19/12, p. 8.*
>
> When Officer Smeltzer approached the car, he noticed that the driver of the vehicle, the Defendant, had red, bloodshot, glassy and "heavy-lidded" eyes. *N.T. 7/19/12, p. 9*. An odor of alcohol emanated from the Defendant's vehicle. *Id.* While conversing with the officer, the Defendant admitted to drinking two beers that evening. *N.T. 7/19/12, pp. 9-10.* The Defendant responded slowly to the officer, but did not slur his words. *N.T. 7/19/12, p. 21.*
>
> Officer Smeltzer directed the Defendant to step out of his vehicle and thereafter administered three field sobriety tests. In the first test, the "heel to toe walk," the officer

told the Defendant to take six steps forward, six steps back and to count aloud as he did so. The Defendant took four steps, failed to count aloud and was unsteady on his feet. *N.T. 7/19/12, p. 12.* During the second test, the Defendant was instructed to tilt his head back, close his eyes, outstretch his arms and touch the tip of his nose with the tip of his finger. The Defendant touched the bridge of his nose with the middle of his finger. *N.T. 7/19/12, p. 13.* Finally, the Defendant was asked to perform the "one-legged stand test." He was directed to stand on one foot and lift the other foot approximately six inches from the ground and count to nine. The Defendant lifted his foot but had to touch his foot to the ground numerous times. *N.T. 7/19/12, p. 14.* At no point did the Defendant inform the officer that he suffered from any condition that would have prevented him from adequately completing the field sobriety tests. *N.T. 7/19/12, p. 32.* Based upon his observations and the Defendant's performance on all three tests, Officer Smeltzer formed the opinion that the Defendant was incapable of safely operating a motor vehicle. *N.T. 7/19/12, p. 42.*

The Defendant was transported to St. Mary's Medical Center by Officer Justin Bickhardt of the Morrisville Police Department. *N.T. 7/19/12, pp. 44-46.* After arriving at the hospital, the Defendant signed a consent form allowing the hospital staff to draw his blood. *N.T. 7/19/12, p. 46.* In Officer Bickhardt's presence, Thomas Mazzo, a registered nurse, drew the Defendant's blood.

> *N.T. 7/19/12, pp. 46, 48, 51.* The Defendant's blood was drawn at 1:30 AM on October 25, 2011. *N.T. 7/19/12, pp. 47, 51*; Exhibit C-1. Thereafter, Mr. Mazzo placed the Defendant's patient label on the vials of blood and put the vials into an evidence bag, after which point the evidence bag was sealed. *N.T. 7/19/12, pp. 48, 52.* The Defendant's blood samples were later submitted to the Bucks County Crime Laboratory for analysis. *N.T. 7/19/12, pp. 56, 65.* The Defendant's blood alcohol content was determined to be .105%. No drugs were detected. *N.T. 7/19/12, p. 67*; Exhibit C-3.

Trial court opinion, 2/13/13 at 1-3 (footnote omitted).

Appellant raises the following issues on appeal:

> I. Whether the Trial Court's finding of guilt as to Driving Under the Influence, High Rate of Alcohol, was supported by sufficient evidence because the Analyst testified that the test on [appellant]'s blood sample should not be reported based upon the Buck's County Crime Labs' written procedures[?] More specifically, the analyst testified that the written procedures require that the internal standard peak area for [appellant]'s samples and quality control samples must be within twenty-five percent of the average internal standard peak areas of calibrators and that [appellant]'s samples fell outside of the twenty-five percent limit.

II. Whether the Trial Court's finding of guilt as to Driving Under the Influence, High Rate of Alcohol, was supported by sufficient evidence because the Analyst testified that [appellant]'s blood alcohol content may be as low as 0.077%[?]

III. Whether the Trial Court's finding of guilt as to Driving Under the Influence, High Rate of Alcohol, was supported by sufficient evidence because the Commonwealth failed to develop a sufficient chain of custody for [appellant]'s blood sample[?] More specifically, contrary to the chain of custody documents stating that Officer Smeltzer placed the blood into evidence, Officer Smeltzer testified that he had no interaction or involvement with the blood after it was drawn from [appellant] at the hospital.

IV. Whether the Trial Court erred by allowing Joanne Szpanka to testify that Josh Folger, another analyst with Buck's County Crime Lab, made a typo in drafting the lab[']s procedures over Defense Counsel[']s hearsay objection[?]

V. Whether the Trial Court's finding of guilt as to Driving Under the Influence, High Rate of Alcohol, was against the weight of the evidence because the Analyst testified that the test on [appellant]'s blood sample should not be reported based upon the Buck's County Crime Lab['s] written procedures[?]

More specifically, the analyst testified that the written procedures require that the internal standard peak area for [appellant]'s samples and quality control samples must be within twenty-five percent of the average internal standard peak areas of calibrators and that [appellant]'s samples fell outside of the twenty-five percent limit.

VI. Whether the Trial Court's finding of guilt as to Driving Under the Influence, High Rate of Alcohol, was against the weight of the evidence because the Analyst testified that [appellant]'s blood alcohol content may be as low as 0.077%[?]

VII. Whether the Trial Court's finding of guilt as to Driving Under the Influence, High Rate of Alcohol, was against the weight of evidence because the Commonwealth failed to develop a sufficient chain of custody for [appellant]'s blood sample[?] More specifically, contrary to the chain of custody documents stat[ing] that Officer Smeltzer placed the blood into evidence, Officer Smeltzer testified that he had no interaction or involvement with the blood after it was drawn from [appellant] at the hospital.

VIII. Whether the Trial Court's finding of guilt as to Driving Under the Influence, General Impairment, was against the weight of evidence because the Trial

> Court as finder of fact improperly found a reliable blood alcohol content which could be consider[ed] in determining whether [appellant] was impaired and the remaining testimony and evidence provided was if insufficient weight to support a conviction[?]

Appellant's brief at 5-6 (footnotes and suggested answers omitted).

Preliminarily, we note a duplication of issues above. Appellant raises the same core issue at Issues I and V, II and VI, and III and VII. The only difference is that the former issue is cast as a sufficiency of the evidence claim while the latter issue is cast as a weight of the evidence claim. We determine that the core issues described at Issues I and V and Issues II and VI go to the sufficiency of the evidence; consequently, we will not review Issues V and VI because the core issues do not implicate the weight of the evidence. On the other hand, we find that the core issue described at Issues III and VII goes to the weight of the evidence; consequently, we will not review Issue III as sufficiency of the evidence is not implicated.

We will address appellant's Issues I and IV together as they are closely connected. Issue I challenges the sufficiency of the evidence:

> A challenge to the sufficiency of the evidence is a question of law, subject to plenary review. When reviewing a sufficiency of the evidence claim, the appellate court must

> review all of the evidence and all reasonable inferences drawn therefrom in the light most favorable to the Commonwealth, as the verdict winner. Evidence will be deemed to support the verdict when it establishes each element of the crime charged and the commission thereof by the accused, beyond a reasonable doubt. The Commonwealth need not preclude every possibility, of innocence or establish the defendant's guilt to a mathematical certainty. Finally, the trier of fact while passing upon the credibility of witnesses and the weight of the evidence produced, is free to believe all, part or none of the evidence.

Commonwealth v. Teems, 74 A.3d 142, 144-145 (Pa.Super. 2013) (citations omitted), ***appeal denied***, 79 A.3d 1098 (Pa. 2013), citing ***Commonwealth v. Toland***, 995 A.2d 1242, 1245 (Pa.Super. 2010), ***appeal denied***, 29 A.3d 797 (Pa. 2011).

Issue IV questions the admission of alleged hearsay evidence. The following principles guide our consideration of whether the trial court erred in its conclusion.

> The admission of evidence is committed to the sound discretion of a trial court and will not be reversed absent an abuse of discretion. Discretion is abused where the law is not applied. Where improperly admitted evidence has been considered by the [fact-finder], its subsequent deletion does not justify a

> finding of insufficient evidence and the remedy in such a case is the grant of a new trial.

Commonwealth v. Chamberlain, 731 A.2d 593, 595 (Pa. 1999) (internal quotations and citations omitted), ***cert. denied, Chamberlain v. Pennsylvania***, 132 S.Ct. 2377 (2012).

> The term "hearsay" is defined as an out-of-court statement, which is offered in evidence to prove the truth of the matter asserted. Hearsay statements are generally inadmissible unless they fall under an enumerated exception. An out-of-court statement is not hearsay when it has a purpose other than to convince the fact finder of the truth of the statement.

Commonwealth v. Busanet, 54 A.3d 35, 68 (Pa. 2012) (internal citations omitted), ***cert. denied, Busanet v. Pennsylvania***, 134 S.Ct. 178 (2013).

In Issue I, appellant argues that the evidence was insufficient because the BAC result testified to by analyst Joanne Szpanka was unreliable. Specifically, appellant contends that Szpanka contradicted her testimony when she first testified that the result had to conform to a certain threshold stated in the laboratory's standard operating procedure manual ("SOP"), then testified that the SOP actually contained an error. (Appellant's brief at 20-24.) As a corollary to this issue, in Issue IV, appellant also argues that the trial court erred in admitting Szpanka's alleged hearsay testimony as to how she found out

the SOP contained an error. (Appellant's brief at 29-30.)

The SOP for the Bucks County Crime Laboratory provides standards for testing. Specifically, it provides that "the internal standard peak area for all samples and controls must be within 25 percent of the average internal standard peak area of the calibrators." (Notes of testimony, 7/19/12 at 75-76.) Szpanka later testified that this 25 percent figure was a clerical error, and the laboratory utilized a 50 percent figure. (Notes of testimony, 7/20/12 at 5.) She also stated that "[t]he laboratory practice is within 50 percent, and it always has been." (***Id.***) Appellant's BAC result was within 50 percent, but not within 25 percent. (Notes of testimony, 7/20/12 at 4.)

Szpanka testified about this clerical error as follows.

> Q. So according to your lab procedures, you're not to report that result. Correct?
>
> A. Upon reviewing the SOP for the laboratory, it had come to my attention that there is a clerical error –
>
> Counsel for Appellant: Objection.
>
> A. – in the SOP.
>
> THE COURT: She's answering the question. Overruled.
>
> Counsel for Appellant: I didn't ask where it came to her attention from, Your Honor. Hearsay, Your Honor, that's my objection.

> A. You put the SOP in front of me. I read the SOP, turned the SOP to you and the ADA, and said the 25 percent comment was a typographical, clerical error. Last lab. The laboratory practice is within 50 percent, and it always has been.

Id. at 5.

Szpanka later testified, on re-direct examination, about how this clerical error came about. She stated that Josh Folger, the person who prepared the SOP, "was using a prior method from another laboratory as a template for his SOP." (***Id.*** at 13.) Counsel for appellant again objected to hearsay. The trial court permitted Szpanka to testify because it was her understanding of why she was following a different protocol. (***Id.***)

On appeal, appellant argues that the trial court erred in failing to sustain these hearsay objections. The trial court concluded that the evidence was not hearsay, and reasoned as follows.

> There is no evidence on the record that the witness's knowledge of the error came from out-of-court statements of a third party. In any case, the explanation was not being offered for the truth of the matter asserted, i.e. that the error in fact occurred in that fashion. The import of the testimony was that the written procedural protocol relied upon by the defense contained incorrect information.

Trial court opinion, 2/13/13 at 7.

We agree. When Szpanka testified that it had come to her attention that there was a clerical error in the SOP, that does not indicate that someone told her about it. Appellant argues that her language to the effect, "it had come to my attention," indicates that someone had told her of the error. To the contrary, we find the language "it had come to my attention" suggests that Szpanka discovered the error herself. Had Szpanka testified, "it was brought to my attention," we would agree that that language would indicate that someone told her about the error. As for Szpanka's testimony that Folger was using a prior method from another laboratory as a template for his SOP, this is not an assertion that Folger told her this information. Szpanka may have witnessed Folger preparing the SOP using the other laboratory's template. Moreover, this latter remark was not being offered for the truth of the matter asserted since the origin of the error in the SOP was of no moment. It was the existence of the 25 percent error itself that was critical and Szpanka testified to this as if it were first-hand knowledge and not hearsay. Simply stated, there is no indication in Szpanka's testimony that she was relying on, or repeating, an out-of-court statement by a third party. Issue IV is without merit.

Having found that Szpanka's correction of the clerical error in the SOP was properly admitted, appellant's Issue I can also be found to be without merit. The correct measure for determining appellant's BAC was 50%. On re-direct, the Commonwealth adduced testimony from Szpanka that using

the proper parameter of 50%, appellant's BAC was determined to be .105. (Notes of testimony, 7/20/12 at 12-14.) Appellant's argument that the evidence was insufficient using the incorrect 25% measure thus relies upon an improper predicate to reach a false conclusion. We remind appellant that our standard of review requires us to view the evidence in the light most favorable to the Commonwealth. The Commonwealth produced evidence that the proper measure was 50% and that using that parameter, appellant's BAC was .105. The evidence was sufficient and appellant's Issue I is without merit.

In Issue II, appellant argues that the evidence was insufficient because Szpanka testified that appellant's BAC may be as low as .077%. This is a mischaracterization of Szpanka's testimony.

Here, appellant was convicted of DUI – high rate of alcohol, which provides as follows.

> **(b) High rate of alcohol.** – An individual may not drive, operate or be in actual physical control of the movement of a vehicle after imbibing a sufficient amount of alcohol such that the alcohol concentration in the individual's blood or breath is at least 0.10% but less than 0.16% within two hours after the individual has driven, operated or been in actual physical control of the movement of the vehicle.

75 Pa.C.S.A. § 3802(b).

Appellant argues that Szpanka's testimony that appellant's BAC "may be as low as .077%" renders the evidence insufficient to sustain the verdict. (Appellant's brief at 24-27.) The trial court concluded that appellant "mischaracterizes this testimony. [Szpanka] testified that utilization of the *proper procedure* for calculating blood alcohol content would *not* result in a blood alcohol content of .077%." (Trial court opinion, 2/13/13 at 7 (emphasis in original).) We agree.

On cross-examination, Szpanka testified as follows:

> Q. And a calibration curve, basically, is an equation that allows you to extrapolate a blood/alcohol content?
>
> A. Yes. It's an equation of a line.
>
> Q. Okay. So using the average area of 272,582, you came up – plugging into the calibration curve, you came up with a result of .0777?
>
> A. Correct.

Notes of testimony, 7/20/12 at 8.

On re-direct examination, Szpanka clarified this testimony. She testified that "[t]he internal standard recovery for this particular alcohol result was 193,393. It was not the average of the calibrators. It was 193,393. And that is how the calculation was done." (***Id.*** at 15.) The Commonwealth's attorney further clarified how counsel for appellant reached the .077 number.

> [ADA]: And what [counsel for appellant] was using was the average of the calibrators to get that .077 number. Correct?
>
> A. Yes.

Id. at 15-16.

Based on a review of this testimony, we agree with the trial court that appellant's argument that Szpanka testified that appellant's "blood alcohol content might be .077 percent" is a mischaracterization of the testimony. (Appellant's brief at 26, 36.) Szpanka's testimony was based on a hypothetical situation that appellant's BAC could be .077%. She then testified that in this case, because the actual internal standard recovery value was available, .105% was actually appellant's BAC. This is between the statutory range of .10% and .16%. Accordingly, Issue II is without merit.

As previously noted, we will not be reviewing Issues III, V, and VI. In Issue VII, appellant argues that his conviction for DUI – High Rate of Alcohol was against the weight of the evidence because the Commonwealth failed to establish a sufficient chain of custody for his blood sample. We note our standard of review:

> A motion for a new trial based on a claim that the verdict is against the weight of the evidence is addressed to the discretion of the trial court. ***Commonwealth v. Widmer***, 560 Pa. 308, 319, 744 A.2d 745, 751-52 (2000); ***Commonwealth v. Brown***, 538 Pa. 410,

435, 648 A.2d 1177, 1189 (1994). A new trial should not be granted because of a mere conflict in the testimony or because the judge on the same facts would have arrived at a different conclusion. ***Widmer***, 560 Pa. at 319-20, 744 A.2d at 752. Rather, "the role of the trial judge is to determine that 'notwithstanding all the facts, certain facts are so clearly of greater weight that to ignore them or to give them equal weight with all the facts is to deny justice.'" ***Id.*** at 320, 744 A.2d at 752 (citation omitted). It has often been stated that "a new trial should be awarded when the jury's verdict is so contrary to the evidence as to shock one's sense of justice and the award of a new trial is imperative so that right may be given another opportunity to prevail." ***Brown***, 538 Pa. at 435, 648 A.2d at 1189.

An appellate court's standard of review when presented with a weight of the evidence claim is distinct from the standard of review applied by the trial court:

> Appellate review of a weight claim ***is a review of the exercise of discretion, not of the underlying question of whether the verdict is against the weight of the evidence***. ***Brown***, 648 A.2d at 1189. Because the trial judge has had the opportunity to hear and see the evidence presented, an appellate court will give the gravest consideration to the findings and reasons advanced

> by the trial judge when reviewing a trial court's determination that the verdict is against the weight of the evidence. ***Commonwealth v. Farquharson***, 467 Pa. 50, 354 A.2d 545 (Pa.1976). One of the least assailable reasons for granting or denying a new trial is the lower court's conviction that the verdict was or was not against the weight of the evidence and that a new trial should be granted in the interest of justice.

Widmer, 560 Pa. at 321-22, 744 A.2d at 753 (emphasis added).

Commonwealth v. Clay, 64 A.3d 1049, 1054-1055 (Pa. 2013).

In its opinion, the trial court identified the correct standard by which it was to assess the weight of the evidence ("so contrary to the evidence as to shock one's sense of justice"). (Trial court opinion, 2/13/13 at 5.) The trial court later provided this analysis on chain of custody:

> To establish chain of custody, the Commonwealth need not produce every individual who came into contact with the evidence, nor need it eliminate all possibilities of tampering. *Commonwealth v. Rick*, 366 A.2d 302 (Pa.Super. 1976). Evidence may be admitted despite gaps in testimony regarding its custody. *Commonwealth v. Bruner*, 564 A.2d 1277, 1285 (Pa.Super. 1989) (citing *Commonwealth*

v. Hudson, 489 Pa. 620, 414 A.2d 1381 (1980)). Gaps in the chain of custody go to the weight that is to be afforded evidence, not to its admissibility. *Commonwealth v. Copenhefer*, 553 Pa. 285, 312, 719 A.2d 242, 256 (1998).

The evidence admitted at trial in the instant case established that, after the initial car stop, the Defendant was transported to St. Mary's Medical Center by Officer Bickhardt. N.T. 7/19/12, pp. 4446. Thomas Mazzo, a registered nurse, drew the Defendant's blood in [the] presence of Officer Bickhardt. N.T. 7/19/12, pp. 46, 48, 51; Exhibit C-1. Mr. Mazzo placed the Defendant's patient label on the vials of blood, placed the vials into an evidence bag and sealed the bag. N.T. 7/19/12, pp. 48, 52. Officer Bickhardt then transported the evidence to the police station where it was secured in evidence. N.T. 7/19/12, p. 48. Lt. Thomas Herron subsequently transported the evidence to the Bucks County Crime Laboratory for purposes of analysis. N.T. 7/19/12, pp. 56, 65. This evidence is clearly sufficient to permit admission of the blood test results. The Defendant's challenge to the sufficiency and weight of the evidence base[d] upon chain of custody is, therefore, without merit.

In challenging the chain of custody, the Defendant relies on Exhibit C-1, the blood alcohol evidence kit form and Exhibit C-2, the laboratory's submission form, which indicate that Officer Smeltzer placed the blood

> samples in evidence at the police station and not Officer Bickhardt, contradicting Officer Smeltzer[s] testimony that he did not handle the evidence. N.T. 7/19/12 p. 43. This contradiction does not alter the conclusion that evidence of the blood test analysis was admissible. In *Commonwealth v. Seibert*, 799 A.2d 54, 61 (Pa.Super.2002), the court held that the fact that the Emergency Room technician did not remember taking the defendant's blood did not preclude admission of the blood test results. The court held that the previously completed, signed, and dated form explaining the performed procedures and corresponding results was sufficient to establish a chain of custody. *Commonwealth v. Seibert*, 799 A.2d 54, 61, (Pa.Super.2002). In the instant case, the Blood Alcohol Kit Evidence Report, Exhibit C-1, and the Bucks County Crime Laboratory Chain of Custody Report, Exhibit C-2, establish the blood was transferred from the registered nurse who drew the blood to Office[r] Bickhardt. Officer Bickhardt transferred custody of the evidence to Officer Smeltzer, who placed the item into evidence. Under the holding of *Seibert*, this evidence was sufficient to establish chain of custody. Moreover, even with this gap in the chain of custody, the evidence is still admissible. *Commonwealth v. Bruner*, *supra.* As stated above, gaps in the chain of custody go to the weight that is to be afforded evidence, not to its admissibility. *Commonwealth v. Copenhefer*, *supra.*

Id. at 8-9.

We find no abuse of discretion in the trial court's review as to the weight of the evidence pertaining to the chain of custody of the blood sample. The court reviewed the chain of custody and addressed appellant's specific complaint. There is no error.

Finally, in Issue VIII, appellant asserts that his conviction for DUI – General Impairment was against the weight of the evidence. The trial court provided the following analysis:

> Finally, the Defendant avers that the conviction of Driving Under the Influence – General Impairment was against the weight of the evidence because the court "improperly found a reliable blood alcohol content" in determining whether or not the Defendant was impaired, and that the remaining testimony and evidence was of insufficient weight to support the verdict. As discussed above, the Defendant's blood alcohol content of .105% was valid and admissible. The Defendant's blood alcohol content, considered in conjunction with evidence concerning the Defendant's driving, the officer's observations of the Defendant, and the Defendant's failure to properly perform field sobriety tests is more than sufficient to support the conclusion that the Defendant was incapable of safe driving. His conviction for violating section 3802(a)(1) of the Driving Under the Influence of Alcohol statute was, therefore, proper.

Id. at 9-10.

Again, we see no abuse of discretion in the trial court's analysis. The trial court catalogued the several factors leading to its verdict, particularly the valid evidence that appellant's BAC was .105%. There is no error here either.

Accordingly, having found no error in the issues raised on appeal, we will affirm the judgment of sentence.

Judgment of sentence affirmed.

Ott, J. joins the Memorandum.

Strassburger, J. files a Concurring and Dissenting Memorandum.

Judgment Entered

/s/ Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 9/17/2014

CONCURRING AND DISSENTING MEMORANDUM BY STRASSBURGER, J.:

FILED SEPTEMBER 17, 2014

Because I conclude that the trial court erred by admitting hearsay evidence with respect to how

Szpanka found out about the error in the SOP (Issue IV), I respectfully dissent.[1]

> The term "hearsay" is defined as an out-of-court statement, which is offered in evidence to prove the truth of the matter asserted. Hearsay statements are generally inadmissible unless they fall under an enumerated exception. An out-of-court statement is not hearsay when it has a purpose other than to convince the fact finder of the truth of the statement.

Commonwealth v. Busanet, 54 A.3d 35, 68 (Pa. 2012) (internal citations omitted).

The hearsay rule is grounded in the following principles.

> The hearsay rule provides that evidence of a declarant's out-of-court statements is generally inadmissible because such evidence lacks guarantees of trustworthiness fundamental to the Anglo-American system of jurisprudence. Hearsay evidence is presumed to be unreliable because the original declarant is not before the trier of fact and, therefore, cannot be challenged as to the accuracy of the information conveyed. Exceptions to the hearsay rule are premised on

[1] I agree with the Majority's conclusions with respect to Issue II. Because I conclude, *infra*, that Appellant is entitled to a new trial, I would not address any of Appellant's weight of the evidence claims, as the relief I would grant is the same.

> circumstances surrounding the utterance which enhance the reliability of the contents of the utterance, . . . and render unnecessary the normal judicial assurances of cross-examination and oath[.]

Commonwealth v. Chamberlain, 731 A.2d 593, 595 (internal citations omitted).

The standard operating procedure (SOP) for the Bucks County Crime Laboratory provides the standards for testing blood alcohol content (BAC). Specifically, the written manual provides that "the internal standard peak area for all samples and controls must be within 25 percent of the average internal standard peak area of the calibrators." N.T., 7/19/2012, at 75-76. However, analyst Joanna Szpanka (Szpanka) testified that the SOP contained an error, and that the laboratory actually used 50 percent for the average internal standard peak area of the calibrators.

Instantly, in order for the trial court to believe Szpanka's testimony that there was an error in the SOP, it had to accept that a mistake was actually made. Szpanka testified that she did not make the mistake; rather, she testified that Josh Folger made the mistake. N.T. 7/20/2012, at 13 ("Mr. Folger was using a prior method from another laboratory as a template for his SOP."). Thus, Appellant should have had the opportunity to cross-examine Mr. Folger with respect to his alleged mistake. Accordingly, I conclude that the trial court erred when it overruled Appellant's hearsay objection.

I also consider whether the admission of this evidence was harmless error. "The harmless error doctrine, as adopted in Pennsylvania, reflects the reality that the accused is entitled to a fair trial, not a perfect trial." ***Commonwealth v. Hairston***, 84 A.3d 657, 671-72 (Pa. 2014).

This Court has described the proper analysis as follows:

> Harmless error exists if the record demonstrates either: (1) the error did not prejudice the defendant or the prejudice was de minimis; or (2) the erroneously admitted evidence was merely cumulative of other untainted evidence which was substantially similar to the erroneously admitted evidence; or (3) the properly admitted and uncontradicted evidence of guilt was so overwhelming and the prejudicial effect of the error was so insignificant by comparison that the error could not have contributed to the verdict.

Id (quoting ***Commonwealth v. Hawkins***, 701 A.2d 492, 507 (Pa. 1997)).

In this case, Szpanka testified that the standard internal recovery fell within the 50% standard, but not within the 25% standard. N.T., 7/20/2012, at 4. Thus, the testimony with respect to which percentage was proper – the one used by the laboratory in practice or the one stated in its own SOP – was critical in this case. Moreover, the BAC goes directly to the heart of the DUI – high rate of alcohol charge, as the

Commonwealth must prove that Appellant's BAC fell within .10 to .16. Thus, any error with respect to the laboratory's standards as to how to calculate BAC was not harmless. Accordingly, Appellant is entitled to a new trial on this charge.[2]

Because Appellant is entitled to a new trial on the DUI – high rate of alcohol conviction, I conclude that Appellant is also entitled to a new trial on the general impairment conviction because the improper BAC testimony could have contributed to the trial court's verdict on this charge as well.[3]

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[2] "Where improperly admitted evidence has been considered by the [fact-finder], its subsequent deletion does not justify a finding of insufficient evidence and the remedy in such a case is the grant of a new trial." ***Chamberlain***, 731 A.2d at 595. Thus, I would not address Appellant's sufficiency of the evidence argument (Issue I) on this issue.

[3] Because Appellant's convictions for careless driving, violating duties at a stop sign, and failing to use a turn signal are not affected by the hearsay testimony, Appellant is not entitled to a new trial on those charges.

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Respondent v. DREW RIZZO, Petitioner	:	No. 757 MAL 2014 Petition for Allowance of Appeal from the Order of the Superior Court

ORDER

PER CURIAM

AND NOW, this 11th day of March, 2015, the Petition for Allowance of Appeal is **DENIED**.