ARIZONA SUPREME COURT

STATE OF ARIZONA, Appellee, v. COURTNEY NOELLE WEAKLAND, Appellant.	))))))))))	No. CR-17-0615-PR Court of Appeals No. 2 CA-CR 2016-0186 Pima County Superior Court No. CR-20153118-001

BRIEF OF *AMICUS CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF APPELLANT

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INTRODUCTION

This case represents the latest chapter in the saga of implied consent. Although this Court made clear in *State v. Butler*, 232 Ariz. 84 (2013), that there was no "DUI exception to the Fourth Amendment," and that consent for a blood draw must comply with the Fourth Amendment, the court of appeals (COA) continues to misapply this law. In *State v. Valenzuela (Valenzuela I)*, 237 Ariz. 307 (App. 2015), two judges ignored black-letter Fourth Amendment law and accepted that "submission equals consent," which this Court unanimously rejected in *State v. Valenzuela (Valenzuela II)*, 239 Ariz. 299 (2016).

This Court divided on the question whether *Carrillo v. Houser*, 224 Ariz. 463 (2010), unsettled the law sufficiently that Valenzuela was entitled to reversal; four out of five justices held the good-faith exception should apply. Because Valenzuela's arrest pre-dated *Butler*, this Court did not consider its application. Now, in *State v. Weakland*, __ Ariz. __, 2017 WL 5712585 (App., Nov. 28, 2017), a different two-judge majority of the COA has held that the good-faith exception applies to DUI arrests made prior to *Valenzuela II*.

Amicus curiae Arizona Attorneys for Criminal Justice (AACJ) is concerned that this Court's exclusionary-rule jurisprudence fails to provide sufficient guidance to lower courts. Its two most recent opinions, *State v. Jean*, 243 Ariz. 331 (2018), and *State v. Havatone*, 241 Ariz. 506 (2017), are in conflict. *See Jean*, 243 Ariz. at

344 ¶50 (Bales, C.J., dissenting in part). AACJ asks this Court to bring order to chaos and adopt a practical rule as described in this brief, ensuring consistent application that honors Arizonans' rights under the Fourth Amendment. In so doing, this Court should also consider extending the protections of article 2, section 8 of the Arizona Constitution beyond the Fourth Amendment and hold that the state constitutional exclusionary rule has meaning beyond merely deterring police misconduct.

INTERESTS OF *AMICUS CURIAE*

AACJ, the Arizona state affiliate of the National Association of Criminal Defense Lawyers, was founded in 1986 to give a voice to the rights of the criminally accused and to those attorneys who defend the accused. AACJ is a statewide not-for-profit membership organization of criminal defense lawyers, law students, and associated professionals dedicated to protecting the rights of the accused in the courts and in the legislature, promoting excellence in the practice of criminal law through education, training and mutual assistance, and fostering public awareness of citizens' rights, the criminal justice system, and the role of the defense lawyer.

Amicus offers this brief in support of Petitioner because the right to be free from unreasonable searches and seizures and the Arizona right to privacy are paramount. Under the federal exclusionary rule, when the law is unsettled, police are required to resolve any questions in favor of the citizenry. Because this Court

has introduced inconsistency into Arizona's exclusionary-rule jurisprudence, AACJ asks this Court to address that inconsistency and reject the novel interpretation of the *Weakland* majority. Finally, AACJ notes that the U.S. Supreme Court's statements that the purpose of the exclusionary rule is to deter police misconduct, originating in the 1970s, ignores the rule's history of protecting the integrity of the judicial system. Recognizing and breathing life into this history may be done through the state constitution, and AACJ asks this Court to do so.

ARGUMENTS

I. This Court's application of the good-faith exception to the exclusionary rule has been inconsistent.

In *Valenzuela II*, this Court considered whether prior case law, such as *Campbell v. Superior Court*, 106 Ariz. 542 (1970), and *State v. Brito*, 183 Ariz. 535 (App. 1995), were still binding, or whether "*Carrillo* establishes that police officers were misstating the law when they admonished arrestees, based on the MVD form, that they are required to submit to tests." *Valenzuela II*, 239 Ariz. at 313 ¶57 (Bales, C.J. dissenting in part).[1] The majority held that it did not because *Carrillo* involved

[1] The State mistakenly thinks that *Butler* had no impact on the issue because neither the majority nor the dissent in *Valenzuela II* addressed it. Response at 6. The State acknowledges that *Butler* was decided after Valenzuela's arrest but claims that this Court was required to qualify its reasoning by adding language that this Court had never questioned or overruled *Campbell* or *Brito* "until *Butler*." Response at 6 n.4. It cites no authority for the proposition that this Court was so required. *Amicus* agrees

a question of statutory interpretation, and this Court "neither suggested that the admonition used here to obtain that assent misstated the law or was coercive, nor has this Court ever questioned or overruled *Campbell* or *Brito*." *Id*. at 309 ¶34. Both the majority and the dissent framed the inquiry correctly: what should law enforcement have known, and when should they have known it? The difference in opinion was a matter of emphasis. Chief Justice Bales—*Carrillo*'s author—focused on the portion that turns on the requirement that a driver consent, whereas the majority looked to *Carrillo*'s penultimate paragraph that explained the limits of the opinion and avoided discussion of constitutional claims, including a challenge to *Campbell*. Because the Court's earlier cases specifically permitted the ADOT form admonition, and because *Carrillo* specifically refused to consider that issue, *Valenzuela II* held that law enforcement would be expected to interpret *Carrillo* as having no effect on the admonition's constitutionality.

Butler, on the other hand, posed a different question: notwithstanding strict compliance with the requirements of A.R.S. §28-1321, must an officer obtain voluntary consent, as understood in Fourth Amendment jurisprudence, before engaging in a warrantless search and taking the suspect's blood? In *Butler* the juvenile did not specifically challenge the ADOT form admonition; rather, the

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that it would have been preferable to explain *Butler*'s impact, since post-*Butler* cases were pending before this Court when *Valenzuela II* was decided. "Preferable," however, is not equivalent to "required."

officer and school officials—recognizing that the juvenile was "shaking and visibly nervous," "became loud and upset after being told he was being arrested," and in handcuffs, 232 Ariz. at 88 ¶20—obtained acquiescence through coercion, not voluntary consent. Although the ADOT form admonition had been read in that case and was not specifically challenged, the crux of *Butler* is that voluntary consent must be obtained, rather than acquiescence and submission to lawful authority. Unlike *Carrillo*, where this Court disclaimed discussion of constitutional arguments, *Butler* specifically addressed the need for Fourth Amendment compliance when obtaining voluntary consent.

Notably, *Butler* cited the COA's erroneous opinion that "'the informed consent statute presents no Fourth Amendment issue,'" 232 Ariz. at 87 ¶6 (quoting *State v. Butler*, 231 Ariz. 42, 45 n.6 (App. 2012)); but that part of the COA's opinion cited *Campbell* as authority for its proposition. Where this Court could say in *Valenzuela II* that nothing in *Carrillo* undermined *Campbell* or *Brito*, *Butler* recognized the COA's reliance on *Campbell* and undermined it. Weakland notes that Pima County Attorney Barbara LaWall announced in the press that law enforcement would need to adapt its practices to conform to *Butler*. Petition at 9. Thus, law enforcement should have known it needed to update its procedures for obtaining voluntary consent. Instead, law enforcement did not make any changes until

December 18, 2015—ten days after this Court held oral argument in *Valenzuela II*. *See* Appendix.

Last year, in *Havatone,* this Court addressed the constitutionality of A.R.S. §28-1321(C). The State makes the claim that "*Havatone*, decided less than a year after *Valenzuela II*, addressed a different legal issue and cast no doubt on the continuing validity of *Valenzuela II*." Response at 4 (emphasis removed). *Havatone*'s relevance, however, is based on its analysis of the good-faith exception, not the specific warrant exception at issue. *Havatone* acknowledged Arizona cases that permitted warrantless blood draws when a suspect is unconscious, such as *State v. Cocio*, 147 Ariz. 277 (1985), but also pointed out that cases as early as *Schmerber v. California*, 384 U.S. 757 (1966), held that evanescence of alcohol in blood did not create a *per se* exigency. This Court was divided, noting that the COA had recently decided the question to the contrary in *State v. Reyes*, 238 Ariz. 575 (App. 2015). Both *Havatone* and *Reyes* involved offense dates in 2012, before the Supreme Court decided *Missouri v. McNeely*, 569 U.S. 141 (2013). *McNeely* settled the question, holding that there was no special "DUI exception to the Fourth Amendment." The question in *Havatone* involved the state of pre-*McNeely* jurisprudence.

Although in both cases this Court divided on the applicability of the good-faith exception and reached different conclusions, the same standard was applied: at the time of the warrantless search, did police rely on "'binding appellate precedent

specifically authoriz[ing] a particular police practice'"? *Havatone*, 241 Ariz. at 512 ¶24 (quoting *Davis v. United States*, 564 U.S. 229, 241 (2011)). But two months ago, a majority of this Court abandoned that standard in *Jean*, holding that law enforcement was permitted to extrapolate from beeper cases that GPS tracking similarly would be permitted. While citing a different section of *Davis*, *Jean* fails to acknowledge that part of *Davis* that states the binding precedent should "specifically authorize[]" the police procedure at issue. *Jean*, 243 Ariz. at 342 ¶40 (quoting *Davis*, 564 U.S. at 232). Instead of looking to *Davis*, as did Chief Justice Bales's partial dissent, the main opinion in *Jean* looked to federal circuit courts and other states' courts. *Id*. at 343 ¶45. As the Chief Justice pointed out, *Davis* distinguished the applicability of the good-faith exception in jurisdictions like the Eleventh Circuit, which specifically authorized searches like the one in Davis's case, from its applicability in other jurisdictions, where the question was left open to debate. *Id*. at 344 ¶50 (Bales, C.J., dissenting in part) (citing *Davis*, 564 U.S. at 247).

Review is necessary to bring consistency back to this Court's recent exclusionary-rule jurisprudence.

II. The *Weakland* majority's application of the good-faith exception has never been accepted by this Court. The correct application requires exclusion when the law is unsettled.

In *Weakland*, the COA created a new rule that the exclusionary rule applies when COA judges misinterpret the rule in pending cases until the COA is reversed by this Court. Such a rule is bad public policy. It permits law enforcement to continue violating the Fourth Amendment prior to a final decision on a particular issue, rather than encourage law enforcement to honor the Fourth Amendment until they are certain the precedent "specifically authorizes a particular police practice." It ignores that there is a sliding scale of reasonableness of erroneous lower court opinions. For example, the result in *Valenzuela* was clearly dictated by *Butler*, yet two COA judges failed to recognize this in *Valenzuela I* and continued to assert that the Fourth Amendment requirement of voluntary consent for a warrantless search has no role in a DUI investigation. COA judges are loathe to call their colleagues' opinions "unreasonable." For these reasons, this Court must not abide the *Weakland* rule that unfairly punishes criminal defendants for the errors of the judiciary.

Weakland also contradicts another thread of COA cases. In the wake of *Rodriguez v. United States*, 135 S. Ct. 1609 (2015), the State argued that *Davis* should preclude application of the new rule to pending cases. In *State v. Kjolsrud*, 239 Ariz. 319, 325 (App. 2016), the COA argued for applying the good-faith exception in this manner:

> For our purposes, binding precedent is "Arizona or Supreme Court authority [that] explicitly authorized" the conduct in question. [Citations omitted]. If the law is, "at the very least, unsettled," then "application of the exclusionary rule would provide meaningful deterrence because ... it incentivizes law enforcement to err on the side of constitutional behavior." [Citations omitted]. In other words, although law enforcement agencies are not "expected to anticipate new developments in the law," they should be aware of "reasonable" interpretations of existing case law.

Id. ¶20 (quoting *State v. Mitchell*, 234 Ariz. 410, 419 ¶31 (App. 2014)). Applying this rule, the COA recognized it had "specifically authorized" police officers in *State v. Box*, 205 Ariz. 492 (App. 2003), to engage in *de minimis* extensions of a stop for purposes of having a canine dog sniff the exterior of the car. While *Kjolsrud* recognized a factual distinction from *Box*, it also pointed out that the Supreme Court held in *Rodriguez* that it was not stating a "new rule" but was explaining a rule announced decades earlier. *Kjolsrud*, 239 Ariz. at 325-26 ¶¶23-24.

Kjolsrud relied on *Mitchell*, and the source for *Mitchell*'s language, 234 Ariz. at 419 ¶31, about "incentiviz[ing] law enforcement to err on the side of constitutional behavior" was Justice Sotomayor's concurring opinion in *Davis*, 564 U.S. at 251, which, in turn, was quoting *United States v. Johnson*, 457 U.S. 537, 561 (1982). Thus, the need to protect the citizenry's rights in the face of unsettled law is well-established. Applied here, *Butler* unsettled the law as to whether the ADOT form admonition complied with the need to obtain voluntary consent for a warrantless search and seizure of an arrestee's blood.

Another way to understand the good-faith exception is to analogize it to retroactive applications of significant changes in the law. In *State v. Shrum*, 220 Ariz. 115, 118 ¶14 (2009), this Court explained, "The rationale for the [Ariz.R.Crim.P.] 32.1(g) exception is apparent: A defendant is not expected to anticipate significant future changes of the law in his of-right PCR proceeding or direct appeal." *Davis* also uses the language of not expecting police officers to anticipate later changes in the law. For either doctrine to apply, the change in the law must be "some transformative event, 'a clear break from the past.'" *Shrum*, 220 Ariz. at 118 ¶15 (quoting *State v. Slemmer*, 170 Ariz. 174, 182 (1991)). In rejecting a significant-change-in-the-law claim, this Court stated:

> An appellate decision is not a significant change in the law simply because it is the first to interpret a statute. Nor is an appellate opinion a change in the law simply because it reverses a trial court judgment; such correction of trial court legal error is a routine occurrence in appellate review. No different conclusion is compelled merely because trial courts other than the one whose judgment is on appeal had previously made the same error.

Shrum, 220 Ariz. at 120 ¶21. As for the argument that most lawyers misunderstood the statute, this Court stated that if such could be proven, at best it could state a case for ineffective assistance of counsel but not for a significant change in the law. Just as an appellate opinion is not a change in the law merely by reversing a trial court judgment, an opinion of this Court is not a change in the law when it reverses the COA's erroneous decision, as was the case in *Valenzuela*.

This Court should use similar concepts in explaining the good-faith exception.[2] If a case extends or even modifies an existing rule, then such would implicate neither Rule 32.1(g) nor the good-faith exception. *See State v. Werderman*, 237 Ariz. 342 (App. 2015) (recent holding that presence of nonpsychoactive metabolite of marijuana alone could not be basis to prosecute DUI was not significant change in the law). Police officers may not be expected to anticipate future court decisions, but their legal departments are expected to be aware of existing law and interpret it in a manner that protects the citizenry.

III. The exclusionary rule of article II, section 8 of the Arizona Constitution should provide broader protection than the Fourth Amendment.

The Supreme Court has held since *United States v. Calandra*, 414 U.S. 338 (1974), that the purpose of the exclusionary rule is to deter police misconduct. In *Davis*, the Court explained that it recognized the errors of past "expansive dicta," 564 U.S. at 237 (quoting *Hudson v. Michigan*, 547 U.S. 586, 591 (2006)). It "abandoned the 'reflexive' application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits." *Id*. at 238 (citing *Arizona v. Evans*,

[2] Arizona courts have never decided whether a new Fourth Amendment decision could be the impetus for a Rule 32.1(g) claim in an already-final case. Such a question should be preserved for another day. *Amicus* asks only that this Court apply similar terminology across myriad doctrines, unless it expressly states a reason not to do so.

514 U.S. 1, 13 (1995)). Although this Court recently refused to extend the exclusionary rule of article II, section 8 of the Arizona Constitution beyond the Fourth Amendment, *see State v. Hummons*, 227 Ariz. 78, 82 ¶16 (2011), the time has come to reconsider.

The exclusionary rule has been under attack since it was first announced in *Weeks v. United States*, 232 U.S. 383 (1914). Justice Cardozo explained (and rejected) the rule in this fashion: "The criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. 13, 21 (1926). It is one thing to disagree with the fundamentals of the exclusionary rule; it is entirely different to rewrite history in pursuit of that effort.

Contrary to the "sloppy dicta" claim made by some members of the Supreme Court, *Weeks* was not well-reasoned and rooted in originalism. Following a recitation of the principles and history underlying the Fourth Amendment, the Court concluded:

> The tendency of those who execute the criminal laws of the country to obtain conviction by means of unlawful seizures and enforced confessions, the latter often obtained after subjecting accused persons to unwarranted practices destructive of rights secured by the Federal Constitution, should find no sanction in the judgments of the courts, which are charged at all times with the support of the Constitution, and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights.

232 U.S. at 392. The Court then turned to the remedy:

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Id. at 393. The Court deduced that allowing illegally obtained evidence in court "would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution, intended for the protection of the people against such unauthorized action." *Id*. at 394. Thus, the exclusionary rule is rooted in the need to protect the integrity of the judiciary so it does not become complicit in illegal action.

Not until *Elkins v. United States*, 364 U.S. 206, 217 (1960), did the Court use the language of deterrence: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins* was partially incorrect. *Weeks* says nothing about deterrence as the rule's purpose; rather, *Weeks* acknowledged that at common law, the constable was deterred from violating a person's Fourth Amendment rights by the threat of civil action for trespass. 232 U.S. at 390.

This misstatement in *Elkins* was repeated as the new purpose of the exclusionary rule for the post-Warren Court era. The Court now rejects applications of the rule on the ground that trespasses can be brought as civil rights claims under

42 U.S.C. §1983. *See Hudson*, 547 U.S. at 597. In recent years, however, the Court also extended qualified immunity for officers and employers to such an extent that not even the most barbaric violations are actionable. *See Safford Unif. Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (defendants entitled to qualified immunity for strip-searching thirteen-year-old girl at school in pursuit of Tylenol); *Florence v. Board of Chosen Freeholders*, 566 U.S. 318 (2012) (defendants entitled to qualified immunity for arrest and jailing a person for an unpaid fine, including strip search and inspection of genitals and anus). Thus, the claim that the exclusionary rule serves to deter police is untenable.

Giving a state constitutional interpretation to the exclusionary rule "also could provide greater certainty and predictability to defendants and law-enforcement alike than hitching our jurisprudence to often amorphous and constantly evolving U.S. Supreme Court decisions." *Jean*, 243 Ariz. at 354 ¶94 (Bolick, J., dissenting in part). Such was the impetus for the separate interpretation of the state constitution in the context of home searches. *See State v. Bolt*, 142 Ariz. 260, 264 (1984) (expressing concern that *Segura v. United States*, 468 U.S. 796 (1984), could undermine sanctity of the home). *Amicus* asks this Court to unhitch its exclusionary-rule jurisprudence from the Fourth Amendment to provide this certainty and also so that this Court can recognize that the true purpose of the exclusionary rule is to protect the integrity of the judicial system.

CONCLUSION

For these reasons, *amicus curiae* AACJ requests that this Court recognize that the good-faith exception to the exclusionary rule only applies when the law is clearly settled.

RESPECTFULLY SUBMITTED this 19th day of March, 2018

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ADOT
Motor Vehicle Division

OFFICE MEMORANDUM T6455

FROM: MVD POLICY UNIT

THRU: ERIC R. JORGENSEN
Division Director

TO: ECD ORGS
ARIZONA COURTS
ARIZONA LAW ENFORCEMENT AGENCIES

DATE: DECEMBER 18, 2015

RE: ADMIN PER SE/IMPLIED CONSENT AFFIDAVIT, FORM #40-5807

Attached is a new version of the Arizona Admin Per Se/Implied Consent Affidavit, form #40-5807 (R10-15). The changes to the form are on the back of page 1, the admonitions page (page 2 of the attached sample). The form has been revised to better reflect the language of the implied consent statute. Changes were also made to help officers to more effectively use the form.

Key changes include:

- A box at the top of the page for the officer to check indicating he/she ensured the DUI suspect was under arrest for DUI (or other relevant charges) prior to reading the admonitions.
- A change in language that reflects the language used in the implied consent statute.

No later than January 1, 2016 the new form shall be used by law enforcement. Once in use, all existing stock and/or any previous versions of the form should be destroyed. It is recommended that all jurisdictions start using the new form immediately and all existing supplies of the form be destroyed.

The amended form can be ordered by phone at 602-712-7306, or for pick up orders, at the following address:

MVD Distribution Center Manager
1309 N. 21st Avenue
Phoenix, Arizona 85009

ADOT

Motor Vehicle Division

ADMIN PER SE/IMPLIED CONSENT AFFIDAVIT

DUI or DR Case Number

☐ Prior to reading the below admonitions, I ensured the person named on the front of the form had been placed under arrest for at least one of the following charges: ARS 28-1381; ARS 28-1382, ARS 28-1383, ARS 4-244.34, ARS 13-1201, ARS 13-1204, other Title 13, Chapter 11 charge.

ADMONITIONS

☐ Arizona law states that a person who operates a motor vehicle at any time in this state gives consent to a test or tests of blood, breath, urine or other bodily substance for the purpose of determining alcohol concentration or drug content. The law enforcement officer is authorized to request more than one test and may choose the types of tests.

☐ If the test results are not available, or indicate an alcohol concentration of 0.08 or above (0.04 or above in a commercial vehicle,) or indicate any drug defined in ARS 13-3401 or its metabolite without a valid prescription, then your Arizona driving privilege will be suspended for not less than 90 consecutive days.

☐ If you refuse, do not expressly agree to submit to, or do not successfully complete the tests, your Arizona driving privilege will be suspended. The suspension will be imposed for 12 months, or for two years if you've had a prior implied-consent refusal within the last 84 months.

☐ Yes ☐ No Will you submit to the tests?

If person unreasonably **delays** the completion of test, read the following to him or her:

You are not entitled to further delay taking the tests for any reason. Further delay will be considered a refusal to submit to the tests.

☐ Yes ☐ No Will you submit to the tests?

Additional Comments

Officer Signature