IN THE COURT OF APPEALS

STATE OF ARIZONA

DIVISION TWO

STATE OF ARIZONA, Appellee, v. FRANCISCO VALENZUELA, Appellant.	)	Arizona Court of Appeals No. 2 CA-CR 2014-0169 Department B Cochise County Superior Court No. CR2013-00076

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

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INTRODUCTION

¶1 Arizona law enforcement officers investigating a possible driving under the influence offense read to an arrestee what is euphemistically called an "admin per se / implied consent admonition." This admonition, which was read to the appellant in this case, informs the accused that "Arizona law" requires him or her to submit to a warrantless search of his or her breath, blood, or urine. Appendix. This admonition, of unknown authorship, does not comply with the directives of the implied consent statute. A.R.S. § 28-1321. More importantly, the admonition violates the Fourth Amendment to the Constitution by securing consent to a warrantless search based upon the officer's claim of lawful authority.

¶2 Arizona Attorneys for Criminal Justice is submitting this *amicus curiae* brief because of its concern that the rights of thousands of persons accused of a DUI have been, and are presently being violated by law enforcement's use of this improper admonition. The warrantless searches conducted by the officers cannot be justified by consent of an individual who is told he has no right to refuse.

INTERESTS OF *AMICUS CURIAE*

¶3 *Amicus curiae* Arizona Attorneys for Criminal Justice 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. AACJ is the Arizona state affiliate of the National Association of Criminal Defense Lawyers.

¶4 AACJ offers this brief in support of the appellant because the issues presented are critical to the right of those accused of driving under the influence to be free of police coercion. Courts throughout the country, particularly the United States Supreme Court and the Arizona Supreme Court, are recognizing that the Fourth Amendment has for too long been ignored in DUI cases. AACJ asks this Court to give effect to the Fourth Amendment for motorists who receive the admin per se advisory from police and from whom police demand "consent" to take a sample of their blood, breath or urine.

ARGUMENTS

I. THE VALIDITY OF A SEARCH OF A PERSON'S BLOOD, BREATH, OR URINE IS GOVERNED BY THE FOURTH AMENDMENT.

¶5 Performing a blood draw and obtaining a breath sample are searches under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757 (1966); *Skinner v. Railway Labor Executives Assn.*, 489 U.S. 602 (1989). Any blood or breath test must be in compliance with the procedures prescribed in the Fourth Amendment's warrant clause. *Skinner*, 489 U.S. at 619.. A warrantless search is per se unreasonable and can be justified only if it falls under specifically established exceptions. *Id*. A person has a constitutional right to refuse a warrantless search. *State ex rel. Verburg v. Jones*, 211 Ariz. 413, 121 P.3d 1283 (App. 2005); *State v. Palenkas*, 188 Ariz. 201, 933 P.2d 1269 (App. 1996); *State v. Stevens*, 228 Ariz. 411, 267 P.3d 1203 (App. 2012); *United States v. Prescott*, 581 F.2d 343 (9th Cir. 1978) (refusal to warrantless search is a right protected by the Constitution). The state, in order to justify a warrantless search under the consent exception, must prove that the consent is voluntary.

¶6 The Fourth Amendment is not abrogated nor superseded by Arizona's implied consent statute, A.R.S. § 28-1321. The validity of a search for blood or breath is governed solely by the Fourth Amendment. In *State v. Quinn*, 218 Ariz. 66, 178 P.3d 1190 (App. 2008), Division One of this Court rejected the state's argument that

A.R.S. § 28-673 (the implied consent statute pertaining to those involved in traffic accidents) could thwart the Fourth Amendment's probable cause requirement in a criminal case. "On its face, the statute authorizes a warrantless blood draw in the context of a civil license suspension.... No other use of the test is explicitly authorized by the statute." *Id*. at 70 ¶ 14, 178 P.3d at 1194. Similarly, the "implied consent" contained in A.R.S. § 28-1321(A) is applicable, if at all, only to an administrative license suspension. It is not a substitute for the Fourth Amendment's requirement of a voluntary consent.

¶7 The Arizona Supreme Court rejected the state's argument that the implied consent statute abrogated the Fourth Amendment's requirement of voluntary consent:

> Neither the implied consent law nor decisions by this Court have ever suggested the "consent" referenced in subsection (A) authorizes warrantless searches of all persons arrested for driving under the influence.

Carrillo v. Houser, 224 Ariz. 463, 466 ¶ 18, 232 P.3d 1245, 1248 (2010). Recently, the Court again rejected the state's argument that the implied consent statute constitutes an exception to the warrant requirement. *State v. Butler*, 232 Ariz. 84, 302 P.3d 609 (2013). The language contained in subsection A of the statute does not require a driver to impliedly consent to a warrantless search of his breath or blood: "We hold now that independent of A.R.S. § 28-1321, the Fourth Amendment requires an arrestee's consent be voluntary to justify a blood draw." *Id*. at 88 ¶ 18,

302 P.3d at 613. Thus, consent is determined solely upon the Fourth Amendment's requirements.

II. A.R.S. § 28-1321 DOES NOT AUTHORIZE THE ADMONITION PRESENTLY BEING READ TO PERSONS ARRESTED FOR DUI.

¶8 Arizona's "so called" implied consent law, by its very language, was never meant to supplant, limit, or expand the exceptions to the Fourth Amendment's warrant requirement. *See Quinn*, *Carrillo, Butler*, *supra*. The statutory procedure required to be used by the officer upon arrest does not, on its face, violate the Fourth Amendment. Subsection B of the statute requires that the arresting officer "request" the person submit to a test. "After an arrest, a violator shall be requested to submit to and successfully complete any test or tests prescribed by subsection A of this section, and..." A.R.S. § 28-1321(B) (emphasis added). After a refusal to this request, the statute requires that an arrestee be informed of the administrative sanctions for failing to consent. This procedure was specifically upheld in *Carrillo*:

> Notwithstanding Subsection (A), Subsection (B) requires that the law enforcement officer "shall" request the arrestee to take a test and, if the arrestee "refuses," the officer must explain that the arrestee's license will be suspended unless the arrestee "expressly agrees to submit to and successfully completes the test."

224 Ariz. at 465 ¶ 10, 232 P.3d at 1247 (emphasis added).

¶9 The procedure outlined by the statute protects against using the threat of

license suspension to unconstitutionally coerce the accused into giving consent. It requires a request and either a voluntary consent or a refusal before the officer takes further action. It is only after the officer has obtained a refusal that he is required to inform the arrestee of the possible license suspension.

¶10 The admonition which was read to Mr. Valenzuela is identical to the admonition read to DUI arrestees throughout the state. Appendix; RT 12/27/13, pp. 13-16. Instead of requesting permission, the arrestee is told that Arizona Law requires him or her to submit. On four separate occasions, the officer tells the arrestee he or she is "required" to submit.[1] If an arrestee is hesitant to give consent, he or she is informed that he or she is not entitled to delay for any reason. *Id*.

¶11 The statute does not authorize an officer to tell an arrestee that Arizona law requires an arrestee to submit to a warrantless search. Quite the opposite. The statute, in order to comply with the Fourth Amendment, requires that a request for consent be made without claim of authority or coercion. The admonition given in the present case is not statutorily authorized.

¶12 "Request" is defined in Webster's Collegiate Dictionary, Tenth Edition, as "to ask as a favor or privilege." The word "require" contained in the admonition is

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[1] *See* Appendix ("Arizona law *requires* you to submit. . . . The law enforcement officer may *require* you to submit to two or more tests. You are *required* to successfully complete each of the tests. . . . You are, therefore, *required* to submit to the specified tests.") (emphasis added).

defined as "to claim or ask by right and authority." *Id*. When adding the word "submit" ("to yield to governance or authority," *id*.) into the mix, it becomes clear that the admonition is a demand based upon claim of governmental authority. A person confronted with the admonition read by an officer could only conclude he or she had no right to refuse.

¶13 In *State v. Groshong*, 175 Ariz. 67, 852 P.2d 1251 (App. 1993), this Court was faced with a consent in a DUI case obtained in the absence of the above admonition. The Court found that the consent was voluntary because "[t]he officer stated that he did not threaten Groshong or tell him there would be any consequences if he refused and that it was entirely up to him whether to provide the sample.". *Id.* at 69, 852 P.2d at 1253. *Groshong*'s finding of voluntariness was based upon facts demonstrating a non-coercive request and an explanation of the arrestee's right to refuse. The admonition read in Mr. Valenzuela's case is the mirror opposite; Mr. Valenzuela, like all other arrestees in Arizona who are read the form included in the Appendix, was told he was required to submit and that refusal will have consequences.

¶14 The state has urged that the courts in *Campbell v. Superior Court*, 106 Ariz. 542, 479 P.2d 685 (1971), and *State v. Brito*, 183 Ariz. 535, 905 P.2d 544 (App. 1995), have held the admonition read to arrestees valid under the statute and the Constitution. This argument fails for several reasons. First, *Campbell* was concerned

with an administrative, not a criminal, proceeding. *Brito* involved the issue of the validity of a jury instruction containing the admonition. Neither involved a Fourth Amendment issue. More importantly, *Brito*'s and *Campbell*'s pronouncements were based upon an interpretation of subsection (A) of the implied consent statute. This interpretation may be a correct reading of subsection (A). The subsection, however, applies solely, if at all, to administrative license hearings. *Quinn*. Subsection (A) does not authorize warrantless searches conducted in criminal investigations. The argument that *Campbell* and *Brito* justify "implied consent" searches in criminal cases has been specifically rejected. *Quinn*; *Carrillo*; *Butler*.

III. CONSENT OBTAINED BY ACQUIESCENCE TO A CLAIM OF LAWFUL AUTHORITY MAKES A SUBSEQUENT "CONSENT" INVOLUNTARY.

A. Acquiescence to Claim of Lawful Authority.

¶15 Consent obtained based upon an arresting officer's claim of authority to conduct a warrantless search is not voluntary:

> When a law enforcement officer claims authority to search a home under a warrant he announces in effect that the occupant has no right to resist the search. The situation is implicit with coercion, albeit colorably lawful coercion. Where there is coercion, there cannot be consent.

Bumper v. North Carolina, 391 U.S. 543, 550 (1968) (emphasis added). *See also Orhorhaghe v. I.N.S.*, 38 F.3d 488, 500 (9th Cir. 1994) ("It is well-established that

there can be no effective consent to a search or seizure if that consent follows a law enforcement officer's assertion of an independent right to engage in such conduct.").

¶16 This standard is absolute. The "totality of circumstances" test for voluntariness announced in *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), is not applicable when the arrestee has been told he or she has no right to refuse.[2] Justice Black, in his dissent in *Bumper*, argued that the testimony of Hattie Leath, the defendant's grandmother whose "consent" was the basis for the police search, demonstrated a complete and voluntary consent to search. *Bumper*, 391 U.S. at 555-57 (Black, J., dissenting). The *Bumper* Court rejected Justice Black's entreaty to examine and weigh the factual circumstances in determining voluntariness. "Where there is coercion, there cannot be consent." In *Schneckloth*, the Court acknowledged the continued validity of this concept and held that certain circumstances used to gain consent require no balancing requirement. "Conversely, [when consent] was coerced by the threat of force, or granted in submission to a claim of lawful authority—then we have found the consent invalid and the search unreasonable." 412 U.S. at 233 (emphasis added).

[2] The argument that lack of knowledge is but one fact to consider is not applicable when the officer affirmatively states that the arrestee has no such right.

B. Cases Finding Claim of Lawful Authority Invalidates Consent.

¶17 Courts have uniformly held that a claim of legal authority makes a subsequent consent per se involuntary. In *Bumper*, the Court found the officer's claim of a valid warrant rendered the subsequent consent invalid. In *Orhorhaghe*, the agents asserted they did not need a warrant. In *Amos v. United States*, 255 U.S. 313 (1921), the Court held consent involuntary after agents stated "we have come to search the premises."

¶18 A law enforcement officer's use of an administrative duty to submit to a search as a subterfuge to gain evidence for a criminal investigation has been universally condemned. Consent obtained by this means is involuntary. In *Commonwealth v. Krisco Corp.*, 421 Mass. 37, 653 N.E.2d 579 (1995), the state, under the guise of an administrative inspection, conducted a search of a business for criminal wrongdoing. Announcing to the owner that agents were on the premises for an administrative inspection made the consent invalid.

¶19 In *State v. Casal*, 410 S.2d 152 (Fla. 1982), officers boarded a boat purportedly justified as a registration and certificate inspection but the real purpose was to investigate criminal violations. The officer informed the owner of the boat he needed no warrant since he was not conducting a search, and thus the Florida Supreme Court determined that the consent was involuntary. *See also United States v. Johnson*, 994 F.2d 740 (10th Cir. 1993) (consent to search taxidermy shop for criminal violations obtained by federal agents by showing employee state statute

requiring consent to administrative inspections made subsequent consent involuntary.); *People v. Pace*, 101 A.D.2d 336, 475 N.Y.S.2d 443 (1984) (New York statute authorizing warrantless administrative searches of junkyards cannot be used to justify search by police in criminal investigation). Similarly, the State of Arizona cannot use a purported administrative duty under A.R.S. § 28-1321(A) to obtain consent for a search as part of a criminal DUI investigation.

IV. CASES HOLDING CONSENT INVOLUNTARY IN DUI INVESTIGATIONS.

¶20 State courts have addressed, in DUI cases, the validity of consent given after a claim of lawful authority. In *Hannoy v. Indiana*, 789 N.E. 2d 977, 988 (Ind. App. 2003), the court held that the officer's statement to the accused that "It's my duty to check your blood for blood alcohol" clearly implied that the blood draw was mandatory and that Hannoy had no choice in the matter. This claim of authority to draw blood by the office rendered the subsequent consent involuntary.[3]

¶21 The Georgia Supreme Court in *Cooper v. State*, 277 Ga. 282, 587 S.E.2d 605 (2003), held that informing the accused that the law required the arrestee to submit

[3] The admonition approved by Indiana's courts, based upon an implied consent statute remarkably similar to Arizona's, reads: "I must give you the opportunity to submit to a chemical test." *Cochran v. State*, 771 N.E.2d 104 (Ind. App. 2002).

to the blood draw invalidated the subsequent consent. Similarly, in *State v. Edgar*, 296 Kan. 513, 530, 294 P.3d 251, 262 (2013), the Kansas Supreme Court held that informing the arrestee you "do not have a right to refuse" a breath test made the subsequent consent involuntary, especially in light of the state statute requiring an officer to "request" a breath sample. The Kansas court approved the reasoning of a lower court's unpublished decision in *City of Lenexa v. Gross*, holding that informing the arrestee he or she was "required by law" to take a breath test made the subsequent consent invalid. Only a few months ago, in *State v. Fierro*, __ S.D. __, 853 N.W.2d 235 (2014), the South Dakota Supreme Court also held that consent obtained after telling an arrestee she was required by law to give blood sample was invalid. Thus, there is a very clear nationwide trend of courts applying the Fourth Amendment to abuses by law enforcement of the local implied consent statutes.

CONCLUSION

¶22 The admonition given in this case, and uniformly given by law enforcement officers throughout the state, is not authorized by A.R.S. § 28-1321. Telling a person the law requires submission to a warrantless search is in direct conflict with the person's Fourth Amendment right to refuse, making any alleged consent involuntary.

¶23 This Court cannot countenance the continued violation of the rights of

individuals arrested for DUI. The admonition currently given by law enforcement, which was given to Mr. Valenzuela in this case, violates both the statute and the Fourth Amendment to the United States Constitution.

DATED: (electronically filed) December 22, 2014.

ARIZONA ATTORNEYS FOR
CRIMINAL JUSTICE

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 31.24 and 31.13(b)(2), Arizona Rules of Criminal Procedure, undersigned counsel hereby certifies that this *Amicus Curiae* Brief complies with Rule 31.13(b) as follows:

1. The brief is proportionately spaced, and uses 14 point Times New Roman typeface, in compliance with Rule 31.13(b)(1);

2. The brief contains 2,809 words, and has an average of no more than 280 words per page, including footnotes and quotations, in compliance with Rule 31.13(b)(2);

3. The brief is double spaced, with top and bottom margins of at least one inch and side margins of at least one inch, in compliance with Rule 31.13(b)(1).

DATED: (electronically filed) December 22, 2014.

By /s/
Jeffrey D. Bartolino
Attorney for Arizona Attorneys for Criminal Justice

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief of *Amicus Curiae* Arizona Attorneys for Criminal Justice in Support of Petitioner and Motion for Leave to File an *Amicus Curiae* Brief, electronically filed with the Court, will be mailed on December 22, 2014, to the following:

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DATED this 22nd day of December, 2014.

By /s/
Jeffrey D. Bartolino
Attorney for Arizona Attorneys for Criminal Justice

5/21/2014

LE or DR Case Number

ADMONITIONS

For the reasons stated on the front of this form, I read the following to the person named on the front:

☐ Arizona law requires you to submit to and successfully complete tests of breath, blood or other bodily substance as chosen by the law enforcement officer to determine alcohol concentration or drug content. The law enforcement officer may require you to submit to two or more tests. You are required to successfully complete each of the tests.

☐ If the test results are not available or indicate your alcohol concentration is 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, your Arizona driving privilege will be suspended for not less than 90 consecutive days.

☐ If you refuse to submit or do not successfully complete the specified tests, your Arizona driving privilege will be suspended for 12 months, or for two years if there is a prior implied consent refusal, within the last 84 months, on your record. You are, therefore, required to submit to the specified tests.

☐ Yes ☐ No Will you submit to the specified 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 refusal to submit to the tests.

☐ Yes ☐ No Will you submit to the specified tests?

Additional Comments

Officer Si