IN THE SUPREME COURT

STATE OF ARIZONA

STATE OF ARIZONA, Appellee, v. FRANCISCO L. ENCINAS VALENZUELA, Appellant.	)))))))))))	Arizona Supreme Court No. CR-15-0222-PR Arizona Court of Appeals No. 2 CA-CR 2014-0169 Department B Cochise County Superior Court No. CR2013-00076

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

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ARGUMENT

This Court unequivocally stated in *State v. Butler*, 232 Ariz. 84 (2013), that the implied consent statute does not abrogate the Fourth Amendment and that officers must obtain consent that is voluntary. As recognized in *Carrillo v. Houser*, 224 Ariz. 463 (2010), the administrative duty to consent to a chemical test, along with its penalties for refusal, may coexist with the Fourth Amendment's right to refuse so long as, and to the extent, that the implied consent statute did not interfere with rights conferred by the Fourth Amendment. Yet there has been no renunciation by the State of the claim that there exists a "DUI exception to the Fourth Amendment," and the State and lower courts continue to treat "implied consent" as identical to consent as contemplated by the Fourth Amendment.

The Court of Appeals assumed that this Court endorsed the standard admonition that is read to all drivers because the same admonition read to Valenzuela was also read to the juvenile in *Butler*, and this Court said nothing about a defective admonition in *Butler*. *Valenzuela*, 237 Ariz. 307, ¶ 7 (App. 2015). The State now asks this Court to rely on what it seems to characterize as an implicit validation by this Court of the admonition at issue. *State's Supplemental Brief*, pp.7-8 n.3. *Amicus curiae* Arizona Attorneys for Criminal Justice (AACJ) participated in the *Butler* litigation as well, and points out that the challenge in *Butler* had nothing to do with the admonition's language but rather the other attendant circumstances to the

"consent" that was given. As this Court warned only last week in *Dobson v. McClennen*, __ Ariz. __, ¶ 12, CV-14-0313-PR, 2015 WL 7353847 (Ariz. S. Ct., Nov. 20, 2015), lower courts should not take statements from its previous cases out of context and assign to them meaning that was never intended.

The State continues to take out of context *dictum* from *Missouri v. McNeely*, 133 S.Ct. 1552, 1566 (2013), to support the proposition that the implied consent that a driver gives as a condition for operating a vehicle on the roads is sufficient to satisfy the consent exception to the Fourth Amendment's warrant requirement. *State's Supplemental Brief*, pp. 4-5. This argument was put forth by the State in both *Carrillo* and in *Butler*, and it was resoundingly rejected both times. *See also Aviles v. State*, 443 S.W.3d 291 (Tex. Crim. App. 2014) (after case vacated and remanded by United States Supreme Court for Texas to reconsider in light of *McNeely*, state court held that state's implied consent statute cannot substitute for actual consent).

The existence of the implied consent statute should have no bearing on the outcome of this case. This Court should hold that the purpose of the implied consent statute is to secure administrative sanctions against a driver who refuses to participate in a chemical test, and that law enforcement should no longer confuse "implied consent" with actual consent that is voluntary within the meaning of the Fourth Amendment.

The State has consistently represented Valenzuela's argument as a "proposed

per-se-involuntary-consent rule with respect to Arizona's implied-consent statute." *State's Supplemental Brief*, Question Presented for Review. AACJ believes that the State has set up a straw man to knock down and that Valenzuela's argument is primarily concerned with addressing the voluntariness of consent. But even if, *arguendo*, Valenzuela's argument can be read to be asking for such a *per se* rule, the State still should address the heart of Judge Eckerstrom's dissenting opinion, which in no way suggests the creation of such a rule.

This Court can take judicial notice of its own files. As noted in AACJ's initial *amicus curiae* brief, the identical issue is pending before this Court in *State v. Oliver*, 2 CA-CR 2014-0359 (Memo.Dec., August 18, 2015), CR-15-0278.[1] In that case, Oliver's petition was filed on October 9, 2015, and the State filed its response on November 3, 2015 (after review was granted in *Valenzuela*). Thus, the State has now had three opportunities (petitions for review in Valenzuela and Oliver, and the supplemental brief in Valenzuela) to explain the effect of the rule from *Bumper v. North Carolina*, 391 U.S. 543 (1968), on this case. The State has passed on all three opportunities, even though Judge Eckerstrom (like AACJ) relied quite heavily on *Bumper*. Its silence is notable; likely it is because the State cannot distinguish *Bumper* from the issue presented here. *Cf. State v. Glissendorf*, 235 Ariz. 147, ¶ 24 (2014) ("The State's reticence perhaps reflects that there is no convincing

[1] Cited pursuant to Ariz. R. Sup. Ct. 111(c)(2)-(3).

argument…").

Only *amicus curiae* City of Scottsdale has even addressed the *Bumper* question. Scottsdale's attempt to distinguish *Bumper* is flawed; it is based on an erroneous assumption that a claim of lawful authority (which renders subsequent consent involuntary) is limited to a false assertion of authority pursuant to a warrant. This argument lacks merit, as shown by the myriad of Supreme Court cases not involving warrants to which the doctrine has been applied:

> Conversely, if under all the circumstances it has appeared that the consent was not given voluntary—that it was coerced by threats, or force, or granted only in submission to a claim of lawful authority, then we have found the consent invalid and the search unreasonable. *See, e.g., Bumper v. North Carolina*, 391 U.S. at 548-549; *Johnson v. United States*, 323 U.S. 10 (1948); *Amos v. United States*, 255 U.S. 313 (1921).

Schneckloth v. Bustamonte, 412 U.S. 218, 233-34 (1973). In *Amos*, the Court held consent obtained after officers told the occupant that "we have come to search the premises" involuntary. And in *Johnson*, the officer's false statement that the accused was under arrest, and that this arrest justified a search of the premises rendered the subsequent search involuntary. More recently, in *Florida v. Royer*, 460 U.S. 491 (1983), the Court cited *Bumper*, *Johnson*, *Amos*, and *Schneckloth*, and extolled that the burden of proving consent free and voluntary is not met by a showing of mere submission to a claim of lawful authority. *See also Orhorhaghe v. United States*, 38 F.3d 488 (9th Cir. 1994) ("We didn't not need a warrant" stated "in a manner bound to confuse" and "was intended and received as an assertion that the agents had the

legal power to enter the apartment without a warrant.").

The manner of asserting a claim of lawful authority can take many forms, and is certainly not limited to a false claim of a valid warrant. A statement that a person is required "to submit" has been recognized by the courts as almost the definition of a claim of lawful authority. In *Florida v. Bostick*, 501 U.S. 429, 435 (1991), the Court held that consent can be determined voluntary only so long "as the police do not convey a message that compliance with their requests is required." In *United States v. Drayton*, 536 U.S. 194, 206 (2002), the Court, in holding a consent voluntary, noted, "Lang (arresting officer) provided Dayton with no indication that he was required to consent to a search." In *State v. Groshong*, 175 Ariz. 67, 71 (App. 1993), the court, holding the defendant's consent voluntary, pointed to the fact that "Groshong consented after he was told he was not required to provide the sample." Thus, Scottsdale's attempt to limit the scope of *Bumper* fails.

Scottsdale also relies heavily on a federal magistrate's opinion in *United States v. Sugiyama*, __ F.Supp.2d __, 2015 WL 4092494 (D. Md. 2015). This support is not only misplaced but also of dubious precedential value.[2] First, Sugiyama did not consent to the search; he refused. Second, there was no issue of the validity of this refusal. The sole issue presented was whether 18 U.S.C. § 3118,

[2] The case, as published in Westlaw, does not reflect that a district judge approved the magistrate's findings of fact and conclusions of law.

which provides for a one-year suspension of a person's driving privilege upon refusal, violated the Fourth Amendment. The above opinion, not touching upon any issues presented in this case, is irrelevant to this Court's decision. But in any event, the reasoning of that case is contradicted by this Court's holdings in *Carrillo* and *Butler*. If this Court need not follow the Ninth Circuit's interpretation of the Fourth Amendment, *see, e.g.*, *State v. Serna*, 235 Ariz. 270, ¶¶ 21-22 (2014), then it certainly need not follow the interpretation of a magistrate judge in Maryland.

Finally, public policy does not support allowing law enforcement to claim consent based on acquiescence. When enforcing the constitutional rights of suspects, the standard response from law enforcement is: "these are necessary tools to do our job." This argument from fear that "the sky will fall" has been repeated too many times in the last half-century, most notably after *Miranda v. Arizona*, 384 U.S. 436 (1966). Each time it is shown to be unfounded when citizens continue to waive their constitutional rights even when advised of those rights and offered an opportunity to invoke those rights. By using an administrative duty as subterfuge to obtain consent in a criminal investigation, the process will no doubt be easier and faster for law enforcement; but the Fourth Amendment necessarily places limits on the tools that law enforcement may use to obtain evidence against arrestees.

In this case, the State is concerned that implied consent will become unenforceable. The reality is that implied consent has outlived its necessity. When

the statute was enacted in the 1960s, it was arguably necessary because drivers who refused would not have their blood taken at all. Today, officers throughout the state have no trouble obtaining a telephonic search warrant within moments of a driver refusing consent. Thus, the factual underpinning that supported a need to threaten drivers with dire administrative consequences no longer exists.

It is not the role of the judiciary to repeal legislation that is inadvisable. If the implied consent statute is not *per se* unconstitutional, then this Court must give it a constitutional reading. *Carrillo*; *State v. Thompson*, 204 Ariz. 471, ¶ 27 (2003). If this Court takes too narrow a view of the issues presented here, however, the State may continue to fail to grasp the magnitude of the problem, as it has continued to do so here.

For this reason, this Court may wish to consider the creation of a prophylactic against coercion. Judge Eckerstrom suggested that the standard admonition, read by officers in many (if not most) law enforcement agencies to all DUI arrestees, needs to be changed in order to comport with the Fourth Amendment and *Bumper*. This Court should take all necessary steps to ensure that the message is received that there is no DUI exception to the Fourth Amendment.

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DATED: (electronically filed) November 27, 2015.

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