IN THE SUPREME COURT
OF THE STATE OF ARIZONA

STATE OF ARIZONA, Respondent/Appellee, v. FRANCISCO L. ENCINAS VALENZUELA, Petitioner/Appellant.	Arizona Supreme Court No. CR15-0222-PR Court of Appeals, Division Two No. 2 CA-CR14-0169 Cochise County Superior Court No. CR201300076

BRIEF OF AMICUS CURIAE NATIONAL COLLEGE FOR DUI DEFENSE FILED IN SUPPORT OF PETITIONER/APPELLANT FRANCISCO L. ENCINAS VALENZUELA

Filed with the written consent of the parties

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INTRODUCTION

Amicus Curiae the National College for DUI Defense, Inc. (NCDD) offers its views on the issue presented by this Court in its order granting review:

Does a citizen, who is in police custody, voluntarily consent to a warrantless search of his or her person following the repeated demands of a police officer that the citizen is required by law to submit to that search?

NCDD submits that this question must be answered in the negative. By definition, consent must be voluntary to be effective. Accordingly, the Division Two Court of Appeals erroneously held that consent for a warrantless search was voluntarily given by a citizen in custody who was repeatedly told that he was required by law to submit to the search and was never expressly informed of his right to refuse.

INTERESTS OF AMICUS CURIAE

Amicus Curiae the National College for DUI Defense, Inc. (NCDD) is a nonprofit professional organization of lawyers, with over 1,000 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its extensive educational programs, its website, and its email list, NCDD trains lawyers to more effectively represent persons accused of drunk driving.

Counsel for amicus states that no counsel for a party authored this brief in whole or in part and no person, other than amicus, its members, or its counsel made a monetary contribution to the preparation of this brief.

Amicus offers this brief in support of Petitioner/Appellant Valenzuela because the issue presented touches the core of its mission to defend and preserve individual liberties of all persons accused of driving under the influence as guaranteed by the United States Constitution.

SUMMARY OF ARGUMENTS

The Repeated Demands of a Police Officer That a Citizen Under Arrest is Required to Submit to a Warrantless Search of his or her Body Overcome the Voluntary Will of That Citizen in Violation of the Fourth Amendment; and

Mere Compliance by a Citizen Under Arrest with the Orders of a Police Officer Does not Demonstrate Voluntary Consent.

STATEMENT OF FACTS

Amicus Curiae the National College for DUI Defense, Inc. adopts the statement of the case and statement of the facts of the parties to this proceeding.

ARGUMENTS

A. The Fourth Amendment Prohibits the Drawing of Blood in This Case.

¶1 A warrantless search is presumptively unreasonable under the Fourth Amendment, "subject only to a few specifically established, jealously and

carefully drawn exceptions." ***Jones v. United States***, 357 U.S. 493, 78 S.Ct. 1253, (1958); ***State v. Vasquez***, 167 Ariz. 352, 807 P.2d 520 (1991); ***State v. Greene***, 162 Ariz. 431, 784 P.2d 257 (1989). The same presumption has been attributed to Article II, §8 of the Arizona Constitution by ***State v. DeWitt***, 184 Ariz. 464, 910 P.2d 9 (1996).

¶2 Simply put, there is no excuse for the police to ignore the Fourth Amendment's requirement that a search warrant be obtained if the State wishes to compel a sample of a DUI suspect's breath and/or blood. As declared by this Court in ***State v. Butler***:

> ***McNeely*** also forecloses the State's arguments that requiring warrants for blood draws will unduly burden law enforcement officials or render Arizona's implied consent law meaningless. "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment ***mandates*** that they do so[1]."
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> 232 Ariz. 84, 302 P.3d 609 (2013) , *citing* ***Missouri v. McNeely,*** __ U.S. __, 133 S.Ct. 1552, 1561, 185 L. Ed. 2d 696 (2013) (emphasis added).

¶3 With telephonic search warrants so readily available to the police in DUI investigations, there is no excuse for not seeking one. In fact, the ***McNeely*** case,

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[1] This cannot be overemphasized enough. There is no excuse for not getting a search warrant; the police are mandated to do so.

cited by ***State v. Butler***, above, looked to Arizona as a prime example of a state where search warrants are readily available to police in a timely manner (***Missouri v. McNeely***, ***supra,*** 133 S.Ct. at 1573).

¶4 Absent a warrant, the State may remain compliant with the Fourth Amendment by demonstrating that either an exigency[2] prohibited the State from being able to obtain the warrant, or that the subject of the search freely and voluntarily consented to the search, as claimed in the courts below. When the State elects to proceed on a theory of consent, it bears the heavy burden of proving by clear and positive evidence that any consent given was voluntarily and intelligently given, and was not the product of duress or coercion. ***Schneckloth v. Bustamonte***, 412 U.S. 218, 227, 248-49, 93 S.Ct. 2041, 2047, 2059 (1973); ***State v. Paredes***, 167 Ariz. 609, 810 P.2d 607 (App. 1991). "Coercion is implicit in situations where consent is obtained under color of the badge, and the government must show that there was no coercion in fact." ***United States v. Shaibu***, 920 F.2d 1423, 1426 (9th Cir. 1989) (*citing* ***United States v. Page***, 302 F.2d 81, 83-84 (9th Cir. 1962)) (Footnotes omitted in original).

¶5 Through careful scrutiny of the totality of the circumstances, a reviewing court may determine that consent to search was freely and voluntarily provided:

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[2] There is no exigency claimed in this case.

> "The government must show that consent was given. It must show that there was no duress or coercion, express or implied. The consent must be 'unequivocal and specific' and 'freely and intelligently given.' There must be convincing evidence that defendant has waived his rights. There must be clear and positive testimony. '***Courts indulge every reasonable presumption against waiver of Constitutional rights.***' "
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> ***United States v. Shaibu***, ***supra***, 920 F.2d 1423, 1426 (9th Cir. 1989) (*citing* ***United States v. Page***, 302 F.2d 81, 83-84 (9th Cir. 1962); footnotes omitted in original) (emphasis added).

1. The Custodial Setting is Inherently Coercive and the Language of the Admonitions Serves to Enhance Rather Than Dispel that Coercion.

¶6 It is well-settled that a custodial environment is inherently coercive. *See, e.g.,* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 93 S.Ct. 2041 (1973), *citing* ***Miranda v. Arizona,*** 384 U.S. 436, 86 S.Ct. 1602 (1966). This is not a small point. The inherent coercive pressures of a custodial environment are not limited to the confines of the police station, but rather exist in any circumstance where the defendant is in custody. Thus the custodial status of the defendant is of tantamount importance when evaluating a question of voluntary consent.

¶7 It is clear from the Supreme Court's analysis in ***Miranda*** that a higher level of scrutiny is placed on police practices when a defendant is in custody:

> The cases under consideration] all share salient features - incommunicado interrogation of individuals in a police-dominated atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights.

> ... Again we stress that the modern practice of in-custody interrogation is psychologically rather than physically oriented ... this Court has recognized that coercion can be mental as well as physical and that the blood of the accused is not the only hallmark of an unconstitutional inquisition. ... To be sure, the records do not evince overt physical coercion or patent psychological ploys. The fact remains that in none of these cases did the officers undertake to afford appropriate safeguards at the outset of the interrogation to [e]nsure that the statements were truly the product of free choice.

Id. at 446 - 458.

¶8 There can be no question that courts should conduct a substantially more thorough review of police practices that occur when a defendant is in custody. The analysis in ***Miranda*** and in ***Maryland v. Shatzer*** compel this conclusion. 559 U.S. 98, 103-04, 130 S.Ct. 1213, 1219 (2010). When the police execute a warrantless search of defendant who is in custody, reviewing courts must necessarily begin with a presumption of coercion. The same pressures that caused the genesis of the ***Miranda*** warning exist in every arrest, as does the same potential for the police use subtle pressures and other measures to overcome the free will of the person in custody. Given the extent to which the "psychological pressures [will] work to undermine the individual's will to resist and to compel him to speak where he would not otherwise do so freely," the ***Miranda*** court declared that "no statement obtained from the defendant can truly be the product

of his free choice," unless "adequate protective devices are employed to dispel the compulsion inherent in custodial settings." ***Miranda v. Arizona***, 384 U.S. 436 (1966).

¶9 Therefore, the question necessarily becomes what mitigating effect, if any, do the current admonitions have against that inherently coercive environment. A review of the plain language of the admonitions indicates that the coercive pressures of the custodial environment are not dissipated or mitigated by these "warnings;" rather, they are aggravated by them. A reasonable person, who is under arrest, having been repeatedly told by an armed police officer that he is required to submit (not consent, submit) to the officer's demands for his breath, blood, or urine is not going to believe he has a choice to do anything but comply. See ***Maryland v. Shatzer***, 559 U.S. 98, 105, 130 S.Ct. 1213, 1220 (2010) ("The implicit assumption, of course, is that the subsequent requests for interrogation pose a greater risk of coercion. That increased risk level results not only from the police's persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody ...").

¶10 Thus, the matter as properly framed before the Court should be whether the admonitions as they are currently phrased serve to dispel or mitigate the inherent coercion attendant in any custodial setting sufficient to protect the Fourth

Amendment interests of a citizen in police custody. The purpose of the ***Miranda*** warning is to overcome those inherently coercive pressures and level the playing field between the citizen and the State. The same purpose could be achieved in a warrantless consent search context by re-wording the admonitions from their current coercive state to reflect the protections of the Fourth Amendment, such as an explicit advisory of the right to refuse the search.

¶11 In its decision, the ***Valenzuela*** majority rejected the use of a Miranda-like warning, relying on ***Schneckloth's*** determination that knowledge of the right to refuse was not "an indispensable element of voluntary consent." ***Valenzuela***, 237 Ariz. 307 at ¶29, *citing* ***Schneckloth v. Bustamante***, 412 U.S. at 246-48. ***Schneckloth***, however, is a limited holding, and applicable in cases where a defendant is not in custody. 412 U.S. at 248-49. Indeed, since the Fourth Amendment mandates officers get a search warrant when they can, any consent for a search when a defendant is in custody must be obtained in a manner that protects the defendant in the same fashion that requiring a warrant would.

¶12 Additionally, the ***Valenzuela*** majority found that the language contained in the admonitions was both legally accurate and non-coercive. Whether the language contained in the admonitions is a inaccurate misconstruction of A.R.S. § 28-1321, or a scrupulous black-letter rendition of the law is a question addressed

by the parties, and amicus does not develop it further here. To be certain, however, the language currently used in the admonitions is coercive and the effect it has on the listener is the true test of its Fourth Amendment compatibility.

¶13 For example, the difference between "submit" and "consent" is not mere semantics. ***See State of South Dakota v. Medicine***, 865 N.W.2d 492, 496, ¶ 10 (2015). There, South Dakota Supreme Court rejected the State's argument that these two words were synonymous:

> Although the State suggests this sentence [I request that you submit to the withdrawal of your _____(blood, breath, bodily substance)] should be viewed as a second request for consent ... we are unconvinced. The word consent is defined as: "To give assent, as to the proposal of another; agree." In contrast, the word submit is defined as: "To yield or surrender (oneself) to the will or authority of another."

Id. (internal citations omitted).

¶14 Further, the ***Medicine*** Court went on to find that the language in the South Dakota advisory[3] was evidence of coercion. ***Id.*** at 497, ¶ 11. Noting again that the

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[3] The advisory in South Dakota is:

1. I have arrested you for a violation of SDCL 32-23-1.
2. SDCL-32-23-10 provides that any person who operates a vehicle in this state has consented to the withdrawal of blood or other bodily substance and chemical analysis.
3. I request that you submit to the withdrawal of you _____(blood, breath, bodily substance).
4. You have the right to an additional chemical analysis by a technician of

"plain meaning" of the word "submit" undermined the argument that the advisory was anything short of a mandate, the Court declared:

> [B]ecause consent is an exception to the warrant requirement, an officer's assertion that a defendant has already consented is functionally equivalent to an assertion that the officer possesses a warrant - both claims are assertions that the officer has authority to search.

Id.

¶15 In sum, since the environment is already coercive, the repetitive demands of an armed and uniformed police officer that a citizen under arrest is required to submit to the search do not serve to mitigate the coercion. Rather, the language of the admonitions serves to exacerbate and aggravate the circumstances to the detriment of the defendant's ability to freely and voluntary waive his Fourth Amendment protections. This is especially true where the citizen is never explicitly told of the right to refuse the search.

2. Knowledge of the Right to Refuse is an Important Component in the Totality of Circumstances

¶16 As noted above, according to the majority opinion, the lack of knowledge of the right to refuse is not dispositive of the question of voluntariness. ***State v.***

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your own choosing, at you own expense.

5. Do you consent to the withdrawal of your _____ (blood, breath bodily substance)?

Valenzuela, 237 Ariz. 307, ¶ 29, 350 P.3d 811, 819 (App. Div. 2, 2015)*, citing* ***Schneckloth v. Bustamonte***, 412 U.S. 218, 93 S.Ct. 2041 (1973). The majority displayed, as the centerpiece of its holding, the idea that a driver in Arizona has a statutorily supported right to refuse the search and is so informed of that right by the statute A.R.S. § 28-1321. ***Id.*** at ¶ 13. Indeed, the majority goes out of its way to carve out a right that is not supported in the statutory language. ***Valenzuela***, 350 P.3d at 822-23, ¶ 46 (Eckerstrom, C.J., dissenting). Having done so, the majority then declares that neither the right to refuse nor knowledge of that right are important to an analysis of voluntary consent. ***Id.*** at ¶ 29. Consider, alternatively, the analysis of the South Dakota Supreme Court's decision in ***Medicine***:

> Although the State is not normally required to prove a defendant knew he had the right to refuse consent, the Supreme Court cases from which this rule derives are materially distinguishable from the present case: each involved officer conduct that did not disclose the subject's right to withhold consent, ***but also did nothing to actively suggest the subject had no right***[4]. (Internal citations omitted).

State of South Dakota v. Medicine, 865 N.W.2d at 495, ¶ 14.

¶17 The current language in the admonitions does not, contrary to the majority's

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[4] That cannot be said to be true where officers repeat no less than four times that the defendant is required to submit to the search.

opinion, contain any express statement that there is a right to refuse. There is no language in the admonitions to suggest an option other than submission. Nothing in the plain language of the admonitions advises a defendant of his Constitutional protections against unreasonable searches, as provided by the U.S. and Arizona Constitutions. Instead, a driver is first told that the test is mandatory ("Arizona law requires you to submit...") and that he is "required" to successfully complete a test. Then the driver is told, according to the majority decision below, that the test is somehow optional, through notification of the severe administrative penalty for refusing this mandatory test. It appears that the language regarding the administrative penalty is the language seized upon by the majority in ***Valenzuela*** as conveying the protections of the Fourth Amendment. Finally, the driver is told again that he or she "is, therefore, required to submit to the test." It cannot be said that the admonitions in Arizona explicitly state that a driver has a choice whether to submit to the search. Indeed, the language, as noted above, tells the driver he has no option.

B. Consent Cannot be Demonstrated by Mere Compliance with the Demands of an Armed and Uniformed Police Officer by a Citizen who is Under Arrest.

¶18 Additionally, the Court of Appeals rejected the applicability of the U.S. Supreme Court's holding in ***Bumper v. North Carolina*** to the matter at bar.

Valenzuela, 350 P.3d at 815, ¶ 11-13. There, it was held that any acquiescence to an apparent claim of authority to search (i.e., you are required to submit) was not voluntary. ***Bumper v. North Carolina***, 391 U.S. 543, 548-49 (1968). The ***Valenzuela*** majority found that ***Bumper*** was inapplicable, since the defendant in this case was made aware of the "right to refuse." To the extent that petitioner develops the applicability of this holding to the matter at bar, amicus will not comment further, except to note the following: when the State causes or actively contributes to a citizen's belief that there is no option but to submit to the search, in an already inherently coercive environment, a defendant's conduct cannot be considered free and voluntary. ***Bumper***, ***supra***; *see also* ***United States v. Drayton***, 536 U.S. 194, 122 S.Ct. 2105 (2002); ***Ohio v. Robinette***, 519 U.S. 33, 117 S.Ct. 417 (1996).

¶19 Indeed, the United States Supreme Court construed a person's submission to a claim of authority to search under the law as a willingness to abide by the law, and not as a waiver of constitutional rights and protections. ***Bumper v. North Carolina***, 391 U.S. 543, 88 S.Ct. 1788 (1968). As such, consent to search cannot be demonstrated by mere compliance with the orders of a police officer. "[C]onsent must be given voluntarily and not simply in acquiescence to a claim of lawful authority." ***United States v. Lopez***, 911 F.2d 1006, 1010 (5th Cir. 1990).

For example, a defendant does not consent to the State's actions by complying with police demands for entry into an individual's home, when the police have threatened to kick the door down if they are not let in, or when they have shown the homeowner an unsigned warrant. ***State v. McMahon***, 116 Ariz. 129, 568 P.2d 1027 (1977).

¶20 Similarly, blood samples are not given voluntarily when it is given under an officer's claim that the law requires it to be produced. When someone provides a sample for testing after being told by a law enforcement officer that they are "required by law" to provide a specimen for testing, that action is taken "under color of the badge" and "in acquiescence to a claim of lawful authority." It is not voluntary, and the State cannot establish that the blood sample was voluntarily provided.

¶21 Further, the ***Medicine*** Court declared that the language of the DUI advisory in South Dakota to be evidence of coercion. Noting that the admonitions used in that case contained language that informed a defendant he had already consented to the search, the Court there held that such language operated as a "functional[] equivalent" of the officer's assertion that he already possesses a warrant. 865 N.W.2d 492, 498, ¶ 12 (2015). Indeed, as the ***Medicine*** Court points out

> Thus, when a law enforcement officer acts with "presumed authority ... [a

> defendant's] conduct complying with official requests cannot ... be considered free and voluntary."

Id. at 498, ¶12, citing ***Lo-Ji Sales, Inc. V, New York***, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326 (1979).

¶22 By failing to provide explicit language regarding the right to refuse the search to a defendant who is in custody, law enforcement officers in Arizona administering the admonition as written have succeeded in doing exactly what the admonition appears to have been designed to do: compel submission to a warrantless search while avoiding any mention of the state and federal Constitutional protections against unreasonable searches that all defendants enjoy.

CONCLUSION

¶23 Consent to search is not valid unless "it is the product of an essentially free and unconstrained choice by its maker." ***Schneckloth v. Bustamonte***, 412 U.S. 218, 93 S.Ct. 2041 (1973). Given the inherently coercive nature of the custodial environment, the coercive language of the admonitions, and the absence of any actual knowledge of the right to refuse, the search conducted was in violation of the Fourth Amendment. The State may not rely on mere compliance with an order from a police officer to submit to a search to demonstrate voluntary consent; there must be an indication of a free exercise of will to overcome the lack of a warrant.

¶24 Based upon the foregoing, the Court of Appeals decision must be reversed.

RESPECTFULLY SUBMITTED this 1st day of December, 2015.

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