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6 IN THE JUSTICE COURT OF THE STATE OF ARIZONA
7
8 IN AND FOR THE COUNTY OF PIMA

9 THE STATE OF ARIZONA,)

10 Plaintiff,)

NO. TR03-046204

11 vs.)

NO. TR03-007911

12 Esequiel Rascon Jimenez,)

13 Defendant,)

14 Christina Jungers)

15 Defendant.)

Honorable Carmen Dolny

16 **DEFENDANT'S SUGGESTED FINDINGS OF FACT AND LAW**

17 Submitted in supplementation and support of
18 Defendants' Motion To Suppress Evidence Obtained In Violation
19 of Defendant's Right Against Unreasonable Search and Seizure.

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21 RESPECTFULLY SUBMITTED this 10th day of September, 2004.

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1 Summary of Testimony - Relevant Facts

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3 1. Circumstances of the Blood Draws

4 a. State v. Jimenez

5 On October 5, 2003, Deputy Heath arrested Mr. Jimenez for driving under influence. In a parking
6 lot located at Cardinal and Valencia, Deputy Heath had Mr. Jimenez stand at the trunk of his patrol car
7 while he attempted to draw blood. (p. 104, ll. 5-7; p. 106, ll. 10-22). When Deputy Heath inserted the
8 needle into Mr. Jimenez’s arm, Mr. Jimenez, leaned back, pulling the needle from the arm. (p. 118-119,
9 ll. 11-10). Deputy Heath then attempted to draw blood a second time from Mr. Jimenez. (pp. 119-120,
10 ll. 21-7).

11 During the second attempt, Mr. Jimenez looked down at the needle and tube, and seeing blood
12 entering into the tube, flinched. (p. 127, ll. 1-5). The needle came out of the arm and Deputy Heath was
13 only able to obtain a partial vial of Mr. Jimenez’s blood. (p. 127, ll. 7-10). Deputy Heath asked Mr.
14 Jimenez whether he wanted to be stuck a third time so that an additional sample of blood could be
15 obtained. Mr. Jimenez declined Deputy’s Heath offer to puncture him again. (p. 127, ll. 12-21).

16 Deputy Heath used an evacuative tube system when drawing blood from Mr. Jimenez. (p. 117, ll.
17 12-13). Experts Cathee Tankersley and Diana Mass testified that if a needle is prematurely removed while
18 drawing blood when an evacuative tube system is being used, the vacuum will draw air into the tube. (p.
19 65, ll. 12-22; p. 330, ll. 24-28). Deputy Heath could have transported Mr. Jimenez to a hospital but elected
20 not to because, in his words, “we’re not required to do so.” it (pp. 137-138, ll. 19-3) (p. 104, ll. 18-21).

21 b. State v. Jungers

22 On January 20, 2003, Deputy Phaneuf arrested Ms. Christina Jungers for DUI. Deputy Curtin
23 responded to the Pima County Sheriff’s Department’s main station at Phaneuf ‘s request to draw blood.
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3 Even though Kino hospital was just minutes away, Deputy Curtin elected to draw blood in the parking lot
4 of the main station. (p. 179-180, ll. 19-2; p. 190, ll. 6-8). Despite the fact that Ms. Jungers had a broken
5 foot, Deputy Curtin conducted the blood draw on Ms. Jungers with her standing at the trunk. (p. 211, ll.
6 1-12; p. 161, ll. 12-16). Prior to conducting the blood draw, Deputy Curtin failed to sanitize the trunk of
7 the patrol vehicle where he conducted the blood draw. (p. 182, ll. 9-14). It was Deputy Curtin's practice
8 at the time not to clean the trunk area when doing blood draws. (pp. 182-183, ll. 21-2).

9 In addition to her broken foot, Ms. Jungers also informed Deputy Curtin she was on a number of
10 medications, one of which was a blood thinner. After completing the blood draw, and despite knowing that
11 Ms. Jungers was on blood thinners, Deputy Curtin held gauze on Ms. Jungers wound for only 30 seconds.
12 (p. 193, ll. 9-11). When asked how long his training instructed him to hold the gauze or cotton the wound,
13 Deputy Curtin, could not re-call. (p. 193, ll. 22-24). Deputy Curtin testified he routinely holds the gauze
14 down for just a few seconds before checking the wound. He further testified he believed most people
15 would clot in ten seconds or so. (p. 193, ll. 18-19).

16 2. The Deputies' Training

17 Neither Deputy Heath nor Deputy Curtin are nationally certified in phlebotomy. (pp. 175-176, ll.
18 21-1). Both deputies attended a short phlebotomy course taught at Phoenix Community College for law
19 enforcement officers. (p. 95, ll. 11-23; p. 96-97, ll. 23-7; p. 160, ll. 7-9). The primary instructor of the
20 course was Cathee Tankersley. (p. 96, ll. 13). The book used by the officers is *Phlebotomy Essentials*,
21 co-authored by Ms. Tankersley. (p.18, ll. 25-27; p. 97, ll. 8-22; p. 97, ll. 15-17). See Ruth McCall &
22 Cathee M. Tankersley, *Phlebotomy Essentials*, (3rd ed, 2003). The course consisted of two days in the
23 class room learning how to perform venipuncture. (p. 50, ll. 3-5). After two days of instruction, the
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3 deputies then were sent out to local medical facilities where they performed 100 blood draws. (p. 100, ll.
4 13-21). The 100 draws were all done with the patient sitting in a phlebotomy or similar type chair. (p. 78,
5 ll. 17-21).

6 **3. Entry Level Competency vs. Full Competency**

7 When a student finishes a phlebotomy education program, they are considered to have career entry
8 competency. The employer then must ensure that the newly hired phlebotomist has the competencies
9 needed for the job they have been hired for. Upon being hired, the individual still should go through an
10 orientation and oversight period before being allowed to work independently. (Mass, p. 304, ll. 1-5).

11 Ms. Swetnam, a Carondelet Health Network administrator, testified Carondelet demands either six
12 months of phlebotomy experience or completion of a legitimate phlebotomy program such as the ones
13 offered at Pima Community College or the Pima Medical Institute. Upon being hired, the new phlebotomist
14 undergoes orientation and a 160 hour internship before being considered fully trained. (Swetnam, pp. 255-
15 256, ll.25-5).

16 **4. Procedures**

17 Following rules and protocols significantly reduces risks of harm to both the person giving blood
18 as well as the person drawing the blood. (p. 327-328, ll. 24-5; p. 323, ll. 23-25). While mistakes can
19 happen in any circumstance, rules and protocols(precautions) are followed to lower the risk. (p. 278, ll.
20 17-22).

21 **a. Precautions**

22 The area where a blood draw is performed (not the person, but the physical location) needs to be
23 cleaned once a day and after any spill. (Tankersley, p. 31, ll. 21-27; p. 333, ll. 18-25). In cases where there
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3 is no definable shift or work-place, a prudent, educated person would clean the area before she put a
4 patient in that area. (Mass, p. 342, ll. 20-21).

5 OSHA requirements protect the person who is doing the blood draw. (p. 58, ll. 17-22; p. 334, ll.
6 5-8). A consequential effect of OSHA regulations is that the person from whom blood is being drawn is
7 also protected. (p. 334, ll. 9-13; p. 341, ll. 23-24). While infectious disease can be picked up anywhere,
8 it is especially important that precautions be taken when drawing blood. Ms. Mass testified:

9 Yes, I'm sure you can go into Wal Mart and touch something and pick up somebody's other
10 left over whatever, uh infections. ***But we're talking about blood bourne pathogens here,
11 things that can cause fatalities. So the severity of what can occur from transmission of
12 organisms and blood is much more severe.***

13 (Mass, p. 336, ll. 7-13).

14 During blood draws, there is a possibility that blood could spray out. (p. 64, ll. 18-20). If left
15 uncleaned, hepatitis can still be alive for as long as one week in a dried form. (p. 337, ll 12-16). A
16 problem in regards to avoiding exposure to pathogens is that it is not always possible to see open lesions
17 or cuts on people. For instance, small cuts such as paper cuts would be difficult to notice in a thinly light
18 environment. (Mass, p. 379, p. 22-26).

19 ***b. Concerns and Dangers Associated With Blood Draws***

20 There are numerous dangers associated with the drawing of blood and an abundance of case law
21 indicates as much. Defendants urge this court to take judicial notice of the numerous injuries and dangers
22 associated with the drawing blood as documented in the footnoted case law.¹ Ms. Tankersley and Ms.

23 ¹See Cahill v. HCA Management Co., 812 F.2d 170 (4th Cir. 1987) (patient brought suit for injuries allegedly caused
24 by negligent venipuncture); Mengelson v. Ingalls Health Ventures, 751 N.E.2d 91 (Ct. App. Ill. 2001) (plaintiff developed
25 reflex sympathetic dystrophy (RSD) from blood draw); Jones v. Rapides General Hosptial, 598 So.2d 619 (La. App. 3 Cir.,
1992) (plaintiff developed gas gangrene infection from negligent blood draw); Montgomery v. Opelousas General Hospital,
546 So.2d 621 (La. App. 3 Cir., 1989) (plaintiff's injury to median nerve of her arm caused by negligent venipuncture); Martin
v. Wentworth-Douglass Hospital, 130 N.H. 134, 536 A.2d 174 (N.H., 1987) (complications during phlebotomy procedure

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3 Mass also testified to a number of risks and concerns associated with drawing blood. Ms. Tankersley
4 testified: that nausea is an issue in blood draws; that it is common for people to become stressed out over
5 having blood drawn (pp. 22-23, ll. 22-1); and that stress from a blood draw may be severe enough to cause
6 convulsions. (p. 39, ll. 9-10). Ms. Mass testified: that nerve damage resulting in permanent injury can
7 occur (p. 315, ll. 14-18; p. 324, ll. 14-15); that arteries and veins can be nicked or perforated leading to
8 internal hemorrhaging (p. 315, ll. 14-28; p. 324, ll. 17-20); and that tendons can be struck causing pain and
9 injury. (p. 402, ll. 6-10).

10 c. *Clinical vs. Non-Clinical Settings*

11 Pima County Sheriff's Department deputies are only taught how to draw blood in the clinical
12 setting. (Tankersley, pp. 24-25, ll. 24-1). Clinical settings are safer than non-clinical settings in that
13 clinical settings are set up to deal with complications. (Tankersley, p. 74, ll. 1-8). Clinical settings have
14 phlebotomy chairs which provide stability for the arm. (Swetnam, p. 277, ll. 7-8). A phlebotomy chair
15 with an arm rest makes it safer for all parties. (Swetnam, p. 277, ll. 14-18. p. 278-279, ll. 24-3).

16 d. *Standing Blood Draws*

17 Both deputies testified they typically conduct their blood draws with the subjects standing by the
18 trunk of their patrol vehicles. (pp. 161-161, ll. 22-2. p. 135, ll. 22-23). Ms. Tankersley, instructor and
19 curriculum developer of the Phoenix Community College course, testified that the course instructional
20 materials specifically provided that blood draws should *never* be done on individuals while they are

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23 resulted in injury to plaintiff's lateral antebrachial cutaneous nerve); Thomas v. West Calcasieu-Cameron Hospital, 497 So.2d
24 375 (La. App. 3 Cir., 1986) (hospital's negligence in performing blood draw resulted in permanent damage to plaintiff's
25 median or ulnar nerve and long-term pain); Morgan v. Willis-Knighton Medical Center, 456 So.2d 650 (La. App. 2 Cir., 1984)
(award of \$95,000 affirmed where expert testimony established plaintiff, as result of negligent blood draw, suffered ulnar nerve
damage, a painful nerve damage condition called causalgia, muscle atrophy, 27% disability of the arm, and 16% impairment of
the body as a whole).

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3 standing. (p. 81, ll. 13-18), Ruth McCall & Cathee M. Tankersley, Phlebotomy Essentials, 259 (3d ed,
4 2003). Ms. Mass also testified that performing a blood draw on a person while they are standing is not an
5 acceptable procedure. (p. 329, ll. 19-24). Ms. Swetnam testified that standing blood draws should be done
6 only as a last resort. (Swetnam, pp. 282-283, ll. 18-3).

7 Blood should not be drawn from people while they are standing because people may move or fall
8 during the blood draw process. (Tankersley, p. 82, ll. 5-9). "People flinch because they're needle phobic."
9 (Mass, p. 401, ll. 4-8). Blood draw subjects could get nervous. They could be scared. They could feel
10 faint, and as a result, they could pass out, fall, or sway. (Swetnam, p. 281, ll. 1-10).

11 Not only should blood never be drawn from individuals while they are standing, but doing so when
12 the blood draw subject is believed to be intoxicated raises additional risks and concerns. Ms. Mass
13 testified:

14 [I]f they have trouble with balance, just walking, that means that, um, they may not be able
15 to hold their balance when they're standing or halfway kneeling. And they have more
susceptibility to, uh, dizziness, fainting.

16 (pp. 332-333, ll. 25-1).

17 Both deputies were aware that drawing blood with the subject standing is not proper protocol.
18 Deputy Heath recalled reading in the text book that blood draws should never be done while the blood
19 draw subject is standing. (p. 111, ll. 8-13; p. 112, ll. 5-11). Similarly, Deputy Curtin also testified he was
20 aware that the text book indicated blood draws were never to be done while a person is standing. (p. 194,
21 ll. 6-8).

22 5. Quality Assurance and Competency Testing

23 It is fundamental to a phlebotomy program that there be some sort of quality assurance program.
24 (Mass, p. 343, ll. 22-25). The officers' training materials extensively covers oversight and quality control.

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3 See Ruth McCall & Cathee M. Tankersley, Phlebotomy Essentials. ch 2. (3d ed, 2003). See also (Mass,
4 p. 345, ll. 5-9).

5 Quality assurance is used to identify areas where improvements are necessary. That is the ultimate
6 goal of quality assurance. If no quality assurance program is in place, then the organization will continue
7 to have errors and ongoing techniques that may cause harm. (p. 381, ll. 17-20). Part of legitimate quality
8 assurance program includes competency testing and continuing training. (Mass, p. 344, ll. 1-3). Ms.
9 Swetnam testified that Carondelet demands their phlebotomists to have yearly competency testing. (p. 261,
10 ll. 22-28; p. 274, ll. 16-30), and if a phlebotomist is found to be making mistakes, the mistakes are
11 documented and the phlebotomist are retrained. (p. 275, ll. 8-11).

12 Sgt. Theel supervises the Pima County Sheriff's Department phlebotomy program. (p. 218, l. 19).
13 Sgt. Theel has not attended phlebotomy training. (p. 219, ll. 20-21; p. 228, ll. 17-19). Sgt. Theel testified
14 that Pima County Sheriff's Department has no quality control, oversight, or competency testing program.
15 (p. 241, ll. 10-18). Sgt. Theel randomly reviews police narrative reports of blood draws. (p. 234, ll. 8-18).
16 The narratives are standard narratives officers prepare when they are involved in an investigation. Sgt.
17 Theel doesn't review all of the reports because in his opinion, it would take too much time. (p. 234, ll. 13-
18 18).

19 In regards to the narrative, officer "phlebotomists" are required to include a number of different
20 items/events in the narrative concerning blood draws. (p. 245, ll. 9-23). Sgt. Theel is aware that deputies
21 commonly do not include the information which the phlebotomy rules require. Sgt. Theel is unconcerned
22 about this as he looks at the reports and the items which should be included in the reports from a
23 procedural/prosecution position. (p. 248, ll. 3-12).

24 Sgt. Theel is also aware that his deputies disregard their training in regards to drawing blood from
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3 subjects while they are standing. (p. 242-243; pp. 251-252). Sgt. Theel indicated that this had been a topic
4 of discussion and that the deputies prefer to do the draws with the subjects standing. (pp. 242-243). Sgt.
5 Theel defended the deputies actions noting that it was easier for the deputies to do the blood draws with
6 the subjects standing. (pp. 251-252).

7 **6. Standard of Care**

8 The number one rule of standard of care is to do no harm. (Mass, p. 319, ll. 7-10)(Swetnam, p. 280,
9 ll. 1-3). A phlebotomist or person drawing blood should keep this standard of care in mind at all times
10 when conducting venipuncture. (p. 280, ll. 7-9).

11 While the general overriding standard of care is “do no harm,” there are specific protocols and
12 procedures which are recognized by the industry. These specific protocols have been formulated and
13 placed in print by the National Committee for Clinical Laboratory Standards (NCCLS). NCCLS
14 membership is composed of members from professional groups, governmental groups, industry groups,
15 and consumer groups. These members provide input that established the standards. As such, NCCLS is
16 “the community” in that it includes people from healthcare, government, and industry. The regulations
17 which NCCLS provides for venipuncture *is* the community standard. (Mass, pp.306-307, ll. 15-12; pp.
18 319-320, ll. 26-7). See also Arbogast v. Mid-Ohio Valley Medical Corp., 214 W.Va. 356, 589 S.E.2d 498,
19 503 (2003), in which the West Virginia Supreme Court finds that the standards set by the NCCLS are the
20 standard of care for drawing blood.

21 **a. Pima County Sheriff’s Department and Standard of Care**

22 Pima County Sheriff’s phlebotomy program has standard operating procedures (SOPs). These
23 SOPs requires that deputies doing venipuncture perform “phlebotomy duties in a manner consistent with
24 the *community standard of care for such practices....*” (pp. 320-323; pp. 230-231. (emphasis added)).
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3 Phlebotomy program supervisor, Sgt. Theel, who put together the phlebotomy program SOPs, specifically
4 noted that “there’s a certain accepted standard practices for actually drawing the blood from a person’s
5 body...” Sgt. Theel explained this standard of care requires his deputies draw blood “[i]n a manner that
6 *they were trained to obtain the blood from the body.*” (p. 231, ll. 3-11).

7 Neither Sgt. Theel, Ms. Tankersley, Ms. Swetnam, or Ms. Mass testified to any standard of care
8 other the standard of care which is taught all phlebotomists and expected of all phlebotomists. There was
9 no evidence ever submitted that officers conducting venipuncture were subject to a different less stringent
10 set of protocols simply because they were law officers. Indeed, Ms. Tankersley testified that the training
11 which the officers receive is essentially the same training which non-officers would receive if they took
12 the regular class taught over the course of a full semester. (p. 9, ll. 7-12).

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14 **Findings and Conclusions of Law**

15 **I.**

16 **DRAWING BLOOD FROM A CRIMINAL DEFENDANT IS A FOURTH**
17 **AMENDMENT SEARCH WHICH MUST BE CONDUCTED IN A REASONABLE**
18 **MANNER.**

19 In Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826 (1966), the U.S. Supreme Court
20 addressed the reasonableness of compelled blood extractions by the police. The Court held that, based
21 on the facts of that case, the search was performed in a reasonable manner because “[p]etitioner’s
22 blood was taken by a physician in a hospital environment according to accepted medical practices.”
23 Schmerber, 384 U.S. at 771.

24 The Court allowed the use of the blood test results in Schmerber, but only because the invasive
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3 procedure was a limited intrusion administered by medical personnel in a medical environment. The
4 Court specifically held that:

5 The integrity of an individual's person is a cherished value of our society.
6 That we today hold that the Constitution does not forbid the State's minor
7 intrusions into an individual's body under stringently limited conditions in no
8 way indicates that it permits more substantial intrusions, or intrusions under
9 other conditions.

10 Id at 772.

11 Schmerber established the constitutional standard for the removal of blood evidence from within
12 the body of a DUI suspect. The Court was very careful to limit its decision to blood draws in medical
13 facilities by medical personnel. In so doing, it recognized its prior holdings involving intrusions into the
14 body and the use of excessive force. For example, in Rochin v. California, 342 U.S. 165, 174, 72 S.Ct. 205
15 (1952), a case which involved the stomach pumping of a suspect, Justice Frankfurter wrote that the Court
16 was obligated to address "the use of modern methods and devices for discovering wrongdoers and bringing
17 them to book." In doing so, he recognized the importance of being "duly mindful of reconciling the needs
18 both of continuity and of change in a progressive society." Id., 342 U.S. at 172. The Court found that the
19 search in that case not only violated the Fourth Amendment as an unreasonable search, but it also violated
20 the Due Process clause of the Fourteenth Amendment because it "shocked the conscious" and offended "a
21 sense of justice." Id., 342 U.S. at 172-73.

22 A few years later, the Court addressed the issue of taking a blood sample from an unconscious DUI
23 suspect in Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408 (1957). Over scathing dissents, the majority
24 upheld the constitutionality of the blood draw because "there is nothing 'brutal' or 'offensive' in the taking
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3 of a sample of blood when done . . . under the protective eye of a physician.” Breithaupt, 352 U.S. 436.
4 When the Court decided Schmerber ten years later, it followed its invasive search precedents. The Court
5 extracted the “reasonable force” rule from Rochin: blood draws that do not involve an excessive use of
6 force on the suspect are acceptable. From Breithaupt, the Court fashioned another rule, the “medically
7 approved manner” standard: blood draws that are conducted in a medically approved manner are not
8 unreasonable.

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10 From these cases, the Schmerber Court established a clear standard for the taking of blood. It must
11 be done in a medically approved manner, by medical personnel, and in a medical facility. Searches
12 performed in this manner are reasonable under the Fourth Amendment and do not violate the Due Process
13 Clause of the Fourteenth Amendment.

14 II.

15 THE DRAWING OF BLOOD IN STATE v. JIMENEZ AND STATE v. JUNGERS WAS 16 NOT DONE IN A REASONABLE MANNER.

17 A. Blood Was Not Drawn In A Medically Approved Manner.

18 The means and procedures employed by the State were not reasonable in that they were unsafe and
19 failed to comply with the applicable standard of care. In the evidentiary hearing, the State objected to the
20 standard of care espoused by Ms. Tankersley and Ms. Mass, and endorsed by Sgt. Theel. The State’s basis
21 for this objection was never made entirely clear as the State never presented any evidence of an alternative
22 standard of care. To be sure, the U.S. Supreme Court, in Schmerber, in reviewing the admissibility of blood
23 drawn for forensic purposes referred to the medical standard as a determining factor in finding the draw in
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3 its case reasonable. Schmerber, 384 U.S. at 771. In People v. Esayian, 112 Cal.App.4th 1031, 1040 (Cal.
4 Ct. App. 2003) the California appellate court noted, “Clearly a blood draw is a medical procedure and must
5 be conducted in keeping with medical requirements for such procedure.” Similarly, in Arbogast, the West
6 Virginia court found the NCCLS standards to be the controlling standard of care. Arbogast at 502. Any
7 assertion by the State that a medical standard of care is not applicable to drawing blood because it is being
8 done for forensic purposes is without factual or legal foundation.

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10 **1. Deputy Heath and Deputy Curtin conducted standing blood draws**

11 In both State v. Jimenez and State v. Jungers, blood was drawn from both defendants while they were
12 standing. Standing blood draws do not comply with the applicable standard of care. All three experts
13 testified that blood should not be drawn from people while they are standing as it is not safe and
14 unnecessarily places the blood draw subject at risk. Indeed, all three experts testified about the multitude
15 of risks associated with conducting blood draws while the subject is standing. The State's own expert
16 witnesses testified that standing blood draws should never be done, or if done, only be done as a *last*
17 alternative.

18 In the present cases, standing blood draws were *not* done as a last alternative, but as a *first choice*.
19 Testimony was undisputed that in both cases, the deputies could have conducted the blood draws elsewhere
20 and in a different manner, but that they elected to draw blood from the defendants in the field while they
21 were standing. In the case of Ms. Jungers, Deputy Curtin elected to have her stand despite the fact she had
22 a broken foot and in both cases, blood was drawn from individuals whom officers suspected of being
23 intoxicated. In so doing, the deputies deviated from the applicable standard of care and needlessly placed
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3 the defendants at risk of serious, and possibly permanent injury.

4 **2. Deputy Curtin failed to properly sanitize the area where the blood draw**
5 **occurred.**

6 In addition to Deputies Heath and Curtin breaching protocols by drawing blood while Mr. Jimenez
7 and Ms. Jungers were standing, Deputy Curtin, in Ms. Jungers case, failed to sufficiently sanitize the area
8 where the blood draw was conducted. Deputy Curtin’s failure to clean the trunk of the patrol vehicle prior
9 to conducting the blood draw on Ms. Jungers was not acceptable protocol. (Mass, p. 342-343, ll. 22-8). Not
10 only did Deputy Curtin fail to clean the trunk, but he was not even sure upon whose trunk the blood was
11 draw. It was clear from his testimony he did not know what had happened on that trunk prior to placing
12 Ms. Jungers arm on it. Ms. Mass testified, “not knowing what had happened at that trunk, to me that would
13 mean I better sanitize before I do anything.” (p. 343, ll. 6-8). In failing to sanitize, Deputy Curtin needless
14 subjected Ms. Jungers to increased and unacceptable risks associated with deadly blood borne pathogens.

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16 **3. Both Deputy Curtin and Deputy Heath failed to use proper protocol in regards**
17 **to taking precautions to halt bleeding after the draw was completed.**

18 Deputy Curtin did not and does not follow the instruction he received in regards to holding gauze
19 down on the puncture wound. He usually will check “after a few seconds cuz most people - you know, in
20 ten seconds or so.” (Curtin, p. 193, ll. 9-11). In Ms, Jungers case, Deputy Curtin testified he held the gauze
21 down for 30 seconds. (p. 193, ll. 6-11). Deputy Heath similarly testified he held gauze on Mr. Jimenez’s
22 wound for one minute - marginally longer then Deputy Curtin maintained pressure on the wound, but still
23 far short of the three to five minutes the text book instructed him to observe. See (p. 119, ll. 17-19) and
24 Ruth McCall & Cathee Tankersley, Phlebotomy Essentials, 271 (3d ed, 2003).

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3 Failure to apply pressure, or apply adequate pressure can result in leakage of blood and hematoma
4 formation. Id. See also testimony of Ms. Mass indicating the pressure is to keep a hematoma from
5 developing. (p. 386, ll. 1-8). In light of testimony that Ms. Jungers was on blood thinners, holding gauze
6 on the wound for thirty seconds is not only a breach of protocol and a deviation from the applicable standard
7 of care, but an act that could very likely lead to injury. Deputy Curtin’s failure to follow protocol and the
8 applicable standard of care placed Ms. Jungers at increased risk of harm.

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10 **4. The Pima County Sheriff’s Department’s Failure To Institute A Quality Assurance Program Placed The Defendant’s At Increased Risk of Harm.**

11 The failures detailed above on the part of Deputy Heath and Deputy Curtin can, at least in part, be
12 directly attributed to the Sheriff’s department’s failure to implement a quality assurance program. The
13 existence of a quality assurance program is fundamental to phlebotomy practice and the community
14 standard of care applicable to phlebotomy. In these cases, the lack of a quality assurance program resulted
15 in deputies creating their own protocols which deviated from the community standard of care. The deviant
16 protocols created by the deputies were dangerous and needlessly placed the defendants at risk of harm.

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18 In regards to both the cases before this court, Ms. Mass testified that the circumstances of drawing
19 blood in the field are new experiences/situations where officers, without proper supervision and orientation
20 have to “sort of invent their own sort of way to do things and that is how you develop deviation from the
21 protocol.” (pp. 314-315, ll. 8-1).

22 Pima County Sheriff’s Department, in failing to conduct quality assurance, failed to address ongoing
23 problems concerning deputy deviation from protocols. If quality assurance had been implemented, these
24 deviations would have been identified and corrected. Because of the Sheriff’s department failure to
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adequately supervise Mr. Jimenez and Ms. Jungers were subjected to an unwarranted increased risk of harm.

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3 **B. Blood Was Not Drawn In A Medical Facility**

4 The setting where Deputy Heath drew Mr. Jimenez’s blood, and the setting where Deputy Curtin
5 drew Christina Jungers blood were not medical or clinical settings. (p. 104, ll. 7-20. p. 161, ll. 8-11).
6 And while the State suggests that drawing blood in the field can, and is, just as safe as drawing blood in
7 a medical environment, their own expert, Cathee Tankersley, testified that clinical settings are safer
8 then non-clinical settings. (p. 74, ll. 1-8).

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10 Not only could the deputies have transported the individuals to clinical settings, but they
11 offered no reason for their decision not to transport to a clinical setting other then their belief that they
12 did not have to (pp. 137-138, ll. 19-3)(p. 104, ll. 18-21). In failing to take Mr. Jimenez and Ms. Jungers
13 to a clinical setting the deputies needlessly and without good cause placed defendants at increased and
14 risk of harm. To be sure, Mr. Jimenez suffered two misguided attempts to draw blood from him in the
15 field. The second attempt only achieving a partial sample which undoubtedly was contaminated by
16 outside air. This needless fiasco most assuredly would have been averted if he had been taken to a
17 clinical setting where blood would have been drawn while he was securely seated with his arm
18 appropriately supported by a phlebotomy chair arm rest.

19 **C. Blood Was Not Drawn By Medical Personnel**

20 Under Schmerber any person who performs an invasive search of a DUI suspect must be
21 “qualified medical personnel” before the search itself can be found constitutional pursuant to the Fourth
22 and Fourteenth Amendments. In State v. Olcavage, 200 Ariz. 582 (Ariz. Ct. App. 2002), and a few
23 months later in State v. Carrasco, 203 Ariz. 44 (Ariz. Ct. App. 2002), the Court of Appeals held that
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3 medical technologists and medical assistants, because of their particular training and experience, were
4 qualified persons to draw blood under Arizona statutory law.

5 In Olcavage, the Court of Appeals held that, under A.R.S. § 28-1388 only, the two civilian
6 phlebotomists were, “by reason of training and experience, competent to draw blood. Each has
7 completed formal education on the subject; each has been certified by nationally recognized agencies in
8 the field; and each has performed thousands of blood draws.” Olcavage, 200 Ariz. at 588. The court
9 was also careful to note that “it is the training and experience that makes a person ‘qualified’ [under
10 A.R.S. § 28-1388]—not the title itself.” Id. at footnote 4. In Olcavage, the court found the phlebotomist
11 to be qualified because he had a formal instruction, had been certified by national agencies, and had
12 performed thousands of blood draws (Olcavage, 589).

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14 Unlike the phlebotomists and medical assistants which drew blood in Olcavage and Carrasco,
15 Deputies Heath and Curtin are not “medical personnel.” Deputy Heath and Deputy Curtin are
16 fundamentally different from the phlebotomists examined in Olcavage and Carrasco, not simply
17 because they lack the kinds of credentials as the phlebotomists in Olcavage – which they do in fact
18 lack. The critical difference lies in the fact that Deputy Heath and Deputy Curtin, unlike the two
19 phlebotomists in Olcavage, whose jobs were, by design and definition, limited exclusively to **health**
20 **care** and medical related areas, are first and foremost law officers. (Theel, p. 243-244, ll. 9-4). As law
21 enforcement officers, they spend the vast majority of their working hours doing things completely
22 unrelated to phlebotomy. Almost all of the people they associate with have no medical training and,
23 under Pima County Sheriff’s Department’s current protocols, Deputies Heath and Curtin will *never*
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3 again be required to demonstrate to anyone that he is continuing to perform venipuncture technique
4 safely.

5 But the most problematic issue lies in the inherent conflict of interest that is created when we ask
6 someone to play the roles of police officer and phlebotomist at the same time. While this conflict is
7 discussed in great detail below, suffice to say, it is axiomatic that to be considered "medical personnel"
8 one must, in fact, be acting as medical personnel. The function of Deputy Heath and Deputy Curtin, as
9 law enforcement officers, is to *extract evidence from a suspect*, for the purposes of prosecuting and
10 convicting him. On the other hand, the roles of Deputy Heath and Deputy Curtin, as phlebotomist, is, *or*
11 *should be*, to observe and exercise the standard of care any medical personnel would exhibit while
12 *administering a medical procedure to a patient*. The two roles have different goals which are often in
13 conflict with each other. Here, the facts leave no doubt that Deputies Heath and Curtin were first and
14 foremost acting as law enforcement officers, and not acting as medical personnel with the best interests
15 of the Mr. Jimenez and Ms. Jungers. Deputies Heath and Curtin were and are not medical personnel
16 and as such, were not qualified to draw blood from Mr. Jimenez and Ms. Jungers.
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19 III.

20 THE FOURTH AND FOURTEENTH AMENDMENT PROHIBITS LAW 21 ENFORCEMENT OFFICERS FROM PERFORMING FORENSIC BLOOD DRAWS.

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23 _____The Schmerber Court specifically stated that it would have "serious concerns" if a DUI blood
24 draw "were administered by police in the privacy of the stationhouse." Id. A key factual difference
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3 between these cases and Schmerber, for purposes of Fourth and Fourteenth Amendment analysis, is that
4 in these cases, blood *was drawn by law enforcement officers in the field*, not by a doctor in the
5 hospital. This highly troubling distinction casts a dark shadow upon the legality of the draws in the
6 cases at bar. This is because the inherent conflict of interest which exists when police officers play the
7 role of law enforcement officer while at the same time, purporting to act as a "phlebotomist." This
8 conflict is further complicated by the nature of the DUI arrest:

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10 The drunk driving arrest, while involving an undeniably serious offense, generally involves
11 a police-suspect interaction quite different from that occurring in most other police-suspect
12 contacts. The drunk driver, though perhaps not a first time offender, is generally not as
13 familiar (indeed, if familiar at all) with police procedure as are suspects in many other
14 contexts. "Drunks are not always friendly boisterous parlor comics or tragic figures
15 weeping in alcoholic despair, to be gently ushered to a quiet corner, to sleep off the
16 poison." "The driver accused of drunkenness is, if guilty, typically recalcitrant,
17 obstreperous and—not infrequently—belligerent." The accused drunk driver is often
18 surprised, confused, disoriented, and almost invariably, to a greater or lesser degree,
19 intoxicated.

20 The accused drunk driver does not act out this scenario alone. *The police officer, too, is*
21 *an active participant in what has become, by the time of arrival at the jail or hospital, a*
22 *particularly dynamic interaction. Ultimately, there are two conflicting egos, two*
23 *conflicting temperaments, and two diametrically opposed agenda. Common sense*
24 *dictates that this combination of factors is a recipe for violence and danger to all*
25 *concerned.*

20 Forcible Removal of Blood Samples from Drunk Driving Suspects, 60 S. Cal. L. Rev. 1115, 1133
21 (1987) , (citing People v. Kraft, 3 Cal. App. 3d 890, 901 (1970) (David, J., dissenting) (majority
22 holding that police using particular submission restraint on DUI suspect while nurse drew blood was
23 unconstitutional)) (emphasis added).

24 The record established through the evidentiary hearings for these cases is replete with
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3 numerous facts, circumstances, and incidences brightly illuminating this glaring conflict of interest.

4 Consider the following:

- 5 1) In looking back to the very beginning of this "program" testimony indicated that the
6 program came about for the convenience of law enforcement. Deputy Curtin testified
7 that while he is not aware specifically why Sheriff's Department decided to train
8 officers in venipuncture, from his experience, it saves law enforcement time. (p. 191, ll.
9 1-5).
- 10 2) Sgt. Theel, the "supervisor" of the Pima County Sheriff's Department "phlebotomy
11 program" unequivocally and indeed, proudly affirmed this fundamental conflict of
12 interest when he testified that even during the course of a blood draw, his deputies are
13 first and foremost acting as law enforcement personnel. (pp. 243-244, ll. 20-4). To be
14 sure, he testified that phlebotomy is a *secondary function* of the "phlebotomist"
15 deputies. Their primary duty is not phlebotomy or venipuncture, but law enforcement.
16 (p. 243, ll. 9-19).
- 17 3) The fact deputies Heath and Curtin were and are acting with law enforcement interests
18 first and foremost is evidenced by their testimony that despite being taught *not* to do
19 blood draws while standing, both routinely conduct blood draws with the subject
20 standing. (p. 135, ll. 22-23) (p. 194, ll. 6-8).
- 21 4) The decision to draw blood from individuals in the field with subjects standing was
22 made by law enforcement for the convince of law enforcement, and at the expense of
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3 defendant's safety. Deputy Heath decided it was acceptable to perform blood draws on
4 individuals while they are standing because other law enforcement officers told him it
5 was acceptable. (p. 110, ll. 9-17). Deputy Heath admitted his instructors never told
6 him it was O.K. to draw blood from people while they are standing. (pp. 111-112, ll. 14-
7 11).

8 5) Sgt. Theel is aware his deputies often fail to include information in their narratives
9 which the phlebotomy rules require. Sgt. Theel is unconcerned about this as he looks at
10 the reports and the items which should be included in the reports from a
11 procedural/prosecution position. (p. 248, ll. 3-12). Sgt. Theel is also aware that his
12 deputies have disregarded their training in regards to conducting blood draws on
13 subjects while standing. (p. 242-243; pp. 251-252). Indeed, Sgt. Theel indicated this
14 had been a topic of discussion and the deputies preferred to do the draws with the
15 subjects standing. (pp. 242-243). Sgt. Theel defended the deputies actions noting that it
16 was *easier for the deputies* to do the blood draws with the subjects standing. (pp. 251-
17 252).

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19 6) Despite the fact clinical settings are safer then non-clinical settings, and the fact the
20 deputies were only trained in the clinical environment, the deputies nonetheless, elected
21 to draw blood in the field. Deputy Heath could have transported Mr. Jimenez to a
22 hospital but he chose not do it. (pp. 137-138, ll. 19-3). Deputy Heath did not transport
23 Mr. Jimenez do a hospital/clinical setting because, in his words, "we're not required to
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3 do so.” (p. 104, ll. 18-21). Similarly, even though Kino Hospital was only minutes
4 away, and even though Ms. Jungers had a broken foot and was on blood thinners,
5 Deputy Curtin elected to remain at the main station. (179-180, ll. 19-2; p. 190, ll. 6-8).
6 These choices can only be attributed to law enforcement convenience.

7 7) The fact that there is no quality assurance program demonstrates a callous disregard for
8 the safety of the blood draw subjects. Indeed, as Ms. Mass testified, the fact blood is
9 drawn on the trunk of a car is a deviation from protocol that a quality assurance program
10 would find and address. (Mass. p. 346-347, ll. 23-4). If the Sheriff's Department had a
11 quality assurance program, it would identify such a problem and provide an appropriate
12 solution. Ms. Mass testified, “Doing phlebotomy on the trunk of the car, to me, would
13 not have been an appropriate solution.” (Mass, p. 347, ll. 6-10). The fact that this is
14 occurring can only be attributed to the fact that the Sheriff's Department and its deputies
15 are more concerned with the job of gathering evidence then performing safe blood
16 draws.
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18 8) The fact that Sheriff's Department is content to place a supervisor in charge of the
19 "phlebotomy program" who has no appropriate training or background to adequately
20 supervise venipuncture, again, can only be attributed to the fact the Sheriff's Department
21 is simply more concerned with the job of gathering evidence then performing safe blood
22 draws. As Ms. Mass testified, the fact Sgt. Theel has no phlebotomy training is a
23 problem. The person in charge must know the task intimately. (Mass, p. 350, ll. 17-29).
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4 Evidence in these cases starkly elucidates the conflict of interest between officer and medical
5 personnel. One would be hard pressed to find facts which highlight this conflict more profoundly than
6 those found in these cases. To be sure, it is unimaginable that a supervisor and his employees in a
7 bonafide medical environment would show such disregard for fundamental protocol and the safety of
8 blood draw subjects such as Sgt. Theel and his deputies have done here. The fact that Sgt. Theel and
9 his deputies so honestly, and without apology, demonstrate this disregard is directly attributed to the
10 fact they are law enforcement, not medical personnel. Under the totality of the circumstances, the
11 police officer blood draw “shocks the conscience,” and it “offends a sense of justice.” These draws are
12 an unreasonable search under the Fourth Amendment, and a violation of due process under the
13 Fourteenth Amendment. See Rochin, supra.
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16 RESPECTFULLY SUBMITTED this 10th day of September, 2004.
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19 _____
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