

1 James A Charnesky  
State Bar No: 019022  
2 Pima County Bar No: 65301  
**LAW OFFICES OF CHARNESKY & DIEGLIO, L.L.C.**  
3 **318 South Convent Avenue**  
**Tucson, Arizona 85701**  
4 **Tel: (520) 903-1422**  
**Fax: (520) 903-1443**  
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7 **IN THE SUPERIOR COURT IN THE STATE OF ARIZONA**  
8 **IN AND FOR THE COUNTY OF PIMA**

9 State of Arizona,

10 Plaintiffs,

11 v.

12 Christina Jungers,

13 Defendant.

Case No. CR 2005 1908

APPELLEE'S SUPPLEMENTAL BRIEF  
ADDRESSING *STATE V. MAY*, 2005 WL  
1314882

THE HON. CHARLES SABALOS  
DIV. 6

14  
15 Appellee, by request of this court, and by and through undersigned counsel, respectfully  
16 submit this following supplemental Memorandum of Points and Authorities.  
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18 DATED this 30th day of June, 2005.  
19

20 Law Offices  
Charnesky & Dieglio, L.L.C.  
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23 JAMES A. CHARNESKY  
ATTORNEY FOR DEFENDANT  
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25 Copy of the foregoing  
delivered this date to:

26 CASEY MCGINLEY, ESQ.  
27 DEPUTY COUNTY ATTORNEY  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. State v. May - Fourth Amendment Analysis Regarding Officer Conducted Blood**  
3 **Draws**

4 **A. Summary of Facts in State v. May**

5 Among other things, appellant May challenged the trial court’s denial of his motion to  
6 suppress the blood evidence based upon his assertion that the law officer conducted blood draw  
7 was unreasonable. In support of his argument he cited to Schmerber v. California, 384 U.S. 757,  
8 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966). State v. May, 2005 WL 1314882, ¶¶ 4-5 (App. 2005).

9 The trial court made a factual determination that the procedure used by the deputy  
10 “resulted in only a slightly higher risk of complications...” Id. at ¶ 8. Based upon this record,  
11 the Court of Appeals “could not say the trial court abused its discretion.” Id. at ¶ 9. In support of  
12 its ruling, the court of appeals cited a number of cases from other jurisdictions. See People v.  
13 Esayian, 112 Cal.App.4th 1031, 5 Cal.Rptr.3d 542 (2003), State v. Sickler, 488 N.W. 2d 70  
14 (1992), and State v. Daggett, 250 Wis.2d 112, 640 N.W.2d 546, 2002 WI App. 32 (App. 2002,  
15 review denied).

16 **B. Review of Main Cases Cited in May**

17 **1. People v. Esayian**

18 In Esayian, a phlebotomist, under the supervision of a nurse, drew blood from the  
19 appellant at a detention center. Prior to the blood draw, the nurse checked the appellant’s vital  
20 signs. The court reviewed the record in a light most favorable to upholding the trial court’s  
21 decision and held the trial court did not abuse its discretion when it denied appellant’s motion to  
22 suppress. Unlike the case at bar, this case did not involve law officers drawing blood in the  
23 field, and in a manner inconsistent with the applicable medical standard of care.

24 **2. State v. Sickler**

25 In Sickler, a law officer, whom was also a registered nurse, drew blood from the  
26 appellant at the jail. The appellant was placed in a separate room where he was secured in a  
27

1 chair. Sickler at 73. The court, in finding that the draw did not violate Sickler’s Fourth  
2 Amendment rights specifically stated:

3 Based upon the forgoing, the procedure employed *in no threatened the safety or*  
4 *health of Sickler*, and thus was not overly intrusive. *We are convinced that the*  
5 *blood sample was withdrawn in a reasonable, medically approved manner by a*  
*qualified nurse.*

6 Id. (emphasis added). Of note, in the case at bar, unlike in Sickler, the trial court made factual  
7 findings that the blood *was not* drawn in a *reasonable, medically approved manner.*

### 8 9 3. State v. Daggett

10 The court also cited to State v. Daggett, 250 Wis.2d 112, 640 N.W.2d 546, 2002 WI App.  
11 32 (App. 2002, review denied). In Daggett, a physician drew blood from the defendant in a  
12 booking room at the county jail. Id. at ¶ 4. The Daggett court noted that a blood draw would be  
13 unreasonable “if it invites an *unjustified* element of personal risk infection and pain.” Id. at ¶  
14 16. In the Daggett case, the court found that there was no such evidence. Id.

15 Like Esayian and Sickler, Daggett is also distinguishable from the case at bar. In  
16 Daggett, blood was drawn by a certified nurse, not a police officer. More importantly, however,  
17 in the instant matter, unlike Daggett, the trial court *did* make explicit findings that there was an  
18 increased risk of infection, pain, and harm, and that the increased risk was both easily avoidable  
19 and unnecessary. See trial court’s minute entry.

### 20 21 4. The Holding of State v. May

22 In May, the court of appeals noted the trial court’s determination that the non-medical  
23 environment draw “resulted in only a slightly higher risk of complications in a field setting than  
24 those of criminal setting.” While the court of appeals did not explicitly indicate, one must  
25 assume that based upon the record, the court was unable to make a determination as to whether  
26 the “slightly higher risk” was unjustified. The court, viewing the issue in a light most favorable  
27 to upholding the decision, stated they could not “say the trial court abused its discretion in so  
28 ruling.” Id. at ¶ 9.

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**C. Application of May, Sickler, Esayian, and Daggett to State v. Jungers**

In the instant matter, the trial court made factual determinations markedly different than those made either in the May case, or in Esayian, Sickler, and Daggett. In Jungers, blood was not drawn in a controlled safe environment and in a medically approved manner, and unlike the above noted cases, the trial court unequivocally found there was an *unjustified* increased risk of harm to Ms. Jungers.

To be sure, unlike the Sickler case, where the court found that the procedure *in no way* threatened the safety or health of Mr. Sickler, the trial court in this case, (supported by testimony of all three expert witnesses) found Deputy Curtin did not draw blood in a medically approved manner and that the procedures he employed *did* threaten the safety and health of Ms. Jungers. See court minute entry, defendant’s pleadings, and transcript of proceedings.

Indeed, the record reflects that Deputy Curtin believed Ms. Jungers to be intoxicated and balanced impaired. The record reflects that Deputy Curtin knew Ms. Jungers had a broken foot and knew that she was on numerous medications and blood thinners. Instead of taking her to a hospital<sup>1</sup>, for no reason other than law enforcement convenience, Curtin drove Ms. Jungers to the parking lot at the Pima County Sheriffs Department at 1750 E. Benson Highway, located mere minutes away from Kino Hospital.

The record reflects that Curtin made Ms. Jungers stand by the trunk of the vehicle where the draw was conducted. Curtin did not remember sanitizing the trunk area. After the draw, the deputy held gauze over the wound for only 30 seconds to stop the bleeding. The two experts called by the State as well as the defense expert all agreed blood should not be taken from a person who is standing and neither should it be taken from a person whose arm is unsupported

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<sup>1</sup> The record reflects that transporting Ms. Jungers to Kino Hospital would have been no more difficult and perhaps even easier than taking her to the parking lot of the Sheriff’s Department Main Station, where the draw was conducted. The record also reflects that Curtin could have taken Ms. Jungers inside the station, where she could have been seated and secured, but that Curtin elected, for his own convince, to draw her blood outside with her *standing* by the trunk of the car.

1 because of obvious increased risk factors. The experts also testified that in cases where a patient  
2 is taking certain medications or blood thinners, pressure should be applied for a minimum of  
3 sixty seconds, and not thirty seconds as Deputy Curtin did with Ms. Jungers.

4 The trial court stated the following:

5 In both the cases at bar, the arresting officers were aware of specific  
6 physical conditions that could compromise the health and safety of the  
7 arrestees. The officers could easily have taken the subjects to a hospital  
8 but they chose not to. Moreover, the manner in which these two blood  
9 draws were done did not meet the prevailing standard of care and they put  
10 the suspects at unnecessary and unreasonable risk. Officers ignored and  
11 violated important guidelines that were taught in all the training the  
12 officers received.

13 Viewed in a light most favorable to upholding the trial court's decision, the record  
14 supports the trial court's finding that Ms. Jungers was *unjustifiably* placed at increased risk of  
15 infection, harm and pain. Similarly, the standards dictated by Schmerber, and espoused by May,  
16 Sickler, Esayian, and Doggett, support the trial court's suppression of the blood evidence.

17 Respectfully submitted this 30th day of June, 2005.

18 Law Offices  
19 Charnesky & Dieglio, L.L.C.

20 \_\_\_\_\_  
21 JAMES A. CHARNESKY  
22 ATTORNEY FOR DEFENDANT

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24 delivered this date to:

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