

1 Attorney and
2 Firm
3 Information
4 Here

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

7 THE STATE OF ARIZONA,)
8)
9) **Plaintiff,**) **NO. TR KEYBOARD()**
10)
11) **vs.**) **MOTION TO SUPPRESS EVIDENCE**
12) **OBTAINED IN VIOLATION OF**
13) **KEYBOARD(),**) **DEFENDANT'S RIGHT AGAINST**
14) **UNREASONABLE SEARCH AND**
15) **Defendant.**) **SEIZURE**
16)
17) **Honorable KEYBOARD()**
18)
19)

20 COMES NOW the defendant, KEYBOARD(), by and through undersigned
21 counsel and hereby moves this Honorable Court to grant Defendant's Motion to Suppress
22 all evidence obtained in violation of his right against unreasonable search and seizure
23 guaranteed to him by both the United States Constitution and Article II of the Arizona
24 Constitution. Additionally, Defendant respectfully asks this honorable court to suppress
25 all evidence obtained in violation of his due process rights pursuant to United States
Constitution and Article II of the Arizona Constitution.

The grounds for this motion are fully set forth in the attached Memorandum of
Points and Authorities.

RESPECTFULLY SUBMITTED DATE .

Law Offices
KEYBOARD()

KEYBOARD()
Attorney for Defendant

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MEMORANDUM OF POINTS AND AUTHORITIES

FACTS:

I. THE INCIDENT

- A. On KEYBOARD(Date of Incident), KEYBOARD(Name of Deputy/Officer) arrested KEYBOARD(Name of Blood Draw Subject) for DUI. KEYBOARD() read KEYBOARD() Arizona Implied Consent/Admin Per Se with the help of KEYBOARD() in Spanish and informed him he was required to give a sample of his blood. Mr. KEYBOARD() complied.
- B. KEYBOARD(), who had conducted the DUI investigation, also performed the blood draw on Mr. KEYBOARD(). KEYBOARD() performed the blood draw on KEYBOARD() on the trunk of this patrol vehicle.
- C. Per KEYBOARD() instructions, KEYBOARD() stood during the blood draw. During the course of the blood draw, KEYBOARD() (insert facts of your case here that make the draw distniquishable from the normal draw...).

II. TRAINING/QUALIFICATIONS

- A. The State asserts KEYBOARD() is qualified to draw blood by virtue of his attending a one week phlebotomy course specifically compressed/reduced for law enforcement officers. The Phoenix College course consists of two days of classroom instruction, two days performing blood draws in medical

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facilities under the supervision of medical personnel and one day of testing, law enforcement instruction, grading, and questions.

B. The course KEYBOARD() attended covered venipuncture in clinical settings. Materials indicate blood draw subjects are to be seated and the arm secured. The immediate area of the draw should be sanitized per OSHA regulations. The course materials specifically indicated blood draws are *never* to be conducted on individuals while they are standing. See Phlebotomy Essentials, Second Edition, by McCall and Tankersley, p. 205.

C. After attending the course KEYBOARD() was instructed to perform blood draws in the field when requested by other law enforcement officers engaged in DUI investigations. KEYBOARD() was advised not to conduct blood draws in his own investigations unless absolutely necessary.

III. OVERSIGHT AND CONTROL

A. Training materials recieved by KEYBOARD() and other Pima Count Sheriff's Department officers having attended the Phoenix College course specifically call for oversight and quality control procedures to assure blood draws are conducted in a safe and correct manner. See Phlebotomy Essentials, Second Edition, by McCall and Tankersley, pp. 319-328.

B. Pima County Sheriff's Department has virtually no written departmental procedures, regulations, or protocols governing deputy behavior in regards

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to drawing blood. Pima County Sheriff's Department has no regulations mandating the sterilization of the immediate area where a blood draw is conducted. Course materials specifically call for the sterilization of the blood draw area before and after a blood draw. See Phlebotomy Essentials, Second Edition, by McCall and Tankersley. pp. 113-145. Training materials similarly call for individuals drawing blood to use protective masks and gowns while conducting blood draws. Id. Pima County Sheriff's Department has no regulations mandating the use of masks and gowns. Pima County Sheriff's Department has not provided any gowns to the deputies.

C. Deputy KEYBOARD() (and the other deputies who have attended the venipuncture course) draw blood from individuals in the field without any medical supervision. Pima County Sheriff's Department has no program in place specifically designed to monitor and or evaluate officers conducting blood draws.

D. Blood draws conducted by the Pima County Sheriff's Department deputies commonly occur in a myriad of unsterile and hazardous environments. Pima County Sheriff's Department incident reports show blood draws having occurred on the ground under duress, in the rear seats of squad cars, inside sewer facilities, and in the back rooms of convenience stores, among other places. Pima County Sheriff's Department has no regulations prohibiting the drawing of blood in any of the above noted situations.

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E. Pima County Sheriff's Department does not require deputies drawing blood to prepare or keep any specialized documentation or log regarding blood draws they may perform. The only documentation they are required to file is a standard narrative which all officers prepare when involved in an investigation.

F. Pima County Sheriff's Department does require its deputies to conduct blood draws according the community standard of care. Additionally, Pima County Sheriff's Department also strongly advises its deputies not to conduct blood draws in their own DUI investigations, but instead, seek the assistance of another person whom is not directly associated with the investigation. In this case, KEYBOARD(), despite being the primary investigating officer, also drew the blood. KEYBOARD() made no attempt to bring in another person to conduct the blood draw.

LAW & ARGUMENT:

I. THE DRAWING OF BLOOD FROM KEYBOARD() WAS AN UNREASONABLE SEARCH AND SEIZURE WHICH PLACED THE DEFENDANT'S HEALTH AND SAFETY AT RISK.

Rule 16.2(b) of the Arizona Rules of Criminal Procedure provides that “[t]he prosecutor shall have the burden of proving, by a preponderance of the evidence, the lawfulness in all respects of the acquisition of all evidence which the prosecutor will use at trial.” In situations where the evidence has been obtained pursuant to a valid warrant, the defendant bears the burden of going forward with some evidence to show that the challenged evidence was illegally obtained. See Rodriguez v. Arellano, 194 Ariz. 211,

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213, 979 P.2d 539, 541 (Ariz. App. 1999) (citing State v. Hyde, 186 Ariz. 252, 270, 921 P.2d 655, 673 (Ariz. 1996)).

The Fourth Amendment to the United States Constitution requires all searches by the government to be reasonable. Similarly, the Arizona Constitution guarantees that it's residents shall not be "disturbed in [their] private affairs . . . without authority of law." Ariz. Const., Art. II, sec. 8. These principles extend to internal searches of a person's body. See Winston v. Lee, 470 U.S. 753, 105 S. Ct. 1611 (1985) (bodily intrusions are protected by the Fourth Amendment).

"The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State." Schmerber v. California, 384 U.S. 757, 767, 86 S. Ct. 1826, 1834 (1966). In Schmerber the defendant was arrested for driving under the influence of alcohol. At police direction, a blood sample was drawn from the defendant without his consent by a physician at a hospital. The United States Supreme Court was faced with the questions "whether the police were justified in requiring [defendant] to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." Id. at p. 768. The Supreme Court explained, "the Fourth Amendment's proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances or which are made in an improper manner." Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834 (1966). The Supreme Court ultimately upheld the conviction and concluded the petitioner's rights were not violated. Id. at 772, 1836.

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In upholding the conviction, the Schmerber court reasoned blood tests are commonplace and for most people the procedure involves "virtually no risk, trauma, or pain." Schmerber at 771, 1836. The court also reasoned the test performed on the suspect "was performed in a reasonable manner." Id. While the Court upheld the convictions, the Court was quick to note the reasonableness requirement of the Fourth Amendment must be respected. The **means and procedures** used in conducting a search and seizure **must be reasonable**.

In emphasizing the means and procedures must be reasonable, the Court commented upon circumstances it deemed to be suspect in nature. The Court stated:

We are thus not presented with the serious questions which would arise if a search involving use of a medical technique, even of the most rudimentary sort, were made by other than medical personnel **or** in other than a medical environment--for example, if it were administered by police in the privacy of the stationhouse. To tolerate searches under these conditions might be to invite an unjustified element of personal risk of infection and pain.

Id. at 772 (emphasis added).

APPLICATION

In this case, KEYBOARD(Blood Draw Officer) and Pima County Sheriff's Department ignored applicable health and safety standards and, in so doing, with gross disregard, placed the health and safety of KEYBOARD(Defendant) at risk. To be sure, **the circumstances surrounding the blood draw in this case implicate KEYBOARD(Defendant) interests in privacy and, more importantly, his security, to a much greater extent than the defendant in Schmerber.**

A. The risk of infection, pain and physical disability.

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An important consideration for the Court in Schmerber was the risk of infection, pain, and disability. It is important not to minimize the risk of infection and pain that may occur during or after a blood draw. Any time somebody is stuck with a needle, there are risks of complications. The cases illustrating this fact are numerous. See Cahill v. HCA Management Co., 812 F.2d 170 (4th Cir. 1987) (patient brought suit for injuries allegedly caused by negligent venipuncture); Mengelson v. Ingalls Health Ventures, 751 N.E.2d 91 (Ct. App. Ill. 2001) (plaintiff developed reflex sympathetic dystrophy (RSD) from blood draw); Jones v. Rapides General Hospital, 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 resulted in injury to plaintiff's lateral antebrachial cutaneous nerve); Thomas v. West Calcasieu-Cameron Hospital, 497 So.2d 375 (La. App. 3 Cir., 1986) (hospital's negligence in performing blood draw resulted in permanent damage to plaintiff's 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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B. The Importance of Medical Personnel (as opposed to statutory "qualified" personnel)

Because of the above documented risks, In Schmerber, the Court made clear the necessity of using medical personnel to perform any kind of intrusion into the body which would be considered a medical procedure under other circumstances. In the instant case, the police officers were not medical personnel.

The situation presented this court in the instant matter is *exactly* what the U.S. Supreme Court sought to avoid in Schmerber when it warned against a blood draw “made by *other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of a stationhouse.*” Schmerber v. California, 384 U.S. 757, 771-72, 86 S. Ct. 1826, (1966) (emphasis added). This type of unreasonable behavior is precisely the type of action the Supreme Court implied would preclude ill-gotten evidence. The Court in Schmerber made clear the necessity of using medical personnel to perform any kind of intrusion into the body which would be considered a medical procedure under other circumstances.

C. KEYBOARD() blood was not drawn by qualified medical personnel.

In Schmerber, the Court suggested a two-prong approach to determining whether an individual’s privacy and safety interests have been unreasonably compromised when it stated that “serious questions would arise” if such a procedure were administered 1) by other than medical personnel, or 2) in other than a medical environment. See Schmerber, 384 U.S. 771-72. In the instant matter, KEYBOARD() blood was drawn by a law enforcement officer with minimal medical training. Despite State claims to the contrary,

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KEYBOARD() was not, and is not "medical personnel," as referred to by the Court in Schmerber. KEYBOARD(), a full time law enforcement officer with virtually no medical training.

The State asserts KEYBOARD() is qualified to draw blood by virtue of attending a crash course in "Phlebotomy" in which he received two days of actual class room instruction. KEYBOARD(), in fact, never received a crash course in "phlebotomy," but attended a 1.5 credit hour course in the narrow topic of *venipuncture*, one of only numerous skills fully trained phlebotomists learn and maintain competence in. He is a law officer with limited training in venipuncture. He does not work in the medical field. He is not supervised by medical personnel. He is not subject to oversight and competency testing like medical personnel. He does not spend his work days performing venipunctures. He spends his days enforcing the law. He is not medical personnel. He is not a trained "phlebotomist."

Arizona case law has established individuals are not legally qualified to perform invasive phlebotomy procedures simply because they have a "title" attached to them. See Pennartz v. Olcavage, 200 Ariz. 582, 30 P.3d 649 (Ariz. App. Div. 1, 2001). In Olcavage, the Court of Appeals held that two civilian health care workers, trained in phlebotomy procedures, were "qualified" to draw blood for DUI purposes under A.R.S. § 28-1388(A). Olcavage, 200 Ariz. at 588, 30 P.3d at 655. The Olcavage court based its opinion on the specific characteristics of these particular individuals:

Each has completed formal education on the subject; each has been certified by nationally recognized agencies in the field; and *each has performed thousands of blood draws.*

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Id. (emphasis added). In an effort to avoid misapplication of its very narrow holding, which was limited to the overall qualifications of the two health care workers who drew blood in the cases consolidated into Olcavage, the Court of Appeals stated the following:

We emphasize, however, that *it is the training and experience that makes a person “qualified”—not the title itself.* But we need not decide here the minimum threshold at which a professed phlebotomist becomes qualified because, wherever that threshold lies, the training and experience of the phlebotomists here clearly exceed that threshold.

Id. at fn. 4 (emphasis added).

The training and the experience of KEYBOARD() and the rest of the Pima County Sheriff's Department deputies who are, in the words of the Court of Appeals, “professed phlebotomists,” varies dramatically from that of the two health care workers examined in Olcavage. The phlebotomists in Olcavage completed formal education on the subject. In contrast, sheriff's deputies attend what can only be described as a crash course in venipuncture. The course is taught at Phoenix College (“PC”), but its format differs from the class that other students at PC attend. The “normal” course extends the length of an academic semester. Over the course of the semester, the students receive 40 hours of classroom instruction and must perform 100 blood draws to pass the course. In contrast, the police course is severely compressed into five days, allowing for a few extra days if some of the officers cannot perform the 100 blood draws within the 5-day time period. Actual “class room” instruction is a mere 16 hours.

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Once the officers finish the course, they receive a certificate issued by Phoenix College, and the Sheriff's Department dubs them "certified phlebotomists."¹ (See KEYBOARD() Certificate of Completion). In contrast, the two individuals who drew blood in Olcavage were certified in phlebotomy by national medical associations: the American Society of Phlebotomy Technicians and American Medical Technologists. See 200 Ariz. at 585, 30 P.3d 649.

The two health care workers in Olcavage bore the title "phlebotomist" because their training and experience warranted such a classification. KEYBOARD() is different. He is a law enforcement officer who, in an extremely hurried environment, received instruction in the basics of venipuncture technique. After he finished the PC course, KEYBOARD(), like all officers in his position, has been subject to virtually no oversight, supervision, or reevaluation of his ability to perform invasive phlebotomy procedures. While he may have been instructed to write a narrative after each blood draw and to comply with the community standard of care, the Pima County Sheriff's Department has provided little or no other guidelines or supervision. Indeed, the Pima County Sheriff's Department has no program in place to monitor its officers and assure that they are acting within the community standard of care.

Unlike the two phlebotomists in Olcavage, who's jobs were, by design and definition, limited exclusively to health care and medical related areas, KEYBOARD()

¹ Because the Phoenix College course at issue in this litigation only teaches venipuncture, officers are only issued a *certificate of completion*. The certificate only indicates the completion of the one compressed course. In comparison, Phoenix College issues a *phlebotomist certificate* to those individuals graduating from their phlebotomy program. The phlebotomist certificate indicates that the student has taken and passed the full phlebotomy program at Phoenix College.

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is first and foremost a cop. As a sheriff's deputy, he spends the vast majority of his working hours doing things completely unrelated to phlebotomy. As the Pima County Sheriff's Department has no oversight protocols, KEYBOARD() will *never* again be required to demonstrate to anyone that he is continuing to perform venipuncture technique safely.

D. The blood draw was not conducted in a safe manner.

The facts of this case violate both prongs of the Schmerber test of reasonableness. First, as noted above, KEYBOARD()'s blood was not drawn by medical personnel. More importantly, the medical technique was not administered in a safe manner.

In Schmerber, *supra*, the Supreme Court states that even conducting blood draws in a station house can be unreasonable. In the instant matter, KEYBOARD() drew **KEYBOARD()'s blood while he was standing by the trunk of his car.** KEYBOARD() training materials specifically instructed that him to never perform blood draws on individuals while they are standing. Indeed, expert testimony will establish that such a protocol is patently unacceptable as it not only puts the blood draw individual at unnecessary and unacceptable risk of injury, but also places the integrity of the sample at risk.

Because the blood draw was done in the field with KEYBOARD() standing, he was repeatedly exposed to an unreasonable risk of injury, pain, and infection. These risks were needlessly and substantially increased because police officers, not medical personnel, performed the medical procedure in a manner inconsistent with community standard of care. To be sure, expert testimony will establish a whole host potential

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injuries and risks which would have been significantly reduced, or would have been virtually non-existent had the blood been drawn pursuant to the community standard of care.²

KEYBOARD(), while leaning over the trunk of the car he, predictably, stood up. Because he stood upright, the needle prematurely pulled from this arm. Expert testimony will establish that KEYBOARD() failed to comply with the applicable community standard of care and needlessly placed KEYBOARD() at substantial risk of harm.

Not only did KEYBOARD() needlessly place KEYBOARD() at risk, but ironically, his actions also placed the integrity of the sample at risk when he prematurely removed the needle from the gray topped vacuum tube and drew air into the tube right along with the blood. KEYBOARD() not only failed to comply with the community standard of care, but also failed forensically to assure the reliability of the evidence obtained.

E. State v. May, 2005 WL 1314882 and the risk of harm

There are few cases addressing the reasonableness or legality of blood draws. In Arizona, Division Two of the Court of Appeals recently issued an opinion in which it declined to overrule a trial court's denial of defendant's motion to suppress the blood evidence based upon his assertion that the law officer conducted blood draw was unreasonable. In support of his argument he cited to Schmerber v. California, 384 U.S.

² By insisting upon performing the blood draw with KEYBOARD() standing, KEYBOARD() needlessly placed KEYBOARD() at risk of falling, where upon, any countless number of serious injuries could have occurred. Expert testimony will establish that it is not uncommon for individuals to become woozy or pass out at the sight of needles or blood. Because of this, phlebotomists are specifically taught never to draw blood while the subject is standing. Expert testimony will also establish that the likelihood of a person swaying, becoming woozy, or passing out would be increased if the person was intoxicated.

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757, 86 S. Ct. 1826, 16 L.Ed.2d 908 (1966). State v. May, 2005 WL 1314882, ¶¶ 4-5 (App. 2005). Because this case addresses the issue at bar, a close examination of the case and the authority it cites to is necessary.

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

1. Review of Main Cases Cited in May

a. People v. Esayian

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

b. State v. Sickler

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

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

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

Id. (emphasis added). In this case, unlike in Sickler, KEYBOARD() did *not* drawn in a *reasonable, medically approved manner*. (place more analysis on why the cop blood draw in the instant case was not conducted in a medically approved manner)

c. State v. Daggett

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

Like Esayian and Sickler, Daggett is also distinguishable from this case. In Daggett, blood was drawn by a certified nurse, not a police officer. More importantly, however, in the instant matter, unlike Daggett, the there is ample evidence that KEYBOARD() placed KEYBOARD() at an increased risk of infection, pain, and harm, and that the increased risk was both easily avoidable and unnecessary.

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d. The Holding of State v. May

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

e. Application of May, Sickler, Esayian, and Daggett

In the facts in this case are markedly different than those made either in the May case, or in Esayian, Sickler, and Daggett. In this case blood was not drawn in a controlled safe environment and in a medically approved manner, and unlike the above noted cases, there is an abundance of evidence that KEYBOARD() placed KEYBOARD() at an ***unjustifiably*** increased risk of harm to KEYBOARD(). **(This section above must be modified to fit the facts of your case. It is important to distinguish your case from the run of mill blood draw case)**

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 evidence in this case, (supported by testimony of expert witnesses) is that KEYBOARD() did not draw blood

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in a medically approved manner and that the procedures he employed *did* threaten the safety and health of KEYBOARD().

In this case, KEYBOARD() believed KEYBOARD() to be intoxicated and balanced impaired. KEYBOARD() knew KEYBOARD() (insert facts that show that your client has special circumstances that the officer ignored/disregarded such as physical and medical issues that increased the risk of harm). Instead of taking him to a hospital, for no reason other than law enforcement convenience, KEYBOARD() opted to conduct the blood draw roadside with KEYBOARD() standing by the trunk of patrol cruiser. (insert facts to show that the draw was done in fairly close proximity to a hospital or even a facility where your client could have been seated. This goes to the issue of exigency. The State may attempt to show that because of evanescent nature of alcohol in the blood stream, that they needed to draw blood on site. The close proximity of other alternatives effectively eliminates this argument).

Experts 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 because of obvious increased risk factors.

III. The Fourth and Fourteenth Amendments Prohibit Police Officers From Ever Performing Blood Draws.

Schmerber established, and still controls, the standard for the removal of blood evidence from within the body of a DUI suspect. For this reason, the Schmerber opinion itself remains the most useful resource for analyzing the reasonableness of the specific kind of search involved in this case: the DUI blood draw. It is important to remember that

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the Schmerber Court strictly limited its holding to “minor intrusions into an individual’s body under stringently limited conditions [that] in no way . . . permits more substantial intrusions, or intrusions under other conditions.” Schmerber, 384 U.S. at 772. That was the very last sentence of the opinion. In the second to the last sentence of the opinion, the Court reminds us that “[t]he integrity of an individual’s person is a cherished value of our society.” Id. And only a few sentences earlier, the Court specifically stated that it would have “serious concerns” if a DUI blood draw “were administered by police in the privacy of the stationhouse.” Id.

Such pronouncements are in keeping with the Court’s invasive search cases that preceded Schmerber. For example, in Rochin v. California, 342 U.S. 165, 174, 72 S.Ct. 205 (1952), a case which involved the stomach pumping of a suspect, Justice Frankfurter wrote that the Court was obligated to address “the use of modern methods and devices for discovering wrongdoers and bringing them to book.” In doing so, he recognized the importance of being “duly mindful of reconciling the needs both of continuity and of change in a progressive society.” Id., 342 U.S. at 172. The Court found that the search in that case not only violated the Fourth Amendment as an unreasonable search, but it also violated the Due Process clause of the Fourteenth Amendment because it “shocked the conscious” and offended “a sense of justice.” Id., 342 U.S. at 172-73.

A few years later, the Court confronted the issue of removal of a blood sample from an unconscious DUI suspect in Breithaupt v. Abram, 352 U.S. 432, 77 S.Ct. 408 (1957). Over scathing dissents, the majority upheld the constitutionality of the blood draw because “there is nothing ‘brutal’ or ‘offensive’ in the taking of a sample of blood when done . . . *under the protective eye of a physician.*” Breithaupt, 352 U.S. 436

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(emphasis added). When the Court decided Schmerber ten years later, it tried to harmonize the invasive search precedents. The Court extracted the “reasonable force” rule from Rochin -- blood draws that do not involve an excessive use of force on the suspect are acceptable. From Breithaupt, the Court fashioned another rule, the “medically approved manner” standard -- blood draws that are conducted in a medically approved manner are not unreasonable.

Arizona courts have more or less followed the “reasonable force-medically approved manner” standard, although they have in recent years expanded the doctrine to its rational limits. In State v. Olcavage, 200 Ariz. 582 (Ariz. Ct. App. 2002) and State v. Carrasco, 203 Ariz. 44 (Ariz. Ct. App. 2002), the Court of Appeals expanded the “medically approved manner” standard by enlarging the class of medical personnel qualified to perform blood draws. See Olcavage; Carrasco, discussed infra. In a controversial opinion, the court also dramatically expanded the “reasonable force” standard in State v. Clary, 196 Ariz. 610 (Ariz. Ct. App. 2000). In a strongly worded dissent, Chief Justice Fidel expressed disapproval with the majority’s expansion of Schmerber and Fourth Amendment case law. See Clary, 196 Ariz. at 617. In that case, Justice Fidel discussed Fourth Amendment dignitary interests and how they are affected to a greater degree in cases that involve invasive searches because “[t]here is a substantial difference in the force required to enter a residence and the force required ‘to restrain an accused to the degree necessary to allow a needle to be inserted and maintained within a vein.’” See Id. at 618 (citing Robert Brooks Beauchamp, “Shed Thou No Blood”: The Forcible Removal of Blood Samples from Drunk Driving Suspects, 60 S. Cal. L. Rev. 1115, 1133 (1987) [hereinafter *Forcible Removal*]).

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However, the Schmerber Court was correct in limiting its holding to the specific facts of that case because the “reasonable force-medically approved manner” standard is difficult to apply to situations where the facts differ from those in Schmerber. See *Forcible Removal*, 60 S. Cal. L. Rev. at 1128-1135.

1. A Police Officer Can Never Be “Qualified” To Draw Blood From A DUI Suspect

A key factual difference, for purposes of Fourth and Fourteenth Amendment analysis, in this case, from Schmerber, is that the blood was drawn by a police officer in the field, not by a doctor in the hospital. In Arizona, the legislature has addressed the issue of who may be qualified to draw blood in DUI cases. Pursuant to A.R.S. § 28-1388, “only a physician, a registered nurse or another qualified person may withdraw blood for the purpose of determining the alcohol concentration or drug content in the blood.” In State v. Olcavage, 200 Ariz. 582 (Ariz. Ct. App. 2002), and a few months later in State v. Carrasco, 203 Ariz. 44 (Ariz. Ct. App. 2002), the Court of Appeals held that medical technologists and medical assistants, because of their particular training and experience, were qualified persons to draw blood under the statute. Of course, any person who performs an invasive search of a DUI suspect must be “qualified medical personnel” under Schmerber before the search itself can be found constitutional pursuant to the Fourth and Fourteenth Amendments.

KEYBOARD() does not here argue that the individuals at issue in Olcavage and Carrasco are not qualified “medical personnel” under Schmerber. But police officers are not “medical personnel,” and they can never be qualified to perform blood draws under Schmerber and the Fourth and Fourteenth Amendments.

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KEYBOARD() and other law enforcement officers who complete the Phoenix College short course are fundamentally different from the phlebotomists examined in Olcavage and Carrasco, not simply because they lack the kinds of credentials as the phlebotomists in Olcavage—which they do in fact lack. The critical difference lies in the fact that KEYBOARD() and his needle-wielding colleagues are cops. As noted earlier in this pleading, Unlike the two phlebotomists in Olcavage, whose jobs were, by design and definition, limited exclusively to *health care* and medical related areas, KEYBOARD() is first and foremost a cop. As a police officer, he spends the vast majority of his working hours doing things completely unrelated to phlebotomy. Almost all of the people he associates with have no medical training. And, under Pima County Sheriff's Department's current protocols, KEYBOARD() will *never* again be required to demonstrate to anyone that he is continuing to perform venipuncture technique safely.

But the most problematic issue lies in the inherent conflict of interest that is created when we ask someone to play the roles of police officer and phlebotomist at the same time. The function of KEYBOARD(), the cop, is to *extract evidence from a suspect*, for the purposes of prosecuting and convicting him. On the other hand, the role of KEYBOARD(), the phlebotomist, is, *or should be*, to observe and exercise the standard of care any medical personnel would exhibit while *administering a medical procedure to a patient*. This conflict is further complicated by the nature of the DUI arrest:

The drunk driving arrest, while involving an undeniably serious offense, generally involves a police-suspect interaction quite different from that occurring in most other police-suspect contacts. The drunk driver, though perhaps not a first time offender, is generally not as familiar (indeed, if familiar at all) with police procedure as are suspects in many other

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contexts. “Drunks are not always friendly boisterous parlor comics or tragic figures weeping in alcoholic despair, to be gently ushered to a quiet corner, to sleep off the poison.” “The driver accused of drunkenness is, if guilty, typically recalcitrant, obstreperous and—not infrequently—belligerent.” The accused drunk driver is often surprised, confused, disoriented, and almost invariably, to a greater or lesser degree, intoxicated.

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

Forcible Removal, supra, at 1133 (citing *People v. Kraft*, 3 Cal. App. 3d 890, 901 (1970) (David, J., dissenting) (majority holding that police using particular submission restraint on DUI suspect while nurse drew blood was unconstitutional)) (emphasis added).

Such a state of affairs is *exactly* what the U.S. Supreme Court sought to avoid in *Schmerber* when it warned against a blood draw “made by *other than medical personnel or in other than a medical environment—for example, if it were administered by police in the privacy of a stationhouse.*” *Schmerber v. California*, 384 U.S. 757, 771-72, 86 S.Ct. 1826, (1966) (emphasis added). The common denominator in all invasive search cases in which the search was upheld is the involvement of qualified civilian medical personnel. The presence of a detached health care worker, who lacks any interest in the arrest, prosecution, or conviction of the person to whom she is attending, is what makes the invasive search a reasonable one. When instead it is the police officer who holds the needle and pierces the skin, the constitutional equation is drastically altered, and it violates the Fourth and Fourteenth Amendment standards established for legitimate

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invasive searches. The “protective eye” of the civilian medical employee is shut.³ See Breithaupt, supra. The conditions under which the government enters an individual’s body are no longer “stringently limited,” and a much “more substantial intrusion” of the kind the Court warned against now exists. See Schmerber, supra. Under the totality of the circumstances, the police officer blood draw “shocks the conscience,” and it “offends a sense of justice,” which makes it an unreasonable search under the Fourth Amendment, and a violation of due process under the Fourteenth Amendment. See Rochin, supra.

CONCLUSION

The actions of Pima County Sheriff’s Office and KEYBOARD() violated Mr. KEYBOARD()'s constitutional rights guaranteed under the Fourth Amendment and made applicable to the State of Arizona by the Fourteenth Amendment, as well as Article II, Section 8 of the Arizona Constitution. As such, all evidence associated with the illegal seizure of his blood must be suppressed.

For the reasons stated above, KEYBOARD() respectfully requests this Court to find the search (i.e. the blood draw) was prohibited by the Fourth and Fourteenth Amendments of the United States Constitution and Article II, Section 8 of the Arizona Constitution and to suppress all evidence subsequently obtained. State v. Rosengren, 199 Ariz. 112, 119, 14 P.3d 303, 310 (Ariz. Ct. App. Div. 2, 2000) (citing Murray v. United States, 487 U.S. 533, 537, 108 S.Ct. 2529, 2533, 101 L.Ed.2d 472, 480 (1988); Wong

³ The inherent conflict of interest is clear in this case. KEYBOARD() drew blood on the trunk of a patrol vehicle while KEYBOARD() was standing *not because it was necessary*, but because it was convenient for KEYBOARD(), *the law enforcement officer*. To be sure, there can little doubt that a civilian medical phlebotomist would not have chosen the trunk of a patrol vehicle to perform an invasive medical procedure unless *medical* reasons made it necessary.

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Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 417, 9 L.Ed.2d 441, 455 (1963)).

Exhibits to follow in a separate filing.

RESPECTFULLY SUBMITTED DATE .

Law Offices
KEYBOARD()

KEYBOARD()
Attorney for Defendant

Copies of the foregoing to:

KEYBOARD(County Prosecutor)
Deputy County Attorney