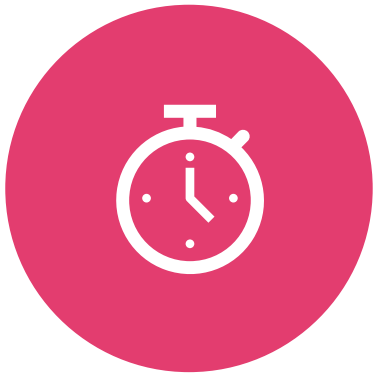
2025 JURY TRIAL ACADEMY

AFTERNOON SESSION

Motions and Evidentiary Objections



COURTROOM MANAGEMENT

FAIR AND EFFICIENT PROCEEDINGS

SAFEGUARD CONSTITUTIONAL RIGHTS

Motions to Suppress

- **COMMON MOTIONS**

* Motions challenging the traffic stop: lack of reasonable suspicion for the stop.

Officers must have a specific, articulable reason to initiate a traffic stop (e.g., swerving, speeding, broken taillight). If the stop was based on a mere hunch or pretext without legal justification, any evidence obtained may be suppressed.

* Motions challenging the arrest:

After the stop, officers must develop probable cause to arrest for DUI (e.g., failed field sobriety tests, odor of alcohol, slurred speech). If the arrest occurred without sufficient evidence, subsequent chemical tests or statements may be inadmissible.

* Motions challenging the validity of the blood/breath results, or the equipment/process used in the collection of the evidence:

Equipment: Calibration and maintenance of the breathalyzer device, proper observation period before testing.

Blood Tests: Chain of custody, consent or warrant requirements.

Additional Motions to Suppress

Additional areas where a court may see a defense motion to suppress:

Failure to Read Implied Consent Warnings (Admin Per Se)

- Most states require officers to inform drivers of the consequences of refusing chemical testing.
- Failure to properly advise the driver may result in suppression of test results or administrative penalties being overturned.

Lack of or Incomplete Body/Dash Cam Footage

- Missing or incomplete video can raise questions about the officer's credibility or the legality of the stop and arrest.

Miranda Violations (Post-Arrest Statements)

- If the defendant was in custody and interrogated without being read Miranda rights, any statements may be suppressed.
- This often applies to admissions made after arrest but before formal questioning.

Admin Per Se: ARS 28-1321

- **A.R.S. §28-1321(B**) states: After an arrest a violator shall be requested to submit to and successfully complete any test or tests prescribed by subsection A of this section, and if the violator refuses the violator shall be informed that the violator's license or permit to drive will be suspended or denied for twelve months, or for two years for a second or subsequent refusal within a period of eighty-four months, unless the violator expressly agrees to submit to and successfully completes the test or tests. A failure to expressly agree to the test or successfully complete the test is deemed a refusal. The violator shall also be informed that:
  - 1. If the test results show a blood or breath alcohol concentration of 0.08 or more, if the results show a blood or breath alcohol concentration of 0.04 or more and the violator was driving or in actual physical control of a commercial motor vehicle, a vehicle for hire as defined in section 28-9501 or while providing transportation network services as defined in section 28-9551 as a transportation network company driver as defined in section 28-9551 or if the results show there is any drug defined in section 13-3401 or its metabolite in the person's body and the person does not possess a valid prescription for the drug, the violator's license or permit to drive will be suspended or denied for not less than ninety consecutive days.
  - 2. The violator's driving privilege, license, permit, right to apply for a license or permit or nonresident operating privilege may be issued or reinstated following the period of suspension only if the violator completes alcohol or other drug screening.

Examples of Motions to Suppress

- Sample Motion to Suppress Breath Results:
  - *State v. Jessica Example (in materials)*: Review and discussion of the motion and State's response. How would you rule?

    Defense Mtn to Suppress

    State's Response

  - Omnibus Motion
  - Discussion: How do judges handle? How do you handle?

📄 Judicial Checklist: Evidentiary Hearing on Motion to Suppress in DUI Cases

Maricopa County Justice Courts
Ashley Fritz, Judicial Education Officer
Updated: December 2025

🚨 1. Validity of the Traffic Stop

☐ Was there **reasonable suspicion** for the initial stop?
☐ Did the officer articulate specific facts (e.g., traffic violation, erratic driving)?
☐ Was the stop based on a **pretext** or anonymous tip without corroboration?

👮 2. Probable Cause for Arrest

☐ Did the officer observe signs of impairment (e.g., odor of alcohol, slurred speech)?
☐ Were **field sobriety tests (FSTs)** conducted and documented properly?
☐ Was the totality of circumstances sufficient to establish **probable cause**?

🧪 3. Chemical Testing Procedures

☐ Was the **breathalyzer** properly calibrated and maintained?
☐ Was there a valid **warrant or consent** for blood/urine testing?
☐ Was the **chain of custody** for blood/urine samples intact?

📋 4. Implied Consent Compliance

☐ Was the defendant properly advised of **implied consent rights**?
☐ Was the advisement recorded or documented?
☐ Did the defendant **refuse or consent** voluntarily?

🎥 5. Video and Audio Evidence

☐ Is **dash cam or body cam footage** available and complete?
☐ Does the footage support or contradict the officer's account?
☐ Was any footage **lost or not preserved**?

🗣️ 6. Miranda and Custodial Statements

☐ Was the defendant **in custody** at the time of questioning?
☐ Were **Miranda warnings** given before interrogation?
☐ Were any statements made **voluntarily and knowingly**?

⚖️ 7. Other Constitutional Concerns

☐ Was there any **unlawful detention or delay**?
☐ Were any **searches** conducted without a warrant or valid exception?
☐ Were the defendant's **due process rights** upheld?

📝 Notes:

📌 *This checklist is intended as a judicial reference tool and does not constitute legal advice or binding authority.*

Maricopa County Justice Courts, Arizona

[redacted] [redacted]

CASE NUMBER: _____

STATE OF ARIZONA

( ) -
Plaintiff(s) Name / Address / Phone

( ) -
Defendant(s) Name / Address / Phone

( ) -
Attorney for Plaintiff(s) Name / Address / Phone

( ) -
Attorney for Defendant(s) or Garnishee Name / Address / Phone

ORDER

The court, having previously set a firm jury trial on [INSERT DATE AND TIME] in the above referenced matter issues the following orders:

IT IS ORDERED, final disclosure shall be made within seven (7) days prior to the firm jury trial date pursuant to AZ.R.Cr.P.15.6(c).

IT IS FURTHER ORDERED, any violations of the final disclosure deadline may result in sanctions pursuant to AZ.R.Cr.P.15.7(c).

IT IS FURTHER ORDERED, to efficiently manage the proceedings and complete the trial in a timely manner, proposed jury instructions shall be filed with the court no later than [INSERT DATE].

Date: _____ _____
Justice of the Peace

I CERTIFY that a copy of this document has been or will be mailed to:

☐ Plaintiff at the above address ☐ Plaintiff's attorney ☐ Defendant at the above address ☐ Defendant's attorney

Date: _____ By _____
Signature

[redacted]

BY MS. [redacted]

Q So you did make an arrest?

A Yes, ma'am.

Q And what did you arrest the Defendant for?

A DUI, driving under the influence of alcohol.

Q Now, let's get into the information about the driving. So when you responded, you already had knowledge that you were responding to the Defendant having multiple traffic violations; is that correct?

MR. [redacted]: Objection. Asked and answered. I think he's already clarified that.

THE COURT: [redacted]

MS. [redacted]

[redacted]

CROSS-EXAMINATION

BY MR. [redacted]:

Q Ofc. [redacted]?

We have testimony that there was bad driving. That he failed to stop not once, but twice at two stop signs, and that he was driving on the wrong side of the road. We also have an admission from the Defendant that he had consumed five beers.

MR. [redacted]: Objections. Facts not in evidence. Outside the scope.

MS. [redacted]: Facts are in evidence. The officer --

[redacted]

MR. [redacted]

[redacted]

MR. [redacted]: Because it was post-Miranda, post-arrest, at which time he admitted to the amount of alcohol. Previously, he just admitted to consuming alcohol, in general.

[redacted]

MR. [redacted]

THE COURT: [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

BY MS. [redacted]

Q Deputy, what training have you had in regards to how the videos are captured and stored within the agency?

A As part of my drug recognition expert training, I'm required to attend in-service training, at least eight hours every two years. I routinely attend the -- the International Association of Chiefs of Police Drug Evaluation and Classification conference, commonly referred to as Drugs, Alcohol, and Impaired Driving. As part of that, I've attended advanced training in relation to the -- the limitations and -- of bodycam footage and video in general, versus whether it's dashcam or on-person body camera versus still shots and in reference to how the -- what the limitations are versus what the human body is capable of.

Q And during your experience, have you also observed your bodycam versus what you would see on the street?

MR. [redacted]: Objection. Leading.

MS. [redacted] It's foundation, Your Honor.

[redacted]

[redacted]

alcohol is present in your breath.

WITNESS: An individual's partition ratio varies from above 2100 to one to below 2100 to one. So, when the analyzer prints out a value it's using this partition ratio.

So, let's say for example your partition ratio is above 2100 to one, the instrument is going to underestimate what your blood alcohol level is. If the partition ratio is below that value, then it's going to overestimate your blood alcohol level.

And partition ratios can range anywhere from 700 to one to 4200 to one. Most of them are -- are near the -- the 2100 to one, but that -- that's -- that's a range. So, if somebody's partition ratio is 700 to one, and they do a breathalyzer, it's going to have three times the true value.

If it's 4200 to one, then it's going to be half of what the true value is.

Lawyer Q And -- and so in order to -- to compromise or to address that variance, the 2100 is an excepted universal standard?

Witness A It is -- so, it isn't universal. However in the United States it's legislated that if you make a breathalyzer that's the partition ratio that you're going to use.

Europe and Australia have different partition ratios and that's set up by their government.

Lawyer Q Now, so -- so aside this variance of -- of the

partition ratio, is there a -- a budge of uncertainty or margin of error that's associated with -- with a reading?

Witness A Yeah. So any time you perform a breath test the quality control can be plus or minus 10 percent. So I apply that same rate to the donor sample. So plus or minus 10 percent. So let's say the blood -- or the breath result is a .100. So plus or minus 10 percent would be .01 and so it would be within the range of .09 - .11.

Lawyer Q Now, -- now when alcohol is taken into the body is the alcohol effecting the human body immediately?

A So if you --

Defense MS. [redacted]: Objection. Foundation.

[redacted]:

[redacted] [redacted]

THE COURT: [redacted]

[redacted] [redacted]

[redacted] [redacted]

Witness A Well, the permit is good for five years. And so they have to do a recertification class online when their permit is either approaching expiration or is expired.

State Q And if they don't complete that test will their card or their number work in order to get the instrument to work?

Witness A So, the -- the cards have an expiration date on them. So, at that point the instru -- they -- they wouldn't be able to do a test.

state Q Now, Counsel was asking about the .05. And you made it a point a couple of times to say that that's the per se limit. Do you remember that testimony?

A .05 --

Q .05 --

A -- being the per se limit?

Q The per se limit.

Witness A I did state that the American Medical Association advocates for a .05 per se.

State Q And that a person -- could a person under a .05 be impaired by alcohol?

A Yes.

Q Why is that?

Witness A Because as I stated, depending on the chronic or naive exposure of alcohol to an individual that's going to be -- that's going to be part of it. You know, if a person is brand new to drinking they're going to be affected more

significantly than somebody who's been doing it for a long time, and doing -- and drinking a lot.

So, you know, if -- if your brand new to it and you drink a little bit you're going to start feeling it. And so that's one of the reasons. Also, individual biological variability. Depends on the individual. Various people can tolerate alcohol better than others. But like I said, a lot of it is -- is based on your experience with drinking.

State Q Now, if the time of stop is at 11:32, and the test is at 12:27, almost an hour later --

A Uh-huh (affirmative).

Q -- what is your opinion as to the alcohol of whether its in the absorption or the elimination phase?

Defense MR. [redacted] Objection. Outside the scope.

[redacted]

State MS. [redacted]: May we approach?

THE COURT: Yes.

(Bench conference as follows:)

[redacted]

MR. [redacted]: Judge, what I had said to him, what

was asked about his -- his determination that he had been drinking more, and there was nothing to indicate that he had drank more. So I had asked him he doesn't know if that .108 has plateaued or not. Here the State is trying to add additional information regarding that -- that area of .108.

THE COURT: [redacted]

MS. [redacted]: No. No. I'm not asking about whether or not he's impaired at .10 or not. It's that there's -- there's no drinking for an hour immediately prior to the test. I can ask it that way. If there's not a drink for an hour.

[redacted]

training and experience?

A I went to Maricopa County Sheriff's Police Academy, graduated that in earlier parts of 2015.

Q Uh-huh.

A There we learned about just like traffic stops, the civil violations, and whatnot. And then, from there I did field training, road training, went to gang training, different types of -- the interview investigation trainings. And then traffic-related, I've done horizontal gaze nystagmus training, HGN, and certified in that.

Q And do you have specific training and experience with DUI investigations?

A Yes. The horizontal gaze nystagmus, we went over field sobriety tests, along within the academy we went over that. I've done multiple DUI task forces throughout my two years, and I've done quite a few DUIs myself, both drug- and alcohol-related.

Q Thank you. Now, were you on duty on [redacted] at approximately 5:24 a.m.?

A Yes, ma'am.

Q Okay. And were -- did you respond to area East Indian School Road and North Mesa Drive?

A Yes.

Q Okay. And is that in the jurisdiction of this court?

A Yes, it is.

Q Now, how did you come into contact with the Defendant?

A From Sgt. [redacted] she initiated the traffic stop. I was at the substation at Indian School and Center, and I responded to her location. [redacted].

Q Now, when you received the call to respond, what were you responding to?

A I don't recall the specifics, but that our dis --

Q Like when the call came in, what was it for?

A Someone driving through stop signs, is what I remember.

Q Okay.

A It might have been a little more detailed just from following, just giving out locations and whatnot. But I'd have to look through our CAD records for that.

Q Okay. So prior to responding, you had received a call for traffic violations, correct?

A Yes, ma'am.

Q Bad driving? Okay. Now, when you responded to the scene, what happened next?

A I responded. I approached from the driver's side. Sgt. [redacted] already talking to the Defendant. She, I forgot what point it occurred, but Defendant was asked to step out of the vehicle and he did. It was during that time, just

dealing with him, I smelled a strong odor of alcohol emitting from both his breath and body, as well as I observed now bloodshot, watery eyes.

Asked him basic questions, where he's coming from. He told me coming from a friend's house in Phoenix, driving home in Scottsdale. He did tell me he just moved over from Florida. I asked him if he had been drinking. He said he had been drinking at his friend's house. He had about four hours of sleep before he woke up and decided to drive home.

Q Okay. Did you perform any field sobriety tests?

A Yes, I did.

Q Okay. Can you tell us about that?

A I had him perform the HGN, horizontal gaze nystagmus test. And during which time I observed six out of six clues of impairment.

MR. [redacted]: Objection. Foundation.

[redacted]

MS. [redacted]: Well, I didn't ask a question, so we can get into more of the field sobriety tests.

THE COURT: What's your problem with the foundation?

[redacted]

MR. [redacted] He hasn't established his training and experience with HGN, Your Honor. [redacted]

[redacted]

SURPRISE CITY COURT – 16081 N. CIVIC CENTER PLAZA, SURPRISE, AZ 85374 (623)222-4800

STATE OF ARIZONA **VS** _____ **DOB:**	**CASE NUMBER:** **COMPLAINT:**	**JURY TRIAL ORDER**

This case is currently set for **Jury Trial on** _____ at _____ at Surprise City Court located at 16081 North Civic Center Plaza, Surprise, Arizona

IT IS ORDERED that counsel shall be available to try this case on _____**, at** _____**.** with day 2, if needed, being _____**.** Counsel with scheduling conflicts shall arrange for coverage by other attorneys as may be necessary to try this case during the date(s) stated above.

IT IS ORDERED that counsel for the State and the Defense shall promptly schedule and ensure the availability of their intended witnesses for this trial date, by subpoena or as otherwise necessary and appropriate, as this trial date is intended to be FIRM.

IT IS ORDERED affirming the **Jury Trial Management Conference** set for _____**at** _____**.**

IT IS ORDERED appointing as the trial judge in this case.

Dated this _____ day of _____, 2025.

_____
Judge Louis Frank Dominguez

On_____ copies were emailed/mailed to:
Surprise City Prosecutor prosecutor@surpriseaz.gov
Defense Attorney:
Defendant:

LAW OFFICE OF

[redacted]

Attorneys for Defendant

FILED
JUN 09 2025
Justice of the Peace

IN THE JUSTICE COURT

IN THE COUNTY OF MARICOPA, STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff, vs. JESSICA Defendant	Case No.: [redacted] MOTIONS IN LIMINE JT: [redacted] 2025 at 8:00 a.m. *Before the Honorable*

Defendant, by and through counsel undersigned, brings the following motions in limine as follows:

1. *Preclusion of Officer's Improper Opinion of Impairment (Fuenning)*

To prohibit any police witness from offering an opinion as to the ultimate issue of intoxication or impairment. The Arizona Supreme Court has previously ruled that the ultimate issue of fact is squarely within the sole province of the jury and testimony by the police to the ultimate issue of fact violates that province. [*Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121; see also Rules 102 and 403, Arizona Rules of Evidence].

2. *Suppression of Evidence for Non-Disclosure of Evidence (Rule 15/Brady)*

To prohibit the State from any mention or use of any police report, including

supplements, narratives, accident reports, lab reports, records of periodic maintenance, repair records, recorded questions that were asked, or answers given, and; any other materials not disclosed at least seven (7) days prior to trial. Counsel understands that a witness may suddenly "regain" his or her memory while on the stand. Such conduct is not highly unusual and can be dealt with appropriately on cross-examination. This motion is directed toward information contained in documents or materials not disclosed to the defense, but which should have been disclosed. [*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct 1194, 10 L.Ed.2d 215 (1963); Rule 15.2(c), Arizona Rules of Criminal Procedure].

3. *Limiting the Scope of Rebuttal to its Proper Purpose*

To limit the scope of rebuttal testimony and rebuttal closing argument to its proper purpose: "rebuttal." Rebuttal means that the State may introduce evidence or raise arguments which contradict the evidence and arguments of opposing counsel. Rebuttal is not a time for the State to introduce new arguments or evidence that the State neglected to introduce on direct examination or during the State's first closing argument. The law is clear in Arizona that "[A] prosecutor is allowed considerable latitude in discussion of the evidence and in making reasonable inferences therefrom (citation omitted). Suffice it to say that rebuttal argument should confine itself to answering issues brought up in the argument of the defense counsel and should serve no other purpose." *State v. Randall*, 8 Ariz. App. 72, 74, 443 P.2d 434, 436 (1968).

4. *Improper Testimony or Argument (Societal Risks Associated with DUI)*

To prohibit the prosecutor and all of the State's witnesses from making any reference to facts outside the record including comment or argument regarding matters pertaining to the societal risks posed by drunk drivers. *See State v. Leon*, 190 Ariz. 159, 945 P.2d 1290 (1997).

To prohibit any statements from all State's witnesses that the purpose of DUI

investigations is to prevent injuries or death. [Rules 102, 401, 402 and 403, Arizona Rules of Evidence].

5. *Mimicking FST Performance is Inadmissible*

To preclude the State from offering any demonstration (or 'mimicking') as to how the Defendant performed on the Field Sobriety Test(s) since such tests are not reproducible in court and such demonstration would be more prejudicial that probative. Note: this does not include a demonstration as to how they are supposed to be performed or as to how the officer demonstrated the tests at the time of the investigation. [Rules 102, 401, 402 and 403, Arizona Rules of Evidence].

6. *Reasonable Doubt Pre-Instruction*

In the case of *State v. Portillo*, 182 Ariz. 592, 898 P.2d 970 (1995) the Supreme Court of Arizona determined that trial judges should be required to instruct the jury on the meaning of reasonable doubt. The instruction, below, has become the accepted definition for reasonable doubt in Arizona and is part of the final jury instructions in every criminal case.

Since "Reasonable Doubt" is the standard by which jurors are to decide any criminal case, logically speaking, jurors should know what the standard means *before* they are required to judge evidence by that standard. The defendant requests that this court pre-instruct the jury panel on the issue of reasonable doubt by reading the *Portillo* jury instruction to them:

> 'The state has the burden of proving the defendant guilty beyond a reasonable doubt. In civil cases, it is only necessary to prove that a fact is more likely true than not or that its truth is highly probable. In a criminal case such as this, the state's proof must be more powerful than that. It must be proof beyond a reasonable doubt. Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant's guilt. There are very few things in this world that

> we know with absolute certainty, and in criminal cases the law does not require proof that overcomes every doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him/her guilty. If, on the other hand, you think that there is a real possibility that he/she is not guilty, then you must give him/her the benefit of the doubt and find him/her not guilty."

7. *Instruction on Proper Burden of Proof (Innocent Unless Proven Guilty)*

The defendant requests that this court instruct the jury that the burden of proof, which rests solely on the State, is not "innocent <u>until</u> proven guilty." The correct standard is "innocent *unless* proven guilty." Stating that the standard is "until" literally implies that the outcome is inevitable, whereas the term "unless" implicates, correctly, that the jury has a choice in the outcome. [5th and 6th Amendments, United States Constitution; Article II §§1 and 4, Arizona Constitution].

8. *Instruction on Proper Burden of Proof (Keeping Open Mind)*

The defendant objects to the jury being told to "keep an open mind" and that they should not make up their minds before hearing all of the evidence. Such statements are fundamentally incorrect.

Jurors are frequently instructed on the fundamental principles of Constitutional law during voir dire such that if they were to be required to reach a verdict before hearing any evidence that their verdicts must be "not guilty." This is because the burden of proof, alone, is enough to acquit a person accused of a crime. In fact, Article II §1 of the <u>Arizona Constitution</u> states: "A frequent recurrence to fundamental principles is essential to the security of individual rights and the perpetuity of free government." This implies that they should keep not keep an "open mind," rather keeping a "closed mind" is more appropriate.

The Defendant requests that this Court instruct the jury that they are to keep a closed mind to the possibility that the Defendant is guilty unless the State proves each element of its case by proof beyond, and to the exclusion of, every reasonable doubt. [5th and 6th Amendments, United States Constitution; Article II §§1 and 4, Arizona Constitution].

9. *Motion to Prohibit Improper Use of Field Sobriety Testing*

To prohibit the State from offering any evidence from police witnesses that the police administered Field Sobriety Tests in order to determine if the defendant was able to drive, OK to drive, fit to drive, or any other permutation of the foregoing. Whether the accused was fit to drive is an essential question within the sole province of the jury and amounts to a comment on the ultimate issue which is forbidden territory by *Fuenning v. Superior Court*, 139 Ariz. 590, 680 P.2d 121. Moreover, it is opinion evidence by the officer and the officer's opinion is irrelevant [Rules 102 and 403, Arizona Rules of Evidence].

In *State v. Campoy*, 149 P.3d 756, 149 P.3d 756 (Ariz.App. Div. 2 2006) the Court wrote:

> "We do not question the respondent's motivation in attempting to constrain the state from using terminology that could cause a jury to erroneously assume that the FSTs were scientifically designed to definitively determine alcohol impairment, but the respondent erred in prospectively prohibiting relevant terms. As our jurisprudence indicates, it is impractical to discuss FSTs without using some of the prohibited vocabulary. Instead, the presentation of FST testimony is more efficiently and fairly monitored within the context of the actual presentation of the evidence through opposing counsel's objections and cross-examination. We emphasize, however, that trial courts should not be deterred by our reasoning today from placing appropriate boundaries on such testimony at trial."

10. [redacted] *Tolerance to the Effects of Alcohol or Drugs (Speculation: Expert and Lay Witnesses)*

To prohibit any State's witness from speculating that the Defendant's lack of demonstrable impairment or "masking" of signs or symptoms of impairment is due to tolerance to the effects of alcohol or drugs. Rule 602 of the Arizona Rules of Evidence, *Need for Personal Knowledge* states: "A witness may testify to a matter *only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter*. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703." (Emphasis added).

Yet, in this case, the expert witness may not speculate as to the effects of tolerance under Rule 703. Rule 703 of the Arizona Rules of Evidence, *Bases of an Expert's Opinion Testimony* states: "An expert may base an opinion on facts or data in the case that the expert *has been made aware of or personally observed*. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." (Emphasis added).

Therefore, unless the expert has been made aware of, or personally observed, facts or data which indicate tolerance is a factor in the lack of observed impairment, such testimony would be inadmissible as mere speculation.

Likewise, an expert may not testify to "tolerance" or "masking" under Rule 702 of the Arizona Rules of Evidence, *Testimony by Expert Witnesses*. The rule states:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

Sections b, c, and d require not only sufficient facts or data (which do not exist in this case), but also reliable principles and methods (of determining "tolerance" as opposed to the more logical explanation of "sobriety") as well as proper application of the principles and methods to the individual person on trial.

Such testimony would also be in violation of Arizona Rules of Evidence 401, 402 and 403, as well as Rule 102, which describes the purpose of the Arizona Rules of Evidence: "These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination."

11. *Improper Opinion of Criminalist*

To prohibit the State from offering any evidence of the personal opinion of any criminalist. The personal opinion of a criminalist is irrelevant; however, the opinion held within the scientific community on any subject within the criminalist's knowledge may be relevant. [*State v. Hummert*, 183 Ariz. 484, 905 P.2d 403 (Ariz.App. Div. 1, 1994); Rule 102, 403, 602, 702 and 703, Arizona Rules of Evidence].

12. *Improper Correlation of Field Sobriety Testing and BAC*

To prohibit the State from offering any evidence of correlation of alcohol concentration to performance of Field Sobriety testing. Correlation is more highly prejudicial than probative of any fact and gives the false imprimatur of scientific accuracy to the tests. Such evidence is misleading as they measure only gross neurological

impairment. *State v. Albrecht, (Williams, RPI)* 168 Ariz. 128, 131, 132-133 811 P.2d 791, 795-796 (Ariz.App. 1991). Correlation of performance on FSTs to BAC is reversible error.

"[I]t is clear Arizona law permits testimony about a defendant's performance on FSTs as long as no correlation is made between performance and BAC and no scientific validity is assigned to the tests themselves as accurate measures of BAC." [*State v. Campoy*, 149 P.3d 756, 149 P.3d 756 (Ariz.App. Div. 2 2006).]

13. *Improper Comparison of Number of DUI Investigations to Number of Arrests*

To prohibit the State from offering any evidence in the form of a comparison of the number of DUI arrests to the number of DUI investigations by any police officer. While it may be proper to ask an officer about the number of DUI investigations performed to gauge experience level, it would be improper to compare the number of investigations to arrests without complete disclosure of the police reports and number of convictions obtained from those arrests. Such a comparison puts the defendant at the disadvantage of not being able to verify the officer's truthfulness and memory. Such testimony would be more highly prejudicial than probative of any fact. In other words, the State would be presenting the information to show that the defendant was investigated and arrested--and is therefore guilty--because the officer lets innocent people go free. Such an analogy is improper, especially in light of the standard pretrial instruction given to juries that the fact that a defendant has been arrested is not proof of guilt--in fact it is not proof of anything. [*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct 1194, 10 L.Ed.2d 215 (1963); see also Rule 15, Arizona Rules of Criminal Procedure; Rule 102 and 403, Arizona Rules of Evidence].

14. *Preclusion of Irrelevant and/or Speculative Evidence*

To prohibit the State from introducing any evidence of a "One-to-Ten-Scale" question or answer if the accused does not testify. As part of the police investigation, the accused was asked to rate himself/herself on a scale of one to ten with only "one" and

"ten" being defined. The remaining eight possible answers remain undefined and it would be nothing more than blind speculation to determine what was meant by any answer which is not a "one" or a "ten." [Rule 102, 401, 402 and 403, Arizona Rules of Evidence].

15. *Invasion of the Province of the Jury*

To preclude any State's witness from using the term "intoxicants" or "intoxicating beverage" when referring to an alcoholic beverage allegedly consumed by the defendant. Oftentimes, police will state that they smelled an 'odor of intoxicants" or that the defendant drank an "intoxicating beverage." Whether the beverage is or is not an "intoxicant" or has the power to intoxicate a person is within the province of the jury. Such testimony would be more highly prejudicial than probative of any fact as it requires the witness to speculate as to the effects in the individual case. The defense has no objection if the State's witnesses refer to an "alcoholic beverage" or the name of the actual beverage consumed. [Rule 102 and 403, Arizona Rules of Evidence].

16. *Improper Correlation of HGN in the Absence of a Chemical Test (Lopresti)*

To prohibit the State from introducing any evidence of a correlation between an estimated Blood Alcohol Content and results on an HGN Test without an admissible Blood Alcohol Reading. Once a proper foundation has been laid HGN test results may only be admitted for the purpose of permitting the officer to testify that, based on his/her training and experience, results indicated possible neurological dysfunction, one cause of which could be alcohol ingestion. The officer may not testify, as part of the foundation for the HGN, that his accuracy rate is correlated to or predicts a particular BAC:

> "In such a case, HGN test results may be admitted only for the purpose of permitting the officer to testify that, based on his training and experience, the results indicated possible neurological dysfunction, one cause of which could be alcohol ingestion. The proper foundation for such testimony, which the State may lay in the presence of the jury, includes a

description of the officer's training, education, and experience in administering the test and a showing that the test was administered properly. The foundation may not include any discussion regarding the accuracy with which HGN test results correlate to, or predict, a BAC of greater or less than .10%. [*State ex rel. Hamilton v. City Court of the City of Mesa, Leonard Joseph Lopresti*, 165 Ariz. 514, 799 P.2d 855 (Ariz.1990)].

17. *Improper Correlation of HGN to Estimated BAC (Cannon)*

To prohibit the State from introducing any evidence of a correlation between an estimated Blood Alcohol Content and results on an HGN Test without a retrograde to the time of the HGN or without a chemical test at the time of the HGN. In the absence of a retrograde to the time of the HGN, HGN test results may only be admitted for the purpose of permitting the officer to testify that, based on his/her training and experience, results indicated possible neurological dysfunction, one cause of which could be alcohol ingestion. [*State ex rel. Hamilton v. City Court of the City of Mesa, Leonard Joseph Lopresti*, 165 Ariz. 514, 799 P.2d 855 (Ariz.1990); *State of Arizona v. Richard Lee Cannon*, 192 Ariz. 236, 963 P.2d 315 (Div. 1, 1998)].

18. *Preclusion of Unreliable Evidence (Vertical Gaze Nystagmus)*

To prohibit the State from introducing any evidence of a Vertical Gaze Nystagmus (VGN) examination. The VGN "test" does not, and cannot, meet the admissibility standards of *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). The police use VGN to claim an unusually high blood alcohol concentration (BAC) for the individual, but not any particular BAC. Since it is not known what a "unusually high" BAC is for any unknown individual, such testimony would be completely speculative. Moreover, only Horizontal Gaze Nystagmus is admissible under *State ex rel. Hamilton v. City Court of the City of Mesa, Leonard Joseph Lopresti*,

165 Ariz. 514, 799 P.2d 855 (Ariz.1990)], VGN was not analyzed by the court.

19. *Preclusion of Inadmissible Hearsay*

To prohibit the State from introducing any evidence of the officer's accuracy on the HGN test. The record of the officer's accuracy are self-serving hearsay, they do not fall under the hearsay business records exception, and they assume facts that are not in evidence (i.e. that the officer stopped a person with reasonable suspicion, that there was probable cause for arrest, that the person's BAC was .08 or more on an undisclosed instrument). [Rule 102 and 801, Arizona Rules of Evidence].

20. *Preclusion of "Officer" as "Expert"*

To prohibit the State from introducing any evidence or interpretive "expert" testimony by any police witness to the Field Sobriety Tests to the effect that the defendant displayed any signs or symptoms of impairment. Such correlation would be more prejudicial that probative. The State has not presented any evidence that a relevant scientific community can correlate FST performance and an actual degree of impairment pursuant to a *Daubert* hearing as required by the Arizona Rules of Evidence. [*State ex Rel. Romley v. Fields*, 201 Ariz. 321, 328, 35 P.3d 82, 89; Rules 102 and 403, Arizona Rules of Evidence, *United States v. Locascio*, 6 F.3d 924 (2nd Cir. N.Y. 1993), cert. denied, 128 L.Ed. 2d 365, 114 S.Ct. 1646 (1994); *Beach v. United States*, 466 A.2d 862 (D.C. 1983), *Gotti v. U.S.*, 511 U.S. 1070, 114 S.Ct 1645 (1994) (Disqualification of attorney who was present when conversation took place because jury might give his argument undue weight as a basis of interpretation because he was present at the time the conversation took place).].

Prosecutors often attempt to qualify police officers as experts to prove everything from where drug dealers keep their guns to how gamblers talk. These so-called experts have testified in drug trafficking cases, smuggling cases, gambling cases, loan sharking cases, and RICO cases. The case at bar is no exception. See, e.g. *United States v. Locascio*, 6

F.3d 924 (2nd Cir. N.Y. 1993), cert. denied, 128 L.Ed. 2d 365, 114 S.Ct. 1646 (1994). These "experts" are actually testifying that the defendant is guilty but cloaking it in 'opinion' clothing. These police officers are *not* experts, but advocates and their testimony is unfairly prejudicial.

Any police officer who is permitted to testify as an expert, whether named as an 'expert' or not, must not be also allowed to testify as a fact witness. In *Beach v. United States*, 466 A.2d 862 (D.C. 1983), the court found that it was error to permit a detective to testify both as a fact witness and as an opinion witness. In that case, the arresting officer described the events surrounding the defendant's arrest and also testified as an expert witness describing what constitutes a useable amount of heroin. In the present case, the officer who observed the Field Sobriety Tests must testify as to what was observed as performance on such tests. To allow the officer to then interpret the results as an expert will place the officer in a dual role as observer and expert. This is more highly prejudicial than probative of any fact at issue. [Rule 102 and 403, Arizona Rules of Evidence].

21. *Improper Comment on Post-Arrest Silence*

To prohibit the State from introducing any evidence or comment by the prosecutor or state's witnesses on the defendant's post-arrest silence including invocation of Miranda Rights. [*State v. Sorrell*, 132 Ariz. 328, 645 P.2d 1242; *State v. Bowie*, 119 Ariz. 336, 580 P.2d 1190 (Ariz. 1978)]. A defendant's right to due process is violated when a witness introduces a statement at trial that the defendant asserted his right to remain silent [*State v. Gilfillan*, 196 Ariz. 396, 998 P.2d 1069 App. Div. 1, 2000]. A defendant is protected from having his right to remain silent be used against him at trial and violation of that right can be fundamental error [*State v. Newman*, 122 Ariz. 433, 595 P.2d 665 (1979)].

22. *Suppression of Preliminary Breath Test (Lack of Documentation)*

To prohibit the State from introducing any evidence of a preliminary breath test

was administered to the defendant or the results of such test for the reason that the calibration logs have not been disclosed to the defense; that there have been no concurrent calibration check procedures, and; that there is no Quality Assurance Procedure in-place for the device used. [Arizona Administrative Code R13-10-101(7), (20); Rule 15 Arizona Rules of Criminal Procedure].

23. *Suppression of Preliminary Breath Test (No Replicate Testing)*

To prohibit the State from introducing any evidence of a preliminary breath test for the reason that replicate breath tests were not administered. [Arizona Administrative Code R13-10-103 and R13-10-104; *State ex rel Dean v. City Court*, 163 Ariz. 366, 788 P.2d 99, *State ex rel. Dean v. City Court*, 163 Ariz. 510, 789 P.2d 180, *State v. Velasco*, 165 Ariz. 480, 799 P.2d 821, *State v. Rodriguez*, 173 Ariz. 450, 844 P.2d 617, *Moss v. Superior Court In and For the County of La Paz*, 175 Ariz. 348, 857 P.2d 400].

24. *No Burden Shifting (Independent Test)*

To prohibit the State from shifting the burden of proof to the defense by mentioning that the defendant had and waived the opportunity to have an independent chemical test completed, or that the defendant was advised of the right to obtain an independent chemical test. Such information is neither an element of any offense charged, nor is it a prerequisite to the introduction of the State's chemical test. Such information could only be used to improperly influence the jury by shifting the burden to the defense to prove innocence. Such information is more highly prejudicial than probative of any fact. [5th & 6th Amendments, U.S. Constitution, Article I, §4Arizona Constitution, Rules 102, 401 & 403, Arizona Rules of Evidence, *In re Winship*, 397 U.S. 358, 361, 90 S.Ct. 1068, 1071 (1970)].

25.

No Burden Shifting (Referee Testing)

To prohibit the State from shifting the burden of proof to the defense by mentioning that one of the two tubes of blood remains intact for testing by the defense.

Such information is neither an element of any offense charged, nor is it a prerequisite to the introduction of the State's chemical test. Such information could only be used to improperly influence the jury by shifting the burden to the defense to prove innocence. Such information is more highly prejudicial than probative of any fact. [5th & 6th Amendments, U.S. Constitution, Article I, §4, Arizona Constitution, Rules 102 and 403, Arizona Rules of Evidence].

26. *Improper Claim of "Expert Status" (DRE)*

To prohibit the State from introducing any evidence that any police witness is a "Drug Recognition Expert" as the label "Expert" is misleading to the jury. Allowing a police officer to declare him or herself an "expert" usurps the power and authority of the court vested in the trial judge. [Rules 102 and 403, Arizona Rules of Evidence].

27. *Improper Comment on Right to Counsel*

To prohibit the State from introducing any evidence that the defendant had asked to speak with an attorney or that the defendant was following an attorney's advice by not submitting to any test. Such comment would amount to a due process violation requiring a mistrial.

Although the Supreme Court has not addressed whether due process is violated by admission of evidence of a defendant's invocation of his decision to meet with counsel before his arrest, many jurisdictions, including Arizona, have addressed those issues, and have found a due process violation occurs under those circumstances. (*State v. Palenkas*, 188 Ariz. 201, 933 P.2d 1269, (Ariz.App. Div. 1 1996). *Sizemore v. Fletcher*, 921 F.2d 667, 671 (6th Cir.1990) (prosecutor "may not imply that an accused's decision to meet with counsel, even shortly after the incident giving rise to a criminal indictment, implies guilt"); *United States v. McDonald*, 620 F.2d 559, 563-64 (5th Cir.1980) (constitutional error "to attempt to prove a defendant's guilt by pointing ominously to the fact that he has

sought the assistance of counsel"); *United States v. Yeager*, 476 F.2d 613, 616 (3d Cir.1973) (prosecutor's comment that defendant called his attorney the morning after the incident constitutional error)).

28. *Improper Impeachment of a Witness*

To prohibit the State from improperly impeaching a witness by asking the defendant if the police officer is lying in the event that the police officer's version of events differs from the defendant's version of events. *United States v. Henke*, 222 F.3d 633 (9th Circuit). In *United States v. Sanchez*, 176 F.3d 1214 (1999) Ninth Circuit, the prosecutor's cross examination of the defendant which forced the defendant to call a U.S. Marshall a liar constituted prosecutorial misconduct because it called for an opinion on the credibility of a witness. While the court found that it was prosecutorial misconduct, the case was reversed on other grounds, so the court never reached the issue as to whether this was reversible error or not.

29. *Prosecutor May Not Ask Witnesses to Speculate*

To preclude the prosecutor from asking any witness who was not a passenger in the defendant's vehicle to speculate if they "would feel comfortable" as a passenger in a vehicle driven by the defendant, or, if they would be a passenger in a vehicle driven by the defendant. Such testimony amounts to nothing more than mere speculation on the part of the witness, takes into account myriad variables which cannot be thoroughly explored at trial, is more highly prejudicial than probative of any point and is irrelevant to any issue. [Rules 102, 401 & 403, Arizona Rules of Evidence].

30. *Improper Comment on Alleged Prior DUI*

The State is put on notice that in the event or a violation of any of the above motions granted by this court, defense counsel will move for a mistrial and dismissal of charges, with prejudice, for prosecutorial misconduct. The State has the duty to inform

its witnesses of all motions in limine granted to ensure their cooperation with the court.

RESPECTFULLY REQUESTED this 21st day of May 2025

LAW OFFICE

ORIGINAL of the foregoing efiled
with the Clerk of the Court and a

COPY of the same emailed this
21st day of May 2025 to:

Maricopa County Attorney's Office

LAW OFFICE OF

[redacted]

Attorneys for Defendant

FILED
MAY 13 2025
[redacted]
Justice of the Peace

IN THE [redacted] JUSTICE COURT

IN THE COUNTY OF MARICOPA, STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff, vs. JESSICA [redacted] Defendant	Case No.: [redacted] MOTION TO SUPPRESS BREATH TEST RESULTS JT: [redacted] Before the Honorable [redacted]

Jessica [redacted] pursuant to Rule 16, Ariz. R. Crim. Proc., respectfully moves this Court follow the rule of law and suppress all evidence relating to the collection, analysis, and results of the breath samples unlawfully obtained. Trooper Kothe incorrectly and unlawfully invoked the implied consent law to obtain samples of Jessica's breath. In giving the admin per se advisement in his vehicle, the trooper failed to follow the rule of law by making false and coercive statements to Ms. Russotto. Later, while in custody in the breath test room of the station, the trooper again failed to follow the rule of law, improperly and coercively using his own version of the admin per se advisement to manipulate Jessica into providing two breath samples.

In addition, when Jessica did not express clear and express consent, the trooper was required by law to advise her of the consequences for refusal or incomplete testing as provided in A.R.S.§ 28-1321(B) and then ask again whether she would consent to providing bodily fluid samples. The trooper never read A.R.S.§ 28-1321(B) after she repeatedly refused to provide samples.

THE TROOPER OBTAINED BREATH SAMPLES BY IMPROPER INVOCATION OF THE ADMIN PER SE LAW

On July 28, 2024, at approximately 12:42 am, Trooper Koethe, Department of Public Safety (DPS), responded to a one-vehicle collision in the area of the northbound state route 143 University on ramp. Trooper Koethe contacted Jessica Russotto and talked with her about the accident and how she was feeling. Jessica explained how the accident occurred. Having survived a violent beating by her ex-boyfriend which almost killed her only a year and half earlier, Jessica explained she suffered a crushed right eye orbital, severed facial nerves, a broken nose in two places, a cut thigh, a traumatic brain injury and concussion, and injuries to three cervical vertebrae. She told the trooper she was seeing doctors as she still had the effects from the trauma, including no feeling in the left side of her face, loss of vision in her left eye, and chronic back pain with degenerative discs. Jessica explained that after being a victim of this domestic violence in Illinois, she moved to Arizona as a result of this near-death event. Jessica informed the trooper she suffered from post-traumatic stress over the event (PTSD) and was in treatment. While Jessica did not feel she needed medical attention the car accident, Jessica informed the trooper the collision had brought back feelings of PTSD from her DV incident. Completely disregarding her explanation, Trooper Kothe had her perform HGN and other physical roadside evaluation.

Jessica informed the trooper she was feeling "stressed out" about the accident. NHTSA warns police officers against administering HGN to individuals who have serious eye problems as well as administering the evaluations to individuals who have just been in an accident and report physical balance issues. In fact, Jessica's medical conditions from the domestic violence and the rollover (the next day she was diagnosed with a concussion) invalidate the roadside evaluations. Disregarding his training, the trooper had Jessica go through the physical evaluations. Based on his observations during the invalid physical evaluations, the trooper placed Jessica under arrest at 1:08 am. The trooper handcuffed Jessica and placed her in the back of his patrol car.

Once in the vehicle, Trooper Kothe invoked the Implied Consent Law and read Jessica the admin per se advisement ("advisement") at approximately 1:24 am. As the trooper was reading the advisement, Jessica on two occasions said "no" to taking the test. After the second time saying no, Jessica said she was afraid of needles and any blood test. The trooper said he would not have her submit to a blood test but rather a breath test. Jessica then asked what would happen to her license if she did take the test, "am I going to lose my license?". The trooper responded by falsely saying "so, your license is going to get suspended, just a matter of whether it is a 90 day or a 1 year". The trooper followed this false statement by asking "will you consent?". At this time, Jessica felt coerced and said she would take the test. (Axon video, 40:22 – 41:58).

After arriving back at the police station, the trooper placed Jessica in the breath test room. Jessica told the trooper she did not know if she wanted to take the breath test. No less than four times, Jessica informed the trooper she is not sure about taking

the breath tests. Instead of reading the advisement of "you are not entitled to further delay, any further delay will be deemed a refusal, will you submit to the test", the trooper goes off script. The trooper states, "I am going to be very frank with you since you have been cool with me." The trooper then said, "the next step is to put you in a room, draft a search warrant, once obtained, bring in a phlebotomist and draw your blood." On two different occasions prior to the trooper mentioning the warrant blood draw, Jessica informed the trooper of her fear of needles and having her blood drawn. At this time, Jessica felt coerced, and she felt she had no choice to refuse the test. Feeling coerced, Jessica submitted to providing two breath samples. The trooper never read Jessica the final warning on the advisement about refusing to provide the requested sample would be deemed a refusal. Instead, the Trooper coerced her by informing her about obtaining a search warrant to take her blood. (Axon video, 1:20:45 – 1:26:06).

THE TROOPER WENT OUTSIDE THE RULE OF LAW
INCORRECTLY INVOKING THE ADMIN PER SE LAW

It is clear under Arizona Law that bodily fluids can be obtained in a DUI case only pursuant to voluntary consent, the implied consent law, or a search warrant. *State v. Valenzuela*, Ariz. 299 ¶ 2, 371 P.3d 627 (2016), A.R.S.§ 28-1321, A.R.S.§ 28-1388. However, in relation to a warrantless breath test, Arizona has followed the U.S. Supreme Court case of *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) stating, "[u]nder Fourth Amendment to the United States Constitution, suppression was not required" because a breath test is incident to arrest. *State v. Navarro*, 241 Ariz. 19 ¶ 3, 382 P.3d 1234. However, the issue addressed in *Birchfield* is not the same issue presented in this case where the

trooper goes outside the rule of law. The *Birchfield* Court decided "whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream." 136 S.Ct. at 2172. Further, *Birchfield* only addresses the intrusion on privacy in relation to a breath test. It does not, address the application of the exception away from the site of arrest or further in time from the time of the arrest. In fact, the three cases under its review involved a roadside breath test, refusals, and an administrative suspension. It did not address a trooper going rogue and making false and coercive statements. *Birchfiled* also did address the implied consent law as applied in Arizona which may be invoked to obtain a breath sample in lieu of a warrant. Upon a refusal, a warrant may be sought under statute. Accordingly, *Birchfield*, as well as *Navarro*, are inapposite and inapplicable to this case where the trooper went outside the rule of law.

In as much *Navarro* relies on a breath test being allowed as a search incident to arrest, the case is also inapplicable to the case at hand as the breath test was well away from the time of arrest in both location and time.

Further, in both *Valenzuela* and *Navarro*, the implied consent law was invoked by the accurate reading of the admin per se advisement. In this case, the trooper went outside the rule of law and must not be allowed to benefit from his false and incorrect statements nor his coercive language.

The Arizona Supreme Court, in *State v. Valenzuela*, held consent for both blood and breath samples was involuntary though obtained by the ***proper reading*** of the admin

per se advisement which included the coercive language "Arizona law requires". 239 Ariz. 299 ¶ 2, 371 P.3d 627 (2016) (however, because the officer relied in good faith on existing law, the test results were not suppressed). The Court stated that "[i]f the arrestee refuses to consent to testing or fails to successfully complete the tests, the officer should advise the arrestee of the consequences for refusal or incomplete testing as provided in § 28-1321(B), and then ask again whether the arrestee will consent to testing." 239 Ariz. 299 ¶ 29, 371 P.3d 627. This language has been incorporated in the revised admin per se advisement. The Court emphasized the officer following the advisement and not deviating from the advisement.

In 2019, the Arizona Supreme Court in *State v. DeAnda III* held that a ***proper reading*** of the admin per se advisement did not require suppression of the test even if it was an outdated admin per se advisement. However, citing *Valenzuela*, the Court reiterated, "the state would be well advised to use the more recently revised version of the implied consent form, as amended after *Valenzuela II*, to follow the procedure set forth in § 28-1321(B) or otherwise provide "the arrestee a clear choice whether to submit to testing or refuse consent." 246 Ariz. 104 ¶ 18, 434 P.3d 1183 (2118).

The current case is analogous to the use of *Miranda* warnings. The Federal Courts have consistently reaffirmed that suppression of a suspect's statements is generally required when an officer fails to read the *Miranda* warnings accurately or only reads part of the warnings. In *U.S. v. Tehrani*, 826 F. Supp. 789 (1993), the Court found that the absence of advice regarding the right to remain silent and the use of statements in court

rendered the warnings fatally deficient under *Miranda*. The *Tehrani* Court reasoned that the requirements of *Miranda* are met only when the warning reasonably conveys to a suspect their rights. The Court found there is no "talismanic incantation" required, but the suspect should be advised of the right to remain silent, that anything said can be used against them, and that they have the right to have an attorney present and that if they cannot afford one, an attorney will be appointed for them. Further, failure to give the prescribed warnings and obtain a waiver of rights before custodial questioning generally requires exclusion of any statements obtained. *Doody v. Ryan*, 649 F.3d 986 (2011). This principle is reinforced by the case law, which consistently holds that statements made without full and effective *Miranda* warnings are inadmissible. *U.S. v. Murphy*, 778 F. Supp.2d 237 (2011).

Here, the trooper made incorrect statements, changed the language of the admin per se advisement, and failed to read the admonitions in A.R.S. § 28-1321(B). The trooper failed to tell Jessica she was not entitled to further delay. Also, the trooper misled Jessica when she asked what would happen if she took the test by stating her license would be suspended when that fails to suppose her test result could be below a .08 bac. Like the Federal Courts and their consistent suppressing of statements when *Miranda* is not read to reasonably convey the warnings, the test results must be suppressed when as in this case the trooper chose to invoke the admin per se then acted outside the rule of law, failing to reasonably convey admin per se advisement.

Throughout her time with the officer, Jesicca was unsure of what she should do based on the trooper's incorrect advisement of the admin per se that was both coercive and incorrect. The implied consent law and its admin per se advisement protects law enforcement and the integrity of the evidence. Its purpose is to maintain equity and the rule of law of our judicial system, to ensure the safety and order of our community. Once the trooper invoked the admin per se, the rules required the trooper to follow the rules to reasonably convey the directives from our Courts as in *Miranda* cases. The trooper relied upon and invoked the implied consent law then gave the admin per se incorrectly. The law requires him to give the advisement correctly. Our judicial system works best when the rules are followed. Following the rules maintains the social order. If this Court allows the admission of the breath test results, the Court's sanctions the language of the admin per se as optional, merely a guideline. That weakens the protections **for everyone**, not just Jessica.

Based on the above, the Fourth, Fifth, Fourteenth Amendments to the U.S. Constitution, and the Arizona State Constitution Article II, Sections 4 (due process of law), 8 (right to privacy), 10 (self-incrimination), and 24 (rights of accused in criminal prosecutions), the breath test results must be suppressed.

RESPECTFULLY REQUESTED this 9th day of May 2025

LAW OFFICE [redacted]

[redacted] Attorney for Defendant

RACHEL H. MITCHELL
MARICOPA COUNTY ATTORNEY

[redacted]
MCAO Firm #[redacted]
Attorney for Plaintiff

IN THE [redacted] JUSTICE COURT
STATE OF ARIZONA, COUNTY OF MARICOPA

THE STATE OF ARIZONA, Plaintiff, vs. JESSICA [redacted] aka [redacted] Defendant.	[redacted] STATE'S RESPONSE TO DEFENDANT'S MOTION TO SUPRESS BREATH TEST RESULTS

The State of Arizona, by and through undersigned counsel, hereby responds to Defendant's Motion to Suppress Breath Results and asks that this Court deny Defendant's request.

Submitted May 19, 2025.

RACHEL H. MITCHELL
MARICOPA COUNTY ATTORNEY

BY: /s/ [redacted]
[redacted]

MEMORANDUM OF POINTS AND AUTHORITIES

I. FACTS

On July 28, 2024, at 00:38, DPS received a 9-1-1 call regarding a single vehicle collision on the northbound on ramp for State Route 143 at University Drive. When Trooper Kothe arrived, he observed Defendant in the front driver's seat of a Jeep Patriot. The Jeep Patriot's airbags were deployed and there was damage to the roof of the vehicle, suggesting the vehicle had rolled. When Trooper Kothe approached the Defendant and asked her if she was okay and what happened, Defendant stated, with slurred speech, she was, "driving fine and then [her] car flipped." Trooper Kothe and Captain Gephart worked to move the Defendant's vehicle from on ramp to the gore area. During this period, Defendant made statements to Captain Gephart about how she had recently purchased the vehicle and believed something flew in front of her car, causing the collision. During that exchange Captain Gephart smelled the odor of alcohol on the Defendant.

After removing Defendant's car from the on ramp, Trooper Kothe then asked Defendant to perform some field sobriety tests to make sure she was not impaired. The Defendant agreed to do field sobriety tests. After performing field sobriety tests, Defendant admitted to Trooper Kothe that she had been drinking and performed a preliminary breath test. The preliminary breath test yielded a result of .177. Trooper Kothe ultimately arrested Defendant placed her in the back of the patrol vehicle.

At 1:22AM, while Defendant was in the back of Trooper Kothe's patrol vehicle, Trooper Kothe asked the Defendant the first admonition of admin per se - whether she would consent to "a test or tests of [her] blood, breath, urine or other bodily substance for the purpose of determining [her] alcohol concentration or drug content." Defendant asked Trooper Kothe is she could refuse, and he informed her that she could. Defendant refused. Trooper Kothe then moved on to the next admonition. Prior to reading the next admonition, Defendant informed Trooper Kothe she does not like needles. Trooper Kothe

read the next three admonitions and Defendant asked Trooper Kothe what he would suggest she do. Trooper Kothe informed her that he could not suggest anything.

Trooper Kothe then informed Defendant that if she did not like needles, they could do a breath test. When asked whether she should like to do a breath test, Defendant said, "it's gonna say that I've been drinking." Trooper Kothe, again, asked whether she would like to do a breath test. Defendant asked Trooper Kothe what happens and whether she would lose her license. Trooper Kothe then informed her that her license would be suspended either the ninety days or one year. Trooper Kothe asked her, again, whether she would consent to the breath test, and Defendant agreed to take the breath test.

While at the station, Trooper Kothe prepared the Intoxilyzer 9000 and interviewed Defendant during the deprivation period. At 2:02AM Trooper Kothe stated the Intoxilyzer would be ready shortly and explained the time frame for the breath tests. Defendant then vocalized her concern about whether she should do the breath test. Based on her statements, her concern was regarding the admissibility of the breath test and admissibility of any refusal. Trooper Kothe asked if she would consent to the breath test, and Defendant asked if the breath test was admissible. Trooper Kothe notified her that the Intoxilyzer results could be brought up in court.

Once the Intoxilyzer started making noises to signal the test was ready, Defendant, again, asked if the Intoxilyzer results could be used in court. Trooper Kothe, again, told Defendant that Intoxilyzer results could be brought up in court and asked whether Defendant would consent. Defendant then asked if she would be put in prison. Trooper Kothe informed the Defendant that prison is a decision for the prosecutor. Defendant asked what would happen if she did not perform the breath test and Trooper Kothe stated he would have to do additional paperwork, and they would go from there. Defendant then told Trooper Kothe she wished he could tell her what to do, and Trooper Kothe reminded her that he could not tell her what to do. Defendant and Trooper Kothe then had the following exchange:

Defendant: My inner self is telling me not to.

Trooper Kothe: Okay. That's fine.

Defendant: Are you sure?

Trooper Kothe: Yeah, if you don't want to blow you don't have to blow.

Defendant: I'm not gonna get into trouble?

Trooper Kothe: It's one-hundred percent consensual. So do you want to blow or not? Because.. it's a yes or a no and I can't really help you with making the decision of yes or no it's just whether you want to or not. And then I take different steps from there.

Defendant: So you have to do extra paperwork?

Trooper Kothe: Yeah, I'll have to do extra paperwork, yes.

Defendant: Okay... well that would suck so… yeah my inner self is telling me not to. I don't know. I think it's because my friend Molly blew and she had to do 30 days in jail and she had a seizure in jail and I don't want to go to jail. Because I know in Arizona your first time you go to jail.

Trooper Kothe: So, Jessica, I'm just going to be very frank with you because you've been very cool with me, okay, I'm going to be very cool with you. The next step is I'm gonna put you in one of the rooms. I'm gonna draft a search warrant. Once I get the search warrant signed, I'm going to bring you back in here with a phlebotomist and we're gonna draw your blood,

Defendant: (inaudible) I'll just blow. Thank you.

Trooper Kothe: I know you don't like blood – needles, so.

Defendant: Yeah, no.

After this exchange, Defendant walked over to the Intoxilyzer and performed the breath test.

II. LAW AND ARGUMENT

A. Defendant Voluntarily Consented to the Breath Test.

Departure from the implied consent procedures does not alone show that consent is involuntary. *State v. De Anda*, 246 Ariz. 104, 107, ¶16 (2019). Voluntariness of consent given after an admonition turns on the totality of the circumstances. *Id.*

Defendant argues that because Trooper Kothe improperly told the Defendant her license would be suspended for the ninety days or one year after receiving the results was a failure warranting suppression. However, in viewing the totality of the circumstances, Defendant was properly notified of the consequences of refusal when she was initially read the admin per se form. Having just performed a preliminary breath test and being informed of the result, Defendant knew the next breath test would indicate she had been drinking. She even admitted so to Trooper Kothe. Trooper Kothe's review of the consequences, although not by the book, was not an improper assessment of Defendant's consequences.

Defendant also told Trooper Kothe why she originally refused Trooper Kothe's request for a blood or breath test – her fear of needles. When Defendant expressed doubts about doing the breath test, Trooper Kothe informed Defendant that the breath test was "one-hundred percent consensual." On multiple occasions, Defendant asked whether she was allowed to refuse and whether she would be in trouble and each time Trooper Kothe reminded her she could refuse, and she would not be in trouble for refusing. Given Defendant's extensive medical history and her fear of needles, Trooper Kothe was being considerate in informing her of the consequences of a further refusal. After being informed that the alternative was a blood draw, Defendant thanked Trooper Kothe. That is not the behavior of someone who feels coerced. The totality of the circumstances do not support Defendant's assertion. Defendant's consent was voluntary.

B. Defendant's Breath Test is a Lawful Search Incident to Arrest Under *Birchfield*.

The Fourth Amendment prohibits "unreasonable searches" without a warrant. Administration of a breath test constitutes a search. *Birchfield v. North Dakota*, 579 U.S. 438, 455 (2016). The question then turns to whether or not a warrantless breath test is reasonable. *Id.* The Supreme Court held in *Birchfield* that "because the impact of breath tests on privacy is slight, and the need for BAC testing is great, the Fourth Amendment permits warrantless breath tests incident to arrest for drunk driving." *Id.* at 440. The Fourth Amendment does not require officers obtain a warrant prior to demanding a breath test when it is demanded search incident to arrest. *Id*. at 441.

Arizona precedent has held the same. Defendant's Motion to Suppress argues that *Navarro* does not apply because the breath test was "well away from the time of arrest in both location in time."[1] On the contrary, in *State v. Navarro*, Navarro was found by law enforcement passed out behind the wheel while blocking traffic. Tucson Police officers woke Navarro and conducted a DUI investigation. He was read his Miranda Rights at the scene and transported to a police station where he was read the "admin per se" admonitions. The "admin per se" form that was read to Navarro was the one later held invalid by the Court in Valenzuela for being coercive. Still, upon hearing the admonition, Navarro agreed to submit to a breath test. 241 Ariz. 19, 20 ¶ 2 (App. 2016).

The Arizona Court of Appeals emphasized that requiring a DUI arrestee to "exhale into a testing device is a 'slight inconvenience' that represents a 'burden which such defendant must bear for the common interest.'" *Id.* at ¶ 4. Therefore, because the warrantless breath test Navarro submitted to did not violate the United States or Arizona Constitution, the exclusionary rule was not application. *Id.* at ¶ 7.

Defendant's Motion asks that this Court go against holdings by both the United States Supreme Court and the Arizona Supreme Court. Both of which hold that a properly

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arrested DUI defendant's consent to a breath test is not constitutionally required because it constitutes a search incident to arrest. *See Birchfield*, 579 U.S. at 455; *Diaz v. Bernini*, 246 Ariz. 114, 116, ¶ 6-7 (2019).

III. CONCLUSION

The Defendant's breath test results should not be suppressed. Based on the totality of the circumstances, the Defendant voluntarily consented to the breath test. Even if the Court finds that Defendant did not consent - Arizona case law is clear. Both the United States and Arizona Constitution permit warrantless breath tests for those arrested for DUI. For all the reasons stated above, the Motion to Suppress should be denied.

Submitted May 19, 2025.

RACHEL H. MITCHELL
MARICOPA COUNTY ATTORNEY

BY: /s/

SURPRISE CITY COURT – 16081 N. Civic Center Plaza, Surprise, AZ 85374 (623) 222-4800

STATE OF ARIZONA vs. _____ Defendant DOB: _____ Case # _____ Complaint # _____	**TRIAL DATE NOTICE** ☐ Jury Trial ☐ Non-Jury Trial	File Stamp Only

BY SIGNING BELOW, DEFENDANT UNDERSTANDS AND AGREES THAT:

- If I am represented by counsel in this case, I will stay in regular contact with my attorney.
- If my mailing address or phone number changes, I will immediately notify the Court and my attorney.
- I understand that if I fail to appear at my Trial:
  - The Court may hold the trial in my absence, and I could be convicted of any or all criminal charges alleged.
  - The Court may enter a default judgment against me on any civil charges and impose fines and fees for those charges. I understand that this could also result in a suspension of my privilege to drive.
  - If a jury trial is cancelled within 24 hours of the scheduled date and time, the Court may impose a $500 Jury Cancellation Fee.
  - The Court may issue a warrant for my arrest without further notice.
  - The Court may order a bond to be posted before I may be released from custody, and may order the forfeiture of any bond that has previously been posted.

DEFENDANT'S CONTACT INFORMATION – REQUIRED

Defendant's Mailing Address _____

City_____ State_____Zip _____

Home Phone_____ Cell Phone_____ Email:_____

This case is set for: ☐ Jury Trial ☐ Non-Jury Trial

On _____, 20_____, at _____ a.m./p.m. in Courtroom _____.

☐ A status conference is scheduled on: _____, 20_____, at _____ a.m./p.m. in Courtroom _____.

I have read, understand and agree to the above:

_____
Defendant's Signature Date

If Defendant is not present with counsel, Defense Counsel shall acknowledge receipt of this Trial Date Notice and return it to the Court, signed by the Defendant, on or before: _____.

_____ _____
Defense Attorney Date Interpreter

_____
Prosecutor Date

_____
Judge Date

Evidentiary Objections

- **Foundation, Arizona Rules of Evidence, Article VI, Witnesses (Rules 601-615)**
  - Foundation Objection 1
  - Objection #2: Outside the scope of the hearing
  - Foundation Objection HGN

Other Objections:

- Asked & Answered
  Which Rule is this?
- Facts Not in Evidence
- Leading

Additional Resources

Example of a Jury Trial Order: Judge Dominguez' Example Jury Trial Order
Example of Trial Date Notice: Example Trial Notice

Example of Order Regarding Pre-Trial Motions Discovery: Example Motion Discovery Order

Evidentiary Hearing on Motion to Suppress Checklist: Checklist for Evid Hrgs Re DUI 12-2025

For further questions or forms/jury instructions:
https://azcourts.sharepoint.com/sites/wendell

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