ARIZONA SUPREME COURT

STATE OF ARIZONA,	)	No. CR-17-0615-PR
	)	
Appellee,	)	Court of Appeals No.
	)	2 CA-CR 2016-0186
v.	)	
	)	Pima County Superior Court
COURTNEY NOELLE WEAKLAND,	)	No. CR-20153118-001
	)	
Appellant.	)	
	)	

SUPPLEMENTAL BRIEF OF *AMICI CURIAE* ARIZONA ATTORNEYS FOR CRIMINAL JUSTICE (AACJ) AND NATIONAL COLLEGE FOR DUI DEFENSE (NCDD) IN SUPPORT OF APPELLANT

David J. Euchner, No. 021768
Pima County Public Defender's Office
33 N. Stone Ave. #2100
Tucson, Arizona 85701
(520) 724-6800
David.Euchner@pima.gov
Attorney for AACJ

Joseph P. St. Louis, No. 011728
Nesci & St. Louis, P.L.L.C.
216 N. Main Ave.
Tucson, Arizona 85701
(520) 622-1222
joestlouis@azdefense.com
Attorney for NCDD

TABLE OF CONTENTS

Page

TABLE OF CASES AND AUTHORITIES ii

INTRODUCTION 1

INTERESTS OF *AMICI CURIAE* 1

ARGUMENTS

I. Historical Analysis Supports Extending the Protection of Arizona's Exclusionary Rule Beyond the Federal Constitution's Protections 2

A. General Principles of State Constitutional Interpretation 2

B. History of the Exclusionary Rule in Federal and State Courts 4

C. The Federal Exclusionary Rule Insufficiently Guards Against Unconstitutional Action by Government, and Thus the State Constitutional Exclusionary Rule Should Afford Greater Protection 11

II. The Correct Application of the Exclusionary Rule Requires Government to Respect the Rights of the Citizenry. Unconstitutionally Obtained Evidence Must Not Be Admitted in Court Unless It Is Unquestionable that Binding Precedent Endorsed the Police Action at Issue 16

CONCLUSION 19

TABLE OF CASES AND AUTHORITIES

CASES PAGES

Adams v. New York, 192 U.S. 585 (1904) 8

Adamson v. California, 332 U.S. 46 (1947) 8

Argetakis v. State, 24 Ariz. 599 (1923)....................8

Boyd v. United States, 116 U.S. 616 (1886) 6, 7

Campbell v. Superior Court, 106 Ariz. 542 (2010) 17

Collins v. Virginia, 138 S. Ct. 1663 (2018) 4

Davis v. United States, 564 U.S. 229 (2011) 11

Diaz v. Van Wie, -- Ariz. --, 2018 WL 3722448 (Ariz. Ct. App., July 31, 2018) 16

Duncan v. Louisiana, 391 U.S. 145 (1968) 8

Eleuteri v. Richman, 141 A.2d 46 (N.J. 1958)....................7

Elkins v. United States, 364 U.S. 206 (1960) 7, 9

Kisela v. Hughes, 138 S. Ct. 1148 (2018)....................13, 14, 15

Mapp v. Ohio, 367 U.S. 643 (1961)....................8, 9, 10, 11

Oregon v. Hass, 420 U.S. 714 (1975)....................2

People v. Defore, 242 N.Y. 13 (1926)....................9

People v. Martin, 290 P.2d 855 (Cal. 1955)....................7

People v. Marxhausen, 171 N.W. 557 (Mich. 1919)....................6

Pool v. Superior Court, 139 Ariz. 98 (1984)....................3

Safford Unif. Sch. Dist. No. 1 v. Redding, 557 U.S. 364 (2009) 15

Schneckloth v. Bustamonte, 412 U.S. 218 (1973)...17

Segura v. United States, 468 U.S. 796 (1984) 13

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) 7

State v. Ault, 150 Ariz. 459 (1986) 12

State v. Bolt, 142 Ariz. 260 (1984) 12

State v. Brito, 183 Ariz. 535 (App. 1995)...17

State v. Butler, 232 Ariz. 84 (2013)..1, 2, 17, 18, 19

State v. Gibbons, 203 P. 390 (Wash. 1922) 6

State v. Havatone, 241 Ariz. 506 (2017) 16, 19, 20

State v. Hummons, 227 Ariz. 78 (2011)...12

State v. Huez, 240 Ariz. 406 (App. 2016)... 18-19

State v. Nissley, 241 Ariz. 327 (2017) 16

State v. Noble, 171 Ariz. 171 (1992) 2

State v. Peoples, 240 Ariz. 244 (2016) 12

State v. Valenzuela (Valenzuela II), 239 Ariz. 299 (2016).......................................1

State v. Weakland, 244 Ariz. 79 (App. 2017) 16, 18

State v. White, 640 P.2d 1061 (Wash. 1982) 12

State v. Wilson, 237 Ariz. 296 (2015)..12

United States v. Calandra, 414 U.S. 338 (1974) 11

United States v. Leon, 468 U.S. 897 (1984) 11

Walder v. United States, 347 U.S. 62 (1954)..7

Weeks v. United States, 232 U.S. 383 (1914) 5, 7, 8, 11

Wolf v. Colorado, 338 U.S. 25 (1949) 7, 8, 9, 10

Zadeh v. Robinson, -- F.3d --, 2018 WL 4178304 (5th Cir., Aug. 31, 2018)....14, 15

ARIZONA REVISED STATUTES

§ 28-1321 17

UNITED STATES CODE

42 U.S.C. § 1983 14

UNITED STATES CONSTITUTION

Fourth Amendment ....passim

Fifth Amendment 6, 10

Sixth Amendment 5

Fourteenth Amendment 8

ARIZONA CONSTITUTION

article 2, section 8 4

article 2, section 10 4

OTHER AUTHORITIES

Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 Ariz. St. L.J. 355 (2016) 3

Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 Ariz. St. L.J. 505 (2012) 3

William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 Harv. L. Rev. 489 (1977) 2

David French, "End Qualified Immunity," *National Review*, Sept. 1, 2018, available at https://www.nationalreview.com/2018/09/end-qualified-immunity-supreme-court/ (last visited September 18, 2018) 14

Arnold H. Loewy, *The Warren Court as Defender of State and Federal Criminal Laws: A Reply to Those Who Believe That the Court Is Oblivious to the Needs of Law Enforcement*, 37 Geo. Wash. L. Rev. 1218 (1969) 9

Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 Ariz. St. L.J. 265 (2003) 3

Supreme Court of Arizona, *The Records of the Arizona Constitutional Convention of 1910*, John S. Goff ed. 4

Wash. Const. article 1, section 7 ....4, 12

Wash. Const. article 1, section 9 4

INTRODUCTION

By granting review in this case, this Court will now answer the question left undecided in *State v. Valenzuela*, 239 Ariz. 299 (2016): whether *State v. Butler*, 232 Ariz. 84 (2013), sufficiently demonstrated that the Fourth Amendment applied to requests for chemical samples in driving-under-the-influence cases, such that law enforcement could no longer rely in good faith on prior case law holding or implying that compliance with our implied consent statute satisfied the Fourth Amendment, and, thus, had good reason to know its action in this case (and others) was unconstitutional prior to *Valenzuela*. Appellant Weakland's petition and supplemental brief, along with the briefs supporting the petition for review filed by *amici curiae* Arizona Attorneys for Criminal Justice (AACJ) and City of Tucson Public Defender, have thoroughly explained why the good-faith exception should not apply in cases where the search occurred after *Butler*. In this brief, AACJ and National College for DUI Defense (NCDD) propose a standard for applying the exclusionary rule that is easy to understand and apply, faithful to the original purpose of the rule, necessary to preserve the balance between the state and the individual, and gives primacy to our state constitution.

INTERESTS OF *AMICI CURIAE*

AACJ provided its statement of interest in its brief supporting the petition for

review filed on March 19, 2018. NCDD is a nonprofit professional organization of lawyers, with over 1,000 members, focusing on issues related to the defense of persons charged with driving under the influence. Through its educational programs, its website, and its email list, NCDD trains lawyers to represent persons accused of drunk driving. NCDD's members have extensive experience litigating issues regarding blood alcohol tests. It files *amicus curiae* briefs in the courts, including in *Butler*, the case that is the centerpiece of this litigation.

ARGUMENTS

I. Historical Analysis Supports Extending the Protection of Arizona's Exclusionary Rule Beyond the Federal Constitution's Protections.

A. General Principles of State Constitutional Interpretation

"[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution." William J. Brennan, Jr., *State Constitutions and the Protections of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). "[A] state is free as a matter of its own law to impose greater restrictions [on] police activity than those this Court holds to be necessary upon federal constitutional standards." *Oregon v. Hass*, 420 U.S. 714, 719 (1975). Although not required to do so, Arizona courts often read our state constitution in lockstep with the United States Supreme Court's reading of the federal constitution and eschew any independent reading of the state constitution. *State v. Noble*, 171 Ariz. 171, 173 (1992); *but see*

Pool v. Superior Court, 139 Ariz. 98, 108 (1984) (while giving great weight to United States Supreme Court decisions, "we cannot and should not follow federal precedent blindly").

More recent scholarship—including from two Arizona Supreme Court justices—have called upon practitioners and judges to look independently to the Arizona Constitution as the source of individual rights. *See* Ruth V. McGregor, *Recent Developments in Arizona State Constitutional Law*, 35 Ariz. St. L.J. 265, 267 (2003) (labeling the three standard approaches as "lockstep," "primacy," and "interstitial / criteria"); Clint Bolick, *Vindicating the Arizona Constitution's Promise of Freedom*, 44 Ariz. St. L.J. 505, 509 (2012) ("Far better is the 'primacy' approach—that is, interpreting state constitutional provisions separately from their federal constitutional counterparts, focusing on their language, intent, and history. Such an approach contributes to consistency in the law, it honors the intent of the framers to provide an independent and primary organic law, and it ensures that the rights of Arizonans will not erode even when federal constitutional rights do."); Paul Avelar & Keith Diggs, *Economic Liberty and the Arizona Constitution: A Survey of Forgotten History*, 49 Ariz. St. L.J. 355, 362 (2016) ("If the goal is to ascertain and give effect to the intent and purpose of the framers and the people who adopted it,—originalism—primacy is the only approach that does that.") (internal quotations omitted). Accordingly, this court should accept the invitation, and the responsibility,

to interpret the protections of the Arizona Constitution separate from those of the federal constitution.

When crafting the Arizona Constitution in 1910, Arizona's declaration of rights was taken in large part from Washington, with many provisions copied verbatim. Among those verbatim provisions are the right to privacy, from article 1, section 7 of the Washington Constitution to article 2, section 8 of the Arizona Constitution, and the right that "[n]o person shall be compelled in any criminal case to give evidence against himself," which appears in article 1, section 9 of the Washington Constitution as well as article 2, section 10 of the Arizona Constitution. These provisions were adopted with no debate at all. Supreme Court of Arizona, *The Records of the Arizona Constitutional Convention of 1910*, John S. Goff ed., at 659, 1232-33 (showing no objection to adoption). For this reason, this Court looks to the Washington Supreme Court for guidance in interpreting corresponding provisions.

B. History of the Exclusionary Rule in Federal and State Courts

In recent years, there has been suggestion that the exclusionary rule has no basis in the Fourth Amendment. *See Collins v. Virginia*, 138 S. Ct. 1663, 1676-77 (2018) (Thomas, J., concurring). While it is true that the text of the Fourth Amendment does not literally spell out the exclusionary rule,[1] the principle underlying the exclusionary rule is undeniable:

[1] The lack of specific text securing a remedy for the violation of a constitutional right

> If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the 4th Amendment, declaring his right to be secure against such searches and seizures, is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution.

Weeks v. United States, 232 U.S. 383, 393 (1914). In *Weeks*, the Court recognized that the remedy in English common law for the unlawful seizure of evidence was the return of the evidence to the person upon whose rights the government agent trespassed:

> The right of the court to deal with papers and documents in the possession of the district attorney and other officers of the court, and subject to its authority, was recognized in *Wise v. Henkel*, 220 U. S. 556, 55 L. ed. 581, 31 Sup. Ct. Rep. 599. That papers wrongfully seized should be turned over to the accused has been frequently recognized in the early as well as later decisions of the courts. 1 Bishop, Crim. Proc. § 210; *Rex v. Barnett*, 3 Car. & P. 600; *Rex v. Kinsey*, 7 Car. & P. 447; *United States v. Mills*, 185 Fed. 318; *United States v. McHie*, 194 Fed. 894, 898.

Id. at 398. It is self-evident that a remedy that involves returning the property or papers to the accused necessarily means that such items cannot be used in evidence by the government. Thus, discounting the constitutional roots of the exclusionary rule merely because the United States Supreme Court took until 1914 to call it such is no divination of the Founders' original intent, just as it would be fallacious to

---

provides no barrier in other contexts. For example, the Sixth Amendment's promise of trial by jury is unaccompanied by any text suggesting that violation of that right is structural error, yet jurists and commentators agree that the remedy is automatic reversal of convictions and a new trial.

reject the Fourth Amendment itself merely because the Court did not squarely interpret it until *Boyd v. United States*, 116 U.S. 616 (1886). *Boyd*, citing the illustrious history both in England and the American colonies that culminated in the Fourth Amendment, was asked to invalidate a demand for forfeiture of property—in other words, a future seizure. Were it the case in *Boyd* that the government agents had already seized the property, as in *Weeks*, no doubt Justice Bradley would have articulated the exclusionary rule in similar language in *Boyd*.

The Washington Supreme Court first recognized the exclusionary rule in *State v. Gibbons*, 203 P. 390 (Wash. 1922), a case involving an illegal seizure of a vehicle which turned out to be transporting liquor. The court first recognized that because the arrest of the accused was unlawful, so was the seizure of his vehicle, which contained the liquor. *Id*. at 394. As did the United States Supreme Court, it found the source of the exclusionary rule not only in the text of the Fourth Amendment and its state analog but also of the Fifth Amendment's prohibition on compelled self-incrimination and the state analog's extension of that prohibition to giving not just *testimony* but also *evidence* against oneself. *Id*. at 395. It relied not only on the recent wave of U.S. Supreme Court cases but also on the reasoning of *People v. Marxhausen*, 171 N.W. 557 (Mich. 1919); and, like *Weeks*, it reasoned that a rule that prohibits future unconstitutional action could not possibly forgive past unconstitutional action. *Id*. at 396.

Over the generations, the U.S. Supreme Court stopped reciting the full history of the rule and, in the process of assuming its validity, merely cited *Boyd*, *Weeks*, and *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), as established precedent. *Walder v. United States*, 347 U.S. 62, 65 (1954), was one such case; after citing these cases, the Court added a sentence without any citation to authority: "All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men." As a result of that statement, the following year, the Supreme Court of California cited this statement as proof positive that "the purpose of the exclusionary rule is not to provide redress or punishment for a past wrong, but to deter lawless enforcement of the law." *People v. Martin*, 290 P.2d 855, 857 (Cal. 1955). In *Elkins v. United States*, 364 U.S. 206, 217 (1960), the Court added a few more phrases: "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins*'s authority for this point was a single case of the New Jersey Supreme Court decided two years earlier, *Eleuteri v. Richman*, 141 A.2d 46, 50 (N.J. 1958). That case conducted no historical analysis and instead chose to reject the exclusionary rule under New Jersey law.

In *Wolf v. Colorado*, 338 U.S. 25 (1949), the U.S. Supreme Court considered the question whether the federal exclusionary rule applied to the states through the

Due Process Clause of the Fourteenth Amendment, and it rejected that proposition. In categorizing the positions of the several states, the Court considered Arizona to be among the "states which passed on the *Weeks* doctrine for the first time after the *Weeks* decision and in so doing rejected it," *id*. at 35 (Table E), but the case it cited for authority, said no such thing. In *Argetakis v. State*, 24 Ariz. 599, 610-11 (1923), this Court found the facts of the case before it akin to those in *Adams v. New York*, 192 U.S. 585 (1904), in that no illegal search or seizure had in fact occurred. Because an illegal search or seizure is a condition precedent to invoking the *Weeks* doctrine, there was no reason for this Court to bring it up. Thus, the Court's classification of Arizona in "States that reject *Weeks*" was erroneous. *Wolf*, 338 U.S. at 38.

Only twelve years later, the Court reversed course in *Mapp v. Ohio*, 367 U.S. 643 (1961), and applied the federal exclusionary rule to the states through the Due Process Clause. As part of the march toward incorporation to the states of most of the protections of the Bill of Rights,[2] the Court recognized that "[t]he right to privacy, no less important than any other right carefully and particularly reserved to

---

[2] *Compare Adamson v. California*, 332 U.S. 46, 89 (1947) (Black, J., dissenting) ("I cannot consider the Bill of Rights to be an outworn 18th Century 'strait jacket' … I would follow what I believe was the original purpose of the Fourteenth Amendment—to extend to all the people of the nation the complete protection of the Bill of Rights"), *with Duncan v. Louisiana*, 391 U.S. 145, 164 (1968) (Black, J., concurring) (while maintaining belief in full incorporation of Bill of Rights, "I am very happy to support this selective process through which our Court has since the *Adamson* case held most of the specific Bill of Rights' protections applicable to the States to the same extent they are applicable to the Federal Government.").

the people, would stand in marked contrast to all other rights declared as 'basic to a free society,'" *id*. at 656 (quoting *Wolf*, 338 U.S. at 27), unless the exclusionary rule was enforced against federal and state governments alike. "The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted on unconstitutional evidence." *Id*. at 657. The Court explained the importance of the exclusionary rule as more than just a deterrent:

> There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine "(t)he criminal is to go free because the constable has blundered." *People v. Defore*, 242 N.Y. at page 21, 150 N.E. at page 587. In some cases this will undoubtedly be the result. But, as was said in *Elkins*, "there is another consideration—the imperative of judicial integrity." 364 U.S. at page 222, 80 S.Ct. at page 1447. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence.

Id. at 659.[3] Thus, the rule's deterrent value is secondary to its true purpose of protecting the integrity of the judicial system.

---

[3] Another commentator's retort to the Cardozo aphorism was, "the criminal does not go free because the constable had blundered, but because he would have gone free if the constable had not blundered." Arnold H. Loewy, *The Warren Court as Defender of State and Federal Criminal Laws: A Reply to Those Who Believe That the Court Is Oblivious to the Needs of Law Enforcement*, 37 Geo. Wash. L. Rev. 1218, 1236 (1969).

Justice Black's concurring opinion in *Mapp* provides a classic textualist argument for a constitutional exclusionary rule, as opposed to a judicial construct. Justice Black, the only justice to vote in the majority in both *Wolf* and *Mapp*, explained his switch had nothing to do with his view on incorporation, but rather his view on the exclusionary rule itself:

> I am still not persuaded that the Fourth Amendment, standing alone, would be enough to bar the introduction into evidence against an accused of papers and effects seized from him in violation of its commands. For the Fourth Amendment does not itself contain any provision expressly precluding the use of such evidence, and I am extremely doubtful that such a provision could properly be inferred from nothing more than the basic command against unreasonable searches and seizures. Reflection on the problem, however, in the light of cases coming before the Court since *Wolf*, has led me to conclude that when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compelled self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule.

Id. at 661-62 (Black, J., concurring). Justice Black then explained that the *Wolf* dissent, which he criticized at the time, persuaded him over time:

> In the final analysis, it seems to me that the *Boyd* doctrine, ***though perhaps not required by the express language of the Constitution strictly construed, is amply justified from an historical standpoint***, soundly based in reason, and entirely consistent with what I regard to be the proper approach to interpretation of our Bill of Rights—an approach well set out by Mr. Justice Bradley in the *Boyd* case.

Id. at 662-63 (Black, J., concurring) (emphasis added).

Although *Mapp*, at its core, is a case about the Due Process Clause and not the exclusionary rule, it was the rule's imposition on the states that inspired negative

reaction that ultimately led to a rewriting of history. Beginning with *United States v. Calandra*, 414 U.S. 338, 348 (1974), the Court began referring to the rule as "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." And it was not until 1984 that any kind of good-faith exception appeared in *United States v. Leon*, 468 U.S. 897 (1984). The exception for good-faith reliance on binding precedent first appeared in *Davis v. United States*, 564 U.S. 229 (2011). Although this interpretation currently controls federal law, the above analysis shows that the original intent was for a broader exclusionary rule that prohibited use of illegally obtained evidence, and the current rule, often described as a "return to originalism," is anything but that.

C. The Federal Exclusionary Rule Insufficiently Guards Against Unconstitutional Action by Government, and Thus the State Constitutional Exclusionary Rule Should Afford Greater Protection

After *Mapp*, states did not need to interpret their state constitutional provisions when they could rely on the Fourth Amendment. As a result, states like Washington which had modeled their exclusionary rules on the *Weeks* rule had no need to use its state constitution to protect the integrity of the judicial system. But over the course of the next twenty years, in response to the U.S. Supreme Court eroding these protections and recasting the exclusionary rule as one focused on deterring police misconduct, the Washington Supreme Court raised its state

constitutional exclusionary rule from its slumber. In *State v. White*, 640 P.2d 1061, 1066-67 (Wash. 1982), it noted that the U.S. Supreme Court had recently held that an unconstitutional stop-and-identify statute did not require suppression of evidence because police could not anticipate that the statute would be struck down, and it rejected the high court's rationale at its core. The court noted that it was the high court that had altered longstanding exclusionary rule jurisprudence, and given Washington's equally longstanding history of reading its corresponding state constitutional provision differently, it was necessary to give broader protection and in so doing strike out on its own. *Id*. at 1070-71. It concluded: "[t]he important place of the right to privacy in Const. art. 1, s 7 seems to us to require that whenever the right is unreasonably violated, the remedy must follow." *Id*. at 1071.

Despite the fact that the Arizona Constitution uses the language of the Washington Constitution rather than the corresponding federal provisions, this Court has only expressly stated independent state grounds for suppression in a handful of cases involving home searches and a recent case involving a cell phone search. *State v. Bolt*, 142 Ariz. 260, 264-65 (1984); *State v. Ault*, 150 Ariz. 459, 466 (1986); *State v. Wilson*, 237 Ariz. 296, 301 ¶ 23 (2015); *State v. Peoples*, 240 Ariz. 244, 250 ¶ 25 (2016). Moreover, this Court has explicitly disclaimed a broader interpretation of the exclusionary rule. *Bolt*, 142 Ariz. at 268-69; *State v. Hummons*, 227 Ariz. 78, 82 ¶ 16 (2011). Notably, in both *Bolt* and *Ault*, the rationale for deciding the cases under

the state constitution was concern that the U.S. Supreme Court was scaling back the historical protections of the Fourth Amendment, as shown in *Segura v. United States*, 468 U.S. 796 (1984). *Bolt*, 142 Ariz. at 264; *Ault*, 150 Ariz. at 466.

AACJ's brief in support of granting the petition, at pages 13-14, argued that the deterrence theory for the exclusionary rule is no longer viable when police officers are immunized for actions that are so obviously egregious. Two weeks after filing that brief, the U.S. Supreme Court held in *Kisela v. Hughes*, 138 S. Ct. 1148 (2018), that an officer was entitled to qualified immunity for shooting a woman in Tucson who was holding a knife but not threatening anyone. Justice Sotomayor criticized the majority's summary disposition of the case in this manner:

> The record, properly construed at this stage, shows that at the time of the shooting: Hughes stood stationary about six feet away from Chadwick, appeared "composed and content," and held a kitchen knife down at her side with the blade facing away from Chadwick. Hughes was nowhere near the officers, had committed no illegal act, was suspected of no crime, and did not raise the knife in the direction of Chadwick or anyone else. Faced with these facts, the two other responding officers held their fire, and one testified that he "wanted to continue trying verbal command[s] and see if that would work." But not Kisela. He thought it necessary to use deadly force, and so, without giving a warning that he would open fire, he shot Hughes four times, leaving her seriously injured.
>
> If this account of Kisela's conduct sounds unreasonable, that is because it was. And yet, the Court today insulates that conduct from liability under the doctrine of qualified immunity, holding that Kisela violated no "clearly established" law. I disagree. Viewing the facts in the light most favorable to Hughes, as the Court must at summary judgment, a jury could find that Kisela violated Hughes' clearly established Fourth Amendment rights by needlessly resorting to lethal

> force. In holding otherwise, the Court misapprehends the facts and misapplies the law, effectively treating qualified immunity as an absolute shield.

Id. at 1155 (Sotomayor, J., dissenting) (cites omitted).

Moreover, only last week, David French of the National Review excoriated the courts for creating and expanding the doctrine of qualified immunity in this manner, in contradiction of Congress's plain language in 42 U.S.C. § 1983.[4] French cited a "blistering attack" on qualified immunity by Judge Willett; that concurring opinion begins:

> The court is right about Dr. Zadeh's rights: They were violated.
>
> But owing to a legal deus ex machina—the "clearly established law" prong of qualified-immunity analysis—the violation eludes vindication. I write separately to register my disquiet over the kudzu-like creep of the modern immunity regime. Doctrinal reform is arduous, often-Sisyphean work. And the entrenched, judge-made doctrine of qualified immunity seems Kevlar-coated, making even tweak-level tinkering doubtful. But immunity ought not be immune from thoughtful reappraisal.

Zadeh v. Robinson, -- F.3d --, 2018 WL 4178304, *10 (5th Cir., Aug. 31, 2018) (Willett, J., concurring). Judge Willett interpreted *Kisela* as standing for the rule that "[m]erely proving a constitutional deprivation doesn't cut it; plaintiffs must cite functionally identical precedent that places the legal question 'beyond debate' to

[4] David French, "End Qualified Immunity," *National Review*, Sept. 1, 2018, available at https://www.nationalreview.com/2018/09/end-qualified-immunity-supreme-court/ (last visited September 18, 2018).

'every' reasonable officer." *Id*. (citing *Kisela*, 138 S. Ct. at 1153). Recognizing that the Supreme Court has been inconsistent on just how similar precedent must be before it is "clearly established," Judge Willett noted that "like facts in like cases is unlikely. And this leaves the 'clearly established' standard neither clear nor established among our Nation's lower courts." *Id*.

Amici believe Weakland must win under the federal exclusionary rule for reasons stated in earlier briefing. Nevertheless, for all of these reasons, the time has come for this Court to abandon the "lock-step" method of applying the Arizona Declaration of Rights. In the last decade, the U.S. Supreme Court has intervened on behalf of local government officials in two Arizona cases to undermine "clearly established" rights. *See also Safford Unif. Sch. Dist. No. 1 v. Redding*, 557 U.S. 364 (2009) (defendants entitled to qualified immunity for strip-searching thirteen-year-old girl at school in pursuit of Tylenol). Police now can act with impunity, unless this Court untethers the state constitutional exclusionary rule from the federal rule.

For all of these reasons, this Court should breathe life into the state constitutional exclusionary rule.

II. The Correct Application of the Exclusionary Rule Requires Government to Respect the Rights of the Citizenry. Unconstitutionally Obtained Evidence Must Not Be Admitted in Court Unless It Is Unquestionable that Binding Precedent Endorsed the Police Action at Issue.

AACJ's brief in support of granting the petition, at page 8, argued that the *Weakland* majority created a new rule that the good-faith exception applies when appellate judges misinterpret the rule in pending cases until their decision is reversed by this Court. Since that time, in *Diaz v. Van Wie*, -- Ariz. --, 2018 WL 3722448 (Ariz. Ct. App., July 31, 2018), the court of appeals accepted special action jurisdiction over a suppression issue and held that a trial court abused its discretion by failing to suppress blood evidence obtained as a result of a warrantless medical draw absent exigent circumstances. Diaz's petition for special action was filed on July 14, 2017, which means that the respondent judge ruled with the benefit of this Court's opinions in *State v. Nissley*, 241 Ariz. 327 (2017), and *State v. Havatone*, 241 Ariz. 506 (2017)—and still issued a contrary ruling. Had *Diaz* been decided the other way, notwithstanding that such an opinion would so clearly contradict *Nissley* and *Havatone*, the rationale of *Weakland*, 244 Ariz. at 450-51 ¶ 19, would allow police to assume that exigent circumstances are no longer required for a warrantless blood draw.

Such a standard would resolve competing interests squarely on the side of government agents and disregard the right of the people to be secure not only in their homes and their papers but even (in DUI cases) in their own bodies. Even under the

deterrence theory of the exclusionary rule, this standard would be entirely unacceptable. Even under the approach to the good-faith exception suggested by the State in its supplemental brief, an erroneous ruling by an intermediate appellate court, soon to be reversed by a state supreme court, could not serve as validation for an unconstitutional police practice.

This case does not require this Court to do any more than follow its own and the U.S. Supreme Court's established precedent and smooth out some rough edges in the expression of the good-faith exception that were described in AACJ's brief in support of granting the petition. The logic is simple. First, in *Campbell v. Superior Court*, 106 Ariz. 542, 554 (1971), this Court held that the Fourth Amendment does not apply in civil administrative hearings. Second, in *State v. Brito*, 183 Ariz. 535, 538-39 (App. 1995), the court of appeals endorsed the very same admin per se form used in Weakland's case (as well as countless others). Third, in *Butler*, 232 Ariz. at 88 ¶ 18, this Court held that "independent of [A.R.S.] § 28-1321, the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw." Fourth, *Butler* relied on *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), for the proposition that voluntariness of consent to search is determined by examining the totality of the circumstances. Fifth, since the good-faith exception only applies in cases of settled law, once *Butler* explicitly held that the Fourth Amendment *does* apply in DUI cases, the law was, at the very least, unsettled.

The State's supplemental brief, at page 7, relies on Justice Pelander's concurrence in *Butler* for support, but if anything other sections of that concurrence prove Weakland's point. Most notably, Justice Pelander expressly noted that the *Butler* opinion unsettled the law and might leave officers confused:

> Finally, I understand that Fourth Amendment issues usually, and necessarily, entail "case-by-case," "fact-intensive, totality of the circumstances analyses." *Missouri v. McNeely*, —— U.S. ——, 133 S.Ct. 1552, 1564, 185 L.Ed.2d 696 (2013). But a core objective of our criminal-case jurisprudence should be "to 'guide future decisions' as well as to 'guide police, unify precedent, and stabilize the law.'" *Weisler*, 35 A.3d at 979 (quoting *Thompson*, 516 U.S. at 114-15, 116 S.Ct. 457). In that regard, I have concerns similar to those recently expressed by Chief Justice Roberts in *McNeely*: "A police officer reading this Court's opinion would have no idea—no idea—what the Fourth Amendment requires of him, once he decides to obtain a blood sample from," in this case, a juvenile DUI arrestee to ensure that the juvenile's consent to a blood draw is voluntary. 133 S.Ct. at 1569 (Roberts, C.J., concurring in part and dissenting in part).

Butler, 232 Ariz. at 91-92 ¶ 35 (Pelander, J., concurring). It is not true that a police officer would have no idea what to do; police departments are perfectly capable of seeking legal counsel to explain the opinion and help craft new policies so as to comply with new Supreme Court jurisprudence.[5] Law enforcement is not permitted to sit on its hands and change nothing.

---

[5] The State claims that Weakland should not be able to "introduc[e] documents that are not a part of the record." State Supplemental Brief, at 15. Notwithstanding the obvious practice of citing newspaper articles as authority, the State has unclean hands in this regard because it never argued good faith before the trial court, *see Weakland*, 244 Ariz. at 81 ¶ 9, and in so doing it denied Weakland an opportunity to present evidence supporting her position. *See State v. Huez*, 240 Ariz. 406, 414 ¶ 29

The ADOT memo appended to AACJ's brief in support of granting the petition was dated December 18, 2015—only ten days after the oral argument in *Valenzuela*. This circumstantial evidence strongly suggests that the government anticipated an unfavorable result in the case and moved fast to adapt to the changing landscape. This proves that the process of adapting to *Butler* would not have been time-consuming at all, had the government been so inclined. This is exactly the kind of "recurring or systemic negligence on the part of law enforcement" recognized as impermissible in *Havatone* by both the majority and dissent. 241 Ariz. at 511 ¶¶ 21-22 (majority), 517-18 ¶ 50 (dissent).

CONCLUSION

For these reasons, *amici curiae* AACJ and NCDD request that this Court give primacy to our state constitution and use the Fourth Amendment as a guide, rather than as a mandate. From there, amici ask that this Court, as a matter of state constitutional law, reject the good-faith exception to the exclusionary rule as antithetical to the historical underpinnings of the exclusionary rule. In any event, the exception cannot apply unless the law is clearly settled and when binding precedent

---

(App. 2016) ("Because the state did not argue attenuation, Huez was deprived of the opportunity to obtain such evidence. Therefore, the proper course of action is to remand to the trial court for a new evidentiary hearing at which the parties may introduce evidence concerning the *Brown/Strieff* factors.").

permits the specific practice at issue, as stated in *Havatone*, and thus Weakland's convictions must be reversed.

RESPECTFULLY SUBMITTED this 21st day of September, 2018.

By /s/ David J. Euchner

David J. Euchner
Pima County Public Defender's Office
33 N. Stone Ave. #2100
Tucson, AZ 85701
Attorney for *amicus curiae*
Arizona Attorneys for Criminal Justice

Joseph P. St. Louis
Nesci & St. Louis, P.L.L.C.
216 N. Main Avenue
Tucson, AZ 85701
Attorney for *amicus curiae*
National College for DUI Defense