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8 **IN THE [REDACTED] COURT**
9 **IN AND FOR THE STATE OF ARIZONA**

10 **STATE OF ARIZONA,**

11 Plaintiff,

12 vs.

13 [REDACTED],

14 Defendant

15 [REDACTED]
16 **DEFENDANT'S MOTION TO**
17 **SUPPRESS**

18 Defendant, through undersigned counsel, hereby requests that this motion to suppress be
19 granted on the grounds that: 1) Defendant was never read his admin per se before officers took
20 his blood, and 2) the officers took Defendant's blood without Defendant's consent or a warrant,
21 resulting in an illegal seizure under the 4th Amendment of the United States Constitution. This
22 motion is supported by the following memorandum of points and authorities.

23 **I. Factual Basis of Motion**

24 On or about [REDACTED], Officer Matthew Gile, badge no. 5867 of the Phoenix Police
25 Department, conducted a traffic stop on Defendant [REDACTED] at about 12th Street and
Peoria Ave. The officer subsequently placed Defendant under arrest for DUI and transported
Defendant to 302 E. Union Hills for processing. Defendant then suffered from chest pain
and requested his nitroglycerine pills from Officer Gile, but to no avail. Officer Gile called
the Phoenix Fire Department in response to Defendant's pain, and Defendant was transported
to [REDACTED] hospital as he complained of chest pains. Before being transported,

1 Officer Cuthbertson, badge no. 7843, drew blood from Defendant without reading Defendant
2 his admin per se and without receiving consent or a warrant from Defendant. Furthermore,
3 Defendant was conscious and coherent at all times. Defendant was subsequently cited for
4 two DUI charges.

5 **II. Defendant was never read his Admin Per Se, never consented to blood draw, and**
6 **no warrant was obtained, deeming the blood draw a seizure under the 4th**
7 **Amendment**

8 Pursuant to Ariz. Rev. Stat. § 28-1321(B), “a violator shall be requested to submit to and
9 successfully complete any test or tests...” and “if the violator refuses the violator shall be
10 informed that the violator's license or permit to drive will be suspended or denied for twelve
11 months.” Neither Officer Gile nor Officer Cuthbertson requested that Defendant complete
12 any test or tests at any time before taking a vial of Defendant’s blood, nor read Defendant his
13 admin per se as noted in the Alcohol Influence Report. Furthermore, Defendant was never
14 unconscious or in a condition rendering him incapable of refusal as prescribed by Ariz. Rev.
15 Stat. § 28-1321(C). Because the officers never asked or advised Defendant about consent nor
16 obtained a warrant, the seizure should be deemed inadmissible. When a motorist is arrested
17 for driving under the influence of alcohol, the officer must request that motorist take a blood
18 or breath alcohol concentration test and inform motorist that license or permit to drive will be
19 suspended or denied for twelve months unless motorist expressly agrees to submit to and
20 successfully completes test or tests. *Diaz v. Arizona Dept. of Transp.* 186 Ariz. 59, 918 P.2d
21 1077 (App. Div.1 1996). In absence of emergency, search warrant is required for search
22 involving intrusion into human body. *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826,
23 16 L.Ed.2d 908 (1966). Because Defendant was never read his admin per se, and no warrant
24 was obtained by either Officer Gile or Officer Cuthbertson, Defendant requests that this court
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1 render the blood draw be deemed inadmissible and suppressed as an illegal seizure under the
2 Fourth Amendment.

3 **III. The officer was not properly qualified to draw blood, and Defendant's rights to**
4 **independent sample were affected due to negligent draw**

5 Officer T. Cuthbertson, badge no. 7843, notes on the venipuncture checklist that "2 vials
6 of blood were turned over to Officer M. Gile 5867 on 7/22/07 at 0155 hours." However, this
7 is misrepresentation, as only one vial of blood was drawn. On the Phlebotomy Draw Report,
8 Officer Cuthbertson notes that Defendant did not have any aspirin, steroids, or blood thinners
9 in his body. However, Defendant uses [REDACTED], a known blood thinner and anticoagulant
10 used to prevent blood clotting. The Officer never asked Defendant about blood thinners, and
11 never read Defendant his admin per se as noted on the Alcohol Influence Report, but decided
12 to draw blood anyway. Because of the Officer's negligence in asking Defendant about blood
13 thinners and requesting permission to draw blood at all, Defendant's venipuncture site began
14 to swell, causing severe bruising and pain to Defendant and resulting in only one vial of
15 blood as noted on the Phlebotomy Draw Report, in direct contradiction to the information
16 provided by Officer Cuthbertson on the Venipuncture Checklist.

17 The drawing of blood is a bodily invasion, and thus, constitutes a search under the Fourth
18 Amendment. *State v. Estrada*, 209 Ariz. 287, 100 P.3d 452 (App. 2004). *Schmerber v.*
19 *California* states that the test to determine whether or not a blood draw is reasonable is
20 "whether the means and procedures employed in taking [the defendant's] blood respected
21 relevant Fourth Amendment standards of reasonableness." *Schmerber v. California*, 384 U.S.
22 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). The court deemed a blood test reasonable
23 because it generally "involves virtually no risk, trauma, or pain." *Id.* At 771, 86 S.Ct. at 1836.
24 Though the court in this case held the blood draw admissible, the case can be distinguished.
25 Officer Cuthbertson did not comply with safe and reasonable conditions in this case, as he

1 did not inquire about blood thinners, subjecting Defendant to an unnecessary risk of harm
2 and pain. Case law dictates that when a blood draw performed was determined unsafe and
3 exposed the individual to an unreasonable risk, the draw does not comply with the Fourth
4 Amendment's requirement of reasonableness. *United States v. Bullock*, 71 F.3d 171, 176 (5th
5 Cir. 1995); *People v. Esayan*, 5 Cal. Rptr. 3d 542 (Ct. App. 2003). It is evident from the
6 facts of this case that the Officer had no concern for Defendant's safety in drawing blood
7 without Defendant's permission nor without knowledge that Defendant had any condition or
8 was on any medication that could render the draw dangerous or unreasonable. Because the
9 Officer did not comply with the proper procedures set forth in the Phlebotomy Draw report to
10 ensure that Defendant had no blood thinners in his body, Defendant suffered bruising,
11 swelling, pain, and was deprived of a second, independent referee sample. Under Ariz. Rev.
12 Stat. § 28-1388(C), "the person tested shall be given a reasonable opportunity to arrange for
13 any physician, registered nurse or other qualified person of the person's own choosing to
14 administer a test or tests in addition to any administered at the direction of a law enforcement
15 officer." The Officers in this case neither notified Defendant of blood draw by obtaining
16 consent through admin per se nor drew the blood in a reasonable manner. Because of these
17 shortcomings, Defendant was not given a reasonable opportunity to arrange for independent
18 testing pursuant to Ariz. Rev. Stat. § 28-1388(C), nor was even afforded a second vial for
19 testing by the State. In fact, because of the negligence of the Officer's, Defendant was put in
20 an unreasonable risk of harm, and suffered actual injury. The Defendant therefore requests
21 that this court grant a motion to suppress based on an unreasonable seizure in addition to an
22 illegal seizure as set forth above.

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Lawrence S. Koplou, No.



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