BOATES & CRUMP, PLLC
3701 W. Anthem Way, Suite 202
Anthem, AZ 85086
J. Nichole Oblinger/026081
Telephone: (623) 551-5457
Facsimile: (623) 551-5458
Attorneys for Defendant

IN THE PAYSON JUSTICE COURT

IN AND FOR THE COUNTY OF GILA, STATE OF ARIZONA

STATE OF ARIZONA, Plaintiff, v. Defendant.	Complaint No.: **MOTION TO SUPPRESS STATEMENTS AND BLOOD TEST RESULTS** (Assigned to Hon. Dorothy Little)

Pursuant to Rule 16.1 of the Arizona Rules of Criminal Procedure, Mr. XXXX ("Defendant") requests that this Court enter its order suppressing all statements made by him after he was read his *Miranda* Rights for the reason that he did not voluntarily and freely waive his *Miranda* Rights; and therefore, the statements were taken in violation of *Miranda v. Arizona*, 384 U.S. 436 (1966). Defendant also requests that this Court enter its order suppressing all blood and test results obtained by Officer XXXXX for the reason that Officer XXXX lacked probable cause to believe Defendant was guilty of driving under the influence at the time he obtained the vials of blood. Defendant, in support of his Motion to Suppress, states the following:

1. Defendant is charged with one count of Driving Under the Influence – Impaired, 28-1381 (A)(1); and one count of Driving Under the Influence – Blood Alcohol Content Over 0.08, 28-1381 (A)(2).

2. Defendant is requesting that the following evidence be suppressed:

a. All statements made to Officer XXXXX after Officer XXXXX read Defendant his *Miranda* Rights;

b. The blood obtained by Officer XXXXX from Nurse XXXX at the Payson Medical Regional Center, and all test results obtained from that blood.

I. STATEMENT OF THE CASE

On July 28, 2007, Defendant was driving his vehicle westbound on Highway 260, just outside of Payson. He was returning home to Phoenix after attending a funeral in Snowflake. At approximately 9:14 P.M., Defendant dozed off at the wheel and crossed over the eastbound lanes of traffic and struck an abandoned car on the east shoulder of the road. Defendant lost consciousness and was seriously injured in this accident. He was eventually transported to Payson Regional Medical Center ("PRMC"), after receiving trauma care at the scene from the Christopher Kohls Fire Department paramedics. Defendant arrived at the PRMC at 11:09 P.M. and was seen by the Emergency Room Doctor, Dr. XXXXX, at 11:45 P.M. Defendant was ultimately transported to St. Joseph's Hospital in Phoenix, where he was treated for concussion with loss of consciousness, crushed vertebrae, a slipped disc, and

several other injuries.

Officer XXXXX from the Arizona Department of Transportation was the only Officer present at the accident scene. Officer XXXXX did not speak to or observe Defendant at the scene of the accident. According to Officer XXXXX, he arrived at the PRMC at 11:54 P.M., at which time he received two vials of blood from a Nurse XXXX, who claimed that she obtained them from Defendant. Officer XXXXX then found Defendant, who was lying in the emergency room, strapped to a back and neck board, and began to question him. Officer XXXXX states that he read Defendant his *Miranda* rights at 11:59 P.M., and subsequently obtained the statements at issue in this Motion. According to Defendant's medical records from PRMC, he was given Morphine, Norflex and Pepcid, intravenously at 11:55 P.M., 4 minutes before he was read his *Miranda* rights. The following is a list of side effects of Norflex (generic name Orphenadrine) obtained from Medicinenet.com and WebMD.com: drowsiness, dizziness, lightheadedness, mental confusion and depression. In addition, one of the precautions listed for Norflex states, "Limit the use of alcohol while taking this medication since excessive drowsiness or depression can occur." Intravenously delivered Morphine has some of the same side effects, lightheadedness, dizziness and drowsiness; and carries a similar precaution, "Limit alcohol consumption because it may add to the dizziness/drowsiness effects of this drug." Again, Defendant was given both of these drugs, intravenously, shortly before Officer XXXXX began to question him and shortly before he allegedly waived his *Miranda* rights.

Another issue of concern is manner in which the blood sample was obtained by Officer

XXXXX. The Officer's report states that at 11:45 P.M. (before ever speaking to or observing Defendant) he obtained two vials of blood from a Nurse XXXX of PRMC; his report does not state what her position is at PRMC. According to the laboratory reports from PRMC, Defendant's specimen (blood) was collected at 12:22 A.M. by the "ER".

The first problem presented by this evidence is the lack of a definite time for the blood draw. Due to conflicting information contained in the medical records and the Officer's report about the time of blood draw, it is impossible to determine if Defendant's blood was drawn within two hours of driving and to determine if it was collected for medical purposes.

The second problem with the blood sample is that Officer XXXXX obtained the blood before ever seeing or speaking to Defendant; therefore, he did not have probable cause to obtain the blood at the time he received it.

II. STATEMENT OF LAW

A. A Defendant Must Knowingly and Intelligently Waive His *Miranda* Rights in Order for His Subsequent Statements to be Admissible.

Miranda v. Arizona provides certain safeguards in the taking of a statement from a suspect. 384 U.S. 436 (1966). "If the accused has been given his *Miranda* warnings and makes a voluntary, knowing, and intelligent waiver of those rights, the statements are admissible." *State v. Smith,* 193 Ariz. 452, 459, 974 P.2d 431, 438 (1999). In *Miranda,* the U.S. Supreme Court said that the prosecution has "a heavy burden" to show a waiver of the constitutional privilege against self-incrimination and the right to counsel. 384 U.S. 436 (1966). "Without *Miranda* warnings and a knowing and intelligent waiver, statements made

by a defendant in custody are per se involuntary and hence inadmissible." *State v. Levens*, 214 Ariz. 339, 342, 152 P.3d 1222, 1225 (Ariz.App. Div. 1, 2007). To satisfy the strictures of *Miranda,* the State must show that the defendant understood his rights and intelligently and knowingly relinquished those rights before questioning began. *State v. Rivera,* 152 Ariz. 507, 513, 733 P.2d 1090, 1096 (1987). In order to determine if a defendant knowingly, intelligently and voluntarily waived the protections of *Miranda*, a court will look at the totality of the circumstances for indications that the defendant had sufficient mental capacity to understand what he was saying and the consequences of his waiver. *State v. Goff*, 25 Ariz.App. 195, 197, 542 P.2d 33, 35 (Ariz.App. 1975). If a defendant's ability to reason and comprehend were so disabled at the time he waived his *Miranda* rights that he was unable to make a free and rational choice, then it must be said that his waiver was not freely and voluntarily given. *Id.* (citing *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)).

In *Mincey v. Arizona*, the U.S. Supreme Court held that statements made by a defendant who was hospitalized for serious injuries which occurred a few hours earlier, were not the product of "a rational intellect and a free will." *Mincey v. Arizona*, 437 U.S. 385, 398 (1978). In *Mincey*, the police officer read the defendant his *Miranda* rights and subsequently questioned him while he was lying on his back in a hospital bed, complaining of being in "unbearable pain." The Court stated, "[i]t is hard to imagine a situation less conducive to the exercise of 'a rational intellect and a free will'" *Id.*

Here, it is the State's burden to prove that Defendant was capable of understanding his rights and therefore, capable of knowingly and intelligently waiving his rights.

Defendant was in the hospital being treated for a head injury, he had lost consciousness at the scene of the accident and had been placed on a back and neck board, he was in pain and disoriented. And, most importantly, Defendant had been intravenously treated with Morphine and Norflex several minutes prior to being read and purportedly waiving his *Miranda* rights. As stated previously, the side effects of both of these medications are drowsiness, dizziness and confusion; and, both medications have precautions not to mix with alcohol because it will heighten their effects. It is clear that Defendant could not have understood his *Miranda* rights enough to knowingly and intelligently waive them, given his injured, concussed and drugged condition. It was the Officer's responsibility to ensure that Defendant was not in a drugged or confused state of mind when he questioned him and asked him to waive his *Miranda* rights. Defendant had rights and privileges guaranteed to him by the Fifth Amendment and he was not given an opportunity to intelligently understand and knowingly waive those rights. As such, any statements obtained from Defendant after he was read his *Miranda* rights should be suppressed.

Additionally, an effective waiver of *Miranda* must be both cognitive and free from government compulsion or overreaching. *State v. Carilllo*, 156 Ariz. 125, 135, 750 P.2d 883, 893 (1988). "[W]hat is police "overreaching" must depend in part on what the police know about the defendant. Certainly, the police cannot be allowed to handle a suspect having … obvious impediments with the same methods that might legitimately be employed on a suspect of greater intellect and sophistication." *State v. Carrillo*, 156 Ariz. 125, 135, 750 P.2d 883, 893 (1988). Although *Carillo* involved a mentally handicapped defendant, it is

similar to the instant circumstances in that Defendant was clearly in a depressed cognitive state due to the drugs he was given as well as his possible concussion and other injuries. In *Carillo*, the Court stated that what constitutes police overreaching "may depend to some degree upon the defendant's capacity to understand the proceedings." The Court indicated that the police officer giving the *Miranda* warnings, when dealing with a suspect whose cognitive capacity is impaired, should take care to explain the defendant's rights in an "understandable, simplified fashion" and give them in a manner that the defendant could understand. *Id.* There is no indication that Officer XXXXX treated Defendant any differently than any other defendant. He does not state that he took extra time or care to make sure that Defendant actually understood his rights enough to intelligently waive them. In fact, it does not appear from Officer XXXXX's report that he even inquired into whether Defendant had been medicated before he began to question him. When the government (police) takes advantage of a defendant's reduced cognitive abilities in order to obtain a waiver of *Miranda* and extract a statement or confession, there is a clear violation of the defendant's Fifth Amendment rights and any statements obtained as a result of such government overreaching must be suppressed.

B. **The Fourth Amendment Prohibits Law Enforcement Officers from Seizing a Sample of an Individual's Blood Without Probable Cause to Believe that He Was Driving Under the Influence**.

Under Arizona law, absent express consent, police may obtain a DUI suspect's blood sample only pursuant to a valid search warrant, Arizona's implied consent law, or the medical blood draw exception in A.R.S. §28-1388 (E). *State v. Cocio*, 147 Ariz. 277, 283,

709 P.2d 1336,1344 (1985), State *v. Aleman*, 210 Ariz. 232, 109 P.2d 571 (Ariz. App. 2005). Here, there was no consent, no search warrant obtained, and the implied consent statute was never invoked, which leaves A.R.S. §28-1388 (E), the medical blood draw exception. A.R.S. §28-1388 (E) states, "Notwithstanding any other law, if a law enforcement officer has probable cause to believe that a person has violated § 28-1381 and a sample of blood, urine or other bodily substance is taken from that person for any reason, a portion of that sample sufficient for analysis shall be provided to a law enforcement officer if requested for law enforcement purposes. A person who fails to comply with this subsection is guilty of a class 1 misdemeanor." In *State v. Cocio*, the Arizona Supreme Court discussed the constitutionality of the medical blood draw statute. The Court held that for a blood draw to be constitutional under the statute there must be: 1) probable cause to believe the suspect was driving under the influence; 2) exigent circumstances; and 3) the blood draw was done by medical personnel for medical purposes. *Cocio*, 147 Ariz. 277, 283. Therefore, the question in this case is, did Officer XXXXX have probable cause to believe that the Defendant was guilty of driving under the influence *at the time he obtained the blood sample*.

At the time Officer XXXXX received the blood sample from Nurse XXXX, the facts known to him were that: 1) Defendant had been involved in an accident where he hit an abandoned car on the opposite side of a narrow, undivided highway; 2) there were unopened beer cans in Defendant's vehicle; 3) Defendant's vehicle smelled of alcohol; and 4) one witness stated that Defendant smelled of alcohol. This information, even taken

cumulatively, rises only to the level of reasonable suspicion, which would allow further investigation – but it does not rise to the level of probable cause. *See e.g. State v. Swanson*, 164 Wis.2d 437, 475 N.W.2d 148 (Wis. 1991) (stating that a suspect's erratic driving, combined with an odor of alcohol, constituted reasonable suspicion to conduct a further investigation, but not probable cause to believe he was guilty of DUI); *State v. Dolan*, 283 Mont. 245, 253, 940 P.2d 436, 441 (Mont.,1997) (holding that police did not have probable cause to obtain a suspects blood when officers did not have personal knowledge of suspect's consumption of alcohol, and neither officer had received information indicating that defendant showed signs of intoxication, from a reliable source, prior to ordering a test of defendant's blood). There are many situations that could have lead to the car and Defendant smelling like alcohol, that don't involve Defendant being intoxicated. The smell of alcohol coming from Defendant's vehicle could easily have resulted from one of the beer cans observed by Officer XXXXX rupturing during the car accident. Likewise, the witness could have been smelling alcohol from the vehicle which resulted from the rupturing of one of the beer cans.

When the Officer arrived at PRMC, and immediately obtained the vials of blood, there is no argument that he possessed reasonable suspicion to investigate Defendant for driving under the influence, but it cannot be said that, at that time, he had enough evidence to arrest Defendant for driving under the influence. Arizona law makes it clear that, *at the time the blood sample is received* by the law enforcement officer, that law enforcement officer must possess *probable cause* to believe the suspect was guilty of driving under the influence.

A.R.S. §28-1388 (E); *State v. Estrada,* 209 Ariz. 287, 289-90, 100 P.3d 452, 454-55 (App.2004) (holding that probable cause is a required element for the medical blood draw exception); *State v. Clary*, 196 Ariz. 610, 612, 2 P.3d 1255, 1257 (Ariz. App. 2000). In this case, Officer XXXXX did not comply with the Arizona statute allowing a medical blood draw exception, because at the time he obtained the blood, he did not have probable cause to arrest Defendant for driving under the influence. Therefore, the blood obtained in violation of Defendant's Fourth Amendment rights and the subsequent blood alcohol test results must be excluded.

III. CONCLUSION

Based on the reasons stated above and the authorities cited, the Defendant requests that this motion to suppress statements obtained in violation of his Fifth Amendment rights and to suppress blood test results obtained in violation of this Fourth Amendment rights, be granted.

RESPECTFULLY SUBMITTED this th day of September, 2008.

BOATES & CRUMP, PLLC

By _____
J. Nichole Oblinger, Esq.
Attorney for Defendant