IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR FLAGLER COUNTY, FLORIDA

STATE OF FLORIDA,

vs.

RICHARD KELLEY,

Defendant.
_____/

CASE NO.: 2014 CF 001032
JUDGE: FOXMAN

Motion to Suppress

COMES NOW the Defendant, Richard Kelley, by and through his undersigned counsel, and respectfully moves this Honorable Court for an order excluding from evidence the results of the blood sample obtained from the Defendant in this case. As grounds therefore would show the following:

Summary of Relevant Facts

The Defendant, Richard Kelley, has been charged by information with DUI Manslaughter, DUI with Property Damage/Personal Injury, DUI, DWLS with Death or Serious Injury and DUI Causing Serious Bodily Injury for an incident that occurred on January 17, 2014, at approximately 11:58 P.M. The Defendant was transported to Florida Hospital Flagler as a result of injuries he received from the incident. While at the hospital, Trooper Dennis Shorter requested the Defendant submit a sample of his blood. Trooper Shorter read the Defendant the Implied Consent warning from a

sheet that is a part of the "DUI package." Trooper Shorter testified in his deposition regarding a general summary of the Implied Consent warning he gave to the Defendant:

> You state who you are and the reason you're asking for a blood sample, and it goes on to about explaining about your driver's license and other stuff like that and how long it will be suspended, for a period of time.

Trooper Shorter then requested the Defendant provide a blood sample, and the Defendant provided the requested sample. The blood sample was analyzed by the Florida Department of Law Enforcement for alcoholic content and it is alleged the Defendant's blood alcohol content was a .137 g/100 mL. No warrant was obtained by law enforcement to collect the Defendant's blood.

Legal Argument

The Fourth Amendment to the U.S. Constitution provides, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause." U.S. Const. Amend IV.

Article I, §12 of the Florida Constitution provides, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures . . . shall not be violated. . . . This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the

United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution."

Blood Sample Subject to U.S. & Florida Constitutional Protection

The Supreme Court of the United States of America said the following on April 17, 2013:

> The Fourth Amendment provides in relevant part that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause." Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. See e.g., United States v. Robinson, 414 U.S. 218, 224 (1973). That principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." Winston v. Lee, 470 U.S. 753, 760 (1985); see also Skinner v. Railway Labor Executives' Assn., 489 U.S. 602, 616 (1989).

Missouri v. McNeely, 133 S.Ct. 1552, 1558 (2013).

In general, under the Fourth Amendment, warrantless searches "are per se unreasonable … subject only to a few specifically established and well-delineated exceptions. Arizona v. Gant, 556 U.S. 332, 338; 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

Because the officer lacked a warrant at the time of the taking the burden rests with the State to justify an exception to the warrant requirement. Hilton v. State, 961 So.2d 284, 296 (Fla.2007) ("When a search or seizure is conducted without a warrant, the government bears the burden of demonstrating that the search or seizure was reasonable."; Kilburn v. State, 54 So.3d 625, 627 (Fla. 1st DCA 2011) ("A warrantless search is per se unreasonable under the Fourth Amendment subject to a few well-defined exceptions … The State has the burden to prove that an exception to the warrant requirement applies.")

In this case no warrant was obtained to secure a sample of the Defendant's blood and the State can show no exception to the warrant requirement. The only conceivable ways to obtain a blood sample from the Defendant in this case is through a theory of exigent circumstances or free and voluntary consent, which the State cannot show.

This Honorable Court should suppress the results of the testing completed on the blood sample collected because the samples were collected in violation of the Fourth Amendment. Evidence obtained in violation of the Fourth Amendment is properly suppressed. Mapp v. Ohio, 367 U.S. 643, 655; 81 S.Ct. 1684; 6 L.Ed.2d 1081 (1961); Katz v. United States, 389 U.S. 347 (1967).

Exigent Circumstances

The facts showed the police never considered obtaining a warrant. Trooper Shorter's deposition testimony was that the Defendant was transported to the hospital where law enforcement read him his obligations under the implied consent law and asked for a sample of blood. There was never any consideration of obtaining a search warrant. The exigent circumstances exception clearly does not apply.

Section 933.07(3), Fla. Stat. (2013) specifically provides for the electronic application and signing of warrants. All the officer had to do was draft a warrant, e-mail it to the on-call state attorney for review and then by the same means to the on-call judge for review and signing pursuant to § 933.40(d), Fla. Stat. All this could have been accomplished in a matter of minutes either in the patrol vehicle or back at the station.

Law enforcement officers are charged with knowledge of the law. Doctor v. State, 596 So.2d 442, 447 (Fla. 1992); Hilgeman v. State, 790 So.2d 485 (Fla. 5th DCA 2001); Sneed v. State, 876 So.2d 1235 (Fla. 3d DCA 2004); Frank v. State, 912 So.2d 329 (Fla. 5th DCA 2005); Kutik v. State, 914 So.2d 484 (Fla. 5th DCA 2005).

The fact that this officer had no knowledge of the law or if he did have such knowledge chose not to avail himself of the procedure provided in the statute cannot equate to excusable neglect or acting in good faith. The court said in Sneed v. State:

> "Furthermore, the evidence supports the trial court's finding that Detective Garcia did not act in good faith, as Florida law holds that police officers are charged with knowledge of the law. (citations omitted) Moreover, the "good faith" exception is based on an objective standard and expects officers to know the law. (citations omitted) Consequently, a law enforcement officer's ignorance of the law is not tantamount to good faith."

Sneed v. State, 876 at 1238.

These facts are similar to those in State v. Kutik. There the officer obtained a driver's medical records in violation of the procedures set out in § 395.3025, Fla. Stat. In excluding the evidence and rejecting the "sorry I didn't know" argument employed by law enforcement and the state the court said:

> Although Demeulenaere may not have known the statutory requirements of section 395.3025, that ignorance does not establish good faith.

State v. Kutik, 914 So.2d at 488.

A warrantless search is per se unreasonable and will only be upheld upon a showing of a valid exception to the warrant requirement. Good faith cannot be established by showing the officers were not aware of exiting law.

The facts in People v. Schaufele, 325 P.3d 1060 (Colo. 2014) are strikingly similar to our facts.

> The police officers did not obtain, or seek to obtain, a warrant. At the suppression hearing, Officers Langert, Andrews, and Beckstrom testified that they were aware that the Greenwood Village Police Department, the Office of the District Attorney, the county attorneys in Arapahoe County, and the Colorado judicial branch all have established procedures in place (which may be initiated by computers in police cars)

> that would have enabled them to apply for and obtain a search warrant for a blood test on an exigent basis. But none of them had ever applied for an expedited warrant, and none of them did so here. (FN2)
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> FN2. After admitting their lack of experience with expedited warrants, the officers speculated that obtaining an expedited search warrant would have taken anywhere from one to four hours.

People v. Schaufele, 325 P.3d at 1063.

The trial court's exclusion of the evidence was affirmed.

In conclusion on this point, there is no excuse for not obtaining a warrant. Exigent circumstances must be evaluated on a totality of the circumstances and on a case by case basis. The facts show that probable cause could have been established within minutes of the crash. If the officers had utilized the procedures set forth in § 933.07, Fla. Stat., a warrant could have been obtained within the hour.

Time to Obtain A Warrant Issue

Florida law holds that blood alcohol evidence in a DUI prosecution is always relevant. If relevant evidence is to be excluded it should be only where the prejudicial value outweighs the probative value. Miller v. State, 597 So.2d 767 (Fla. 1992). An argument to exclude blood alcohol evidence obtained three hours and forth-five minutes after the time of arrest has been rejected. State v. Banoub, 700 So.2d 44 (Fla. 2d DCA 1997). See also: State v. Reed, 400 S.W.3d 509 (Mo.App. S.D. 2013) and People v. Armer, 20 N.E. 521 (Ill.App. 5 Dist. 2014).

Exception of Free and Voluntary Consent

The exception of free and voluntary consent cannot be shown in this case. When the validity of a search rests on a theory of free and voluntary consent, the State has the burden of proving consent was freely and voluntarily given. Florida v. Royer, 460 U.S. 491, 497 (1983). Taking a blood sample under the implied consent provisions of the Florida Statutes is considered a non-consensual taking and does not fall under the consent exception to the warrant requirement. Liles v. State, 2016 WL D892 (Fla. 5th DCA 2016); Williams v. State, 167 So.3d 483, 491 (Fla. 5th DCA 2015). For a search to be based on upon the consent exception to be valid, consent must be given freely and voluntarily; it cannot be the product of coercion. Id. The Defendant only submitted a blood sample after being read his obligations under the Florida Implied Consent Law which included the threat of a driver's license suspension if he did not provide the sample, eviscerating any possibility the sample was obtained under a theory of pure consent. Id. Statutory implied consent provisions do not constitute a per-se exception to the warrant requirement. Id.

This case is substantially similar to State v. Medicine, 865 N.W.2d 492 (SD 2015). In that case the defendant was arrested for DUI and read the following advisement card:

1. I have arrested you for a violation of SCDL § 32-23-1

> 2. SCDL § 32-23-10 provides that any person who operates a vehicle in this state has consented to the withdrawal of blood or other bodily substance and chemical analysis.
> 3. I request that you submit to the withdrawal of your _____ (blood, breath, bodily substance).
> 4. You have the right to additional chemical analysis by a technician of your own choosing at your own expense.
> 5. Do you consent to the withdrawl of your _____ (blood, breath, bodily substance)?

The trial court granted a motion in limine to exclude the blood results and the state appealed, alleging the blood sample had been provided under a theory of pure consent. The South Dakota Supreme Court held, after examining at the totality of the circumstances, the circuit court was correct in the legal determination the defendant did not give free and voluntary consent to a blood draw, rather he submitted to a lawful claim of authority based on the content of the South Dakota statutory advices, which are substantially similar to Florida's Implied Consent warning. Id. at 497. The court also held SCDL § 32-23-10 is not an exception to the warrant requirement because the legislature cannot enact a statute that would preempt a citizen's constitutional rights. Id. at 498.

This case, as in Medicine, the defendants were told their obligations under the implied consent law, which indicated consent had already been given to the blood draw. When an officer tells a defendant he has already consented to a blood draw, this is the functional equivalent of an assertion the officer has a warrant. Both claims are assertions the officer has the authority to conduct a search. When an officer claims

authority to conduct a search, a subject's compliance with the request cannot be considered free and voluntary. Id. at 498 citing Lo-Ji Sales, Inc. V. New York, 442 U.S. 319, 319 (US 1979).

Utilizing a statute cannot be a substitute for voluntary consent. That would be an application of a "per se" rule that the Court has rejected. Missouri v. McNeely, 133 S.Ct. 1552 (2013); Liles v. State, 2016 WL D892 (Fla 5th DCA 2016); Williams v. State, 167 So.3d 483 (Fla. 5th DCA 2015), *review granted,* SC15-1417, 2015 WL 9594290 (Fla.2015)

In Williams the District Court said:

> The State argues that the consent exception to the warrant requirement applies to the facts of this case; thus, we will address that potential exception first. Because Williams did not expressly consent to the breath test-in fact, he did exactly the opposite-the issue is whether he impliedly consented by obtaining a driver's license in Florida and choosing to drive on Florida roads on the night in question. . . ."
>
> Although this appears to be an issue of first impression in Florida, several other states' appellate and supreme courts have considered this issue, with varying results. The vast majority of courts have found that statutory implied consent is not equivalent to Fourth Amendment consent. Footnote 4. We agree.
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> Valid consent has long been recognized as a 'jealously and carefully drawn' exception to the warrant requirement. See Georgia v. Randolph, 547 U.S. 103, 109, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006) (quoting Jones v. United States, 357 U.S. 493, 499, 78 S.Ct. 1253, 2 L.Ed.2d 1514 (1958)). For a search based upon the consent exception to be valid, the consent must be given freely and voluntarily; it cannot be the product of coercion. See, e. g., Norman v. State, 379 So.2d 643, 646 (Fla. 1980) (citing Bumper v. North Carolina, 391 U.S. 543, 548, 88

S.Ct.1788, 20 L.Ed.2d 797 (1968)). Voluntariness is a question of fact to be determined by the totality of the circumstances. See Schneckloth v. Bustamonte, 412 U.S. 218-49, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973). Additionally, consent for purposes of the Fourth Amendment is revocable and can be withdrawn at any time. See, e.g., Smith v. State, 753 So.2d 713, 715 (Fla. 2d DCA 2000).

On the other hand, statutory implied consent-at least according to the State's position-is irrevocable. Even if Williams implied consented to the breath test when he received his driver's license and chose to drive on Florida roads, he explicitly revoked that consent when he refused to submit to the breath test. Furthermore, statutory implied-consent statutes to constitute a per se, categorical exception to the warrant requirement would make a mockery of the many precedential Supreme Court cases that hold voluntariness must be determined based on the totality of the circumstances.

We also find it improbable that the Supreme Court would mention implied-consent statutes in McNeely, yet completely ignore this important potential exception to the warrant requirement. In McNeely, the Court recognized that nearly every state had implied-consent statute, including Missouri. *See* 133 S.Ct. at 1566. When McNeely was arrested, he was told that refusal to submit to the test would lead to the revocation of his driver's license and could be used against him in future prosecutions. Id. At 1557. Still, the Court in McNeely assumed that he had not consented. *See* Id. At 1556 (framing issue as "nonconsensual" blood testing). Allowing implied consent to constitute a per se warrant exception would devour the *McNeely* rule and contradict *McNeely's* general reasoning that these cases must be decided using a totality-of-the-circumstances approach.

Therefore, we choose to follow the majority of courts, including all of the state supreme courts that have addressed this issue, in holding that statutory implied consent does not constitute a per se exception to the warrant requirement. Williams did not necessarily consent to a breath test when he got behind the wheel of his car that night. To the extent that he did, he revoked that consent when he affirmatively refused the breath test.

State v. Williams, 167 So.3d at 490.

Other State Courts Referred to by *Williams*

State v. Villarreal, 475 S.W.3d 784 (Tex.Crim.App. 2014) (mandatory taking statute cannot substitute for voluntary consent"); Byars v. State, 336 P.3d 939 (Nev. 2014) (statute that allowed the officer to use reasonable force to take driver's blood was unconstitutional); State v. Wulff, 337 P.3d 575 (Idaho 2014) (application of the implied-consent statute as a per se exception to the warrant requirement as to blood draws violates the Fourth Amendment); State v. Fierro, 853 N.W.2d 235 (S.D. 2014) (implied consent statute did not provide an exception to the search warrant requirement); State v. Medicine, 865 N.W.2d 492 (S.D.2015) (affirmed a finding that defendant did not knowing and voluntarily consent after being read DUI advisement card); State v. Butler, 302 P.3d 609 (Ariz. 2013) (implied consent statute cannot substitute voluntary consent); State v. Wells, 2014 WL 4977356 (Tenn.Crim.App.) ("the privilege of driving does not alone create consent for a forcible blood draw" "[t]he implied consent law does not, in itself, create such an exception"); Williams v. State, 771 S.E.2d 373 (Ga. 2015) (mere compliance with statutory implied consent requirements for state-administered blood test following arrest for DUI did not, per se, equate to actual, and therefore voluntary); State v. Won, 2015 WL 7574360 (Hawai'i); Flonnory v. State, 109 A.3d 1060 (Del.2015); People v. Schaufele, 325 P.3d 1060 (Colo. 2014) where the court said:

> Further, the trial court correctly noted that, notwithstanding Missouri's implied consent statute, the Supreme Court presumed in McNeely that the Fourth Amendment requires a search warrant before a blood draw, absent exigent circumstances. See McNeely, 133 S.Ct. at 1561. And it correctly noted that our own case law makes clear that Colorado's express consent statute does not abrogate constitutional requirements."

Schaufele, 325 P.3d at 1066.

Summary of Defendant's Argument

The legal argument made in this case is there can never be actual consent after being read a statutory advisory to the driver requesting consent to a chemical test of his blood subject to suspension of his driver's license if he refuses. This argument, known as the "lawful authority principle" is best summarized by Chief Justice Bales concurring opinion in State v. Valenzuela, 371 P.3d 627 (Ariz. 2016). His opinion on this issue is as follows:

> BALES, C.J., concurring in part and dissenting in part.
>
> I agree that Valenzuela did not voluntarily consent to the warrantless search, and I therefore specially concur in parts I, II.A, and II.B of the majority opinion. In two respects, however, I disagree with the majority's analysis. First, I would hold that a person cannot, as a matter of law, be deemed to have voluntarily consented by acquiescing when police assert a search is lawfully authorized (or, as the police stated here, "required" by law). Second, I would not address, in the first instance, the application of the good-faith exception to the exclusionary rule, but if I had to reach the merits, I would hold that the exception does not apply. Accordingly, I respectfully dissent from parts II.C and III.
>
> **I.**
>
> Consistent with *Schneckloth,* the majority recognizes that the voluntariness of consent to a search is determined by the "totality of the

circumstances." *Supra* ¶ 11. In most cases, this inquiry is a factual determination that considers various aspects of the setting in which a search occurs, the conduct of law enforcement officers, and the characteristics of the person who submits to the search. *See Schneckloth,* 412 U.S. at 226-27, 229; *Butler,* 232 Ariz. at 87-88, ¶¶ 13, 20, 302 P.3d at 612-13. "Where there is coercion there cannot be consent." *Bumper,* 391 U.S. at 550. Bumper and earlier Supreme Court decisions recognize that an assertion of lawful authority is inherently (although perhaps lawfully) coercive. Thus, if submission to a search is immediately preceded by such an assertion, consent cannot be deemed voluntary. *See id.* More colloquially, these cases stand for the principle that people do not "voluntarily" consent to searches when they do what the police say the law requires them to do. This "lawful authority principle" is not displaced by *Schneckloth.*

The lawful authority principle is clearly illustrated by *Bumper,* where the Court held that a homeowner's consent was involuntary solely because it was immediately preceded by an officer's assertion that he had a warrant. *Id.* at 548-49. *Bumper* gave no weight to other circumstances of the search. The homeowner was never placed in custody or threatened; she told the officers to "go ahead and look all over the house." *Id.* at 556 (Black, J., dissenting). She testified that she "had no objection to [the police] making a search," she allowed the search "entirely under her own free will, " and she was not forced" at *Id.*

Despite the circumstances suggesting the homeowner was not pressured to submit, the Court in *Bumper* treated as dispositive the fact that the search was immediately preceded by an assertion of lawful authority by the police. Because such an assertion is inherently coercive, *id.* at 550, any succeeding "consent" cannot be "freely and voluntarily given." *Id.* at 548-49. The Court effectively held that consent, in these circumstances, cannot, as a matter of law, be deemed voluntary.

Bumper comports with prior Supreme Court decisions. In *Johnson v. United States*, 333 U.S. 10, 68 S.Ct. 367, 92 L.Ed. 436 (1948), the police, having traced the smell of burning opium to a hotel room, gained entry by knocking on the door, identifying themselves, and telling the occupant that they "want[ed] to talk to [her] a little bit," *Id.* at12, The occupant stepped back "acquiescently" and admitted the officers. *Id.*

Rejecting any suggestion that the occupant had consented to the entry, the Court observed that it "was demanded under color of office" and "granted in submission to authority." *Id.* at 13. In ruling the entry was nonconsensual, the Court did not consider other circumstances of the search.

Johnson in turn cited *Amos v. United States,* 255 U.S. 313, 41 S.Ct. 266, 65 L.Ed. 654 (1921), where officers went to a home seeking evidence of illegally distilled whiskey. *Id.* at 315. The officers gained entry by telling the suspect's wife that they were "revenue officers that had come to search the premises 'for violations of the revenue law.'" *Id.* Without otherwise assessing the circumstances, the Court noted that any contention that the search had been consensual "cannot be entertained," because the officers had demanded admission "to make a search ... under government authority." *Id.* at 317. Foreshadowing *Bumper,* the Court noted that "it is perfectly clear that under the implied coercion here presented," the wife could not voluntarily consent to the search (which the Court phrased as waiving the husband's constitutional rights). *Id.*

We should read *Schneckloth* as preserving the lawful authority principle. Most significantly, the principle respects Fourth Amendment values by recognizing that we expect people to comply with police assertions of lawful authority and that acquiescence in such assertions should not be viewed as "freely and voluntarily" given consent.

Schneckloth, moreover, quoted *Bumper*'s reasoning approvingly and otherwise indicates the Court did not intend to displace its earlier case law. Citing *Bumper, Johnson,* and *Amos,* the Court noted "if under all the circumstances it has appeared that the consent was not given voluntarily- that it was coerced by threats or force, or granted only in submission to a claim of lawful authority- then we have found the consent invalid and the search unreasonable." 412 U.S. at 233-34. This statement should not be read as modifying the Court's prior decisions, but instead as recognizing that the lawful authority principle complements the "totality of the circumstances" test. Immediately after making this statement, *Schneckloth* explained that the Court had not found valid consent in *Bumper,* noting that "(w)hen a law enforcement officer claims authority to search a home under a warrant, he announces

in effect that the occupant has no right to resist the search. The situation is instinct with coercion-albeit colorably lawful coercion. Where there is coercion there cannot be consent." *Id.* at 234 (quoting *Bumper,* 391U.S. at 550).

Schneckloth did not itself involve an assertion of lawful authority to conduct a search, but instead whether the prosecution must show that a person knew he or she had a right to refuse in order to establish that consent was voluntarily given. 412 U.S. at 223-24. In holding that such knowledge is not prerequisite, *Schneckloth* noted that this factor wasnot considered in *Bumper, Johnson,* or *Amos. Id.* at 234. But recognizing that these decisions did not require the prosecution to show a person subjectively knew they could refuse to submit, or that voluntariness depends on the "totality of the circumstances," is not inconsistent with the lawful authority principle. *See id.* at 243 n. 31 (noting that *Johnson* and *Amos* turned on objective circumstances of search rather than absence of knowledge of right to refuse).

Indeed, *Schneckloth* itself noted "Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied." 412 U.S. at 248. Although "[v]oluntariness is a question of fact to be determined from all circumstances," *id.* at 248-49, the Court in *Schneckloth* also restated its earlier observation in *Bumper* that assertions of lawful authority are inherently coercive. The best way to reconcile the Supreme Court's
statements is to recognize that consent to a search cannot, as a matter of law, be deemed voluntary when it is immediately preceded by an assertion of lawful authority.

In rejecting this proposition, the majority identifies two hypotheticals. *Supra* ¶ 18. The first is when an officer retracts an assertion of lawful authority before a person accedes to a search. This hypothetical does not argue against the lawful authority principle. The principle rests on the inherent coerciveness of the assertion of lawful authority; it does not apply when the assertion is withdrawn before a person assents to a search.

The second hypothetical- where an officer's assertion of authority is contradicted by a private third-party before the person submits to a search- also does not support rejecting the lawful authority principle. One might conclude that the inherently coercive nature of the officer'sassertion cannot be dispelled by unofficial, third-party statements. To hold otherwise would require finding that a person can completely ignore the officer's claimed authority and "freely" submit after a third party tells them they need not do so. None of the cases cited by the majority, *supra* ¶ 18, involve a third party contradicting an officer's assertion of authority. Nor need we address that issue here: the officer's assertion immediately preceded Valenzuela's assent to the search.

The majority also implicitly recognizes that the *Schneckloth* "totality test" must apply differently when, as is true here, an officer has asserted lawful authority to conduct a search. The majority- like the Supreme Court in *Bumper* and *Johnson-* does not find significant various circumstances that generally apply under a "totality" test, but instead gives dispositive weight to the officer's repeated assertions of lawful authority. *Compare* ¶ ¶ 22-23 (concluding that Valenzuela's "consent," like grandmother's consent in *Bumper,* was involuntary because nothing dispelled the coercive nature of the assertion of authority) *with Valenzuela,* 237 Ariz. at 315 ¶¶ 30-31, 350 P.3d at 819 (noting that various factors, including suspect's demeanor, emotional state, education, and intelligence, should be considered); *cf Schneckloth,* 412 U.S. at 227, 249 (noting that suspect's knowledge of right to refuse generally is a factor to be considered.)

A better path to the majority's conclusion would be holding that consent cannot, as a matter of law, be deemed voluntary when it is immediately preceded by a claim of lawful authority. Reaffirming this lawful authority principle would remain faithful to Supreme Court precedent while protecting Fourth Amendment values and providing clearer guidance for the public, law enforcement, and our courts.