No. _____

In The
Supreme Court of the United States

PETER BALOV,

Petitioner,

v.

THE STATE OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari To The Fourth Appellate District Court Of Appeal For The State Of California

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The question presented: Is a motorist's consent to a blood draw, for purposes of determining blood-alcohol content, voluntary within the meaning of the Fourth Amendment where the motorist selects blood after unlawfully being instructed by the arresting officer that he was "required to submit" to either breath or blood testing?

PARTIES TO THE PROCEEDING

The State of California was the plaintiff-respondent below. Peter Balov was the defendant-appellant below.

STATEMENT OF RELATED CASES

The People v. Peter Balov, No. S249708, The Supreme Court of California. Review accepted September 12, 2018. Order dismissing and remanding to the Fourth Appellate District Court of Appeal entered on August 28, 2019.

The People of the State of California v. Peter Balov, No. CA270404, The Appellate Division of the Superior Court for the County of San Diego, California. Judgment entered October 13, 2017.

The People of the State of California v. Peter Balov, No. M199722, The Superior Court for the County of San Diego, California. Judgment entered December 6, 2016.

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SECONDARY SOURCES

PETITION FOR WRIT OF CERTIORARI

Petitioner Peter Balov petitions for a writ of certiorari to review the judgments of the Fourth Appellate District Court of Appeal for the State of California, Division 1, Case No. D073018 and the Appellate Division of the Superior Court for the County of San Diego, California, Case No. M199722.

OPINIONS BELOW

A. California Supreme Court

The opinion of the Supreme Court of California dismissing Petitioner's petition for review and remanding it to the Court of Appeal for the Fourth Appellate District, Division 1, is reported at 447 P.3d 669; *see also* App. at 24. The decision of the Supreme Court of California granting Petitioner's petition for review is reported at 425 P.3d 1006; *see also* App. at 22.

B. Court of Appeal of the State of California, Fourth Appellate District, Division 1

The decision of the Court of Appeal for the Fourth Appellate District, Division 1 is reported at 23 Cal. App. 5th 696; *see also* App. at 1. The order accepting certification for transfer from the Appellate Division of the Superior Court for the County of San Diego is unreported. App. 13.

C. Superior Court and Appellate Division of the Superior Court for the County of San Diego, California

The decision of the Superior Court and the Appellate Division of the Superior Court[1] for the County of San Diego, California is unreported. App. at 14.

JURISDICTION

The Appellate Division of the Superior Court for the County of San Diego affirmed the trial court's denial of Petitioner's motion to suppress on Oct. 13, 2017. App. at 15. The Appellate Division certified for transfer to the Court of Appeal, Fourth Appellate District of the State of California, Division One, on October 30, 2017. App. at 13.

The Fourth District Court of Appeal affirmed the rulings of the lower courts on May 23, 2018. App. at 1. Rehearing was denied on June 13, 2018. Petitioner timely filed Petition for Review with the California Supreme Court.

The California Supreme Court granted review on Sept. 12, 2018. App. at 22. After granting review, the California Supreme Court dismissed Petitioner's Petition for Review on August 28, 2019, and remanded to the Court of Appeal for the Fourth Appellate District,

[1] CAL. CONST, ARTICLE VI §§ 4, 11 provide the Appellate Division of the Superior Court with appellate jurisdiction.

Division 1, for a remittitur[2] to issue. App. at 24. Remittitur was issued and the Court of Appeal's decision is final.

Petitioner's case is pre-conviction, but presents all four recognized circumstances (the four *Cox* categories) allowing the Court to treat the judgment of the California reviewing courts as final for jurisdictional purposes. *Florida v. Thomas*, 532 U.S. 774, 777 (2001) (discussing *Cox Broadcasting Corp. v. Cohn*, 429 U.S. 469 (1975)). First, the issue of Petitioner's Fourth Amendment claim within state courts is final. The California Supreme Court accepted, then dismissed review and remanded to the Fourth District Court of Appeal with no instructions for further factfinding or argument. Any trial "would be no more than a few formal gestures leading inexorably towards a conviction," after which the same issue would need to be raised with this Court, resulting in an unnecessary waste of time and energy. *Id*. at 778 (quoting *Mills v. Alabama*, 384 U.S. 214, 217-18 (1966)).

Second, the issue in this case will survive and ultimately warrant Supreme Court review regardless of the outcome of future state-court proceedings. *Cox Broadcasting Corp.*, 420 U.S. at 480. Central to the issue in this case is an officer's conduct when attempting to obtain consent to blood testing from a DUI arrestee. Here, the officer commanded submission to a search

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[2] CAL. RULES OF COURT rule 8.528, sub'd (b)(2) provides: "When the Court of Appeal receives an order dismissing review, the decision of that court is final and its clerk/executive must promptly issue a remittitur or take other appropriate action."

and the arrestee submitted. The voluntariness of that submission is at issue. California courts have seen this factual scenario repeated frequently. *See infra* 22-23. Thus, the outcome on the Fourth Amendment issue will not change in state court. The issue here will need to be addressed.

Third, Petitioner's case is one in which "the federal claim has been finally decided, with further proceedings on the merits in the state court to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case." *Thomas*, 532 U.S. at 779 (quoting *Cox Broadcasting Corp.*, 429 U.S. at 481). Following a conviction, Petitioner cannot revisit the federal claim on appeal, as the California court of last resort has granted and dismissed review of the issue. Should the Petitioner be convicted at trial, Petitioner will be precluded from pressing its federal claim on appeal. *Id*. at 779 (discussing *New York v. Quarles*, 467 U.S. 649 (1984)). Governing state law will not permit Petitioner to again present his federal claim for review. *Cox Broadcasting Corp.*, 429 U.S. at 481. Further, review of the issue in federal habeas corpus (28 U.S.C. § 2254) is precluded. *Stone v. Powell*, 428 U.S. 465 (1976).

Finally, where "a refusal immediately to review the state-court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts." *Id*. at 780 (citing *Cox Broadcasting Corp.*, 429 U.S. at 482-83). A denial of Petitioner's case would erode federal policy pertaining to the obtaining

of consent. Thereafter, Petitioner's case would serve as authority for an officer to command submission to a warrantless search, and for the government to rely on that submission as proof of voluntary consent. Petitioner's case erodes the long-standing rule that mere acquiescence to a claim of authority is not voluntary consent. The paramount justification for this Court to exercise jurisdiction is to protect federal Fourth Amendment policy and uphold the rule of law.

The judgment of the Fourth District Court of Appeal and Appellate Division may be considered final. This Court's jurisdiction is therefore invoked, pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment provides, in relevant part:

> *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 be issue, but upon probable cause.*

STATUTORY PROVISIONS INVOLVED

CALIFORNIA VEHICLE CODE § 23612(a)(1)(A) is included in App. at 28

CAL. VEH. CODE § 23612(a)(1)(D) is included in App. at 28.

CAL. VEH. CODE § 23612(a)(4) is included in App. at 31.

CAL. VEH. CODE § 23152 is included in App. at 26.

STATEMENT OF THE CASE

A. Introduction and Summary of the Argument

After unsatisfactorily performing field sobriety tests, Petitioner was arrested for driving under the influence. There was no property damage or injury involved in Petitioner's arrest. The arresting officer instructed Petitioner that "that per California Law he was required to submit to a chemical test, either a breath or a blood test." App. at 2. The officer then failed to inform Petitioner of the mandated DUI admonishment, required pursuant to CAL. VEH. CODE §§ 23612(a)(1)(D) & (a)(4). *Id*. This admonishment informs the arrestee of the consequences of refusing testing; and is an indirect reference to an option to refuse. App. at 28. The officer never mentioned refusal or implied consent. Without resistance or objection, Petitioner elected to submit a blood sample.

The state relied on a theory of voluntary consent to admit the results of Petitioner's blood-alcohol test. The trial court agreed, finding Petitioner's consent voluntary. Two reviewing courts, the Appellate Division of

the Superior Court and the Court of Appeal, Fourth Appellate District, Division 1, affirmed.

Consent searches have an established role in Fourth Amendment jurisprudence. They serve the interests of law enforcement and the general public. *Schneckloth v. Bustamonte*, 412 U.S. 218, 227-28 (1973). Consensual encounters implicate no Fourth Amendment interest "so long as the police do not convey a message that compliance with their requests is required." *Florida v. Bostick*, 501 U.S. 429, 435 (1991); *see also United States v. Drayton*, 536 U.S. 194, 201 (2002). Yet, that is exactly what the arresting officer told Petitioner: *submission was required*.

The reviewing courts' holdings that Petitioner gave voluntary consent stand in clear contradiction of this Court's precedent. The state holdings build upon flawed legal analyses and a misstatement of law. The Court of Appeal and Appellate Division have rewritten the doctrine of Fourth Amendment consent. As a result, California DUI arrestees are subject to unconstitutional DUI arrest practices.

The decisions in Petitioner's case, and in *People v. Gutierrez*, 27 Cal. App. 5th 1155 (Cal. Ct. App. 2018), *reh'g denied* (Oct. 29, 2018), *review dismissed*, *cause remanded*, *People v. Gutierrez*, 447 P.3d 669 (Cal. 2019), discussed *infra* at 20, exacerbate a division among the states.[3] This division turns upon disagreement over the role implied consent plays in traditional Fourth

[3] Mr. Gutierrez also filed a Petition for Writ of Certiorari with this Court, dated November 26, 2019.

Amendment jurisprudence. California courts adhere to the majority view that implied consent must be tested for voluntariness. Yet, the holdings in Petitioner's case have found voluntary consent where the majority of state courts, and this Court's precedent, would not.

The departure from the majority by the Court of Appeal is especially problematic where California DUI arrests make up a large portion of the annual DUI arrest totals in the United States. California implied consent case law directly impacts more than 100,000 people arrested on suspicion of driving under the influence each year.

Certiorari is warranted to address the discord between the states over implied consent, to correct the holdings of the reviewing courts, and to prevent significant future harm to the Fourth Amendment rights of DUI arrestees.

B. Factual Background

At approximately 3:00 a.m. on March 22, 2015, Petitioner Peter Balov was arrested for suspicion of driving under the influence of alcohol. App. at 2. After failing field sobriety tests, Petitioner was placed under arrest for suspicion of driving under the influence. *Id*. Petitioner's arrest involved neither damage to property nor injury to any persons. The event was a standard, unremarkable and commonplace example of a DUI arrest.

Following Petitioner's arrest, the officer, San Diego Police Officer Luis Martinez, stated to Petitioner that, "per California law, [you] are required to submit to a chemical test, either a breath or blood test." *Id*. at 2-3. Officer Martinez did not follow this statement with the statutory implied consent admonishment, mandated by CAL. VEH. CODE §§ 23612(a)(1)(D) or (a)(4). *Id*.; *see also* App. at 28, 31. The officer made no reference to an option to refuse. The officer did not reference California's implied consent law.

After the officer's command, Petitioner chose blood from the only options afforded to him: breath or blood. *Id*. at 3. At no time did Petitioner resist, protest, or object. Testing performed on the blood sample provided by Petitioner indicated his blood alcohol content exceeded the legal limit.

Petitioner was charged with misdemeanor driving under the influence, in violation of CAL. VEH. CODE §§ 23152, sub'ds (a), (b). *Id*. at 14; *see also* App. at 26. Petitioner moved to suppress the results of his blood alcohol testing.

C. Procedural Background

At the suppression hearing, the Hon. Timothy Walsh determined that Petitioner's consent was voluntary. The court then denied Petitioner's motion to suppress. App. at 14. Petitioner timely appealed to the Appellate Division of the Superior Court of the County of San Diego ("Appellate Division").

Before the Appellate Division, Petitioner argued his consent was involuntary and merely the result of a claim of authority, similar to that discussed in *Bumper v. North Carolina*, 391 U.S. 543 (1968).

Following completion of briefing and oral argument, the Appellate Division affirmed the Trial Court's ruling. App. at 15. Citing to *Drayton*, 536 U.S. 194, *United States v. Watson*, 423 U.S. 411, (1976), and *Schneckloth*, 412 U.S. 218, the court determined, "[in these cases] the Supreme Court was addressing the purported failure to inform persons of the right to refuse voluntary consent, where there was no advance consent, and where the consequences of refusing consent were not codified." App. at 17-18. The court reasoned that under the cited precedent, "the statutory admonishment of the consequences of refusing to submit to testing under CAL. VEH. CODE § 23612 is not a constitutional requirement under the Fourth Amendment. App. at 19.

The Appellate Division thereafter held Petitioner's consent voluntary, as "[t]his case did not involve the type of coercion or deception claimed in [*Drayton*, *Watson*, and *Schneckloth*]." App. at 19. In the court's view, "the officer simply informed [Petitioner] that he was required by California law to submit to a blood or breath test, which is an accurate statement of the implied consent law, and he verbally chose the blood test." App. at 19. The Appellate Division declined to address Petitioner's argument that his consent was acquiescence to an assertion of authority.

The Appellate Division, on its own authority, certified the decision for transfer to the Court of Appeal of the State of California, Fourth Appellate District, Division 1. App. at 13. The Appellate Division concluded transfer to the Court of Appeal was necessary to secure uniformity of law. *Id*.

On appeal to the Fourth Appellate District, Division 1 ("the Court of Appeal"), Petitioner again argued his consent was mere submission to an assertion of authority under *Bumper*. Respondent countered, "there was acquiescence to a proper claim of lawful authority and [Petitioner's] consent was therefore voluntary."[4]

The Court of Appeal adopted Respondent's view of *Bumper*, reasoning the claim asserted in *Bumper* was a false claim of authority. App. at 8. The court noted, "*Bumper* considered whether a false claim by law enforcement that it had a warrant to search the defendant's home vitiated the defendant cohabitant's subsequent consent to the search." *Id*. Further, "[u]nlike law enforcement's claim in *Bumper*, [the officer's] statement to [Petitioner] was not false." *Id*.

Additionally, the court relied upon *Drayton*, stating that the "United States Supreme Court has repeated that the totality of circumstances must control, without giving extra weight to the absence of [an advisal of the right to refuse]." App. at 9-10.

The Court of Appeal concluded that Petitioner freely consented, noting, after driving on the public

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[4] Respondent's Opening Brief at 17.

road and being lawfully arrested for driving under the influence, Petitioner was correctly told he was required to submit to a breath or blood test. "Although the statement was incomplete under SECTION 23612, subdivision (a)(1)(D), there was no evidence [the officer] intended to deceive [Petitioner] about his right to refuse a test altogether." App. at 10. "Nor was [the officer's] statement about the implied consent demonstrably false." *Id*. Failure to communicate the consequences of refusing a chemical test did not make the initial statement requiring consent any more or less coercive than if the information had been provided. *Id*. In neither case is the driver advised of his or her right to refuse test altogether. These findings, Petitioner's lack of objection to testing, and the existence of the implied consent law supported a finding of voluntariness.

The Court of Appeal thereafter denied Petitioner's appeal and affirmed the findings of the lower court. *Id*. at 12.

Following denial of Petitioner's request for rehearing, Petitioner timely filed a petition for review with the California Supreme Court. App. at 22. The court held action in Petitioner's case pending its decision in *People v. Arredondo*, 199 Cal. Rptr. 3d 563 (Cal. Ct. App. 2016), *review dismissed*, *caused remanded*, *People v. Arredondo*, 447 P.3d 668 (Cal. 2019). *Id*. The facts of *Arredondo* involved a blood draw performed on an unconscious suspect, not dissimilar to those considered by this Court in *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019).

On August 28, 2019, the California Supreme Court dismissed Petitioner's case, and remanded to the Court of Appeal for remittitur. App. at 24.

REASONS FOR GRANTING THE PETITION

I. TO FACILITATE UNIFORMITY AMONG STATE COURT APPLICATIONS OF IMPLIED CONSENT.

Arrests for driving under the influence are commonplace, contributing significantly to national annual arrest figures. In 2016, of 10,662,252 arrests, 1,017,808 were for driving under the influence.[5] In 2017, of 10,554,985 total arrests, 990,678 were for DUI.[6] In 2018, of 10,310,960 total arrests, 1,001,329 were for DUI.[7]

To combat this threat, all 50 states have enacted implied consent laws. These laws generally deem a motorist's consent to chemical testing to determine blood-alcohol content when the motorist is arrested or detained on suspicion of driving under the influence.

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[5] Per 2016 FBI Uniform Crime Report, available at https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-18.

[6] Per 2017 FBI Uniform Crime Report, available at https://ucr.fbi.gov/crime-in-the-u.s/2017/crime-in-the-u.s.-2017/topic-pages/tables/table-29.

[7] Per 2018 FBI Uniform Crime Report, available at https://ucr.fbi.gov/crime-in-the-u.s/2018/crime-in-the-u.s.-2018/topic-pages/tables/table-29.

A. State courts remain divided over whether implied consent must be tested for voluntariness.

This Court has, to date, declined to affirmatively reject statutory implied consent as an independent exception to the warrant requirement. Instead, traditional Fourth Amendment jurisprudence has been applied to assess the constitutional compliance of implied consent-related searches. *Mitchell*, 139 S.Ct. at 2532-33. In the absence of a bright-line rule as to the significance of implied consent, state courts question the role implied consent plays in the established legal framework of voluntary consent. The states have not reached a uniform answer.

Consent is an established exception to the warrant requirement of the Fourth Amendment. *Schneckloth*, 412 U.S. at 219. Consent to search must be given voluntarily. *Id*. at 248-49. Voluntary consensual searches remain vital to law enforcement. *Id*. at 227-28. Over 90 percent of warrantless searches are conducted by consent. Paul Sutton, *The Fourth Amendment in Action: An Empirical View of the Search Warrant Process*, 22 CRIM. L. BULL. 405, 415 (1986). In 2008, 57.7 percent of traffic related searches were conducted pursuant to driver consent. U.S. Dep't of Justice, *Contacts Between Police and the Public, 2008, NCJ 234599* (2011).

The voluntariness of consent must be tested and proven. A voluntariness inquiry asks whether "a defendant's will was overborne in a particular case" by the will of the government. *Schneckloth*, 412 U.S. at

226. All of the circumstances surrounding consent must be considered for voluntariness under an objective-innocent-reasonable person standard. *Drayton*, 536 U.S. at 202 (citing *Florida v. Bostick*, 501 U.S. 429, 437-38 (1991)). It is the government's burden to prove the voluntariness of consent and not merely consent yielded in submission to authority. *Florida v. Royer*, 460 U.S. 491, 500 (1983).

Voluntary consent has certain recognized attributes. It is accompanied by a right to refuse a search request; at least to the extent no warrant exists or other warrant exception is applicable. *Schneckloth*, 412 U.S. at 223 (discussing knowledge of "right to refuse" in Fourth Amendment context). And voluntary consent, once given, may be refused or withdrawn. *Florida v. Jimeno*, 500 U.S. 248, 252 (1991) ("A suspect may . . . delimit as he chooses the scope of the search to which he consents"); *see also United States v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986) ("Clearly a person may limit or withdraw . . . consent to a search, and the police must honor such limitations"); *United States v. McWeeney*, 454 F.3d 1030, 1034 (2006) ("A suspect is free . . . to delimit or withdraw . . . consent at anytime").

The minority view of implied consent adopts deemed consent as independent proof of voluntariness. Under this view, implied consent serves either as a *per se* exception or as coercion-proof consent, neither requiring review of the totality of circumstances. The minority applies this view to DUI-blood sampling. State jurisdictions belonging to the minority include

Colorado,[8] Kentucky,[9] Illinois,[10] Missouri,[11] Ohio,[12] and Virginia.[13]

Properly considering the attributes of voluntary consent, "irrevocable implied consent operating as a *per se* rule cannot fit under the consent exception because it does not always analyze the voluntariness of that consent." *Commonwealth v. Myers*, 164 A.3d 1162, 1174 (Pa. 2017) (quoting *State v. Wulff*, 157 Idaho 416, 422 (2014)). Thus, a majority of state courts, including California, have rejected implied consent as a *per se* exception to the Fourth Amendment's warrant requirement. Courts from twenty-nine states continue to analyze the voluntariness of consent to DUI blood testing under the totality of circumstances. Jurisdictions included in this group are: Alaska,[14] Arizona,[15]

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[8] *People v. Simpson*, 392 P.3d 1207, 1209 (Colo. 2017) (terms of Express Consent Statute requires submission to a blood draw).

[9] *Commonwealth v. Hernandez-Gonzalez*, 72 S.W.3d 914, 918 (Ky. 2002) ("consent is implied by law").

[10] *People v. Hayes*, 121 N.E.3d 103 (Ill. 2018).

[11] *State v. Reeter*, 582 S.W.3d 913 (Mo. Ct. App. 2019).

[12] *State v. Hoover*, 123 Ohio St.3d 418 (2009).

[13] *Wolfe v. Commonwealth*, 793 S.E.2d 811 (Va. Ct. App. 2016).

[14] *Anderson v. State*, 246 P.3d 930, 933 (Alaska Ct. App. 2011).

[15] *State v. Valenzuela*, 371 P.3d 627, 632-34 (Ariz. 2016).

Arkansas,[16] California,[17] Connecticut,[18] Delaware,[19] Georgia,[20] Hawaii,[21] Idaho,[22] Kansas,[23] Louisiana,[24] Maine,[25] Michigan,[26] Minnesota,[27] Mississippi,[28] Montana,[29] Nebraska,[30] New Mexico,[31] Nevada,[32] North

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[16] *Dortch v. State*, 544 S.W.3d 518, 529 (Ark. 2018).

[17] *People v. Harris*, 234 Cal. App. 4th 671, 685-89 (Cal. Ct. App. 2015).

[18] *State v. Doyle*, 139 Conn. App. 367, 275 (Conn. Ct. App. 2012).

[19] *Flonnory v. State*, 109 A.3d 1060, 1064 (Del. 2015).

[20] *Williams v. State*, 296 Ga. 817, 817-18 (2015); *see also Olevik v. State*, 806 S.E.2d 505 (2017) (on state law grounds).

[21] *State v. Yong Shik Won*, 372 P.3d 1065, 1075 (Haw. 2015).

[22] *State v. Charlson*, 160 Idaho 610, 617 (2016); *see also State v. Wulff*, 157 Idaho 416, 422 (2014).

[23] *State v. Ryce*, 303 Kan. 899, 944 (2016).

[24] *State v. Newsom*, 250 So.3d 894 (La. Ct. App. 2017).

[25] *State v. LeMeunier-Fitzgerald*, 188 A.3d 183, 190 (Me. 2018).

[26] *People v. Stricklin*, LC No. 2016-0004986-AR, 2019 WL 1745975 *2 (Mich. Ct. App. 2019).

[27] *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, *Brooks v. Minn.*, 134 S.Ct. 1799 (2014).

[28] *John v. State*, 189 So.3d 683, 684 (Miss. Ct. App. 2016).

[29] *City of Great Falls v. Allderdice*, 387 Mont. 47, 50 (2017).

[30] *State v. Modlin*, 867 N.W.2d 609, 618 (Neb. 2015).

[31] *State v. Vargas*, 404 P.3d 416, 422 (N.M. 2017) ("Implied consent laws can no longer provide that a driver impliedly consents to a blood draw.").

[32] *Byars v. State*, 130 Nev. 848, 857-58 (2014).

Carolina,[33] North Dakota,[34] Oregon,[35] Pennsylvania,[36] South Dakota,[37] Tennessee,[38] Texas,[39] Washington,[40] West Virginia,[41] and Wisconsin.[42]

The variety of factual scenarios arising from implied-consent DUI arrests has resulted in findings of both voluntary and involuntary consent to DUI blood draws. Yet, despite the differences in conclusions and fact patterns, certain commonalities in rationale among the majority courts are discernable. For example, where individuals are afforded consultation with an attorney prior to a blood draw, courts have found consent voluntary. *See*, *e.g.*, *State v. Brooks*, 838 N.W.2d 563, 572 (Minn. 2013), *cert. denied*, *Brooks v. Minnesota*, 134 S.Ct. 1799 (2014); *see also Anderson v. State*, 246 P.3d 930, 932-33 (Alaska Ct. App. 2011).

Additionally, where the individual was given information, either verbally or on consent forms, reasonably

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[33] *State v. Romano*, 369 N.C. 678 (2017).

[34] *State v. Hawkins*, 898 N.W.2d 446 (N.D. 2017); *see also State v. Vetter*, 923 N.W.2d 491, 497 (N.D. 2019).

[35] *State v. Moore*, 354 Or. 493 (2013).

[36] *Commonwealth v. Myers*, 164 A.3d 1162, 1180-81 (Pa. 2017).

[37] *State v. Medicine*, 865 N.W.2d 492 (S.D. 2015).

[38] *State v. Henry*, 539 S.W.3d 223, 244 (Tenn. Ct. App. 2017).

[39] *State v. Villarreal*, 475 S.W.3d 784, 799-800 (Tex. Crim. App. 2014).

[40] *State v. Baird*, 187 Wash. 2d 210 (2016).

[41] *State v. McClead*, 211 W.Va 515 (2002), *overruled on other grounds*, *State v. Stone*, 229 W.Va. 271 (2012).

[42] *State v. Blackman*, 898 N.W.2d 774 (Wis. 2017).

indicating refusal to submit was an option, courts have generally found voluntary consent. *See*, *e.g.*, *Brooks*, 838 N.W.2d at 572; *see also Olevik*, 806 S.E.2d at 249; *LeMeunier-Fitzgerald*, 188 A.3d at 192; *Newsom*, 250 So.3d at 900; *John*, 189 So.3d at 684; *Allderdice*, 387 Mont. at 51; *Modlin*, 867 N.W.2d at 621; *Moore*, 354 Or. at 500-01. These decisions suggest even an implied reference to refusal, though coupled with permissible penalties, can preserve the voluntariness of consent.

The use of command language, or its absence, is a significant factor in the majority's voluntariness determinations. Law enforcement's use of verbiage, such as "required" and "submit," has been held coercive by the Supreme Courts of Arizona and South Dakota. *State v. Valenzuela*, 239 Ariz. 299, 307-08 (2016) (repeated use of word required held coercive); *State v. Medicine*, 865 N.W.2d 492, 496-97 (S.D. 2015) (use of the word submit conveys inability to refuse even when coupled with request language). Similarly, where an arrestee was told a blood draw was mandatory and no implied consent admonishment was provided, a Tennessee Court of Criminal Appeals held submission to testing involuntary. *State v. Henry*, 539 S.W.3d 223, 244 (Tenn. Ct. App. 2017). Under opposite circumstances, the Supreme Court of Idaho, in *State v. Charlson*, 160 Idaho 610, 618 (2016), found voluntary consent, despite no conveyance of information refusal as an option, where no facts indicated the officer told the individual they were "required to submit to the blood test." *Id*. at 618.

These common threads taken from among the twenty-nine majority states have been cut by two

recent California appellate court holdings, one of which is Petitioner's case. These holdings present a new standard for officer conduct when requesting arrestee consent to blood testing that is a clear departure from the majority reasoning, and from precedent.

B. The decisions in Petitioner's case contribute to the divide.

CAL. VEH. CODE § 23612(a)(1)(A) deems a motorist's consent to chemical testing of blood or breath upon arrest for suspicion of DUI. App. at 28. California courts, like the other majority states, have held that officers must obtain voluntary consent, or affirmance of prior implied consent, to DUI-arrest blood draws. *See*, *e.g.*, *People v. Harris*, 234 Cal. App. 4th at 685-89; *see also Arredondo*, 199 Cal. Rptr. 3d at 568-70.

Applying the majority rule in most states' reasoning, an officer's statement requiring submission to testing, without some reference to refusal, would result in involuntary consent. The decisions of the Court of Appeal and Appellate Division in Petitioner's case conflict with the majority rationale.

Factually similar to the *Balov* holding, the *Gutierrez* Court held that an officer's statement requiring submission, followed by silence as to the option to refuse, constituted consent allowing the search-incident-to-arrest exception to apply to the resulting warrantless DUI blood draw. *Gutierrez*, 27 Cal. App. 5th at 1158, 1165.

The *Balov* and *Gutierrez* holdings differ where *Balov* relied solely on voluntary consent, and *Gutierrez* first addressed consent to the intrusion, and then used that finding to apply the search-incident-to-arrest exception to California DUI blood draws. *Id*. This Court's holding in *Birchfield v. North Dakota*, 136 S.Ct. 2160 (2016) expressly prohibited application of the search-incident-to-arrest exception to DUI blood testing. *Id*. at 2185 ("a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving").

The Supreme Courts of Arizona and South Dakota, ruled in direct contrast to the voluntariness determination by the *Balov* Court of Appeal and Appellate Division. In *Valenzuela*, 239 Ariz. 299, the defendant was advised three times he was required to submit to chemical testing. *Id*. at 301. Applying *Bumper*, the *Valenzuela* Court determined that the motorist's consent could not be considered voluntary because the officer invoked lawful authority and "effectively proclaimed that *Valenzuela* had no right to resist the search." *Id*. at 306.

Similarly, in *Medicine*, 865 N.W.2d at 496-97, the South Dakota Supreme Court found an arrestee's consent to blood sampling involuntary where he was requested to submit to testing. Use of the word "submit" conveyed a message that the individual had no right to refuse. *Id*. The arrestee's subsequent agreement to testing was held involuntary. *Id*.; *see also Henry*, 539 S.W.3d at 244 (consent following

statement to arrestee blood draw was mandatory without admonishment and held involuntary.)

Departure of *Balov* and *Gutierrez* from majority norms becomes particularly significant when considering their applicability to national DUI arrest totals. In 2018, California experienced a total of 128,192 DUI arrests.[43] In 2017, 122,284 motorists were arrested for DUI.[44] In 2016, 125,963 individuals were arrested for misdemeanor DUI.[45] In 2015, 137,677 individuals were arrested for misdemeanor DUI; in 2014, 151,416.[46] Annually, California DUI arrests comprise roughly 10 to 15 percent of all DUI arrests in the United States.

Thus, a significant percentage of annual DUI arrests in the United States are governed by California implied consent jurisprudence. This percentage increases when placed in context of those arrests occurring in the twenty-nine majority states. Policies adopted by California courts pertaining to consent to DUI blood draws directly affect more than 100,000 people each year.

The standardness of the arrests in *Balov* and *Gutierrez* maximize their influence on DUI arrests, nationally. Both cases involve very commonplace arrests. The *Gutierrez* Court noted its factual scenario "arises

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[43] Statistic available at https://data-openjustice.doj.ca.gov/sites/default/files/2019-07/Crime%20In%20CA%202018%2020190701.pdf.

[44] *Id*.

[45] *Id*.

[46] *Id*.

every day in California. A law enforcement officer arresting someone for driving under the influence (DUI) informs the suspect that he or she must submit to a breath test or blood test to measure blood alcohol content[.]" *Gutierrez*, 27 Cal. App. 5th at 1157. Prior to the *Balov* and *Gutierrez* decisions, similar scenarios were reviewed by other California courts with conflicting holdings. *See*, *e.g.*, *People v. Agnew*, 242 Cal. App. 4th Supp. 1 (Cal. Super. A.D. 2015); *People v. Mason*, 8 Cal. App. 5th Supp. 11 (Cal. Super. A.D. 2016), *disagreed with by Balov*, 23 Cal. App. 5th at n.5; *People v. Ling*, 15 Cal. App. 5th Supp. 1 (Cal. Super. A.D. 2017).

Thus, the *Balov* and *Gutierrez* holdings have established coerced consent as a new standard within the state-majority. Certiorari is warranted to address this contribution to the conflict in the lower courts on the interpretation of implied consent's significance in Fourth Amendment Jurisprudence.

II. THE DECISIONS ARE WRONG.

The Fourth Amendment violation in Petitioner's case arises from the union of two actions by the arresting officer. First, the officer arresting Petitioner required submission, rather than asked for consent. Second, the officer remained silent as to the statutory implied consent admonishment or reference to refusal as an option.

The potential for coercion arises from "not just the omission of the right to refuse or even the statutory consequences of a refusal, the absence of neither of

which would generally amount to a constitutional violation . . . [b]ut it is this lacuna coming after the assertion that submission is 'required' . . . that can taint the actual voluntariness of the ensuing consent to a blood draw." *Mason*, 8 Cal. App. 5th Supp. at 22-23. Together, these actions result in involuntary consent.

The Court of Appeal erred in its analysis of the effect of both actions; an error mirrored by the Appellate Division. The Court of Appeal first erred in rejecting the officer's statement as an assertion of authority coercive to consent.

Second, in order to excuse the officer's unlawful conduct as a coercive factor, the Appellate Division and Court of Appeal rely upon precedent poorly adapted to DUI arrests. The result of these errors was a finding of voluntary consent that contradicts this Court's jurisprudence.

A. An officer's statement requiring submission constitutes an assertion of authority affecting the voluntariness of consent.

Voluntariness is vulnerable to coercion. "Where there is coercion there cannot be consent." *Bumper*, 391 U.S. at 550. Coercion is an effect upon an individual's will produced by external sources. *Bostick*, 501 U.S. at 435 (considering the "accurate measure of the coercive effect" of a law enforcement encounter on a bus). This effect results in consent that comes, not from an "essentially free and unconstrained choice," but because

the individual's "will had been overborne and their capacity for self-determination critically impaired." *Watson*, 423 U.S. at 424 (quoting *Schneckloth*, 412 U.S. at 225).

A variety of pressures may produce a coercive effect vitiating consent. Force, threat and guile are coercive to consent. *Hoffa v. United States*, 385 U.S. 293, 301 (1966). Threat of imprisonment likewise produces a coercive effect, as it is intended to coerce an individual to do the thing required. *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418, 442, 31 S.Ct. 492 (1911); *see also Bailey v. Alabama*, 219 U.S. 244-45, 31 S.Ct. 145 (1911); *United States v. Ocheltree*, 622 F.2d 992, 994 (9th Cir. 1980) (consent involuntary when given subject to agent's assertion that if refused agent would seek a warrant while individual was retained in custody). In the context of implied consent, this Court has noted that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Birchfield*, 136 S.Ct. at 2186; *see also State v. Hawkins*, 898 N.W.2d 446 (N.D. 2017) (finding arrest after initial refusal to be coercive). "Criminally punishing a driver's withdrawal of [implied] consent . . . infringes on fundamental rights arising under the Fourth Amendment." *State v. Ryce*, 303 Kan. 899, 902 (2016). "The same principle applies when deceit or trickery is used to imply an individual has no ability to refuse consent." *United States v. Harrison*, 639 F.3d 1273, 1280 (10th Cir. 2011).

The pressure at issue in Petitioner's case is a claim or assertion of authority by law enforcement to conduct

the search of Petitioner's blood; a claim which effectively conveyed he had no right to refuse.

1. The falsity of an assertion of authority is immaterial to its coercive effect.

Consent yielded as mere acquiescence to an assertion of authority has been held insufficient to establish voluntariness. *See*, *e.g.*, *Amos v. United States*, 255 U.S. 313 (1921); *Johnson v. United States*, 333 U.S. 10 (1948); *Bumper*, 391 U.S. 543; *Lo-Ji Sales, Inc. v. State of New York*, 442 U.S. 319 (1979); *Kaupp v. Texas*, 538 U.S. 626 (2003). Assertion of authority, in effect, announces to the individual they have no right to refuse or to leave. Such situations are instinct with coercion. *Bumper*, 391 U.S. at 550.

Involuntary consent resulting from an assertion of authority has been addressed by this Court. For example, in *Amos v. United States*, government agents stated they were officers seeking to search private property for violations of law. *Amos*, 255 U.S. at 314. The agents neither asked nor requested permission to search. The *Amos* Court found the owner's agreement to allow the search to be involuntary consent, due to assertion of governmental authority. *Id*. at 317.

Similarly, in *Johnson v. United States*, officers dressed in uniform approached an individual's hotel room door, knocked, and said nothing more than "I want to talk to you a little bit." *Johnson*, 333 U.S. at 12. The *Johnson* Court found the inhabitant's grant of entry the result of assertion of authority. *Id*. at 17.

In *Lo-Ji Sales, Inc. v. State of New York*, the searching officers had a warrant at the time they asserted authority; the warrant was later shown invalid. Where officers truthfully assert possession of a search warrant, and that warrant is later held to be invalid, acquiescence to the initial assertion is mere acquiescence to asserted authority. *Lo-Ji Sales, Inc.*, 422 U.S. at 329.

The voluntariness inquiries for seizures and searches are essentially identical. *McWeeney*, 454 F.3d at 1036; *see also Drayton*, 536 U.S. at 202. Assertions of authority overcoming an individual's will have resulted in unlawful seizures. In *Kaupp v. Texas*, 538 U.S. 626, 628, officers sought to interview a suspect. The officers arrived at the suspect's home and obtained consent to enter from the suspect's parent. *Id*. They then surrounded a suspect in his bedroom, in the middle of the night, and told the suspect "we need to go and talk." *Id*. The suspect's statement "okay" and agreement to go with the officers was held to be mere submission to a claim of authority. *Id*. at 631-32.

The leading case on assertion of authority remains *Bumper v. North Carolina*. 4 W. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 8.2(a) (5th ed. 2019). There, the co-habitant was told by officers arriving at her home that they possessed a search warrant. *Bumper*, 391 U.S. at 546-47. Her subsequent consent was determined to be no more than acquiescence to authority as the officers had effectively announced she had no right to resist the search. The *Bumper* Court reasoned mere acquiescence to a claim

of lawful authority fails to establish voluntary consent. *Id*. at 550.

"The *Bumper* Court's ruling turned on the [cohabitant's] acquiescence to the officer's assertion of lawful authority to search regardless of the truthfulness of the officer's claims to possess a warrant." *Valenzuela*, 239 Ariz. at 306-07. Whether the officers lied about possessing authority, had an invalid warrant or valid warrant was never determined.

In a footnote, the Court explained that during argument the Justices were made aware the officers did have a warrant. *Bumper*, 391 U.S. at n.15. This warrant was not returned, and "there is no way of knowing the conditions under which it was issued, or determining whether it was based on probable cause." *Id*. In his concurrence, Justice Harlan noted, "[t]here was a search warrant in this case, and it remains possible that this warrant was issued under circumstances meeting all the requirements of the Federal Constitution." *Id*. at 553. Justice White's dissent argued for vacating the decision, rather than reversal, "since the existence and validity of the warrant have not been determined in the state courts." *Id*. at 1799.

"Although *Bumper* appears to be a case in which the police actually had a search warrant but the prosecution thereafter declined to rely upon the warrant as a basis for the search, the Court made it unmistakably clear that the same result would be reached if the warrant was thereafter relied upon and held invalid or insufficient, or if the police falsely claimed to have a

warrant[.]" *LaFave*, *supra*. What mattered in *Bumper* was the assertion's effect on the listener's will.

In an implied consent context, the *Valenzuela* and *Medicine* Courts found involuntary consent specifically resulting from an assertion of authority; both courts cited the *Bumper* holding. The *Medicine* Court noted, "Whether fabricated or an honest recitation of purported statutory authority, '[w]hen a law enforcement officer claims authority to search an individual, he announces in effect that the individual 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." *Medicine*, 865 N.W.2d at 498 (quoting *Bumper*, 391 U.S. at 550). "The *Bumper* line of cases survives to invalidate any consent given only in acquiescence to an assertion of lawful authority to search." *Valenzuela*, 239 Ariz. at 304.

Each of the discussed decisions indicates consent following an assertion of authority is not truly voluntary, regardless of any underlying deception or falsity of the claimed authority.

2. The Court of Appeal's holding is based on a faulty statement of law.

The *Balov* Court rejected Petitioner's argument that, under *Bumper*, the officer's statement requiring submission amounted to a coercive assertion of authority. App. at 8, 10. The Court of Appeal adopted Respondent's argument that submission to a proper claim of authority is voluntary consent. The Court reasoned

that *Bumper* involved a false claim, where, in Petitioner's case, the statement given was an accurate representation of California's implied consent law. App. at 8. Thus, because the officer's statement was not demonstrably false, did not involve deception, and Petitioner did not object, as well as the existence of the implied consent law, the court found Petitioner's consent voluntary. App. at 10, 12. The Court of Appeal's analysis contains four flaws, not the least of which is its faulty statement of the *Bumper* holding.

First, neither the *Bumper* holding, nor other cases on assertion of authority, require the assertion to be demonstrably false or involve deception. The falsity of the assertion of authority is immaterial to the consenting individual. It was also immaterial to *Bumper*; likely because the Court could not be sure the assertion made was false.

It is a faulty statement of law to maintain that an assertion of authority must be demonstrably false or stem from deception for the statement to produce a coercive effect. Limiting the scope of *Bumper* only to false claims of authority would run contrary to the holding of the Court. The Court made it unmistakably clear that its conclusion would be the same regardless of the veracity of the assertion of authority. LaFave, *supra*; *see also Bumper*, 391 U.S. at 549-50. Thus, the Court of Appeal's distinction between Petitioner's consent and the involuntary submission in *Bumper* is premised on a misstatement of law.

Second, a focus on the falsity of the claim dodges the real issue: *was the individual's will to refuse overborne*? Distinguishing between a false claim and a veracious claim of authority does little to address the effect upon the individual's will; the primary concern in a voluntariness analysis. A proper voluntariness inquiry considers "whether a reasonable person would feel free to decline the officers' requests[.]" *Drayton*, 536 U.S. at 202 (quoting *Bostick*, 501 U.S. at 434-36). Whether a reasonable person is faced with false authority or true authority, they will submit to the assertion.

Third, the distinction the Court of Appeal makes from *Bumper* implies the officer here acted with true authority. App. at 8 ("Unlike law enforcement's claim in *Bumper*, [the officer]'s statement to Balov was not false."). This implication is not an accurate summary of California case law on implied consent. California implied consent is not an independent exception to the Fourth Amendment's warrant requirement. *Harris*, 234 Cal. App. 4th at 685-89. These laws do not convey authority to search. Petitioner's voluntary consent would not be necessary otherwise. Because California implied consent does not impute authority to conduct a blood draw, voluntary consent must be obtained. It cannot be said that the officer's statement requiring submission to testing could alone lawfully compel or justify the subsequent blood draw.

Fourth, the *Balov* Court's reliance on the existence of the implied consent law is misplaced, given the facts of Petitioner's arrest. The officer did not assert he was

acting under implied consent, nor mention it in any way. All the officer said was "per California law." App. at 8. The officer also did not act in compliance with the implied consent statute. App. at 10. None of the statements or actions made by the officer reflect Petitioner was given an implied-consent choice.

Properly applying precedent on consent-by-assertion, including *Bumper*, the officer's statement to Petitioner requiring submission, in effect, announced Petitioner had no right to refuse. Petitioner's submission was not voluntary. No objectively reasonable innocent person would conclude refusing the officer's command was an option. Petitioner's lack of objection does not remove the taint of the officer's coercion. "[F]or constitutional purposes nonresistance may not be equated with consent." LaFave, *supra* (quoting *United States v. Most*, 876 F.2d 191, 199 (D.C. Cir. 1989)).

The Court of Appeal's determination that the officer's statement was not an assertion of authority requiring Petitioner's submission is contrary to nearly 100 years of this Court's precedent, and clearly wrong.

B. The statutory DUI admonishment functions as a curative measure necessary to establish voluntary consent following an officer's command to submit.

Both the Court of Appeal and Appellate Division rejected the officer's failure to properly admonish Petitioner of the consequences of refusal as a coercive factor. App. at 9-10; App. at 17-18. That conclusion was

additional error, stemming from citation to inapplicable precedent; specifically, *Schneckloth*, *Watson*, and *Drayton*.

Officers are required to admonish a DUI arrestee of the consequences of refusal, pursuant to CAL. VEH. CODE § 23612(a)(1)(D) and (a)(4). App. at 28, 31. Subdivision (a)(1)(D) states, "The person shall be told that [his] failure to submit to, or failure to complete the required breath, blood or urine tests will result in [listed statutory penalties]."[47] *Id*.

These statutory provisions inform the arrestee refusal is penalized and may be used against them in court. More importantly, information is conveyed to the arrestee, albeit indirectly, that refusal to submit to chemical testing is an option. As discussed previously, the role of DUI admonishments as an informative, rather than coercive, device has been recognized by a number of other state courts. *See infra* at 18-19.

After his command to submit to testing, it is undisputed the officer did not give Petitioner the admonishment. Failure to properly admonish a DUI arrestee is unlawful under SECTION 23612.

Considering the officer's initially coercive statement and lawful duty to admonish, the cited precedent does not address the need for the admonishment: to cure the taint of coercion.

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[47] At the time of Petitioner's arrest the admonishment read "required chemical testing," but was amended, effective January 2019. The amendment is irrelevant to this case.

1. Coerced consent must be purged of the taint of coercion to be voluntary.

Bumper is not a *per se* rule rendering all consent subsequent to coercion necessarily involuntary. In adopting the totality of circumstances test for voluntariness, the *Schneckloth* Court considered the *Bumper* holding. *Schneckloth*, 412 U.S. at 234. The *Schneckloth* Court's inclusion and discussion of *Bumper* rationally implies a voluntariness analysis does not end when coercion presents. Consent must continue to be tested within the entirety of the totality of circumstances, even following a coercive statement by law enforcement.

This principal was applied in an implied consent context by the *Birchfield* Court, where Petitioner Beylund's case was remanded for further determination of the voluntariness of consent after he was coercively told refusal itself was a crime. *Birchfield*, 136 S.Ct. at 2186.

Schneckloth and *Bumper* should be read harmoniously, "requiring a court to examine the circumstances surrounding an assertion of lawful authority to search to determine whether the consent was sufficiently independent of the assertion to remove its taint." *Valenzuela*, 239 Ariz. at 304.

2. Information pertaining to refusal of consent following an officer's command to submit is a necessary curative measure.

This Court has rejected requiring officers to inform individuals of their right to refuse consent, in all cases, to obtain voluntary consent. *Schneckloth*, 412 U.S. at 227 ("the government need not establish knowledge of the right to refuse as the sine qua non of an effective consent"); *see also Drayton*, 536 U.S. at 206-07; *Watson*, 423 U.S. at 424-25. DUI arrests in implied consent jurisdictions requiring an officer to inform the arrestee of refusal present a scenario outside the reasoning of these holdings.

"Although the State is not normally required to prove a defendant knew he had the right to refuse consent, [Supreme Court] cases from which this rule derives are materially distinguishable from [implied consent arrest cases]: each involved officer conduct that did not disclose the subject's right to withhold consent, but also did nothing to actively suggest the subject had no such right." *Medicine*, 865 N.W.2d at 498 (citing *Drayton*, 536 U.S. at 197-99); *Ohio v. Robinette*, 519 U.S. 33, 35-36; *Schneckloth*, 412 U.S. at 220.

In *Schneckloth*, *Drayton*, and *Watson*, the officers all initiated contact with a commonplace request. *See*, *e.g.*, *Schneckloth*, 412 U.S. at 220 (Officer asks if he could search vehicle); *Drayton*, 536 U.S. at 206 (Officer asks "Mind if I check you?"); *Watson*, 423 U.S. at 822-23 (inspector asks to look inside car). Officers do not

violate the Fourth Amendment merely by approaching an individual and asking questions. *Id*. at 201 (citing *Florida v. Royer*, 460 U.S. 491, 497 (1983)). None of the officers initiated contact with a command to submit.

Additionally, *Schneckloth*, *Drayton*, and *Watson* considered encounters where requiring information about the right to refuse consent would be an *artificial* restriction. *Schneckloth*, 412 U.S. at 229. In California, there is a *natural* statutory requirement for officers to discuss refusal. Additionally, officers are provided by the California Department of Motor Vehicles with forms containing this admonishment to give to DUI arrestees.[48]

Where officers request consent to chemical testing, admonishment might not be necessary for voluntariness; and the *Schneckloth* line of cases remain clearly applicable. But where the officer chooses to initiate contact with a requirement to submit, following arrest, absent an intervening circumstance, the need to inform the individual of the right to refuse becomes paramount. Conveying information about the consequences of refusal alerts the arrestee that the state is asking for cooperation rather than demanding it. *See*, *e.g.*, *Olevik*, 302 Ga. at 249.

Thus, where an officer initiates the encounter with a requirement to submit following arrest, and the arrestee has a right to refuse blood testing, a DUI

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[48] California Department of Motor Vehicles Form DS-367 is provided as a temporary driver's license and contains the mandated DUI admonishment.

admonishment referencing refusal serves as a necessary curative measure. However, silence following that initial command becomes a factor in the coercion of consent.

3. The Court of Appeal and Appellate Division erred by rejecting the officer's failure to comply with California law as a coercive factor influencing consent.

Given the facts of Petitioner's arrest, the Appellate Division and the Court of Appeal's reliance on *Schneckloth*, *Drayton* and *Watson* is misplaced. The officer required submission and had a natural duty to discuss refusal. The two courts applied the holding of *Schneckloth* and/or its progeny without also applying the underlying rationale.

Unlawful failure to admonish must be considered in context, under the totality of circumstances, with the officer's initial statement. When placed in context with the initial statement, the officer's subsequent silence was fatal to voluntary consent.

As the *Drayton* Court noted, "[p]olice officers ask in full accord with the law when they ask citizens for consent . . . the citizen [advises] the police of [their] wishes and for the police to act in reliance on that understanding." *Drayton*, 536 U.S. at 2114. This exchange dispels inferences of coercion. *Id*. To apply *Drayton*'s rationale to dispel inferences of coercion where the

officer both commands consent and acts contrary to the requirements of law defies reasonableness.

While knowledge of the right to refuse may not be the sine qua non of effective consent, the harmony between *Bumper* and *Schneckloth* suggests such knowledge may be a necessary counter to coercion. The Court of Appeal and the Appellate Division erred in their reliance on *Schneckloth*, *Drayton* and *Watson*; and erred in holding the statutory DUI admonishment was not a requirement for voluntary consent under the circumstances.

The ruling of the Court of Appeal and Appellate Division that Petitioner yielded voluntary consent to blood sampling is wrong. The officer's statement requiring submission was a clear assertion of authority that no reasonable person would feel they could refuse. In fact, under California law, officers do not have authority to require submission to blood testing. Under the *Bumper* line of cases, Petitioner's subsequent consent was not voluntary.

The officer's unlawful silence after that statement was a contributor to coercion. The Court of Appeal and Appellate Division determined that silence was not a contributing factor based on precedent inapplicable to the facts.

Certiorari is warranted to address the decisions of the Court of Appeal and Appellate Division, not only for their contribution to the conflict between the lower courts regarding implied consent, but because they run contrary to this Court's doctrine.

III. THE QUESTION PRESENTED IS ONE OF SUBSTANTIAL AND RECURRING IMPORTANCE.

The decisions in Petitioner's case depart from this Court's doctrine and widen state court tension over implied consent, warranting certiorari. The need for review is also imperative to curtail future harm to the citizenry's Fourth Amendment rights. Petitioner's case presents an ideal vehicle to address these issues.

Petitioner's Fourth Amendment violation is, rationally, a recurring and likely substantial problem; at least in numbers warranting certiorari. California reports high annual DUI arrest totals. Other California courts have reviewed similar DUI arrest scenarios. *See infra* at 22-23. The *Gutierrez* Court acknowledged the everyday occurrence of arrests similar to Petitioner's. *See infra* at 23.

There are no statistics showing exactly how many California DUI arrests fail to conform to the requirements of the state's implied consent law. However, because of the *Balov* and *Gutierrez* holdings, there is continuing authority for police to use coercive tactics to obtain motorists' consent to blood draws.

The degree of intrusion contributes to the problem. Coerced consent blood draws unconstitutionally subject motorists to a uniquely intrusive search. "Blood draws are a significant bodily intrusion." *Birchfield*, 136 S.Ct. at 2178. Moreover, they "place in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract

information beyond a simple BAC reading." *Id*. Special judicial scrutiny of consent to DUI blood draws is required given the high degree of intrusion.

The facts of Petitioner's arrest make interpretation of his consent nationally significant. Petitioner's arrest was remarkably unremarkable. Petitioner had no prior experience with DUIs. The arrest was an everyday factual scenario. Further, California implied consent law is comparable to the nation's implied consent laws, generally. Review of Petitioner's case would have widespread applicability making it an ideal vehicle to address the question presented.

Review would further the rule of law. Petitioner's motion to suppress was based upon unlawful officer conduct. If the officer had followed California law, this Court's precedent and the general views of the majority would better support a finding Petitioner gave voluntary consent.

There are no facts suggesting necessity drove the officer to violate California implied consent law. "[T]he Constitution requires the sacrifice of neither security nor liberty." *Schneckloth*, 412 U.S. at 225. The officer's failure to comply with California law offered no benefit to state security but certainly encroached upon Petitioner's freedom.

The question presented does not reach what officers *must* do to obtain voluntary consent. Rather, the question presented asks if there is a minimum bar set for officer conduct when attempting to obtain voluntary consent; specifically, for blood testing from DUI

arrestees. In *Mitchell*, this Court considered what police officers may do in a narrow category of cases. *Mitchell*, 139 S.Ct. at 2531. Here, the question presented considers what officers *may not* do in a broader category of cases. Identifying a minimum bar applicable to DUI arrests would preserve federal policy and voluntary consent jurisprudence.

For the aforementioned reasons, Petitioner's case presents an ideal vehicle for deciding the question presented. Respectfully, certiorari should be granted.

CONCLUSION

For the aforementioned reasons, Petitioner respectfully requests this Court grant certiorari.

November 26, 2019

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