Nos. 14-1470, 14-1468, 14-1507

In The
Supreme Court of the United States

WILLIAM ROBERT BERNARD, JR.,
Petitioner,
v.
STATE OF MINNESOTA,
Respondent.

DANNY BIRCHFIELD,
Petitioner,
v.
STATE OF NORTH DAKOTA,
Respondent.

STEVE MICHAEL BEYLUND,
Petitioner,
v.
GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,
Respondent.

On Writs Of Certiorari To The Supreme Court Of The State Of Minnesota And The Supreme Court Of The State Of North Dakota

BRIEF OF THE DUI DEFENSE LAWYERS ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

Minnesota and North Dakota law makes it an independent crime for an individual to refuse to submit to a warrantless search of their blood, breath, or urine during a routine driving while intoxicated investigation. In this context, a divided Minnesota Supreme Court concluded that criminalizing the act of refusing to submit to a warrantless search is constitutional, under the rationale that an officer-compelled breath test is permissible under the search incident to arrest exception to the Fourth Amendment. The question presented is:

Whether it is constitutional to criminalize the act of refusing to submit to a custodial, warrantless search undertaken to determine an individual's alcohol concentration, and whether the search incident to arrest doctrine removes such searches from the protections of the Fourth Amendment.

This *amicus* brief also addresses a related question, namely, the coercive consequences for the "consent" exception to the Fourth Amendment warrant clause that stem from the passage and enforcement of such laws.

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INTERESTS OF THE *AMICUS CURIAE*[1]

Amicus Curiae DUI Defense Lawyers Association (DUIDLA) has a strong interest in the promulgation and enforcement of fair and constitutional DUI laws that create a safe society while protecting the civil liberties of our populace.

Its mission is to protect and ensure by rule of law those individual rights guaranteed by the state and Federal Constitutions in DUI-related cases; to resist the constant efforts which are being made to curtail these rights; to encourage cooperation between lawyers engaged in the furtherance of these objectives through educational programs and other assistance; to serve as the first and last line of defense of the Constitution; to assist attorneys and public defenders in obtaining advanced training in DUI-related areas through our education scholarship grants.

The DUIDLA is concerned with the practical problems presented to law enforcement, judges, defense attorneys, and the general public in states where the legislatures have criminalized the very act of saying no to a warrantless, and thus presumptively

[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund its preparation or submission. No person other than *amici* and their counsel made a monetary contribution to the preparation or submission of this brief.

illegal, search. This is especially true when such searches implicate the integrity of the human body, with all of the concerns with privacy and dignity associated with such searches. Such laws critically undermine the very concept of "free and voluntary consent" and lead us down a very slippery slope where legislatures (pressured by voters) and agents of the executive (concerned primarily with investigating and prosecuting crimes) become the branches of government that make determinations regarding whether or not a suspect has truly "consented" to a Fourth Amendment search, usurping the role of the judiciary in defining the scope of what does and does not qualify as consent for the purposes of criminal investigations undertaken outside of the formal warrant process.

SUMMARY OF THE ARGUMENT

The consolidated appeals in this matter involve application of North Dakota's and Minnesota's implied consent laws, which are designed to coerce drivers into forgoing their rights under the Fourth Amendment warrant clause whenever an individual is suspected of operating a motor vehicle while impaired by alcohol or drugs. The results of these warrantless searches – blood tests, urine tests, and breath tests – are admissible in any criminal trial

and are also utilized in any civil license revocation process put in place by the legislature.[2]

If a person refuses to comply with the request for a biological sample pursuant to Minnesota's and North Dakota's implied consent laws, then these States impose a civil, administrative sanction against the driver's license or driving privileges, while permitting the act of refusal to be used against the driver in any criminal trial . . . but Minnesota and North Dakota also attach a purely criminal penalty to the refusal, treating it as an entirely new offense almost entirely divorced from the underlying offense of arrest.[3]

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[2] Minn. Stat. § 169A.51 (implied consent law); N.D. Cent. Code, § 39-20-01 (implied consent law); *see also*, UVC § 6-205.1 (New 1962, Rev. ed. 1968); UVC § 6-207(a) (Rev. and Renum. 1992); UVC § 11-904(a) (Rev. & Renum. 2000) (implied consent provisions); UVC § 11-902(a) (Rev. eds. 1962, 1968, 1992); UVC § 11-903(a) (Rev. & Renum. 2000) (admissibility of chemical test provisions).

[3] Minn. Stat. § 169A.20, subd. 2 ("It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license."); N.D. Cent. Code, § 39-20-01(3) ("The law enforcement officer shall inform the individual charged that North Dakota law requires the individual to take the test to determine whether the individual is under the influence of alcohol or drugs; refusal to take the test directed by the law enforcement officer is a crime punishable in the same manner as driving under the influence. . . .").

This *amicus* brief is not about whether or not a breath test used to determine a person's alcohol concentration qualifies as a "search incident to arrest." It will not address the slippery slope being graded by such a law, opening the door to a variety of "search refusal" laws and effectively manufacturing crime whenever an individual attempts to exercise the right to demand a warrant from a neutral magistrate before submitting to an invasion of his or her privacy.[4]

This brief will address the other side of the coin being presented to this Court, the rationale behind legislatures passing test refusal laws such as those that were enacted in North Dakota, Minnesota, and in other states. It is doubtful that the purpose behind these types of test refusal laws is to truly manufacture criminals (although this is one of the results of such a law). No, the purpose of such a law is more blatant, and if possible, more base; such laws are designed to circumvent the Fourth Amendment by simply coercing the individual faced with such a law into giving up their rights of their own accord.

A minority of our states have crossed the Rubicon and outright criminalized the act of refusing

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[4] "And this argument flouts the basic principle that all people must stand on an equality before the bar of justice in every American court. Today, as in ages past, we are not without tragic proof that the exalted power of some governments to punish manufactured crime dictatorially is the handmaid of tyranny." *Chambers v. State of Florida*, 309 U.S. 227, 241 (1940).

to submit to a warrantless search for evidence of impairment. The drafters of the most recent version of the UNIFORM VEHICLE CODE (UVC) noted: "[m]ost states do not consider 'refusal' a criminal offense. Therefore, it should be clarified that 'refusal to submit to a test' is not criminal in nature."[5] The criminal/civil distinction is important, where the Court is applying due process to balance the protected life, liberty or property interests under civil standards contrasted with the judicial scrutiny applied to the infringement of fundamental rights in a criminal case.

Because implied consent proceedings are considered administrative sanctions, the implied consent law is viewed as "'[p]urely administrative and separate from any traffic or criminal drinking/driving infraction even though the implied consent law and the law defining drinking/driving offenses may be contained in the same statute.'"[6]

Although many provisions of the UVC were adopted "practically verbatim" by the States, Congress resisted mandating a FEDERAL TRAFFIC CODE, "[because] voluntary action by the States is slower but much better because more consistent with the basic

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[5] UVC § 6-514(f), pp. 91-92, n. 58 (Rev. 2000).

[6] *Department of Revenue & Taxation v. Hull*, 751 P.2d 351, 356 (Wyo.1988) (*quoting* 2 Nichols, Drinking/Driving Litigation: Criminal and Civil § 20.01, Ch. 20 at 3).

principles of our republic."[7] Minnesota and North Dakota's refusal laws are examples of state experimentation that goes beyond the UVC's recommendations.[8]

ARGUMENT

I. Criminalizing The Act Of Passively Resisting To Warrantless Searches Ignores The Principles Underlying The Fourth Amendment As Such Laws Are Incredibly And Inescapably Coercive In Their Application.

Our founding fathers were guided by several fundamental theories of justice when they established our country and crafted our constitution. An adversarial system of justice was implemented, accusatorial in nature, resting on the premise that the government bears the burden of both obtaining evidence and

[7] *National Committee on Uniform Traffic Laws and Ordinances*, UNIFORM VEHICLE CODE, "Foreword" pp. III-IV (Revised 1956); *but see*, *Eastwood v. Wyoming Highway Dept.*, 76 Wyo. 247, 262, 301 P.2d 818, 824 (Wyo.1956) (finding that Wyoming "[l]egislature had adopted sections of uniform vehicle codes piecemeal and in desultory fashion, instead of considering comprehensive legislation based upon the wide array of material available on the subject. . . .").

[8] *Cf.*, 2011 Wyo. Sess. Laws, Ch. 39, § 2. (amending statutory refusal provision of W.S. § 31-6-102(d) to allow for telephonic warrant); 2011 Wyo. Sess. Laws, Ch. 178, §§ 1-3 (repealing suspension associated with refusal under former W.S. § 31-6-107 and repealing the admission of refusal into evidence pursuant to former W.S. § 31-6-105(f)).

establishing guilt beyond a reasonable doubt with what evidence they obtained. Under an accusatorial system the government must establish guilt by evidence independently and freely secured, and cannot rely upon coercion to prove its charge against an accused. *Chambers v. State of Florida*, 309 U.S. 227, 60 S.Ct. 472, 84 L.Ed. 716 (1940).

Under such a system, the overwhelming power of the executive *vis a vis* any individual accused is apparent and obvious, and so in response to the threat of tyranny our justice system includes a Bill of Rights, a series of checks against executive and legislative actions; since *Marbury v. Madison*, 1 Cranch 137 (1803) it has been the role and duty of the judiciary to enforce the protections of the constitution when the executive and legislative branches fail in their own oaths.

One of these checks, one of the cornerstones of a free society, rests in the Fourth Amendment. The driving force behind the Fourth Amendment stemmed largely from the indiscriminate use of general warrants and writs of assistance in colonial times by the British government. This Court need not be given an exhaustive history of the Fourth Amendment; Fourth Amendment jurisprudence since the founding of our country has provided that background for all who are interested. *See*, *e.g.*, *Boyd v. U.S.*, 116 U.S. 616, 625 (1886) (discussing practice of issuing writs of assistance, and noting that such a practice constituted "the worst instrument of arbitrary power, the most destructive of English liberty and the fundamental

principles of law, that ever was found in an English law book" since they placed "the liberty of every man in the hands of every petty officer").

Concerns with all restrictions to the scope of protection provided by the Fourth Amendment stem from very rational concerns about decent down a slippery, totalitarian slope. Justice Bradley expounded upon concerns for how limitations and exceptions to fundamental rights can, over time, lead to more significant infringements than may have first been contemplated:

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." *Boyd v. U.S.*, 116 U.S. at 635.

Throughout that history of Fourth Amendment jurisprudence – over two hundred and fifty years of interpretation and explanation – the most notable and noble attempts to remind us all of what divides a

free society from a police state have come not from the majority opinions issued by this Court . . . but from the **dissents**. *Maryland v. King*, 133 S.Ct. 1958, 1981 (2013) (Scalia, J., dissenting) (recounting a brief history of the drafting of the Fourth Amendment as chiefly being driven by opposition to general warrants); *Illinois v. Krull*, 480 U.S. 340, 362-364 (1987) (O'Connor, J., dissenting) ("Statutes authorizing unreasonable searches were the core concern of the Framers of the Fourth Amendment. . . . Indeed, as noted, the history of the Amendment suggests that legislative abuse was precisely the evil the Fourth Amendment was intended to eliminate").

The dissents issued by this Court throughout history emphasize why this case, under these facts, cannot be yet another vehicle for an apologetic dissent explaining to the populace why the government is now allowed to use criminal statutes to coerce "consensual" searches from individuals with no regard for the Fourth Amendment. For while consent is a valid exception to the warrant requirement, such consent must be freely and voluntarily given. *Bumper v. North Carolina*, 391 U.S. 543, 548-549 (1968). Should this Court strike down the test refusal laws in this case, it would be of incredible benefit to the various states to clarify the holding issued in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013) and emphasize that while drivers can (and do) freely and voluntarily consent to warrantless searches in DWI investigations, imposing excessive penalties on drivers for withholding such consent will always render

such "consent" nothing more than acquiescence to claims of lawful authority . . . and therefore unconstitutionally coerced.

A. Laws Criminalizing The Act Of Passively Refusing To Submit To Warrantless Searches Are An Unconstitutional Attempt To Streamline Law Enforcement By Strong Arm Tactics.

The constitutional requirement that invasions of individual privacies can occur only under the guise of a warrant issued by a neutral magistrate (or within the context of a carefully crafted exception to this requirement) provides a carefully crafted balance between the needs of law enforcement and the rights of those they are sworn to serve and protect. The Fourth Amendment makes enforcement of our laws more difficult because *it was specifically designed as a check against unbridled freedom of action by the executive*. Without doubt, an unrestrained effort by law enforcement agents to "crack down" on drunken drivers, regardless of the constitutionality of the methods used, would reduce the number of annual incidents of these types. The Fourth Amendment was designed to prevent such excesses, as Justice Marshall explained in one dissent:

> "[C]onstitutional rights have their consequences, and one is that efforts to maximize the public welfare, no matter how well intentioned, must always be pursued within constitutional boundaries. Were the police freed

> from the constraints of the Fourth Amendment for just one day to seek out evidence of criminal wrongdoing, the resulting convictions and incarcerations would probably prevent thousands of fatalities. Our refusal to tolerate this specter reflects our shared belief that even beneficent governmental power – whether exercised to save money, save lives, or make the trains run on time – must always yield to 'a resolute loyalty to constitutional safeguards.' The Constitution demands no less loyalty here." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 650 (1989) (Marshall, J., dissenting).

Decades earlier, when dealing with the question of involuntary blood draws for unconscious suspects, Justice Douglas noted in his own dissent that:

> "If law enforcement were the chief value in our constitutional scheme, then due process would shrivel and become of little value in protecting the rights of the citizen. But those who fashioned the Constitution put certain rights out of the reach of the police and preferred other rights over law enforcement." *Breithaupt v. Abram*, 352 U.S. 432, 442-443 (1957) (Douglas, J., dissenting).

Good intentions do not make for good exceptions to our constitutional protections; instead they often do little more than provide thin rationales for unnecessary curtailments of fundamental rights. Thus, Justice Brandeis dissented:

> "Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J., dissenting).

This statement about the "greatest dangers to liberty" describes the underpinning of these test refusal laws; the well-meaning, sometimes zealous attempts to eliminate as many drunk drivers from our roads as is possible. The goal is a society where nobody dies needlessly to a drunk driver . . . but the reality is that a test refusal law accomplishes nothing more than ingraining into the population that demanding a warrant can be treated as a criminal act, that rights once considered sacred (and outright taken for granted) cannot be exercised without the risk of further exposure to additional penalties.

Justice Jackson, freshly returned from post-war Germany as Chief American Prosecutor at Nuremberg, may have penned the most compelling dissent regarding the importance of the Fourth Amendment as a bulwark against tyranny. He witnessed first-hand what Justice Marshall described as the urge to "make the trains run on time" and the effects of such a desire on the rule of law:

> "Among deprivations of rights, none is so effective in cowing a population, crushing the spirit of the individual and putting terror in every heart. Uncontrolled search and seizure is one of the first and most effective weapons in the arsenal of every arbitrary government. And one need only briefly to have dwelt and worked among a people possessed of many admirable qualities but deprived of these rights to know that the human personality deteriorates and dignity and self-reliance disappear where homes, persons and possessions are subject at any hour to unheralded search and seizure by the police." *Brinegar v. U.S.*, 338 U.S. 160, 180-181 (1949) (Jackson, J., dissenting).

In Minnesota, law enforcement need only articulate probable cause to believe a driver is impaired by alcohol (a very, very minimal burden) in order to invoke the test refusal law. Minn. Stat. § 169A.51, subd. 1(b) (test required upon officer's belief that he or she has developed probable cause). This is not a judicial determination of probable cause; this is the decision of the officer on the scene, the agent of the executive responsible for zealously enforcing the laws. It is one thing for a driver to say "no" to a blood, breath, or urine test, and then be faced with a warrant issued by a neutral magistrate. It is quite another for that driver to say "no" (or "do you have a warrant?") to an intrusion into her very body and be told that she just committed a new criminal act.

Over time, laws like these simply impress upon the population that the very concept of "consent" is not what they were raised to believe, and in fact flies in the face of logic and reason. Minnesota drivers are told that "Minnesota law requires you to take a test" and that "refusal to take a test is a crime." Minn. Stat. § 169A.51, subd. 2(1)(2). When they follow what the law "requires" of them, in order to avoid the crime of refusal, they are later told in court that they "freely and voluntarily consented" to law enforcement's demand to execute a warrantless search.

That is the most egregious consequence of such laws; free individuals being told that they consented to a search, even though they only agreed to submit to such searches after being told that failure to consent was a criminal act. That is how Minnesota ended up with the case of *State v. Brooks*, 838 N.W.2d 563, 571 (Minn.2013), which concluded that Minnesota's test refusal law was not coercing drivers into consenting . . . it was actually *encouraging* a free and voluntary choice by advising drivers that they had the "choice" to either submit to testing or commit the crime of refusal!

The end result of such a scheme is that the State obtains the evidence it wants without worrying about a driver's privacy concerns, and the driver experiences the feeling described by Justice Jackson: "human personality deteriorates and dignity and self-reliance disappear." *Brinegar*, 338 U.S. at 180-181. The driver "deserves" to be pierced by a needle, forced to urinate in the presence of an officer, yelled at while trying to

exhale as much breath as possible into a tube, and not because a judge determined that there was probable cause for such investigatory antics. The driver "deserves" such treatment because 1) the officer who arrested her decided there was a chance she was over the legal limit, and 2) the driver *herself* gave "free and voluntary consent" to the search, consent that was extracted upon the threat of committing another stationhouse crime should that consent be withheld.

The cases before this Court highlight the concerns raised by numerous dissenting justices, cited *infra*, over the past century. These cases present this Court with troubling circumstances; an institutionalized practice of executing a type of custodial, warrantless search that heavily implicate the privacy concerns inherent in the human body; a legislature that has passed a law criminalizing the act of even attempting to refuse to submit to such a search; and a state court system that spent decades bound and determined to craft some sort of *per se* exception to the Fourth Amendment that could legitimize the practice of criminalizing an individual's demand for a warrant.

If coercing individuals into forgoing a core constitutional right becomes the norm, that right no longer exists. When the government is allowed to use its authority to convince the population that *suspected* criminals will become *actual* criminals the minute they try to impede an investigation that implicates fundamental privacy rights, the role of a neutral

magistrate in the warrant process is abdicated, replaced by the sole discretion of law enforcement.

Bernard and its companion cases are not the type of cases that can tolerate yet another artfully worded and historically accurate dissent, explaining to Americans why it is unfortunate that This Court has authorized our legislatures to pass criminal laws that are wholly designed to coerce the population into waiving rights that constitute the core of our criminal justice system. In attempting to coerce Minnesotans into waiving the fundamental right to a warrant by passing a test refusal law, Minnesota (and other states that have followed suit) crossed the Rubicon in an extreme and unconstitutional manner. Under such a scheme, our accusatorial system transitions into an inquisitory one, manufacturing criminal acts for those individuals still interested in exercising the longstanding right to demand a warrant, and rendering the need for neutral magistrates to issue warrants in investigations moot and superfluous.

B. Minnesota's Application Of Its Test Refusal Law Perfectly Exemplifies The Fact That Test Refusal Laws Will Lead To A *Per Se* Consent Exception To The Fourth Amendment.

The principal peril that comes from the act of criminalizing the refusal to submit to a warrantless search is the impact such laws have on the very concept of "free and voluntary consent." In *Bumper v. North Carolina*, 391 U.S. 543, 548-549 (1968) this

Court recognized that when an officer claims the lawful authority to execute a search, and a suspect does no more than acquiesce to this claim of lawful authority, any agreement to that search was irrefutably coerced. "The situation is instinct with coercion – albeit colorably lawful coercion. Where there is coercion, there cannot be consent." *Bumper*, 391 U.S. at 550. In that case, this Court created a *categorical* exception to the general rule that consent to warrantless searches is to be analyzed under a "totality of the circumstances." *Schneckloth v. Bustamonte*, 412 U.S. 218, 226 (1973). Instead of relying on the totality of the circumstances in *Bumper*, this Court rightly concluded that any claim of lawful authority by law enforcement automatically renders any following "consent" to have been coerced.

Prior to 2013, when this Court issued its decision in *Missouri v. McNeely*, Minnesota's Fourth Amendment jurisprudence had completely removed any thought of warrants from the minds of law enforcement officers executing searches during driving while impaired investigations. Based on a misreading of the *Schmerber v. California* case (384 U.S. 757 (1966)), Minnesota operated on the assumption that there was always a *per se* exigency that absolved law enforcement from obtaining a warrant in any DWI case. *State v. Netland*, 762 N.W.2d 202, 214 (Minn.2009) (holding the rapid dissipation of alcohol through the body created a *per se* exigency, an exception to the warrant requirement in breath test cases); *State v. Shriner*, 751 N.W.2d 538, 549 (Minn.2008) (same, as

applied to blood test cases). In 2013, this Court issued its decision in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), abrogating Minnesota's *Netland-Shriner* line of cases and rejecting any claims of a *per se* exception to the warrant requirement in DWI investigations.

Six months after *McNeely*, in the case of *State v. Brooks*, 838 N.W.2d 563, 568-569 (Minn.2013), the Minnesota Supreme Court addressed the concept of consent when law enforcement demands a urine sample from a DWI suspect. The *Brooks* Court made two things clear: that it was not impermissibly coercive to inform a suspect that "Minnesota law requires you [to submit to a warrantless search]" *and* that it was constitutionally acceptable to inform that same suspect that refusing to consent to a warrantless search would be treated as a criminal act. *Id*. The ultimate holding in *Brooks* went one step farther, and held that a suspect's acquiescence to the demand to execute a warrantless search, even after being presented with this ultimatum coupled with a threat, was nevertheless the equivalent of "free and voluntary consent."

The decision of the *Brooks* Court to treat an ultimatum and a threat as a meaningful "choice" was not based on any established United States Supreme Court precedent. The decision also paid lip service to the well-established principle that judicial review of a warrantless search purportedly executed with the suspect's consent must be analyzed under the "totality of the circumstances." *Id*. at 568.

However, the reality could not be further from the truth, because in Minnesota, the Courts have used the test refusal law as an excuse to adopt what is effectively a *per se* consent exception to the warrant requirement. Since the *Brooks* decision was issued, the Minnesota Court of Appeals has decided well over 70 appeals from district court cases dealing with the issue of consent. Every single one of those cases has concluded that the driver freely and voluntarily consented to a custodial, warrantless search of their blood, breath, and/or urine. In at least 24 cases, the Court of Appeals has upheld the district court's conclusion that a driver's consent was free and voluntary, under an astounding array of factual scenarios. *See*, *e.g.*, *Bathen v. Comm'r of Pub. Safety*, Not Reported in N.W.2d., 2014 WL 2178880 (Minn. Ct. App. May 27, 2014) (driver "freely and voluntarily consented" to an in-custody, warrantless search even though the driver had a police dog sicced on him, was repeatedly punched in the head by one police officer and repeatedly punched in the leg by another police officer, and had previously refused to answer Mirandized questions). App. 2-3, 5-6.

In the *Bathen* case, the Court of Appeals drew the absurd distinction that, "[t]hese police actions were an attempt to coerce Bathen to submit to their authority to take him into custody, not to submit to a breath test. Bathen does not explain how they had any effect on his ability to refuse a breath test." App. 7. Just so – the Minnesota court concluded that there was not "any effect" on Bathen's decision to submit to

a warrantless search after being beaten by police officers and bitten by a police dog. In fact, the Court of Appeals concluded that Bathen's "uncooperative conduct" demonstrated "his fortitude to resist lawful police directives and requests despite knowing that police prefer that he comply and despite knowing of the potential consequences of noncompliance." App. 8.

Minnesota's use of its test refusal law to craft a *per se* consent exception to the Fourth amendment is continually solidified not just by upholding district courts concluding that every suspected drunk driver in the state consents to every warrantless search for alcohol concentration . . . but carries over to the more than 43 cases where the Court of Appeals has unanimously concluded that the district court erred every time it found that the State had failed to meet its burden to prove that a driver's consent was freely and voluntarily given. Again, without fail, the Court of Appeals has reversed every district court judge who found that, under the totality of the circumstances, a driver was coerced into consenting. *See*, *e.g.*, *Bjornoos v. Comm'r of Pub. Safety*, Not Reported in N.W.2d., 2014 WL 2565685 (Minn. Ct. App. June 9, 2014) (district court found that a driver was coerced into submitting to a custodial, warrantless search of his blood, where the driver was not only told that he was required by law to submit to testing, but actually managed to initially refuse to submit to testing before later agreeing to a blood test; Court of Appeals reversed the district court and concluded that the

driver's custodial change of heart was not coerced) App. 11; *State v. Selle*, Not Reported in N.W.2d., 2014 WL 2178838 (Minn. Ct. App. May 27, 2014) (district court concluded that appellant did not freely and voluntarily consent, in part because he openly told the officer he did not understand the beginning of the Minnesota Implied Consent Advisory but that he would be "fighting it in a court of law . . . "; Court of Appeals concluded that the appellant consented "as a matter of law.") App. 22.

That is a phrase that runs through many of these decisions, the conclusion that drivers are "consenting" to the execution of warrantless searches "as a matter of law." Each of these drivers is told that they are required by law to submit to a search, and that refusal is a crime . . . and in Minnesota, our highest court has concluded that such advice is not only uncoercive, but is actually the opposite, supporting the conclusion that a driver freely and voluntarily consented to a warrantless search – because the "police made clear to him that he had a choice whether to submit to testing." *State v. Brooks*, 838 N.W.2d 563, 571 (Minn.2013).

To date, 100% of all Minnesota drivers who have reached the appellate level of review in Minnesota have been found to have freely and voluntarily consented to presumptively illegal, warrantless, custodial searches. Every district court judge who found free and voluntary consent has been upheld on appeal; every district court judge who found that a driver's

consent was coerced has been reversed on appeal. Every single one.

Under Minnesota's test refusal law, the courts have adopted a *per se* consent exception to the Fourth Amendment to replace the *per se* exigency exception rejected by this Court in *Missouri v. McNeely*. The claim is that drivers are not "coerced" but are merely offered a "choice" was addressed by Justice Holmes, in *Union Pac. R. Co. v. Pub. Serv. Comm'n of Missouri*, when this Court held careful examination of the topic of consent and "choices," leads to the obvious conclusion that "as conduct under duress involves a choice, it always would be possible for a State to impose an unconstitutional burden by threat of penalties worse than it in case of failure to accept it, and then to declare the acceptance voluntary." *Union Pac. R. Co. v. Pub. Serv. Comm'n of Missouri*, 248 U.S. 67, 70 (1918).

Again, in *New Jersey v. Garrity*, 385 U.S. 493, 499 (1967), this Court analyzed the concept of consent and noted, "Where the choice is 'between the rock and the whirlpool,' duress is inherent in deciding to 'waive' one or the other * * * * It always is for the interest of a party under duress to choose the lesser of two evils. But the fact that a choice was made according to interest does not exclude duress. It is the characteristic of duress properly so called." (*citing Union Pac. R. Co. v. Pub. Serv. Comm'n of Missouri*, 248 U.S. at 70).

While we must assume that the Minnesota Supreme Court had no interest in setting up a police

state for the citizens of Minnesota, the *Brooks* decision currently uses Minnesota's test refusal law to establish a doctrine of *per se* consent whenever a driver says "yes" to a warrantless search of their blood, breath, or urine – after telling these drivers they are required by law to "consent" and that refusal to consent is a criminal act. This is contrary to every single rationale for adopting the Fourth Amendment espoused at the time of the founding of our nation.

C. Test Refusal Laws Co-opt Our Entire Adversarial System Of Criminal Justice, Coercing Defense Attorneys Into Acting As Agents Of The Executive.

Should this Court conclude that it is constitutional to pass a law criminalizing the act of refusing to submit to a warrantless search, it is certain that every legislature in the nation will stand up and take notice, and the experience in Minnesota and North Dakota will be repeated across the country. In 2012, 13% of Minnesotans arrested for DWI refused to submit to a search to uncover alcohol concentration evidence. Minnesota Department of Public Safety, *Impaired Driving Facts 2012*, Office of Traffic Safety (August 2013).[9] Because law enforcement in Minnesota,

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[9] Berning, A., Beirness, D., et al. (November 2007), *Breath Test Refusals* (Report No. DOT HS 810 871), Washington, DC: National Highway Traffic Safety Administration. (NHTSA noted that its "major finding" was the "relatively small change in the refusal rate in the nation since 2001, and since 1987." *Id*. at 3).

as a matter of policy, do not obtain warrants in DWI investigations, this means that well over 80% of all arrestees "consented" to a warrantless search of their blood, breath, or urine – after being explicitly told by the same law enforcement agents that arrested them and transported them out of the public eye into the depths of a nearby jail that they *had* to consent, or they would be committing *a new crime, in the stationhouse, in the presence of law enforcement*.[10]

The vast majority of drivers are not only being coerced into submitting to warrantless searches under such laws, but the role of defense counsel is being critically undermined. In Minnesota, test refusal is not only a crime, but another statute makes it a crime to "aid and abet" any attempt to refuse

[10] Prior to this Court's decision in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), Minnesota's Supreme Court noted, "The obvious and intended effect of the implied-consent law is to coerce the driver suspected of driving under the influence into 'consenting' to chemical testing, thereby allowing scientific evidence of his blood-alcohol content to be used against him in a subsequent prosecution for that offense." *Prideaux v. State, Dept. of Pub. Safety*, 247 N.W.2d 385, 388 (Minn.1976). After the *McNeely* decision, the Minnesota Supreme Court was asked to conclude that advising drivers that "refusal to submit to testing is a criminal act" was unconstitutionally coercive; the Court concluded that such an advisory actually gives "those who drive on Minnesota roads a *right to refuse the chemical test*" and therefore *supports* the conclusion that a driver freely and voluntarily consented to a warrantless search – because the "police made clear to him that he had a choice whether to submit to testing." *State v. Brooks*, 838 N.W.2d 563, 571 (Minn.2013) (emphasis added).

to submit to testing. Minn. Stat. § 169A.78 (anyone who willfully induces, permits, or directs another to violate the test refusal law is "likewise guilty of that offense"). A defense attorney, upon receiving a late night phone call from a client who just caused a traffic accident and is being held in custody, cannot even advise his client to demand a warrant prior to submitting to a blood test. Such advice is a criminal act in Minnesota, as it is inducing another to violate the test refusal law.

Advising a client to invoke his or her Fourth Amendment rights will not only open a defense attorney up to criminal punishment, but may result in disbarment; laywers have an ethical duty to not advise their clients to break the law, or engage in conduct that is prejudicial to the administration of justice. Minn.R.Prof.R. 8.4(e). This provision mimics the Model Rules of Professional Conduct promulgated by the American Bar Association, and applies in one capacity or another across the United States.

Our adversarial and accusatorial system of justice gives the state great power to enforce our laws; that power is deliberately checked by the fact that the awesome power to search a person or a home is restricted in that a neutral magistrate, not the law enforcement agent on the scene, is responsible for determining if, when, and how that power is executed. In this system, defense lawyers act as a final check on all players, ensuring that private citizens are not sent as lambs to the slaughter before the "vast sums of money" spent by our governments "to

establish machinery to try defendants accused of crime." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963).

When the right to say "get a warrant" is compromised by the threat of criminal sanctions, and lawyers can do nothing but advise their clients to "consent" unless they wish to risk their own freedom and legal license, tyranny reigns supreme and our accusatorial system becomes an inquisitorial one, our adversarial system becomes one geared entirely towards ignoring rights once protected by our Constitution.

II. Laws Criminalizing The Act Of Passively Refusing To Submit To Warrantless Searches Serve No Valid Purpose Under Our Accusatorial System Of Justice.

Criminalizing a constitutional right, namely the right to a warrant signed by a neutral magistrate before law enforcement may execute a search for incriminating evidence, cannot be an option available to our legislatures, regardless of the nature of the crime being targeted – the Bill of Rights is not that easily marginalized. Luckily, the state has many other time tested, fully constitutional methods for keeping our roads safe . . . including the always available tool of simply gaining a conviction, before a jury of the driver's peers, for driving while impaired.

A law making it illegal to picket the funerals of servicemen would see broad support from all of those

who oppose the message of the Westboro Baptist Church, but would also destroy the fundamental right to freedom of speech that we have cherished for centuries. A law denying an attorney to those individuals charged with criminal sexual conduct against a minor would certainly improve the conviction rate against the alleged perpetrators of one of the most heinous crimes that can be committed, but would also destroy the fundamental right to counsel that we have embraced since the founding of our nation. A law imposing the death penalty by publicly televised stoning for all those who violate any term of their parole would undoubtedly reduce recidivism, but would also trivialize our long-standing protections against cruel and unusual punishments.

There are constitutional methods of reducing or eliminating the effects of hate speech, criminal sexual conduct, and recidivism without resorting to extreme shortcuts around the Bill of Rights. So, too, there are constitutional ways for us to remain members of a free society, a land governed by laws and not by men, and still work to address the problems faced by drunk drivers. As always, the State is entitled to bring to trial any case where there is probable cause to believe that a driver of a motor vehicle was impaired, or over the legal limit by weight of alcohol or presence of drug. Evidence at that trial can come from not only officer observation, but from direct testing – testing that was obtained pursuant to the constitutional warrant requirement. Some drivers may consent, others may find themselves in a situation that presents exigent circumstances, but in *every single case*

law enforcement must be ready to obtain a judicially-issued warrant to aid in the collection of evidence. This is their duty under the constitution.

There are other tools at the state's disposal as well: States can condition the operation of a motor vehicle and the issuance of a driver's license on the condition that a driver consent to testing if they are arrested or otherwise suspected of violating the conditions of that license. Minn. Stat. § 169A.51, subd. 1(a); *Missouri v. McNeely*, 133 S.Ct. 1552, 1566 (2013) (citing with approval the use of civil implied consent laws). This consent continues even if a driver is unconscious, or otherwise incapacitated. Minn. Stat. § 169A.51, subd. 6. Most importantly, this is a purely civil, regulatory sanction applied to a licensing scheme – not the criminal punishment of a constitutional right.

In the criminal context, the State can also use a driver's refusal against him at trial, without elevating that conduct to the level of an independent offense. *South Dakota v. Neville*, 459 U.S. 553, 554, 563-564 (1983). It is one thing for a driver to be convicted by a jury of his peers based upon the inference that his refusal constituted consciousness of guilt . . . and an entirely other thing for a driver to be convicted by a jury of his peers for the "crime" of telling an officer "get a warrant." The latter situation undermines faith in the constitution and erodes public confidence in the courts, making jurors the unwitting tools of a government that will specifically

instruct its citizens to return a finding of guilt based on a person's exercise of a constitutional right.

Of course, law enforcement always have the right to utilize the awesome power afforded by the warrant process. This has been the practice since general warrants were abolished via the Bill of Rights, and it is a practice that has only gotten easier over time. *Missouri v. McNeely*, 133 S.Ct. 1552, 1562 (2013) (describing technological advancements in obtaining and streamlining the warrant process). Long before the age of cell phones and video conferencing, James Otis argued against the issuance and use of writs of assistance by the British, where he decried the fact that such practices meant that, "every man . . . [would] be liable to be insulted, by a *petty officer*, and threat[e]ned to have his house *ransack'd*, unless he will comply with his unreasonable and *imprudent* demands." Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979, 993-94 (2011) (quoting James Otis' January 4, 1762 article in the *Boston Gazette*). Under the scheme touted by North Dakota and Minnesota, the same situation arises: every driver, upon the barest suspicion of alcohol consumption or drug use, is liable to be coerced into submitting to blood, urine, or breath test; threatened by every petty officer unless he or she complies with demands that may or may not be reasonable, but are certainly unsanctioned by a neutral magistrate.

On the other hand, the use of these warrants, touted by National Highway Traffic Safety Administration

(NHTSA) as an effective method of ensuring convictions and obtaining evidence, shows a true respect for the limits imposed by the Constitution, and provides a solution that works with, not against, the rights of the individual. Haire, E., Leaf, W., et al. (April 2011), *Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina* (Report No. DOT HS 811 461) Washington, DC: National Highway Traffic Safety Administration (noting that when law enforcement utilize warrants in DWI investigations drivers "understand their right to refusal does not terminate the ability of law enforcement to obtain BAC evidence. . . ." On the other hand, ignoring the warrant requirement, going so far as to criminalize the ability of our citizens to even rely upon it, goes a long way towards eroding any public faith in the judiciary and the administration of justice.

It is unquestionably more convenient for law enforcement agents to completely bypass the warrant requirement by simply charging those drivers who refuse to incriminate themselves with the crime of test refusal. Similarly, it undoubtedly makes it easier for prosecutors to gain convictions against those drivers who refuse to incriminate themselves when the only real question presented to the jury is not "was this driver impaired" but rather "did this driver refuse." However, this Court must constantly remember that the convenience of law enforcement and the ease of convicting individuals of crimes is not a valid basis for crafting an exception to the warrant requirement. *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)

("The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that [individual] privacy . . . may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law").

Nobody should face the possibility of being incarcerated solely because they refused to incriminate themselves through waiving their constitutional right to a warrant. Were this Court to uphold the decisions of the Minnesota and North Dakota Supreme Courts, the Upper Midwest would gain the dubious distinction of being among the first states to affirmatively sound the death knell of the Fourth Amendment, ushering in a new era where warrants are obtained at the convenience of law enforcement, and not at the command of the Constitution . . . because it is unequivocally easier to simply coerce drivers into providing "consent" to warrantless searches then exposing an investigation to second guessing by a neutral magistrate. Unrestrained search and seizure is the hallmark of a police state. In Justice Jackson's time, the difference between Stalin's Soviet Union, Hitler's Nazi Germany, and Roosevelt's United States of America was the ability for our countrymen to utter the phrase "get a warrant."

In this case, the Court is being asked to uphold the criminalization of the phrase "get a warrant," and because there is no reliable policy reason for doing so, this Court must uphold its oath and trust that our states can address the "carnage on the highways"

without resorting to unnecessary carnage to our constitution.

III. Laws Criminalizing The Act Of Passively Refusing To Submit To Warrantless Searches Do Not Make Our Roads Any Safer.

In any case involving drivers who are alleged to have operated a motor vehicle while impaired by drugs or alcohol, the government will cite to authority describing the "scourge" of drunk drivers and the "carnage" caused by them, before calmly reciting the state's legitimate goal in preventing as many deaths and as much destruction as possible. But anyone who has ever picked up a newspaper knows full well how much damage even one drunk driver can cause; such a blanket statement by a government attorney is no sane rationale for the destruction of individual liberties.

Here, even if the government's decision to criminalize a constitutional right has some symbolic value in the struggle to rein in drunk drivers, this provides no basis to support an unconstitutional law, even if the cause is indeed a worthy one. Furthermore, in the context of Minnesota's test refusal law it misses the mark, for there is evidence that criminalizing the act of refusal, instead of following the constitutionally mandated procedure of obtaining a warrant and executing a search, makes our roads *less* safe.

As was noted by one legal scholar, "[i]f . . . the state can further both its own interests in highway

safety and the individual's interests in personal integrity, the choice must favor the least intrusive, effective alternative." Beauchamp, R., *'Shed Thou No Blood': The Forcible Removal of Blood Samples from Drunk Driving Suspects*, 60 S. Cal. L. Rev. 1115, 1135 (1987). There *are* competing interests at stake, but only one of those interests is mandated by the Constitution – the right to see a warrant prior to the execution of a search by law enforcement. One question for this Court to consider is whether or not the state's interest in highway safety is even accomplished by criminalizing the exercise of the constitutional right to demand a warrant.

In 2007 the National Highway Traffic and Safety Administration (NHTSA) conducted a study to analyze the impact on drunk driving that results from the routine acquisition of warrants in DWI investigations. The study focused on four states that "use warrants extensively" – Arizona, Michigan, Oregon, and Utah – and sought to analyze the impact such a practice had on the rate of breath test refusals. Hedlund, J., and Beirness, D. (October 2007), *Search Warrants for BAC Test Refusals* (Report No. DOT HS 810 852), Washington, DC: National Highway Traffic Safety Administration. This study, which did nothing more than analyze the consequences of law enforcement *following the Constitution*, concluded that, "In each State, the people interviewed agreed that warrants have reduced breath test refusals and produced BAC evidence in more DUI cases. This in turn has produced more pleas, fewer trials, and more

convictions." *Id*. at 39. The study also noted the main disadvantage of addressing test refusals with warrants: cost. *Id*. However, the study pointed out that:

> "[m]any of the people interviewed regarded these costs as necessary and appropriate for acquiring critical evidence for the criminal DUI charge. Others pointed out that DUI trials are very expensive. If a warrant system increases guilty pleas and reduces trials, then they believe that these savings are greater than the warrant system's cost." *Id*.

The study added that both law enforcement generally supported the use of warrants and that prosecutors and many judges "strongly supported" the practice. *Id*. at 36.

NHTSA performed another review of test refusals across the United States and again proposed the common sense, time-honored tradition of using warrant-authorized blood draws to reduce the rate of test refusal. Berning, A., Beirness, D., et al. (November 2007), *Breath Test Refusals* (Report No. DOT HS 810 871), Washington, DC: National Highway Traffic Safety Administration. In 2005, Minnesota's rate of breath test refusals was 13% – higher than many states that did not criminalize the act of refusal, and lower than other states (like Alaska) who also make refusal a crime. *Id*. at 2. NHTSA noted that its "major finding" was the "relatively small change in the refusal rate in the nation since 2001, and since 1987." *Id*. at 3. In a different study, NHTSA concluded that implementing a procedure whereby warrants are

obtained against drivers who refuse to submit to testing can make it less likely that drivers will even try to refuse, because they "understand their right to refusal does not terminate the ability of law enforcement to obtain BAC evidence. . . ." Haire, E., Leaf, W., et al. (April 2011), *Use of Warrants to Reduce Breath Test Refusals: Experiences From North Carolina* (Report No. DOT HS 811 461), Washington, DC: National Highway Traffic Safety Administration.

Outside of government studies, we can consider the raw data regarding drunk driving incidents in Minnesota and compare those rates to the legislature's efforts at eliminating the constitutional right to a warrant. In evaluating the rate at which Minnesota drivers are reported to have committed impaired driving incidents in violation of Minnesota's DWI laws, the data demonstrates that Minnesota's rate hovers consistently around 30,000 annual criminal convictions and/or license revocations. Minnesota Department of Public Safety, *Impaired Driving Facts 2012*, Office of Traffic Safety (August 2013). From 30,088 reported incidents in 1993, impaired driving incidents peaked in 2006 with 41,951, and since that time have declined to 28,418. *Id*. at 2.

In 1993, the legislature amended Minnesota's DWI test refusal law to apply to any driver suspected of driving while impaired. Prior to that change, the crime of refusal only applied to drivers that had a previous impaired driving incident on their record; after these amendments, which went into effect on August 1, 1993, any driver who refused to submit to

testing could be charged with the independent crime of test refusal, and were advised of that fact as part of the standard Implied Consent Advisory. Minn. Sess. Law Serv. Ch. 347 (May 1993). From 1993 to 1998, after these changes were implemented, impaired driving incidents increased by approximately 2,000 (32,422).

By 2002, Minnesota reported 33,163 impaired driving incidents. In 2003, the legislature again amended the DWI laws to enhance the criminal consequences for test refusal, making the level of offense more severe for those who refuse a test versus those that failed a test, changes that went into effect August 1, 2003. 2003 Minn. Sess. Law Serv. 1st Sp. Sess. Ch. 2 (May 2003). 2003 saw 32,266 reported incidents, a slight decline from 2002, but saw an increase of approximately 2,000 incidents in 2004 (34,202). 2005 saw the rate of reported incidents increase again by approximately 3,000 (37,002). This rate went up yet again in 2006, when 41,951 incidents were reported. It was near the end of 2005 when the legislature amended the *per se* legal limit from .10 to .08. 2004 Minn. Sess. Law Serv. Ch. 283 (May 2004). These changes went into effect on August 1, 2005 – and since 2006, the reported rate of alcohol related incidents has steadily decreased.

That decrease occurred within a year of the legislature reducing the legal limit; compare this to the fact that incidents only *increased* after the legislature ratcheted up the consequences for test refusal. It cannot be said that higher penalties for refusal actually caused more people to attempt drunk driving, but it also cannot be said that increased test refusal

penalties did anything to reduce that rate. While these figures may also be affected by external factors, such as increased (or decreased) enforcement and/or reporting errors, the simple fact remains that there is no evidence that legislating away a driver's constitutional right makes our roads any safer. However, when law enforcement agents are trained on how to use the established warrant procedure, and then take advantage of that procedure, there is evidence that more convictions are obtained, and that our roads are made safer.

CONCLUSION

For all of the foregoing reasons, *amicus* DUIDLA respectfully requests that this Court reverse the decision of the North Dakota and Minnesota Supreme Courts, and clarify that test refusal laws are not only unconstitutional, but that they are also unconstitutionally coercive in cases where drivers purportedly "consent" to warrantless searches strictly to avoid being charged with additional crimes.

Respectfully submitted,

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2014 WL 2178880

Court of Appeals of Minnesota.

Jonathon Joel BATHEN, petitioner, Appellant,
v.
COMMISSIONER OF PUBLIC SAFETY,
Respondent.

No. A13-1902.
|
May 27, 2014.

Dakota County District Court, File No. 19AV-CV-13-1160.

Attorneys and Law Firms

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Considered and decided by BJORKMAN, Presiding Judge; HUDSON, Judge; and ROSS, Judge.

UNPUBLISHED OPINION

ROSS, Judge.

Police officers arrested Jonathon Bathen after police saw him driving erratically, fleeing from his

car, and hiding nearby. Bathen was taken to a detention center, read the implied consent advisory, and given the opportunity to contact an attorney. Bathen agreed to submit to a breath test, which revealed an alcohol concentration of .19 and caused his driver's license to be revoked. Bathen petitioned the district court for review. The district court found that Bathen had voluntarily consented to the breath test and affirmed the revocation. Because the district court's finding that Bathen's consent was voluntary is not clearly erroneous, we affirm.

FACTS

Early in the morning on April 14, 2013, Officer David Engel began following a car in Apple Valley after seeing it run a red light. The car swerved, struck a median, and veered back into its lane. Officer Engel activated his squad car's emergency lights. The car did not stop. It accelerated, went off the road and down an embankment, and hit a retaining wall. It continued through a parking lot and between two businesses and then abruptly stopped behind a building. Officer Engel saw a man later identified as Jonathon Bathen running from the car.

Badger, a police dog, led Officers Zachary Broughten and Andy Helgerson to a cluster of trees where they found Bathen lying on his stomach. Badger bit Bathen's left arm. Officer Helgerson ordered Bathen to stop fighting Badger. Officer Broughten grabbed Bathen's left arm near his wrist.

Bathen tensed his muscles and tried to pull away. The officers ordered Bathen to free his right arm. Bathen did not comply. Officer Broughten struck Bathen in the back and thigh three or four times while Officer Helgerson struck him in the upper body and face. Bathen finally gave up his right arm. Officers handcuffed Bathen, who smelled of alcoholic beverages, had red watery eyes, and slurred his words.

Officer Engel took Bathen to the Apple Valley detention center. Bathen had minor scrapes and scratches on his left arm. Medical personnel determined that he was fit to remain in custody. Officer Engel read Bathen his Miranda rights. Bathen indicated that he understood them and agreed to speak with Officer Engel without a lawyer. He told the officer that he had been picking someone up from a service station but denied he was driving. He would not say who was driving and refused to answer any more questions. Officer Engel read Bathen the implied consent advisory. Bathen said that he understood and wanted to speak with an attorney. Officer Engel gave Bathen access to a telephone and directories. Bathen made a call and then indicated that he was finished trying to contact an attorney. He then agreed to take a breath test, which revealed an alcohol concentration of .19.

The commissioner of public safety revoked Bathen's driver's license, and Bathen petitioned for judicial review. The district court held an implied consent hearing at which the parties presented no

live testimony and stipulated to the admission of police reports and test results. The only issue was whether *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), required the breath test results to be suppressed. The district court concluded that by voluntarily driving in Minnesota, Bathen had presumably consented to the breath test under the implied consent law. Bathen appeals.

DECISION

Bathen argues that the district court erred by denying his suppression motion because his breath test was an unreasonable search. We review for clear error the factual findings that underlie a district court's prehearing suppression order and determine as a matter of law whether the evidence should have been suppressed. *State v. Barajas*, 817 N.W.2d 204, 217 (Minn.App.2012), *review denied* (Minn. Oct. 16, 2012).

Both the United States and Minnesota Constitutions guarantee persons the right to be free from unreasonable searches. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Outside specifically established exceptions, warrantless searches are per se unreasonable. *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967); *State v. Hanley*, 363 N.W.2d 735, 738 (Minn.1985). A breath test is a search under the Fourth Amendment. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-18, 109 S.Ct. 1402, 1412-14 (1989); *State v. Netland*, 762 N.W.2d 202, 212

(Minn.2009), *abrogated on other grounds by Missouri v. McNeely*, 133 S.Ct. 1552 (2013).

Consent is one exception to the warrant requirement. *State v. Brooks*, 838 N.W.2d 563, 568 (Minn.2013), *cert. denied,*134 S.Ct. 1799 (2014).“For a search to fall under the consent exception, the State must show by a preponderance of the evidence that the defendant freely and voluntarily consented.”*Id.* We examine the totality of the circumstances to determine whether consent is voluntary. *Id.* We consider the nature of the defendant's encounter with law enforcement, including “what was said and how it was said,” and “the kind of person the defendant is.”*Id.* at 569 (quotation omitted).

Bathen argues that his agreement to take the breath test was not free and voluntary. Whether consent was voluntary is a question of fact. *See Barajas*, 817 N.W.2d at 218. The district court found that “[t]here is no evidence that [Bathen's] will was overborne such that his consent was not validly made.”It noted that Bathen was read the implied consent advisory, had the opportunity to consult with an attorney, and chose to submit to the test.

Bathen maintains that he was coerced because he was told, as part of the advisory reading, that “Minnesota law requires” him to take the test. *See*Minn.Stat. § 169A.51, subd. 2(1) (2012). He asserts that the supreme court did not address this portion of the advisory in *Brooks.*He misreads *Brooks.*The *Brooks* court concluded that reading the

advisory, which "informs drivers that *Minnesota law requires* them to take a chemical test for the presence of alcohol,""makes clear that drivers have a choice of whether to submit to testing."838 N.W.2d at 565, 570 (emphasis added). And it summarized the *McNeely* decision to highlight that requiring motorists to consent to testing as a condition of driving is a "*legal* tool." *Id.* at 572 (emphasis added).

Bathen also insists that his consent was involuntary because he never spoke to an attorney. The record does not specify whether Bathen contacted an attorney. The district court found and the record shows only that he was given access to a phone and directories, made a phone call, and indicated that he was finished trying to contact an attorney. Even assuming the call was unsuccessful, Bathen's alleged failure to contact an attorney is not dispositive. The supreme court did not rely on the fact that Brooks contacted an attorney to conclude that his consent to testing was voluntary. The supreme court instead agreed with the district court that "nothing in the record suggests that Brooks was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired."*Id.* at 571 (quotation omitted). Then it added, "The fact that Brooks consulted with counsel before agreeing to take each test *reinforces* the conclusion that his consent was not illegally coerced."*Id.* (emphasis added). This language in context suggests that the supreme court would not have decided differently even if Brooks had not consulted with counsel. The court reasoned, it is

"the *ability* to consult with counsel about an issue" that makes a subsequent decision more likely to be voluntary. *Id.* at 572 (emphasis added). Bathen, like Brooks, had "the ability to" contact an attorney before agreeing to testing. If Bathen chose not to take advantage of that opportunity, the opportunity was no less his.

Bathen next argues that his consent was involuntary because he was bitten and beaten during his arrest. We are unconvinced. Badger bit Bathen because Bathen fled and hid, and the officers used force during the arrest because he resisted their attempts to restrain him. These police actions were an attempt to coerce Bathen to submit to their authority to take him into custody, not to submit to a breath test. Bathen does not explain how they had any effect on his ability to refuse a breath test. Bathen was read his *Miranda* rights, permitted without any demonstration of police force to refuse to answer police questions, read the advisory, allowed to contact an attorney, and asked whether he would submit to testing. No evidence suggests that officers unconstitutionally pressured Bathen to be tested for alcohol concentration.

Bathen contended at oral argument that we should conclude his consent was involuntary because he had shown his unwillingness to give the police evidence that could be used against him. He points to his flight from police and his refusal to answer questions as evidence of this unwillingness. But Bathen's running and hiding and his refusal to answer

questions supports the district court's finding that he had *not* been coerced to submit to testing. This uncooperative conduct demonstrates his fortitude to resist lawful police directives and requests despite knowing that police prefer that he comply and despite knowing of the potential consequences of noncompliance.

The record evidence confirms the district court's finding that Bathen voluntarily chose to take the breath test. We need not consider the validity of the district court's rationale that Bathen's consent was presumed under the implied consent law because even without the presumption his consent is apparent.

Affirmed.

2014 WL 2565685

Court of Appeals of Minnesota.

Joseph Robert BJORNOOS, petitioner, Respondent,
v.
COMMISSIONER OF PUBLIC SAFETY, Appellant.

No. A13-1767.
|
June 9, 2014.

Attorneys and Law Firms

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Lori Swanson, Attorney General, Kristi Nielsen, Assistant Attorney General, St. Paul, MN, for appellant.

Considered and decided by BJORKMAN, Presiding Judge; ROSS, Judge; and REILLY, Judge.

UNPUBLISHED OPINION

BJORKMAN, Judge.

Appellant commissioner challenges the district court's rescission of respondent's driver's license revocation, arguing that respondent voluntarily consented to a blood test. We reverse.

FACTS

On January 24, 2013, respondent Joseph Bjornoos was arrested for driving while impaired. Police read Bjornoos the implied-consent advisory and he contacted two attorneys. Bjornoos initially refused to take a breath test, but later agreed to provide a blood sample that revealed an alcohol concentration of 0.20. Based on that result, appellant Minnesota Commissioner of Public Safety revoked Bjornoos's driver's license. Bjornoos moved the district court to review the revocation, and the parties stipulated to the facts in the police report. The district court rescinded Bjornoos's license revocation, holding that his consent was coerced under the implied-consent law. This appeal follows.

DECISION

Collection and testing of a person's blood, breath, or urine constitutes a search under the Fourth Amendment to the United States Constitution, requiring a warrant or an exception to the warrant requirement. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616-17, 109 S.Ct. 1402, 1412-13 (1989); *State v. Brooks*, 838 N.W.2d 563, 568 (Minn.2013), *cert. denied,*134 S.Ct. 1799 (2014). The exigency created by the dissipation of alcohol in the body is insufficient to dispense with the warrant requirement. *Missouri v. McNeely*, 133 S.Ct. 1552, 1561 (2013). But a warrantless search of a person's breath, blood, or urine is valid if the person voluntarily

consents to the search.*Brooks*, 838 N.W.2d at 568. The commissioner bears the burden of showing by a preponderance of the evidence that the driver freely and voluntarily consented. *Id.*

The voluntariness of Bjornoos's consent depends on "the totality of the circumstances," which we review independently. *See id.; see also State v. Harris*, 590 N.W.2d 90, 98 (Minn.1999) ("When reviewing pretrial orders on motions to suppress evidence, we may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing . . . the evidence ."). The relevant circumstances include "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said."*Brooks*, 838 N.W.2d at 569 (quoting *State v. Dezso*, 512 N.W.2d 877, 880 (Minn.1994)). The nature of the encounter includes how the police came to suspect the driver was under the influence, whether police read the driver the implied-consent advisory, and whether he had the right to consult with an attorney. *Id.* A driver's consent is not coerced as a matter of law simply because he or she faces criminal consequences for refusal to submit to testing. *Id.* at 570.

The commissioner argues that examination of the totality of the circumstances reveals that Bjornoos voluntarily consented to chemical testing. We agree. It is undisputed that police had probable cause to believe Bjornoos was driving while under the influence of alcohol. It also is undisputed that Bjornoos received an implied-consent advisory, which informed

him that he had the right to consult with an attorney and that refusal to submit to chemical testing is a crime. Bjornoos contacted an attorney, and because he was not satisfied with the conversation, he consulted a second attorney. He thereafter consented to a blood test. Bjornoos has not claimed, and there is no evidence indicating, that the police did anything to overcome Bjornoos's will or coerce his cooperation. He was not subjected to extensive questioning or held in custody for a prolonged time before being asked to provide a sample for chemical testing.

Overall, this record indicates that Bjornoos voluntarily consented to chemical testing of his blood. Because Bjornoos's consent justified the warrantless search, we conclude the district court erred by suppressing the test result and rescinding Bjornoos's license revocation.

Reversed.

2014 WL 2178838

Court of Appeals of Minnesota.

STATE of Minnesota, Appellant,
v.
Michael John SELLE, Respondent.

No. A13-1693.
|
May 27, 2014.

Hennepin County District Court, File No. 27-CR-12-30407.

Attorneys and Law Firms

Lori Swanson, Attorney General, St. Paul, MN; and Peter A. MacMillan, Michele Wallace, MacMillan, Wallace, Athanases & Patera, P.A., Minneapolis, MN, for appellant.

James M. Ventura, Wayzata, MN, for respondent.

Considered and decided by STAUBER, Presiding Judge; PETERSON, Judge; and HUDSON, Judge.

UNPUBLISHED OPINION

HUDSON, Judge.

In this pretrial prosecution appeal, the state argues that the district court erred by determining that the warrantless blood sample obtained from

respondent under the implied-consent law was unreasonable and unconstitutional. Because appellant voluntarily consented to the blood draw, we conclude that the search was not unreasonable, and we reverse and remand.

FACTS

On April 27, 2012, Crystal police officers investigating the scene of a motor vehicle collision observed that one of the drivers, respondent Michael John Selle, showed signs of impairment. The state alleged that officers detected the smell of marijuana coming from the open window of respondent's vehicle and observed that he was unsteady on his feet, agitated, and had slurred speech, body tremors, and dilated pupils. Respondent failed several field sobriety tests, but a preliminary breath test (PBT) did not detect the presence of alcohol. The officer transported respondent to the Crystal police station, where an officer administered a drug-influence evaluation (DRE). The officer concluded that respondent had operated a motor vehicle in violation of the driving-while-impaired (DWI) law and then read respondent the implied-consent advisory:

> OFFICER: All right, Mr. Michael John Selle, I believe you've been driving, operating or controlling a motor vehicle in violation of Minnesota's DWI law and you've been placed under arrest for this offense. Do you understand that?

RESPONDENT: No, I don't understand that, but I guess I'm gonna have to. I'll be fighting it in a court of law so.

OFFICER: Okay. Minnesota law requires you to take a test to determine if you are under the influence of a hazardous or schedule one through five controlled substance or to determine the presence of a controlled substance or its metabolite listed in schedule one or two, other than marijuana or tetrahydrocannabinols. Do you understand that?

RESPONDENT: Okay, read that again? (inaudible) THC and what?

OFFICER: Other than marijuana or tetrahydrocannabinols, do you want me to read the whole paragraph?

RESPONDENT: Yeah, so –

OFFICER: Minnesota law requires you to take a test to determine if you are under the influence of a hazardous or schedule one through five controlled substance or to determine the presence of a controlled substance or its metabolite listed in schedule one or two, other than marijuana or tetrahydrocannabinols.

RESPONDENT: (inaudible).

OFFICER: Refusal to take a test is a crime, [d]o you understand that?

RESPONDENT: Yeah.

OFFICER: Before making your decision about testing, you have the right to consult with an attorney. If you wish to do so, a telephone and directory will be available to you. If you aren't able to contact an attorney, you must make the decision on your own. You must make a decision within a reasonable period of time. Do you understand that?

RESPONDENT: Yeah, a reasonable amount of time is in like right now?

OFFICER: Yeah. If the test is unreasonably delayed, or if you refuse to make a decision, you will be considered to have refused this test. Do you understand that?

RESPONDENT: Yeah.

OFFICER: Do you understand what I just explained?

RESPONDENT: Yes, I do.

OFFICER: Do you wish to consult with an attorney?

RESPONDENT: Yes, I do.

Respondent attempted to call an attorney on his cell phone, but was unable to reach an attorney. After about three minutes passed, the officer asked respondent whether he wanted to proceed or whether he wanted to keep trying to reach an attorney. Respondent stated that he wanted to continue and confirmed that he was finished using the phone. The officer then asked respondent:

OFFICER: All right, will you take the urine test?

RESPONDENT: Blood test.

OFFICER: So you're saying no to the urine test?

RESPONDENT: Yes. That'll take too long for me to pee.

OFFICER: It'll take too long for you to pee?

RESPONDENT: No-no-no, I can try real quick but otherwise, what are you guys gonna take me somewhere for the blood test?

OFFICER: Yes.

RESPONDENT: Yeah, let's just do the blood test.

Respondent was transported to a hospital, where his blood was drawn without a warrant; testing revealed the presence of the controlled substances THC and Alprazolam.

The state charged respondent with misdemeanor driving while impaired, driving while under the influence of a controlled substance, in violation of Minn.Stat. § 169A.20, subd. 1(2) (2010). Respondent initially moved to suppress evidence resulting from the search, arguing that the implied-consent advisory as read was misleading, that the burden of proof was improperly shifted to him to prove that he used Alprazolam according to its prescribed use, and that the DRE and an officer's testimony were obtained in

violation of his *Miranda* rights. After an evidentiary hearing, the district court issued an order denying the motion to suppress.

After the United States Supreme Court issued its decision in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), respondent renewed his motion to suppress evidence based on that holding. *See id.* at 1563 (holding that the dissipation of alcohol in a defendant's blood did not, by itself, establish exigent circumstances sufficient to excuse police from obtaining a search warrant required under the Fourth Amendment). Respondent argued that, because his consent to testing was not voluntary, and no other warrant exception applied, he was compelled to submit to testing in violation of his Fourth Amendment rights.

The district court considered written arguments and granted the motion to suppress. The district court applied the totality-of-the-circumstances test articulated in *Schneckloth v. Bustamonte*, 412 U.S. 218, 227, 93 S.Ct. 2041, 2048 (1973), and concluded that the state failed to meet its burden to establish that respondent freely and voluntarily consented to the search. The district court noted that when respondent was first asked whether he understood the circumstances of his arrest, he stated that he did not; and that although his right to counsel may have been vindicated, the threat of serious criminal prosecution that accompanies refusal weighed against the voluntariness of the search.

The state challenged the order in this court, which stayed the appeal pending release of the Minnesota Supreme Court's decision in *State v. Brooks*, 838 N.W.2d 563 (Minn.2013), *cert. denied,*124 S.Ct. 1799 (2014). Following *Brooks*, we reinstated this appeal and permitted the parties to submit supplemental briefing.

DECISION

The state may appeal a pretrial order in a criminal case if the district court's alleged error, unless reversed, will have a critical impact on the outcome of trial. Minn. R.Crim. P. 28.04, subds. 1(1), 2(1)."[T]he standard for critical impact is that the lack of the suppressed evidence significantly reduces the likelihood of a successful prosecution."*State v. Edrozo*, 578 N.W.2d 719, 723 (Minn.1998) (quotation omitted). Dismissal of a charge following the suppression of evidence meets the critical-impact standard.*State v. Holmes*, 569 N.W.2d 181, 184 (Minn.1997). Because the district court dismissed the DWI charge after suppressing the evidence, the state has met the critical-impact test.

"When reviewing pretrial orders on motions to suppress evidence, [appellate courts] may independently review the facts and determine, as a matter of law, whether the district court erred in suppressing – or not suppressing – the evidence."*State v. Harris*, 590 N.W.2d 90, 98 (Minn.1999). The state's challenge to the district

court's suppression order presents a question of law, and we examine the facts and review de novo whether the district court erred by suppressing the evidence. *Id.*

Both the United States and Minnesota Constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Minn. Const. art. I, § 10. Warrantless searches are unreasonable, unless an exception applies. *State v. Flowers*, 734 N.W.2d 239, 248 (Minn.2007). The state has the burden to establish the existence of an exception to the warrant requirement. *State v. Ture*, 632 N.W .2d 621, 627 (Minn.2001). One exception to the warrant requirement is voluntary consent. *Schneckloth*, 412 U.S. at 219, 93 S.Ct. at 2043-44; *State v. Diede*, 795 N.W.2d 836, 846 (Minn.2011).

"Taking blood and urine samples from someone constitutes a 'search' under the Fourth Amendment."*Brooks*, 838 N.W.2d at 568. In *Brooks*, the Minnesota Supreme Court held that a totality-of-the-circumstances test applies in assessing whether a defendant voluntarily consented to chemical testing. *Id.* Whether consent was voluntary is a question of fact, and a totality-of-the-circumstances analysis requires evaluation of "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said."*State v. Dezso*, 512 N.W.2d 877, 880 (Minn.1994). The nature of the encounter includes how the police came to suspect the driver was under the influence, whether police read the driver the implied-consent advisory, and whether he

had the right to consult with an attorney. *Brooks*, 838 N.W.2d at 569. But a driver's consent is not coerced as a matter of law simply because he or she is advised of criminal consequences for test refusal. *Id.* at 570.

Here, although *Brooks* had not yet been issued, the district court appropriately analyzed the issue of respondent's consent under the totality-of-the-circumstances standard later enunciated in *Brooks*.*See Schneckloth*, 412 U.S. at 227, 93 S.Ct. at 2048. We disagree, however, with the district court's determination that, based on that standard, respondent did not voluntarily consent to testing.

In *Brooks*, the supreme court held that the defendant consented to a warrantless search of his blood and urine, based on circumstances that he was properly read the implied-consent advisory, had access to a telephone and spoke to an attorney, and agreed to testing. *Brooks*, 838 N.W.2d at 570-72. Similarly, we conclude that in this case, the totality of the circumstances – "the nature of the encounter, the kind of person [respondent] is, and what was said and how it was said" – supports a determination, as a matter of law, that respondent voluntarily consented to testing. *Deszo*, 512 N.W.2d at 880. Respondent was seized at the scene of an accident when he displayed signs of obvious impairment. The arresting officer read him the implied-consent advisory as set out by statute. *See*Minn.Stat. § 169A.51, subd. 2 (2010) (listing requirements of implied-consent advisory); *see also Hallock v. Comm'r of Pub. Safety*, 372 N.W.2d 82, 83 (Minn.App.1985) (stating that "[u]niformity in

giving the implied consent advisory is highly encouraged"). Although respondent initially expressed that he did not understand his arrest for DWI, after hearing the advisory and being provided with an opportunity to contact an attorney, he declined a urine test but unequivocally agreed to take a blood test.

Respondent argues that, unlike the defendant in *Brooks*, he was not able to consult with an attorney before deciding whether to submit to testing. In *Brooks*, the supreme court noted that the defendant's "consult[ation] with counsel before agreeing to [testing] reinforces the conclusion that his consent was not illegally coerced."*Brooks*, 838 N.W.2d at 571. But a defendant's consultation with an attorney is only one factor in the analysis of whether consent was voluntary. *See id.*Here, respondent has not argued that his right to counsel was not vindicated. The record shows that the officer provided ample opportunity for him to contact an attorney, and when he finished using the phone, asked whether he wished to proceed or to try again to reach an attorney. Although declining a urine test, respondent replied unequivocally that he would take a blood test. We conclude that the totality of the circumstances shows, as a matter of law, that respondent voluntarily consented to the search, and the district court erred by suppressing the evidence.

Reversed and remanded.