

STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

v.

Maureen Ann O'Brien,

Defendant.

Court File No. 27-CR-10-35267
The Honorable Philip D. Bush
**ORDER DENYING DEFENDANT'S
MOTION TO SUPPRESS**

The above-captioned matter came before the undersigned Judge of District Court on Defendant's motion to suppress the results of a breath.

The State was represented by Heather P. Magnuson, Esq.

Defendant was represented by Max A. Keller, Esq.

Based upon all the files, records, and proceedings herein, the Court makes the following:

ORDER

1. Defendant's motion to suppress a breath test, because of *Missouri v. McNeely*, was verbally denied **DENIED** with a Memorandum to follow.
2. The attached Memorandum explains the Courts analysis and is made a part of the record.

BY THE COURT:

 sigP.D.Bush

06/05/2013 11:06:27 am

Dated: June 5, 2013

Philip D. Bush
Judge of District Court

MEMORANDUM

Facts

Bloomington Police Officer Kevin Olson stopped Maureen O'Brien's car on suspicion of impaired driving on July 31, 2010¹ at 12:54 a.m. Given the odor of alcohol, O'Brien's statement that she had been drinking earlier, her watery eyes, her balance issues, her failure of field sobriety tests, and a portable breath test reading of .187, Officer Olson arrested O'Brien for driving while impaired ("DWI"). This Court has previously ruled that there was probable cause to arrest and to invoke the Implied Consent process.

After the arrest, O'Brien was taken to the Bloomington Police Department and read the Minnesota Implied Consent Advisory, the wording of which is required by Minn. Stat. §169A.51 subd.2. O'Brien was told: "Minnesota law requires the person to take a test" and "that test refusal is a crime." The process was recorded. O'Brien asked to talk with an attorney, which she did for 80 minutes (i.e., from 1:17 a.m. to 2:37 a.m.). O'Brien then agreed to take the Intoxilyzer test, which gave a reported value of .17 at 2:42 a.m. almost two hours after she was driving. Officer Olson did not attempt to obtain a search warrant and no search warrant was ever issued in this case. O'Brien was charged with two misdemeanors of DWI in the Fourth Degree Operating a Motor Vehicle under the Influence of Alcohol and DWI Operating a Motor Vehicle with an Alcohol Concentration of .08 or more within 2 hours.

The Court conducted a Rasmussen hearing on O'Brien's motions to suppress and the Court orally denied those motions². The case then went to trial where O'Brien was convicted of both charges. The Court said it would issue a written order on the *McNeely* issue. The last

¹ This case is so old because it was part of the now concluded Source Code litigation.

² The *McNeely* suppression motion, if granted, would have only applied to the over .08 charge and not to the driving under the influence charge. If O'Brien appeals and ultimately prevails on her *McNeely* argument, this case would need to be retried on the driving under the influence charge.

submission was received on May 3, 2013. The facts of this case are limited to breath testing, but the analysis will involve some discussion of urine testing, blood testing, and refusal to test.

Defense counsel argues that after *Missouri v. McNeely*, the Fourth Amendment requires a search warrant for a breath test in all DWI cases (or a totality of the circumstances exigency exception). The Defense further argues that, after *McNeely*, Minnesota's refusal statute is unconstitutional because it allegedly violates due process and the Fifth Amendment.³

The State argues that *McNeely* does not apply to breath or urine testing and does not affect this or most DWI cases, that there were exigent circumstances under the totality of the circumstances, there was consent and the search was constitutional because it was incident to a lawful arrest.

Issue

After *McNeely*, when someone is under arrest for DWI in Minnesota, do the police need a search warrant before breath testing? No.

I. *McNeely's* effect on Minnesota DWI law

In order to analyze the effect of *McNeely* on Minnesota DWI and Implied Consent law, it is necessary to briefly⁴ review certain decisions by the United States Supreme Court and Minnesota Supreme Court.

1. United States Supreme Court

There are four major United States Supreme Court decisions that deal with the United States Constitution and the rights of drivers charged with alcohol-related driving offenses.⁵ All four involve drivers who refused to take the test.

³ This Court has over 25 *McNeely* cases (criminal and Implied Consent) pending in various stages and has benefited from reading many defense counsel and state memoranda in those cases as well as the memoranda submitted in this case.

⁴ For a detailed review see the 208 page "DWI-Implied Consent Elements Handbook" Public Safety Division Minnesota Attorney General June 2012 and *Minnesota DWI Deskbook* (Marsh J. Halberg ed., 3rd ed. 2013).

The first case is *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, (1966). In *Schmerber*, the defendant was arrested for driving under the influence. The police asked Schmerber to take a breath test and he refused to submit to alcohol testing. Because they were investigating an alcohol-related accident with injuries, the police took a forced warrantless blood draw over Schmerber's objection. The issue in *Schmerber* was whether, after a lawful arrest and the person has declined to take an alcohol test, may the police intrude into the body and take blood without a warrant.

The Supreme Court held, based on exigent circumstances, that:

We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free of unreasonable searches and seizures. It bears repeating, however, that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the States minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions, or intrusions under other conditions.

Id. at 772, 1836.

In *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 26121, 61 L. Ed. 2d 321 (1979), the Court upheld the constitutionality of Massachusetts Implied Consent law, similar to Minnesota's, that summarily suspended the driver's licenses of drivers who refuse alcohol testing. The Court said:

The Commonwealth's interest in public safety is substantially served by the summary suspension of those who refuse in several ways to take a breath-analysis test upon arrest. First, the very existence of the summary sanction of the statute serves as a deterrent to drunken driving. Second, it provides strong inducement to take the breath-analysis test and thus effectuates the Commonwealth's interest in obtaining reliable and relevant

⁵ The Court will not discuss *Michigan v. Sitz* 496 U.S. 444 (1990) (holding that sobriety roadblock looking for drunk drivers does not violate the Fourth Amendment) because Minnesota does not allow sobriety roadblocks under the State Constitution. See *Ascher v. Commissioner of Public Safety*, 519 N.W. 2d 183 (Minn. 1994). *California v. Trombetta* 104 S. Ct 2528 (1984) (even though technically possible to do so due process does not require preserving the breath samples from an Intoxilyzer machine because of the high accuracy of the machine) will also not be discussed. In addition four cases where certiorari was declined will be discussed in other sections below. Finally the non DWI, impaired railroad worker, case *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602 (1989) will be discussed in in Section IV.

evidence for use in subsequent criminal proceedings. Third, in promptly removing such drivers from the road, the summary sanction of the statute contributes to the safety of public highways.

Id. at 18, 2621.

In response to the argument that it was unconstitutional to treat drivers who refuse alcohol testing more harshly than those who take a test, the Court said:

A state plainly has the right to offer incentives for taking a test that provides the most reliable form of evidence of intoxication for use in subsequent proceedings. Indeed, in many cases, the test results could lead to prompt release of the driver with no charge being made on the “drunken driving” issue. And, in exercising its police powers, the Commonwealth is not required by the Due Process Clause to adopt an “all or nothing” approach to the acute safety hazards posed by drunken drivers.

Id. at 19, 2621.

South Dakota v. Neville, 459 U.S. 553, 103 S. Ct. 916 (1983) was the next DWI case before the Court. This case addresses the issue of whether evidence of defendant’s refusal to submit to a blood-alcohol test is protected by the privilege against self-incrimination. The Court said that:

The simple blood-alcohol test is so safe, painless, and commonplace, see *Schmerber*, 384 U.S., at 771, 86 S. Ct., at 1836, that respondent concedes, as he must, that the state could legitimately compel the suspect, against his will, to accede to the test. Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.

South Dakota v. Neville, 459 U.S. 553, 563-64, 103 S. Ct. 916, 922, (1983)

Justice O’Connor stated the Court’s holding:

We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. See, e.g., *Crampton v. Ohio*, decided with *McGautha v. California*, 402 U.S. 183, 213–217, 91 S.Ct. 1454, 1470–1472, 28 L.Ed.2d 711 (1971). We hold, therefore, that a refusal to take a blood-alcohol

test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.

Id. at 564, 922-23.

The most recent United State Supreme Court case is *Missouri v. McNeely*, 133 S. Ct. 1552, (2013), which is why this matter is before this court. McNeely was arrested for drunk driving. While being transported to the police station, McNeely indicated that he would refuse to provide a breath sample. The officer took him to a hospital and read the Missouri implied consent form. McNeely continued to refuse. Without a search warrant, the officer then ordered a hospital lab technician to pierce McNeely's skin and forcibly draw blood. The blood test result was .15. McNeely was charged with driving while intoxicated.

In *McNeely* the question facing the United State Supreme Court was: When a person, under arrest for driving under the influence of alcohol, refuses to submit to alcohol testing, may the police make a forced warrantless blood draw based on the single factor exigency of dissipation of alcohol? The Court held when a person under arrest for DWI declines to submit to alcohol testing that "in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood draw without a warrant." *Missouri v. McNeely*, 133 S. Ct. 1552, 1568 (2013)

Justice Sotomayor was clear that:

the type of search at issue in this case, ...involved a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's "most personal and deep-rooted expectations of privacy." *Winston v. Lee*, 470 U.S. 753, 760, 105 S.Ct. 1611, 84 L.Ed.2d 662 (1985); see also *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989)

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

In *McNeely*, there are innumerable references to blood testing, and 8 references to phrases like “invasion of bodily integrity” and “compelled intrusion into the human body”. For example the Court said “the fact that people are ‘accorded less privacy in ... automobiles because of th[e] compelling governmental need for regulation,’ *California v. Carney*, 471 U.S. 386, 392, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin.” *Missouri v. McNeely*, 133 S. Ct. 1552, 1565 (2013). (emphasis supplied).

There is, however, no mention or analysis of urine testing or breath testing⁶ in *McNeely*. Justice Sotomayor wrote that:

States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. See NHTSA Review 173; *supra*, at 1556 (describing Missouri's implied consent law). Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution. See NHTSA Review 173–175; see also *South Dakota v. Neville*, 459 U.S. 553, 554, 563–564, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination).

It is also notable that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal (often limiting testing to cases involving an accident resulting in death or serious bodily injury) or prohibit nonconsensual blood tests altogether. Among these States, several lift restrictions

⁶ There is no merit to the defense argument that because the Supreme Court in *Brooks* 2013 WL 1704706 granted certiorari, vacated convictions and remanded in light of *McNeely* the *McNeely* decision applies to more than blood tests. *Brooks* had 3 cases (urine and blood) and all three of Brooks cases were consolidated. Since there was a blood test in one of the cases, and Brooks relied on *Shriner* which *McNeely* has overruled, it makes sense that all the consolidated cases be sent back to the Minnesota court for further decisions. It does not mean that the Supreme Court was expanding *McNeely* to cover both breath and urine testing.

on nonconsensual blood testing if law enforcement officers first obtain a search warrant or similar court order.

Missouri v. McNeely, 133 S. Ct. 1552, 1566 (2013)(emphasis added)

It is this Court's conclusion that *McNeely* is limited to cases where the police, without a search warrant, require a blood test after a person has refused to submit to alcohol testing.

2. Minnesota's DWI and Implied Consent law

Minnesota, like all 50 states, has criminalized drunk driving, Minn. Stat. §169A.20 - 169A.27, has an "Implied Consent" statute, Minn. Stat. §169A.50 – 169A.55, and requires drivers arrested for impaired driving to take a test, Minn. Stat. 169A.51. Unlike a majority of states, Minnesota, in 1990, made it a crime to refuse to submit to testing⁷. Minnesota's current law on refusal to submit to testing states "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)." Minn. Stat. § 169A.20 subd 2. Minnesota does not criminalize refusal to consent but rather it criminalizes refusal to submit to testing⁸. The only place that the police are not required by law to use the Implied Consent process and draw blood without cooperation is in Criminal Vehicular Operation (CVO) cases (accident involving personal injury or death). Unless it is a CVO case, if a driver in Minnesota refuses to submit to testing, the police do not force a blood draw. The police did not force a blood draw of O'Brien in the present case

The 1990 criminalization of refusal was challenged and the Minnesota Supreme Court held that criminal prosecution for refusal was constitutional. "Appellant Driver contends that Minn. Stat. § 169.121, subd. 1a (1990)[now 169A.20 subd. 2], the refusal provision, violates the

⁷ Other states crimination of refusal is discussed below in Section III.

⁸ See *State v. Wiseman* 816 N.W. 2d 689, 693-694 (Minn. Ct. App. 2012)

privilege against compelled self-incrimination protected by both the state and federal constitutions. We disagree.” *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855 (Minn. 1991). Citing *South Dakota v. Neville* the Minnesota Court said that “the testing request is merely police conduct ‘normally attendant to arrest and custody’ and ‘similar to a police request to submit to fingerprinting or photography’” *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 855 (Minn. 1991). The Court then said:

We disagree with appellant that Minnesota's addition of potential criminal penalties for refusal requires a different conclusion than that reached in *Neville*. The fact that certain individuals may face criminal charges for refusing to undergo testing in no way compels those individuals to refuse. Rather, the possibility of criminal liability seems far more likely to encourage suspected drivers to agree to submit to testing.

McDonnell v. Comm'r of Pub. Safety, 473 N.W.2d 848, 855-56 (Minn. 1991).

The Court concluded its analysis by holding that:

the decision to submit to or refuse chemical testing does not present an individual the kind of “cruel choice” prohibited by both the state and federal privileges against compelled self-incrimination. We therefore conclude that in this particular context—where an individual is requested to submit to blood alcohol content testing and potentially faces criminal penalties for refusing to do so, and where that individual is provided a reasonable opportunity to consult an attorney before deciding whether to submit as requested—neither the state nor the federal privilege against compelled self-incrimination is violated.

McDonnell v. Comm'r of Pub. Safety, 473 N.W.2d 848, 856 (Minn. 1991).

A decade later the issue of the constitutionality of Minnesota’s criminalization of refusal was back before the appellate courts. The then Court of Appeals Judge G. Barry Anderson writing for the Court of Appeals held “that the refusal statute does not violate appellant’s Fourth Amendment rights” *State v. Mellett*, 642 N.W.2d 779, 785 (Minn. Ct. App. 2002). *review denied* (Minn. Jul. 16, 2002).

In 2006, the issue was again back in front of the Court of Appeals. Then Court of Appeals Judges Dietzen and Wright held, in an unpublished opinion, that:

Appellant nonetheless argues that *Mellet* did not address the precise issue he raises, i.e., that it is a violation of the Fourth Amendment to criminalize the refusal to submit to a chemical test, because it did not analyze consent as an exception to the Fourth Amendment prohibition against warrantless searches. We disagree. ... We conclude that the holding of *Mellet* is dispositive of appellant's contentions. The state has a compelling interest in protecting its residents from drivers impaired by alcohol, and the statutory framework of implied consent set forth in Minn.Stat. § 169A.20, subd. 2, is a reasonable means to accomplish that objective. Consequently, the statute is constitutional, and the lack of appellant's verbal consent to the taking of the breath test did not violate his Fourth Amendment rights.

State v. Schwichtenberg, A05-768, 2006 WL 463865 (Minn. Ct. App. Feb. 28, 2006)

In 2008, the Court of Appeals, in another unpublished opinion, rejected the argument that criminalizing refusal violates the Fourth Amendment. *State v. Muraski*, A07-1705, 2008 WL 4628598 (Minn. Ct. App. Oct. 21, 2008)⁹. After the Minnesota Supreme Court denied review, Muraski petitioned for a writ of certiorari to the United States Supreme Court. The petition raised the same issues being raised here¹⁰ and certiorari was denied. 130 S.Ct. 197(2009).

In 2008 the Minnesota Supreme Court examined the exigent circumstances exception to the search warrant requirement as it applied to nonconsensual blood draw search of a driver's body. *State v. Shriner* 751 N.W.2d 538 (Minn. 2008). The Court said:

We hold that when law enforcement has probable cause to believe a defendant has committed the offense of criminal vehicular homicide or operation under Minn.Stat. § 609.21 (2006), it is important that the defendant's blood be tested within 2 hours of the accident causing injury to or the death of another. The rapid, natural dissipation of alcohol in the blood creates single-factor exigent circumstances that will justify the police taking a warrantless, nonconsensual blood draw from a defendant, provided that the

⁹ While *Muraski* cites *Netland*, it also cites and uses *Mellet* for support.

¹⁰ The petition raised three issues. "1) Does a statute that makes it a crime to refuse to consent to a search for evidence of criminal activity by that person's accuser violate the person's Fourth Amendment? 2) Does the same statute violate the person's right to substantive due process? and 3) Does that same statute violate the prohibition against unconstitutional conditions?" 2009 WL 1913512 (U.S)(Appellate Petition, Motion and Filing).

police have probable cause to believe that defendant committed criminal vehicular homicide or operation.

State v. Shriner, 751 N.W.2d 538, 549-50 (Minn. 2008). The single factor exigency in *Shriner* was specifically abrogated or overruled by *McNeely*.

In *State v. Netland* 762 N.W. 2d 202 (Minn. 2009), the Minnesota Supreme Court was faced with another challenge to Minnesota's criminalization of refusal to submit to chemical testing. *Netland*, a test refusal case, raised a number of issues and the one of concern in this case is the unconstitutional conditions argument. The Court said:

in order to proceed with her claim, Netland must establish that the criminal test-refusal statute authorizes an unconstitutional search. Because, [based on *Shriner*], we conclude that Netland has not shown that a warrantless search for her blood-alcohol content would have been unconstitutional, we need not determine whether the unconstitutional conditions doctrine applies to Fourth Amendment rights or whether it should be applied to violations of the Minnesota Constitution.

State v. Netland, 762 N.W.2d 202, 212 (Minn. 2009)

The last Minnesota case this Court will analyze is *State v. Wiseman* 816 N.W. 2d 689 (Minn. Ct. App. 2012) petition for certiorari denied 133 S. Ct 1585 (U.S. March 18, 2013),¹¹ which was authored by then Court of Appeals Judge Wright. Wiseman refused to submit to chemical testing and the police did not take a forced blood draw. He was convicted of felony refusal to submit to testing and raised the following issue on appeal:

Wiseman contends that the chemical-test-refusal statute infringes his fundamental right to passively or nonviolently "refuse to consent to a warrantless search" and thereby refuse to produce what the police seek. He asserts that this fundamental right, although lacking an explicit textual source of constitutional protection, is a necessary "corollary" to his constitutional right to be free from unreasonable searches, U.S. Const. amend. IV; Minn. Const. art. I, § 10, and the constitutional preference for warrants.

Id. at 693

¹¹ Again, in the petition for certiorari, Wiseman raised the same three issues as *Muraski* (see fn 10) 2012 WL 6762493 (US)(Appellate Petition, Motion and Filing). If the United States Supreme Court, in *McNeely*, were intending to hold that state statutes that criminalize refusal to test are unconstitutional, they would not have been silent on that issue in *McNeely* and, less than 30 days before *McNeely* was released, would not have declined review in *Wiseman* which raises that precise issue.

In *Wiseman*, the Court relied on *Shriner* and *Netland* to conclude that when the “requirements of probable cause and exigent circumstances are met, *consent* is not constitutionally necessary to administer a warrantless chemical test” *Id.* at 694. The Court then went on to say:

nor is consent the basis for the search. Indeed, the implied consent advisory required by Minnesota law, which was presented to Wiseman, does not seek a person's consent to submit to a warrantless chemical test; rather, it advises a person that Minnesota law requires the person to take a chemical test and that refusal to submit to a chemical test is a crime. Minn.Stat. § 169A.51, subd. 2 (2008). Because neither a warrant nor consent are necessary to administer a constitutionally reasonable chemical test supported by probable cause, our analysis turns on whether there exists a fundamental right to passively or nonviolently refuse to submit to a constitutionally reasonable police search.

Id. at 694. (emphasis supplied) The Court¹² further explained:

Refusal to cooperate with a warrantless but constitutionally reasonable police request for evidence, even when accomplished passively or nonviolently, is subject to criminal penalties or otherwise adverse consequences in a variety of contexts. For example, states may criminally punish an individual for passively or nonviolently refusing to provide his or her identity to the police during a valid *Terry* stop, without abridging the protections of the Fourth Amendment. *Hiibel v. Sixth Judicial Dist. Ct.*, 542 U.S. 177, 188–89, 124 S.Ct. 2451, 2459, 159 L.Ed.2d 292 (2004) (observing that “[t]he threat of criminal sanction helps ensure that the request for identity does not become a legal nullity”); *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). The state also may compel an individual to stand in a lineup or wear particular clothing, or to produce incriminating nontestimonial physical evidence such as a blood sample, a handwriting exemplar, or a voice exemplar, all of which require the individual's cooperation. *Doe v. United States*, 487 U.S. 201, 210, 108 S.Ct. 2341, 2347, 101 L.Ed.2d 184 (1988). If an individual refuses to cooperate with such requests, it is not fundamentally unfair or a violation of due process to use the individual's refusal as evidence of guilt. *See South Dakota v. Neville*, 459 U.S. 553, 566, 103 S.Ct. 916, 924, 74 L.Ed.2d 748 (1983) (holding that state's use of defendant's refusal to submit to chemical test as evidence of guilt “comported with the fundamental fairness required by due process”); *United States v. Brown*, 156 F.3d 813, 815 (8th Cir.1998) (holding that jury may infer guilt from defendant's refusal to provide handwriting exemplar).

Id. at 694-95.

¹² This Court will not quote or discuss *Wiseman*'s reasonableness analysis here but notes that it appears to be an even stronger argument in light of the very recent United States Supreme Court decision in *Maryland v. King*, 569 U.S. ____ (June 3, 2013).

The only place in Minnesota law where the police were authorized to take a forced blood sample after someone has declined was in CVO cases. *Shriner* held that the single factor exigency in CVO cases did not require a search warrant. *McNeely* clearly overrules *Shriner*. The police now either need a search warrant or a totality of the circumstances exigency exception to the search warrant requirement in order to lawfully do a forced blood draw over a person's objection. The status of other Minnesota cases that relied on *Shriner* will be discussed below.

II. Constitutionality of Minnesota's statute criminalizing refusal to test after *McNeely*

Minn. Stat. 169A.20, subd. 2 criminalizing refusal to test was constitutional before *McNeely* and is constitutional after *McNeely*. The Supreme Court in *McNeely* did not address the constitutionality of states statutes that criminalize refusal to submit to testing in DWI cases. The United States Supreme Court has not squarely addressed that issue, but it has denied certiorari in at least three cases where the constitutionality of criminalizing refusal in DWI cases was the central issue on which the defendant sought review.¹³

O'Brien argues that Minnesota's criminalizing refusal to test law is unconstitutional¹⁴. Under Minnesota law, when the constitutionality of a law is challenged, the Minnesota Supreme Court has held that we must presume that "Minnesota statutes are constitutional," and the Court held that the "power to declare a statute unconstitutional should be exercised with extreme caution." *Associated Builders & Contractors v. Ventura*, 610 N.W.2d 293, 299 (Minn.2000). The challenging party "bears the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *State v. Merrill*, 450 N.W.2d 318, 321 (Minn.1990).

¹³ *Muraki* (Minn.) and *Wiseman* (Minn.) are discussed above while *Burnett* (Alaska) and *Hoover* (Ohio) discussed below.

¹⁴ Since O'Brien is not charged with the crime of refusal, this Court has a serious question of whether she has standing to challenge the constitutionality of the refusal law. However, since this issue was not raised by the state and was not briefed, the Court will presume, without deciding, that O'Brien has standing.

McDonnell and *Mellet* have been valid constitutional law for decades and are not overruled by *McNeely*. The fact that *Netland* and *Wiseman*, because of their reliance on *Shriner*, may need clarification as to the legal basis for their rulings does not diminish their precedent. *Netland* and *Wiseman* were not overruled by *McNeely* and their holdings also remain as the law of this state. The argument of unconstitutional conditions, not reached in *Netland*, will be discussed below.

III. Criminalization of refusal submit to testing in other states

In addition to Minnesota, about a dozen other states criminalize refusal to submit to DWI testing.¹⁵ This Court will focus on four of those states. This Court has not been able to find and defense counsel has not identified any state where a statute criminalizing refuse to submit to testing, after arrest for DWI, has been found to be unconstitutional.

Alaska

In the early 1980's, Alaska may have been the first state to criminalize refusal to submit to chemical testing, making it punishable by up to one year in jail. Alaska Stat. §28.35.032. The Alaska Court of Appeals rejected constitutional challenges to the criminalization of refusal in *Svedlund v. Anchorage*, 671 P.2d 378 (Alaska App.1983); *Jensen v. State*, 667 P.2d 188 (Alaska App.1983); and *Coleman v. State*, 658 P.2d 1364 (Alaska App.1983).

Peter Burnett was stopped by the Anchorage police and lawfully arrested for DWI. Like *McNeely*, the police asked him to take a breath test and like *McNeely* he refused. Unlike *McNeely*, the police did not force a blood draw over his objection. Instead, he was charged with and convicted of the crime of refusing to submit to testing. On appeal, the Alaska Court of

¹⁵ The word "about" is carefully used because this is not a law review article and the accuracy of this entire list has not been carefully researched. A 2005 NHTSA report lists 8 states that criminalize refusal and this court is aware of possibly 5 other states that are not on that 2005 list. The thirteen states are Alaska, California, Florida, Kansas, Louisiana, Minnesota, Nebraska, New Jersey, Ohio, Rhode Island, Tennessee, Vermont and Virginia.

Appeals held that “we are satisfied that it is a reasonable search under the constitution because it is incident to arrest. *See Cupp v. Murphy*, 412 U.S. at 295, 93 S.Ct. at 2003, 36 L.Ed.2d at 905. *See also* 1 W. LaFare, *Search and Seizure* § 2.6(a) (1978).” *Burnett v. Municipality of Anchorage*, 678 P.2d 1364, 1368 (Alaska Ct. App. 1984). Burnett filed a petition for certiorari with the United States Supreme Court and it was denied. 469 U.S. 859 (1984).

Burnett then took his case to federal court by way of a habeas corpus petition. Almost 30 years ago Burnett argued, as is being now argued in Minnesota post-*McNeely*, that “a person's consent, in a constitutional sense, is necessary as a matter of law to validate the search of his lungs and the seizure of his breath pursuant to a breathalyzer examination. They contend that they therefore have a constitutional right to refuse such an examination and that they cannot be punished for exercising that right.” *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986) The Ninth Circuit held that “Appellants' argument, however, is incorrect.”

After holding that when a person is under arrest for DWI a breath test is a reasonable search and is constitutional as incident to a lawful arrest, the Court stated:

Appellants' argument regarding consent and cooperation is misplaced. The argument confuses a legal concept, “consent,” with a factual concept, “cooperation.” The two are substantially different. Consent in the constitutional sense is only required where the defendant has a legal right to refuse. As per *Schmerber*, a legally arrested defendant has no constitutional right to refuse a breathalyzer examination. True, he may fail to cooperate, but failure to cooperate does not create a legal right where it would otherwise not exist...

Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1450 (9th Cir. 1986)

It should be noted that *Burnett v. Municipality of Anchorage*, 806 F.2d 1447 (9th Cir. 1986) is cited favorably by the U.S. Supreme Court in both *Skinner* and *McNeely*.

After losing in state court, another driver again challenged Alaska's criminalization of refusal to test also making many of the same legal arguments that are being made today. The Ninth Circuit Court of Appeals affirmed the conviction, holding:

Deering's refusal in this case was neither testimonial nor compelled. The Court held in *Neville* that "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." As our discussion shows, that conclusion is not altered by the imposition of criminal penalties upon the choice of refusal. The analysis proffered in *Neville* is controlling here....

Deering v. Brown, 839 F.2d 539, 544 (9th Cir. 1988).¹⁶

Kentucky

In *Commonwealth v. Hernandez-Gonzalez*, 72 S.W.3d 914 (Ky. 2002), the Kentucky Supreme Court upheld the constitutionality of criminalizing refusal to test. The Court held that it is "firmly established that a suspected drunk driver has a duty to submit to blood alcohol testing." *Id.* at 917. In interpreting confusion over the use of the word consent in Kentucky's Implied Consent law, which in many ways is similar to Minnesota, the Court noted: "[O]ne who refuses will not be physically forced to submit to a chemical test. It does not mean that such person has a lawful right to refuse such testing." *Id.* This is also true in Minnesota.

Virginia

In *Rowley v. Commonwealth*, 629 S.E.2d 188, 191 (Va. 2006), the defendant challenged the criminalization of refusal to test on both Fourth Amendment and Fifth Amendment grounds. The statute was upheld with the Court holding:

Rowley's Fourth Amendment challenge to Code § 18.2-268.3 thus fails for the very reason Code § 18.2-268.2(A) succeeds. The act of driving constitutes an irrevocable, albeit implied, consent to the officer's demand for a breath sample. *See Burnett v.*

¹⁶ *Deering* will be further discussed in section V(3) below with respect to coerced consent. Also *Deering* is cited favorably in *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848, 856 (Minn. 1991) upholding the constitutionality of Minnesota's criminalizing refusal to submit to testing..

Municipality of Anchorage, 806 F.2d 1447, 1450 (9th Cir.1986) (holding that there “is no Fourth Amendment right to refuse a breathalyzer examination”).

Id. at 191.

Ohio

In *State v. Hoover*, 916 N.E.2d 1056 (2009), the Ohio Supreme Court upheld the constitutionality of Ohio’s additional criminal penalty for refusing to submit to chemical testing. In upholding the statute, the court noted: “Hoover has no constitutional right to refuse to take a reasonably reliable chemical test for intoxication.” *Id.* at 1061. The court further explained:

Our conclusion that R.C. 4511.19(A)(2) does not violate the Fourth Amendment to the United States Constitution is also in line with decisions from other jurisdictions. See *State v. Netland* (Minn. 2009), 762 N.W.2d 202; *Rowley v. Virginia* (2006), 48 Va.App. 181, 629 S.E.2d 188; *Burnett v. Anchorage* (Alaska App.1984) 678 P.2d 1364. We hold that R.C. 4511.19(A)(2) does not violate the Fourth Amendment to the United States Constitution or Section 14, Article I of the Ohio Constitution.

Id. at 1062. The United State Supreme Court denied certiorari. 130 S. Ct. 2389 (2010).

In addition to Minnesota, a number of other states have upheld the constitutionality of criminalizing refusal to submit to testing. *McNeely* does not change or alter the basis for those decisions.

IV. The Fourth Amendment and BAC testing in Minnesota

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,” without a judicial search warrant. The above cases provide doctrinal support for *Netland* now that the single factor exigency is no longer good law. This Court will discuss two specific search warrant requirement exceptions.

1. Search incident to lawful arrest

A well-recognized exception to the warrant requirement is search incident to a lawful arrest. “The validity of the search of a person incident to a lawful arrest has been regarded as

settled from its first enunciation, and has remained virtually unchallenged.” *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, (1973) *see also Maryland v. King*, 569 U.S. ____ (June 3, 2013). The Supreme Court has held that “it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction” *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 2040, (1969).

Not every search incident to a lawful arrest is permissible. As the United States Supreme Court noted in a very recent case dealing with DNA samples of arrested person:

This is not to suggest that any search is acceptable solely because a person is in custody. Some searches, such as invasive surgery, *see Winston*, 470 U.S. 753, 105 S.Ct. 1611, 84 L.Ed.2d 662, or a search of the arrestee's home, *see Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), involve either greater intrusions or higher expectations of privacy than are present in this case. In those situations, when the Court must “balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable,” *McArthur, supra*, at 331, the privacy-related concerns are weighty enough that the search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.

Maryland v. King, 569 U.S. ____ (slip opinion 25-26) (June 3, 2013).

Here, we are not dealing with a search incident to arrest that involves forced piecing of the skin, surgery or other unreasonable searches. The reasonableness of the Implied Consent process and the collection of BAC evidence is discussed below in Section 2.

While the Minnesota Supreme Court did not use that exact phrase, the Court was clearly referring to search incident to a lawful arrest in *McDonnell v. Comm'r of Pub. Safety*, 473 N.W.2d 848 (Minn. 1991). The Court, after citing *South Dakota v. Neville*, said “the testing request is merely police conduct ‘normally attendant to arrest and custody’ and ‘similar to a police request to submit to fingerprinting or photography’”. *Id.* at 855.

In *Burnett v. Municipality of Anchorage*, 678 P.2d 1364, 1368 (Alaska Ct. App. 1984), the Alaska Court of Appeals held that “we are satisfied that it is a reasonable search under the constitution because it is incident to arrest.” (citations omitted). Also, the Ninth Circuit approved the use of a breath test as a constitutional search incident to a lawful arrest. *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449 (9th Cir. 1986).

2. Reasonableness and special needs

Reasonableness is the touchstone of all Fourth Amendment analysis. Two years ago, the United States Supreme said:

While warrantless searches are presumptively unreasonable the United States Supreme Court has “recognized that this presumption may be overcome in some circumstances because “[t]he ultimate touchstone of the Fourth Amendment is ‘reasonableness.’ ” *Brigham City, supra*, at 403, 126 S.Ct. 1943; see also *Michigan v. Fisher*, 558 U.S. —, —, 130 S.Ct. 546, 548, 175 L.Ed.2d 410 (2009) (*per curiam*). Accordingly, the warrant requirement is subject to certain reasonable exceptions. *Brigham City, supra*, at 403, 126 S.Ct. 1943.

Kentucky v. King, 131 S. Ct. 1849, 1856, (2011)

This week, the United States Supreme Court decided *Maryland v. King* 569 U.S. ____ (June 3, 2013) which examined the Fourth Amendment’s applicability to DNA searches of people who have been arrested.

To say that the Fourth Amendment applies here is the beginning point, not the end of the analysis. “[T]he Fourth Amendment’s proper function is to constrain, not against all intrusions as such, but against intrusions which are not justified in the circumstances, or which are made in an improper manner.” *Schmerber, supra*, at 768. “As the text of the Fourth Amendment indicates, the ultimate measure of the constitutionality of a governmental search is ‘reasonableness.’ ” *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646, 652, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995). In giving content to the inquiry whether an intrusion is reasonable, the Court has preferred “some quantum of individualized suspicion ... [as] a prerequisite to a constitutional search or seizure. But the Fourth Amendment imposes no irreducible requirement of such suspicion.” *United States v. Martinez-Fuerte*, 428 U.S. 543, 560–561, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (citation and footnote omitted).

Maryland v. King, (slip opinion at p. 8)

In some circumstances, such as “[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable.” *Illinois v. McArthur*, 531 U.S. 326, 330, 121 S.Ct. 946, 148 L.Ed.2d 838 (2001). Those circumstances diminish the need for a warrant, either because “the public interest is such that neither a warrant nor probable cause is required,” *Maryland v. Buie*, 494 U.S. 325, 331, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), or because an individual is already on notice, for instance because of his employment, see *Skinner*, *supra*, or the conditions of his release from government custody, see *Samson v. California*, 547 U.S. 843, 126 S.Ct. 2193, 165 L.Ed.2d 250 (2006), that some reasonable police intrusion on his privacy is to be expected. The need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the “interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.” *Treasury Employees v. Von Raab*, 489 U.S. 656, 667, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989).

Maryland v. King, (slip opinion at p. 8-9)

One area where the searches are held to be reasonable is “special needs.” see *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 109 S. Ct. 1402, (1989). The Sotomayor plurality (see section III of *McNeely*) did not apply the *Skinner* “special needs” doctrine to *McNeely* (an arrested driver, in a “routine” DWI, who refuses to test and the police without a warrant pierced his skin and forced a blood draw without a search warrant). However the Supreme Court has not ruled on whether the “special needs” doctrine would apply to the constitutionality, as exists in the present case, of requiring cooperation with BAC testing and, if a person declines, the person’s body is not violated. The “special needs” doctrine is not usually applied to routine police criminal investigations, but it is an open question whether the Supreme Court would apply it to the states Implied Consent regulatory powers of managing highway safety¹⁷. Some of the issues involved in “special needs” will be discussed here, but given the Court’s other rulings, this Court does not need to specifically decide the “special needs” question.

¹⁷ This is particularly true given the analysis in the recent opinion *Maryland v. King* 569 U.S. ____ (2013) permitting warrantless searches for DNA of an arrested person.

Skinner is frequently cited for proposition that blood, breath and urine testing “implicates” the Fourth Amendment but the case needs more attention than that. In *Skinner* railroad workers were challenging, under the Fourth Amendment, the Federal Railway Administration (FRA) regulations that required blood, breath or urine testing in a number of situations, even when there was no probable cause to believe impairment. Failure to test results in termination of employment.¹⁸

To hold that the Fourth Amendment is applicable to the drug and alcohol testing prescribed by the FRA regulations is only to begin the inquiry into the standards governing such intrusions. *O'Connor v. Ortega*, 480 U.S. 709, 719, 107 S.Ct. 1492, 1499, 94 L.Ed.2d 714 (1987) (plurality opinion); *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S.Ct. 733, 741, 83 L.Ed.2d 720 (1985). For the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. *United States v. Sharpe*, 470 U.S. 675, 682, 105 S.Ct. 1568, 1573, 84 L.Ed.2d 605 (1985); *Schmerber v. California*, 384 U.S., at 768, 86 S.Ct., at 1834. What is reasonable, of course, “depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself.” *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S.Ct. 3304, 3308, 87 L.Ed.2d 381 (1985). Thus, the permissibility of a particular practice “is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.” *Delaware v. Prouse*, 440 U.S., at 654, 99 S.Ct., at 1396; *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976).

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 618-19, 109 S. Ct. 1402, 1414, (1989)

The Court went on to hold:

The possession of unlawful drugs is a criminal offense that the Government may punish, but it is a separate and far more dangerous wrong to perform certain sensitive tasks while under the influence of those substances. Performing those tasks while impaired by alcohol is, of course, equally dangerous, though consumption of alcohol is legal in most other contexts. The Government may take all necessary and reasonable regulatory steps to prevent or deter that hazardous conduct, and since the gravamen of the evil is performing certain functions while concealing the substance in the body, it may be necessary, as in the case before us, to examine the body or its fluids to accomplish the regulatory purpose. The necessity to perform that regulatory function with respect to railroad employees engaged in safety-sensitive tasks, and the reasonableness of the system for doing so, have been established in this case. Alcohol and drug tests conducted in reliance on the authority of Subpart D cannot be viewed as private action outside the reach of the Fourth Amendment. Because the testing procedures mandated or authorized

¹⁸ As far as this Court is aware there is no forced testing under FRA if a worker refuses.

by Subparts C and D effect searches of the person, they must meet the Fourth Amendment's reasonableness requirement. In light of the limited discretion exercised by the railroad employers under the regulations, the surpassing safety interests served by toxicological tests in this context, and the diminished expectation of privacy that attaches to information pertaining to the fitness of covered employees, we believe that it is reasonable to conduct such tests in the absence of a warrant or reasonable suspicion that any particular employee may be impaired. We hold that the alcohol and drug tests contemplated by Subparts C and D of the FRA's regulations are reasonable within the meaning of the Fourth Amendment.

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 633-34, 109 S. Ct. 1402, 1422, (1989)

The state has an undisputed legitimate interest in regulating highway safety in general and impaired driving in particular. As *McNeely* stated:

No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it." *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 451, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990). Certainly we do not. While some progress has been made, drunk driving continues to exact a terrible toll on our society. See NHTSA, Traffic Safety Facts, 2011 Data 1 (No. 811700, Dec. 2012) (reporting that 9,878 people were killed in alcohol-impaired driving crashes in 2011, an average of one fatality every 53 minutes).

Missouri v. McNeely, 133 S. Ct. 1552, 1565 (2013).

In *Skinner*, the Court found a legitimate government concern with railroad fatalities caused by impaired workers (about 2 per year or about 1/5000th the size of DWI fatalities) to be part of the basis to permit warrantless impairment testing of railroad workers. In writing about the problem of drunk drivers Justice Blackman observed, in his concurrence in *Sitz* upholding the federal constitutionality of sobriety roadblocks, that "the slaughter on the highways of this Nation exceeds the death toll of all our wars." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 456, 110 S. Ct. 2481, 2488, (1990).

A person who operates a motor vehicle in Minnesota is on notice that Minnesota requires BAC testing and has a less legitimate expectation of privacy in their BAC level than other

people¹⁹. A person arrested by the police has a diminished expectation of privacy. As the United State Supreme Court very recently wrote:

The expectations of privacy of an individual taken into police custody “necessarily [are] of a diminished scope.” *Bell*, 441 U.S., at 557. “[B]oth the person and the property in his immediate possession may be searched at the station house.” *United States v. Edwards*, 415 U.S. 800, 803, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974). A search of the detainee's person when he is booked into custody may “ ‘involve a relatively extensive exploration,’ ” *Robinson*, 414 U.S., at 227, including “requir[ing] at least some detainees to lift their genitals or cough in a squatting position,” *Florence*, 566 U.S., at — (slip op., at 13).

Maryland v. King, (slip opinion at 24-25) (June 3, 2013)

The *Skinner* Court addresses the privacy concerns that exist with breath testing similar to the test in the case before this Court.

The breath tests authorized by Subpart D of the regulations are even less intrusive than the blood tests prescribed by Subpart C. Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in the employee's bloodstream and nothing more. 626 Like the blood-testing procedures mandated by Subpart C, which can be used only to ascertain the presence of alcohol or controlled substances in the bloodstream, breath tests reveal no other facts in which the employee has a substantial privacy interest. Cf. *United States v. Jacobsen*, 466 U.S., at 123, 104 S.Ct., at 1661-1662; *United States v. Place*, 462 U.S., at 707, 103 S.Ct., at 2644-2645. In all the circumstances, we cannot conclude that the administration of a breath test implicates significant privacy concerns. (emphasis added)

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 625-26, 109 S. Ct. 1402, 1418, (1989)

LaFave observes that “[y]et another theme running through the Supreme Court's decisions is that no warrant is necessary when there is little or nothing for the magistrate to decide.” LaFave 2 Search & Seizure § 4.1(b) (5th ed.) In the context of blood, breath and urine testing of railroad workers operating dangerous equipment the Court said that:

An essential purpose of a warrant requirement is to protect privacy interests by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary

¹⁹ Even with that diminished expectation of privacy under Minnesota law police may not administer a portable preliminary breath test (PBT) without articulable suspicion of impaired driving. Minn. Stat. 169A.41.

acts of government agents. A warrant assures the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope. A warrant also provides the detached scrutiny of a neutral magistrate, and thus ensures an objective determination whether an intrusion is justified in any given case. In the present context, however, a warrant would do little to further these aims. Both the circumstances justifying toxicological testing and the permissible limits of such intrusions are defined narrowly and specifically in the regulations that authorize them, and doubtless are well known to covered employees. Indeed, in light of the standardized nature of the tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate.

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 621-22, (1989)(citations omitted).

Professor LaFare also observes that it is important to keep the search warrant process meaningful by not overwhelming judges with applications.

These different attitudes suggest that considerations other than “exigent circumstances” are at play. Although the Court has never put the matter quite this way, it looks as if the Supreme Court is trying not to overburden the warrant-issuing process. If this is the case, then certainly one might well view sympathetically the Court's efforts to extend the warrantless search category beyond genuine exigent circumstances. This is because a greatly expanded warrant system—that is, one which *truly* adhered to the principle that arrest and search warrants are required whenever practicable—might convert the warrant procedure into more of a mechanical routine, one in which the judiciary would “not always take seriously its commitment to make a ‘neutral and detached’ decision as to whether there exist grounds for a search.” The point is simply this: it may well be that, as a practical matter, the warrant process can serve as a meaningful device for the protection of Fourth Amendment rights only if used selectively to prevent those police practices that would be most destructive of Fourth Amendment values.

LaFare 2 Search & Seizure § 4.1(b) (5th ed.) (emphasis added)

The Court notes that in 2012 there were 40,327 DWI cases (felony, gross and misdemeanor) filed in Minnesota²⁰. According to the defense argument, that there can never be consent because it is coerced, the police would have to prepare and a judge would have to review

²⁰ Of those, 9,530 were filed in Hennepin County.

and sign over 775 search warrants for compelled blood draws²¹ per week or about one every three minutes nonstop during a 40 hour week.

In *McNeely* Justice Kennedy, in his concurrence with the Sotomayo plurality, stated that:

States and other governmental entities which enforce the driving laws can adopt rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment and give helpful guidance to law enforcement officials. And this Court, in due course, may find it appropriate and necessary to consider a case permitting it to provide more guidance than it undertakes to give today.

Missouri v. McNeely, 133 S. Ct. 1552, 1569 (2013)

With respect to testing impaired drivers in Minnesota the police role is narrowly and specifically proscribed. The process is only invoked after there is probable cause to arrest a person for DWI. A legislatively prescribed Notice is read to the arrested person. The person has the right to consult with an attorney. The police may only use approved testing procedures and methods. The person has a right to get their own second test. If the police request either a blood or urine sample and a person declines the police must offer an alternative test method. If a person declines to cooperate (refuses), the police do not take a BAC sample without a warrant. The entire Implied Consent process is recorded to help insure that the police officer follows the specific statutory requirements and to permit later judicial review. Deviation from the clearly and narrowly prescribed requirements results in suppression of the test results and reinstatement of

²¹ A search warrant gives the police the legal authority to compel compliance for example to permit a forced entry into a home to search for evidence of a crime. Search warrant would have to be for a compelled blood draw because breath and urine samples can only be given consensually. A search warrant for breath would be unenforceable because a breath sample, to be valid, has to be deep lung air with a sustained blowing and therefore can only occur with cooperation. While there might be a way to compel with a urine draw without cooperation it would likely be held to be an unreasonable and repugnant search method. Issuing a search warrant for breath would be the same as issuing a drug search warrant where the police are allowed to knock on the door and announce their presence but they are not allowed to go inside and secure the evidence from destruction without the person's permission. In order to avoid the ineffectiveness of a "do not enter" search warrant if search warrants are required in DWI cases they will be for blood. This will also add significant time for the police to transport 40,327 people per year to hospitals for blood draws.

suspended driving privileges. It is this Court's conclusion that Minnesota's Implied Consent procedure meets the reasonable requirements of the Fourth Amendment.

V. Remaining issues

1. Exigent Circumstance

The state argues that under the totality of the circumstances there were exigent circumstances such that a search warrant was not required under the Fourth Amendment. Because of this Court's ruling that a search warrant is not required the Court does not need to reach this issue. The Court does note that under the all of the circumstances here²² if there were a remanded for findings on exigent circumstances it appears likely that there would be such a finding in this case.

2. Coerced consent and due process.

As discussed above, there is no coerced consent because a driver does not have a lawful right to refuse to submit testing. As *Wiseman* correctly observed, consent is not the basis of the search and the search meets the reasonable requirement of the Fourth Amendment. Any due process concerns have been previously addressed by the Minnesota courts. Since O'Brien only raised due process as an issue but did not brief the issue it will not be discussed further here.

3. Unconstitutional conditions

Netland, and O'Brien here, raise the unconstitutional conditions doctrine. Based on *Frost v. R.R. Comm'n Cal.* 271 U.S. 583, 592 (1926), the defense argues that the breath test is an unconstitutional search because the State impermissibly conditions the defendant's driving privileges on an unconstitutional warrantless search for blood-alcohol content. First, because search in this case is constitutional there is no violation of this doctrine. Second, this Court is not

²² The Court has not summarized in the fact section all of the facts in this case that would be used to analysis totality of the circumstances that support exigency.

aware of any cases where this doctrine has been used in a criminal law case. As the Minnesota Supreme Court noted:

The application of this doctrine to other constitutional rights is less clear. *See Dolan v. City of Tigard*, 512 U.S. 374, 407 n. 12, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994) (“Although it has a long history, ... the ‘unconstitutional conditions’ doctrine has for just as long suffered from notoriously inconsistent application; it has never been an overarching principle of constitutional law that operates with equal force regardless of the nature of the rights and powers in question.” (citation omitted)).

State v. Netland, 762 N.W.2d 202, 211 (Minn. 2009).

The third reason this doctrine is not controlling here is that it cannot be reconciled with Supreme Court decisions. If this were an applicable doctrine, the United States Supreme Court would not have upheld the Massachusetts Implied Consent law in *Mackay* and the Supreme Court in *McNeely* would not have favorably cited to all 50 states Implied Consent laws. Further, they would not have declined certiorari in *Muraski* in 2009 and not have declined certiorari less than 3 months ago in *Wiseman*, both of which raise this precise issue. It is this Courts conclusion that the unconstitutional conditions doctrine does not apply to this case.

Conclusion

McNeely holds that when a person, lawfully under arrest for driving under the influence of alcohol, refuses to submit to alcohol testing the police may not make a forced warrantless blood draw based on the single factor exigency of dissipation of alcohol. Minnesota’s reasonable Implied Consent law, including criminalizing refusal to submit to chemical testing, was constitutional before *McNeely* and it is constitutional after *McNeely*. The breath test of the defendant in this case was reasonable under the Fourth Amendment.

P.D.B. 6/5/2013