PROCEDURAL HISTORY

July 31, 2009: Date of offenses alleged in Scott County D.C. File No. 70-CR-09-17926 (Shakopee case).

January 16, 2010: Date of offenses alleged in Hennepin County D.C. File No. 27-CR-10-2851.

January 25, 2010: Date of offenses alleged in Scott County D.C. File No. CR-10-2169 (Prior Lake case).

August 6, 2010: Hearing held in Hennepin County case on Brooks' motion to suppress evidence, Judge Robert M. Small presiding.

September 9, 2010: Judge Small filed an order denying the suppression motion in the Hennepin County case (Appendix at A-7).

September 28, 2010: Consolidated hearing held in Scott County cases on Brooks' motion to suppress evidence, Judge William E. Macklin presiding.

December 6, 2010: Judge Macklin filed an order denying the suppression motions in the Scott County cases (Appendix at A-3).

January 21, 2011: Court trial on stipulated facts held in Hennepin County case to allow Brooks to appeal suppression issues, Judge Small presiding; the court adjudicated Brooks guilty of one count of driving with an alcohol concentration of .08 or more in the first degree.

March 18, 2011: Consolidated court trial on stipulated facts held in Scott County cases to allow Brooks to appeal suppression issues, Judge Macklin presiding; the court adjudicated Brooks guilty of one count of driving with an

alcohol concentration of .08 or more in the first degree for each of the consolidated cases.

April 1, 2011: Sentencing hearing held in Hennepin County case, Judge Small presiding; the court sentenced Brooks to an executed prison term of 48 months.

April 4, 2011: Consolidated sentencing hearing held in Scott County cases, Judge Macklin presiding; the court sentenced Brooks to two concurrent executed prison terms of 72 months.

June 7, 2011: Brooks filed notices of appeal in the Hennepin County (App. Ct. File No. A11-1042) and Scott County cases (App. Ct. File No. A11-1043).

May 7, 2012: Court of appeals filed an unpublished decision affirming Brooks' Scott County convictions.

May 29, 2012: Court of appeals filed an unpublished decision affirming Brooks' Hennepin County conviction.

June 5, 2012: Brooks filed petitions for supreme court review and motions to consolidate in both appeals.

July 17, 2012: Minnesota Supreme Court filed an order consolidating the Scott County and Hennepin County cases and denying Brooks' petition for further review.

October 15, 2012: Brooks filed a petition for a writ of certiorari with the United States Supreme Court.

April 22, 2013: United States Supreme Court entered an order granting Brooks' petition for a writ of certiorari, vacating the court of appeals' judgments and remanding to the court of appeals for further consideration in light of Missouri v. McNeely, 569 U.S. ___ (2013) (Appendix at A-1, A-2).

May 13, 2013: Court of Appeals issued an order reinstating the appeal and setting a briefing schedule.

May 17, 2013: State moves the Minnesota Supreme Court for accelerated review.

July 13, 2013: Minnesota Supreme Court grants state's motion for accelerated review.

LEGAL ISSUE

Issue: Did the district courts err by refusing to suppress the blood and urine test results obtained from warrantless searches of Brooks' body because the state did not prove exigent circumstances to justify the warrantless searches or that Brooks consented to the searches?

Rulings below: The district court in the Hennepin County case ruled that Brooks consented to the search (9/9/10 Hennepin County Order). The district court in the Scott County cases ruled that the searches were justified by the single-factor exigency of alcohol's evanescence (12/6/10 Scott County Order).

Authority: Missouri v. McNeely, 569 U.S. ___ (2013)

Skinner v. Railway Labor Exec. Ass'n, 489 U.S. 602 (1989)

Schneckloth v. Bustamonte, 412 U.S. 218, 224-27 (1973)

STATEMENT OF THE CASE

Appellant Wesley Eugene Brooks was charged in two separate Scott County cases (D.C. File Nos. 70-CR-09-17926 and 70-CR-10-2169) with various offenses, including first-degree driving with an alcohol concentration of 0.08 or more. Urine samples collected from Brooks in both cases under the implied consent law yielded urine alcohol concentrations above the legal limit.

The cases were consolidated at the district court level for a decision on the issue of whether a valid exception to the warrant requirement existed to justify the warrantless searches of Brooks' person for evidence of his alcohol concentration. The district court denied Brooks' suppression motions, ruling that the searches were justified by the single-factor exigency of alcohol's evanescence (Appendix at A-3). Later, at a consolidated stipulated facts court trial to allow Brooks to appeal the suppression rulings, the court adjudicated Brooks guilty of first-degree driving with an alcohol concentration of 0.08 or more in each of the Scott County cases.

Brooks appealed these cases to the Minnesota Court of Appeals. The court of appeals affirmed the convictions, ruling in an unpublished decision that the evanescent nature of alcohol in urine satisfies the exigent-circumstances exception to the search warrant requirement. State v. Brooks, No. A11-1042 (Minn. Ct. App. May 7, 2012).

Brooks also was charged in a Hennepin County case (D.C. File No. 27-CR-10-2851) with various offenses, including first-degree driving with an alcohol

concentration of 0.08 or more. A blood sample collected from Brooks under the implied consent law yielded a blood alcohol concentration above the legal limit.

Brooks moved to suppress the blood test result on the basis that there was no valid exception to the warrant requirement to justify the warrantless search. The district court denied the motion, ruling that Brooks validly consented to the search under the implied consent law (Appendix at A-7).

Brooks appealed this conviction to the court of appeals. The court of appeals affirmed the conviction, ruling in an unpublished decision that the single-factor exigency of alcohol's evanescence justified the warrantless search, and declined to address whether the implied consent advisory coerced Brooks' "consent." State v. Brooks, No. A11-1043 (Minn. Ct. App. May 29, 2013).

Brooks petitioned the Minnesota Supreme Court for further review and filed motions asking that both his appeals be consolidated. In an order dated July 17, 2012, the supreme court granted the motion to consolidate the appeals and denied the petitions for further review.

Brooks filed a petition for a writ of certiorari in the United States Supreme Court. On April 22, 2013, the Supreme Court entered an order granting Brooks' petition for a writ of certiorari, vacating the court of appeals' judgments and remanding to the court of appeals for further consideration in light of Missouri v. McNeely, 569 U.S. ___ (2013) (Appendix at A-1, A-2).

The court of appeals reinstated this appeal on May 13, 2013 and this court issued an order for accelerated review on July 16, 2013.

STATEMENT OF FACTS

Hennepin County case

At the hearing on Brooks' motion to suppress the blood test result, Minnesota State Patrol Trooper Azzahya Williams testified that on January 10, 2010, she was patrolling on Interstate 35W in Minneapolis (HT.5-6).[1] At around 7:00 p.m., Williams saw a black pick-up truck drive past her squad car, and she noticed sparks coming from under the truck (HT.6). Williams drove behind the car and, after a few minutes, at 7:03 p.m., pulled it over (HT.7). Appellant Brooks was driving the car (HT.7-8). After a brief investigation, Williams arrested Brooks on suspicion that he was driving under the influence of alcohol (HT.7).

Williams called for a second officer to help her search Brooks' truck before she had it towed (HT.7-9). She and the other trooper searched Brooks' car, and she did paperwork while she waited for a tow truck to take Brooks' pickup away (HT.11-12).

Williams eventually drove Brooks to the Hennepin County Medical Center; they arrived there at 8:22 p.m., nearly an hour and a half after the initial stop (H.T.7). While they were still in the squad car, Williams read the Minnesota implied consent advisory to Brooks (HT.8, 13). The advisory informed Brooks that Minnesota law required him to take a test, that refusal to take a test is a crime

[1] "HT." refers to the transcript of the suppression hearing held in the Hennepin County case.

and if the test was unreasonably delayed he would be considered to have refused (Ex. 5).

Brooks said he wanted to talk to a lawyer first, so Williams took Brooks inside the hospital and Brooks called a lawyer (HT.8-9; Ex. 5). Brooks finished his telephone call at 8:36 p.m. and said he would submit to a urine test (HT.9).

Brooks tried for several minutes but could not produce a urine sample (HT.9). Williams asked Brooks if he would submit to a blood test and, after he talked to his lawyer again, at 9:01 p.m., two hours after he was stopped on the highway, Brooks submitted to a blood test (HT.9-10).

Williams testified that she was trained on how to obtain search warrants, including telephonic warrants (T.10). She also testified that she has a telephone number to call State Patrol investigators if she has questions or needs help getting a warrant (HT.10). Williams admitted that at no time during the two hours she was with Brooks before his blood was drawn did she try to get a warrant to search his person for evidence of his alcohol concentration (HT.12-13). Williams also testified that she had never applied for a search warrant (HT.14).

At the suppression hearing, Brooks presented evidence that a Hennepin County District Court "duty judge" can be contacted by telephone outside regular business hours through a jailer at the Hennepin County jail (HT.23-25). That evidence further showed that a judge could be contacted within a matter of five to thirty minutes (HT.25).

Scott County cases

The Scott County cases were consolidated for a single suppression hearing (ST.3).[2] At the suppression hearing, Brooks presented evidence that a First Judicial District Court "duty judge" can be contacted by telephone outside regular business hours through a phone number (ST.30-31). The duty judge generally answers the call directly or the caller can leave a message and the judge calls back "shortly thereafter" (ST.31).

As to the issue of whether exigent circumstances existed to justify the warrantless searches of Brooks' person for evidence of alcohol concentration, the parties submitted several exhibits, including the urinalysis reports (ST.5-8; Ex. 2 (Shakopee case); Ex. 3 (Prior Lake case)). The parties stipulated that in the Shakopee case, the stop of Brooks occurred at 7:11 a.m. and the urine collected at 8:45 a.m. (ST.9). The parties stipulated that in the Prior Lake case, the stop occurred at 2:06 a.m. and the urine collected at 3:15 a.m. (ST.10-11). The implied consent advisory form for the Prior Lake case was admitted as Exhibit 5 (ST.1). The implied consent advisory form for the Shakopee case was admitted as Exhibit 6 (ST.14).

Shakopee case

The complaint filed in the Shakopee case alleges that at 2:06 a.m. on July 31, 2009, Shakopee Police Officer Michelle Schmidt stopped a car driving

[2] "ST." refers to the transcript of the suppression hearing held in the Scott County cases.

"rapidly" on South 4th Street in Shakopee (Complaint filed in D.C. File No. 70-CR-09-17926). She identified the driver as appellant Brooks, and after a brief investigation, she arrested him on suspicion that he was driving while impaired and took him to St Francis Regional Medical Center (Id.).

At the hospital, Schmidt read the implied consent advisory to Brooks (Id.). The advisory informed Brooks that Minnesota law required him to take a test, that refusal to take a test is a crime and if the test was unreasonably delayed he would be considered to have refused the test (Ex. 6). After talking to his lawyer by telephone, at 3:15 a.m. Brooks submitted a urine sample (Complaint). The test result revealed an alcohol concentration above the legal limit (Id.).

Prior Lake case

The complaint filed in the Prior Lake case alleges that at 7:11 a.m. on January 25, 2010, Prior Lake police officers responded to a call about a person sleeping in a car (Complaint filed in D.C. File No. 70-CR-10-2169). The officers discovered a man they later identified as appellant Brooks sleeping in the driver's seat of a running car (Id.). After a brief investigation, officers arrested Brooks on suspicion that he was in control of a motor vehicle while impaired (Id.).

The officers read Brooks the implied consent advisory (Id.). The advisory informed Brooks that Minnesota law required him to take a test, refusal to submit to testing is a crime and he would be considered to have refused the test if he unreasonably delayed (Ex. 5). Brooks talked to a lawyer by telephone and said he

would take a urine test. At 8:32 a.m. he submitted a urine sample that yielded an alcohol concentration over the legal limit. (Complaint; Ex. 3; Ex. 5).

ARGUMENT

The warrant requirement applies to the compelled blood and urine alcohol concentration tests used to search for evidence in the criminal investigations in Brooks' cases, and because the state did not prove exigent circumstances to justify the warrantless searches, or that Brooks consented to the searches, the blood and urine test results should have been suppressed.

1. *The blood test and urine tests administered to Brooks constitute "searches" within the meaning of the Fourth Amendment and thus are subject to the reasonableness requirement.*

The Fourth Amendment to the United States Constitution provides in relevant part that "[t]he right to the people to be secure in their ***persons***, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause" (emphasis added). The United States Supreme Court has held that a warrantless search of the person is reasonable only if it falls within a recognized exception. See, e.g., United States v. Robinson, 414 U.S. 218, 224 (1973).

The United States Supreme Court has specifically held that alcohol concentration testing of blood, breath and urine are all searches protected by the Fourth Amendment. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602 (1989). The nature of the intrusion, whether accomplished by piercing the skin with a needle to obtain blood or by collecting a urine sample in a cup, does not change the fact that the purpose of both intrusions is to look for physical evidence of criminal activity in a place where individuals have a legitimate expectation of privacy. Id.

In Skinner, the Court explicitly held that the collection of blood, breath and urine specimens for the purpose of determining alcohol concentration are searches for Fourth Amendment purposes, despite the different nature of the intrusions in each of the collection methods. Id., 489 U.S. at 616-17. The Court said:

> We have long recognized that a "compelled intrusio[n] into the body for blood to be analyzed for alcohol content" must be deemed a Fourth Amendment search. See Schmerber v. California, 384 U.S. 757, 767-68 (1966). See also Winston v. Lee, 474 U.S. 753, 760 (1985). In light of our society's concern for the security of one's person, see, e.g., Terry v. Ohio, 392 U.S. 1, 9 (1968), it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested [individual's] privacy interests. Cf. Arizona v. Hicks, 480 U.S. 321, 324-25 (1987). Much the same is true of the breath-testing procedures . . . . Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, see, e.g., California v. Trombetta, 467 U.S. 479, 481 (1984), implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in Schmerber, should also be deemed a search, see 1 W. LaFave, Search and Seizure § 2.6(a), p. 463 (1987). See also Burnett v. Anchorage, 806 F.2d 1447, 1449 (CA9 1986); Shoemaker v. Handel, 795 F.2d 1136, 1141 (CA3), cert. denied, 479 U.S. 986 (1986).
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> Unlike the blood-testing procedure at issue in Schmerber, the procedures . . . for collecting and testing urine samples do not entail a surgical intrusion into the body. It is not disputed, however, that chemical analysis of urine, like that of blood, can reveal a host of private medical facts about an [individual], including whether he or she is epileptic, pregnant, or diabetic. Nor can it be disputed that the process of collecting the sample to be tested, which may in some cases involve visual or aural monitoring of the act of urination, itself implicates privacy interests. As the Court of Appeals for the Fifth Circuit has stated:
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> > "There are few activities in our society more personal or private than the passing of urine. Most people

> describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom." National Treasury Employess Union v. Von Raab, 816 F.2d 170, 175 (CA5 1987).
>
> ***Because it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable, the Federal Courts of Appeals have concluded unanimously, and we agree, that these intrusions must be deemed searches under the Fourth Amendment.***

Skinner, 489 U.S. at 616-17 (emphasis added).

The Minnesota Supreme Court likewise has held that alcohol concentration testing of blood, breath and urine are searches protected by the Fourth Amendment. State v. Netland, 766 N.W.2d 202 (Minn. 2009); State v. Shriner, 751 N.W.2d 538 (Minn. 2008). Moreover, the Minnesota Supreme Court has held that even a request that a person open his or her mouth so officers can look inside for drugs in a search. State v. Hardy, 577 N.W.2d 212 (Minn. 1998). See also In re the Welfare of C.T.L., 722 N.W.2d 484 (Minn. Ct. App. 2006) (the collection and analysis of a biological specimen constitutes a search). There simply is no legitimate argument that the police collection and testing of blood and urine from Brooks to test for alcohol concentration are not searches subject to Fourth Amendment protection.

The next question the court must consider is whether the search was a reasonable one. The Fourth Amendment does not prohibit all searches, but only those that are unreasonable. United States v. Sharpe, 470 U.S. 675, 682 (1985). What is reasonable depends "on all of the circumstances surrounding the search or

seizure and the nature of the search of seizure itself." United States v. Montoya de Hernandez, 473 U.S. 531, 537 (1985). The permissibility of a particular practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against promotion of legitimate government interests." Delaware v. Prouse, 440 U.S. 648, 654 (1979); United States v. Martinez-Fuerte, 428 U.S. 543 (1976).

The Supreme Court has held that some searches, by their very nature, are so intrusive as to be unreasonable even with a warrant (e.g., forcing a defendant to undergo surgery to recover a bullet or pumping a defendant's stomach for drugs).[3] Obviously the searches in this case are not that type of search. But, importantly, the Court has made very clear the balance generally is struck in favor of the procedures required by the Fourth Amendment's warrant clause. Skinner, 489 U.S. at 620 (citations omitted). Thus, except in certain well-defined circumstances, a search is not reasonable unless it is accomplished pursuant to a judicial warrant issued on probable cause. Id. (citations omitted).

The Court has recognized exceptions to this general rule "when special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirements impracticable." Id. (citations and internal quotation marks omitted). When faced with such special needs, the Court will balance the governmental and privacy interests to assess the practicality of the warrant and probable-cause requirements in the particular contexts. Id. (citations omitted).

[3] Winston v. Lee, 470 U.S. 753 (1984); Rochin v. California, 342 U.S. 165 (1952).

In Missouri v. McNeely, 569 U.S. ___ (2013), the government attempted to convince the United States Supreme Court that: (1) the evanescent nature of alcohol in the body, and (2) the particular danger impaired driver pose to public safety, make searches of persons against whom the police have probable cause to suspect were driving while impaired should be one of these "special" circumstances under which the warrant requirement should give way. The Court declined the government's invitation and made it abundantly clear that there is nothing at all special about searches for alcohol concentration evidence in DWI cases and therefore, that the general warrant and probable-cause requirements apply.

2. *Unless an exception to the warrant requirement applies in a particular case, Missouri v. McNeely requires police to obtain a warrant before searching a person's body for evidence of blood alcohol concentration.*

On April 17, 2013, the United States Supreme court decided the case of Missouri v. McNeely, 133 S.Ct. 1552 (2013). In McNeely the court held that: "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Id. at 1561 (citing McDonald v. United States, 335 U.S. 451, 456 (1948), which held, "We cannot . . . excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the warrantless search] imperative").

To a person with no legal training, it might appear that McNeely stands for the single proposition that warrantless non-consensual blood draws to obtain evidence for a criminal prosecution are no longer permitted in the United States. But to a person who paid even moderate attention in high school civics, it is clear that, although this case ***involved*** a warrantless non-consensual blood draw, it is not ***about*** warrantless non-consensual blood draws.

Rather, McNeely is about whether the Fourth Amendment's warrant requirement must give way in a DWI investigation due to alcohol's evanescence in the body. In a resounding eight-to-one decision from one of the most divided and divisive courts in our nation's history, the Supreme Court's answer is that it ***must not***. The Court made this even more abundantly clear five days after it issued McNeely, when it vacated the judgments in these consolidated cases, two of which involved urine tests and all three of which were allegedly obtained by consent under the Minnesota's implied consent law, and remanded the cases here ***for further consideration in light of Missouri v. McNeely, 569 U.S. ___ (2013)*** (emphasis added). Brooks v. Minnesota, No. 12-478 (Order filed April 22, 2013) (Appendix at A-1). Had the Court intended its holding in McNeely to be limited to warrantless non-consensual blood draws, there would have been no reason to vacate the judgments in these cases that involved allegedly "consensual" urine and blood testing and instruct this court that it must issue a new decision consistent with McNeely.

The practical holding of McNeely is that the methods law enforcement officers have been using to investigate DWI offenses in general, and the way they are investigated in Minnesota in particular, are unconstitutional under the Fourth Amendment. In this case, the blood test and urine tests obtained from Brooks should have been suppressed because they were obtained without a warrant, in the absence of exigent circumstances and without consent.

3. *The state has not proven exigent circumstances to justify the warrantless blood and urine alcohol searches in this case.*

The United States Supreme Court has consistently held that the collection and analysis of a biological specimen for purposes of scientific evaluation is a "search and seizure" entitled to Fourth Amendment Protection. Schmerber v. California, 384 U.S. 757 (1966). Until McNeely, the Supreme Court last considered the questions raised by a warrantless non-consensual search of a person for a biological specimen in DWI cases in Schmerber.

The facts in Schmerber are similar to the facts in McNeely: a blood sample was drawn from a DWI suspect without a warrant and without the suspect's consent. Id. at 758. The Court determined the legality of the warrantless search on the facts of the case, recognizing that requiring authorization by a "neutral and detached magistrate before allowing the invasion of "another's body in search of evidence of guilt is indisputable and great." Id. (quoting Johnson v. United States, 333 U.S. 10, 13-14 (1948)). The ultimate decision in Schmerber that exigent circumstances justified the particular warrantless non-consensual search has been

mis-cited over and over again by a number of courts throughout country, including the Minnesota Supreme Court.

Although the Supreme Court went to great lengths to explain that Schmerber's holding was limited to the "special facts of the case before it, Id. at 771, the decision has spawned an attitude in our legislature, law enforcement and ultimately in our highest court that a warrantless test can be taken legally in any case involving alleged drinking and driving. But Schmerber never stood for the proposition that probable cause to suspect impaired driving will always justify a warrantless alcohol concentration test, nor did the Court intend for it to do so. Id. at 770-71. What the Court actually said was:

> [T]he percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. ***Given these special facts***, we conclude that the attempt to secure evidence of blood-alcohol content ***in this case*** was an appropriate incident to petitioner's arrest.

Id. (emphasis added).

The Court concluded the Schmerber decision with this caution:

> We thus conclude that the present record shows no violation of petitioner's right under the Fourth and Fourteenth Amendments to be free from 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 State's 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 (emphasis added).

The Minnesota Supreme Court, despite the Supreme Court's limiting language in Schmerber, reversed the court of appeal's attempt to adhere to that rule, and held instead that the presence of alcohol in a person's blood constitutes a "single-factor exigency" in every impaired driving case that always justifies bypassing the Fourth Amendment's warrant requirement before the collection of a biological specimen for alcohol concentration testing. State v. Netland, 762 N.W.2d 202 (Minn. 2009); State v. Shriner, 751 N.W.2d 538 (Minn. 2008).

The Supreme Court's decision in McNeely reaffirms the holding in Schmerber and thus overrules the Minnesota cases that established a per se exception to the warrant requirement based on the single "exigent" factor of alcohol's eventual dissipation from the body. Rather, the exigent circumstances exception must be determined on a case-by-case basis and "only applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the circumstances." McNeely, 133 S.Ct. at 1558 (citing Kentucky v. King, 563 U.S. ___, slip op. at 6 (2011)).

The Court reiterated that to determine whether a police officer faced an emergency that justified acting without a warrant, courts must look to the totality of the circumstances in each case based on its own facts and circumstances. Id. at 1559 (citations omitted). The Court also made clear that DWI investigations were not in the "limited class of traditional exceptions to the warrant requirement that

apply categorically and thus do not require an assessment of whether the policy justifications underlying the exception, which may include exigency-based considerations, are implicated in a particular case." Id., n.3 (citations omitted). Rather, the Court held that the general exigency exception can apply to DWI investigations, but it "naturally calls for a case-specific inquiry." Id.

The bottom line in McNeely is:

> In short, while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in Schmerber, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Id. at 1563. Thus, "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." Id. at 1561 (citation omitted).

The burden is completely on the state to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless searches. Welsh v. Wisconsin, 466 U.S. 740, 750 (1984). In these cases, the state has not even attempted to prove any exigency other than the single factor of alcohol's eventual dissipation. And it is difficult to imagine facts less exigent than those in these cases. The officers' decisions not to seek warrants here were not the product of a genuine belief, based on the unique facts and circumstances of the situations, that valuable evidence would be lost. Rather, the decisions were based entirely on an institutional indifference to the Fourth Amendment. This was the

same decision made by the police officer in the McNeely case. The same decision the Supreme Court found to be a violation of the Fourth Amendment's warrant requirement.

Any argument that exigent circumstances did exist would be disingenuous in cases such as these where the officers did not get warrants simply because they believed they were not legally obligated to do so. Instead, they relied on the implied consent law, a process that, because of the constitutional right to consult with counsel, could easily take over an hour. At the time when each of the officers here decided not to get a warrant, there was no telling how much time it might take to vindicate the right to counsel. So if time alone was an exigency in any of these cases, then there also would not have been time to implement the implied consent law. Moreover, evidence was presented that judges are relatively easy to get a hold of by telephone, even outside normal courthouse hours, in each of the jurisdictions involved here.[4] Thus, it would not have been overly burdensome for any of the officers to have obtained a warrant by telephone in a short period of time.

Because there were neither warrants nor exigent circumstances, the searches for evidence with the administration of blood and urine alcohol

[4] This court should not even consider an argument to forgive the state's constitutional violations because there were no procedures in place for these officers to obtain telephonic warrants. Rule 36 of the Minnesota Rules of Criminal Procedure has been in place since 1994. If the county attorneys and/or law enforcement officials have not taken steps to implement the rule in the nineteen years it has been on the books, they should not be heard to complain about that fact now.

concentration tests in these cases violated Brook's Fourth Amendment right to be free from unreasonable searches and seizures. Accordingly, the results of those tests should have been suppressed.

4. ***The state has not proven that Brooks validly consented to the warrantless searches.***[5]

A police officer need not obtain a warrant for a search if a person consented to the search. But before the fruits of a search may be admitted under the consent exception, the state must prove that the consent was given voluntarily and without coercion. United States v. Dennis, 625 F.2d 782 (8th Cir. 1980). The question of voluntariness is a question of fact to be determined from the totality of the circumstances when the consent was allegedly given. Schneckloth v. Bustamonte, 412 U.S. 218, 224-27 (1973).

Consent is voluntary if it is "the product of an essentially free and unconstrained choice by its maker, rather than the product of duress or coercion, express or implied." Schneckloth, 412 U.S. at 222. Consent is involuntary, on the other hand, if it results from circumstances that overbear the consenting party's will and impairs his or her capacity for self-determination. Id. at 233. The state cannot prove consent simply by showing an individual acquiesced to a claim of

[5] The court need not even consider the consent issue because the state never argued to the district courts in any of these cases that Brooks provided valid consent to search. Although the Hennepin County district court on its own decided the search was consensual, this court too did not even consider that theory and decided each of these cases only on the exigent circumstances theory. Thus, this court should deem the consent issue waived by the state. In the event the court does not so deem, consent is being addressed here.

lawful authority or submitted to a show of force. Bumper v. North Carolina, 391 U.S. 543, 548 (1968); State v. Harris, 590 N.W.2d 90, 102 (Minn. 1999). That is, consent must be "received, not extracted." State v. Dezso, 512 N.W.2d 877, 880 (Minn. 1994). No case has ever even suggested that "implied consent" under Minnesota's DWI laws is consent as envisioned by the Fourth Amendment.

Fourth Amendment consent is not proved when the police claim to have a right to the evidence. Bumper v. North Carolina, 391 U.S. at 550. In Bumper, the police showed up at the defendant's home claiming they had a valid search warrant. They did not. When the defendant's grandmother was informed of this putative warrant, she allowed the officers to search the home. Id. At the suppression hearing, knowing there was no warrant, the state claimed the search was consensual because the grandmother let the officers in. The Court dismissed this claim stating:

> One is not held to have consented to the search of his premises where it is accomplished pursuant to an apparently valid search warrant. On the contrary, the legal effect is that consent is on the basis of such a warrant and his permission is construed as an intention to abide by the law and not resist the search under the warrant rather than an invitation to search.
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> One who, upon the command of an officer authorized to enter and search and seize by search warrant, opens the door to the officer and acquiesces in obedience to such a request, no matter by what language used in such acquiescence, is but showing a regard for the supremacy of the law . . . . The presentation of a search warrant to those in charge at the place to be searched, by one authorized to serve it, is tinged with coercion, and submission thereto cannot be considered an invitation that would waive the constitutional right against unreasonable searches and seizures, but rather is to be considered a submission to the law.

Id. at 549 n.14 (citations omitted).

Under these rules, the state has the burden in this case to prove Brooks freely and voluntarily consented to the evidentiary tests. Bumper, 391 U.S. at 548. To do so, the state must prove that Brooks' performance of the tests was not the product of mere submission to the officers' legal authority. Id. To make that determination, the court must examine the totality of circumstances that led to Brooks performing the tests. Schneckloth, 412 U.S. at 224-27.

The only circumstance that could possibly show consent in this case is the fact that Brooks submitted to the tests pursuant to the implied consent law, which is Minnesota's law setting forth the procedure to be employed in obtaining a sample for alcohol concentration testing. In each case, the officer "asked" Brooks if he would take a test only by reading the implied consent advisory, which told Brooks that: (1) Minnesota law ***requires*** him to take a test; (2) refusal to take a test is a crime; and (3) if he unreasonably delays the test or refuses to decide, he would be considered to have refused the test and thus committed this crime.[6]

Under these circumstances, Brooks' submission to the testing processes was not freely and voluntarily given. First of all, the "choice" the officers gave

[6] Both the Hennepin County prosecutor and district court made much of the fact that Brooks spoke to his attorney before "consenting" to the test. But the fact that an attorney instructed a client not to commit a crime hardly bolsters a claim that this was more than "mere submission to legal authority." In fact, the Minnesota Supreme Court has held that an attorney could be disciplined for telling a driver to refuse testing in an era when refusing was not even a crime. Nyflot v. Comm'r of Pub. Safety, 369 N.W.2d 512, 517 n.3 (Minn. 1985).

Brooks was not really a choice at all, given that the first thing the officers told Brooks was that Minnesota law "required" him to take a test. If the law requires something of a person, it can hardly be said that the person actually consented; rather, like Bumper's grandmother standing aside in the face of a claimed search warrant, the person is merely submitting to a legal requirement. Second, when the officers informed Brooks that refusal to take the test is a crime, the officers made very clear that Brooks' only true choice was to take the tests. Thus, not only did Brooks not know he could refuse to test, he was told he could be imprisoned for doing so.

Under these circumstances, the state cannot prove that Brooks freely and voluntarily consented to what would otherwise be three unconstitutional warrantless searches. In fact, the Minnesota Court of appeals has explicitly recognized that "consent" under Minnesota's implied consent law is not consent in a constitutional sense. In State v. Netland, the court observed that "because an individual does not have the right to say no to a chemical test and indeed, is subject to criminal penalties for doing so, the 'consent' implied by law is insufficiently voluntary for Fourth Amendment purposes." 742 N.W.2d 207, 214 (Minn. Ct. App. 2007), rev'd on other grounds, 762 N.W.2d 202 (Minn. 2009). See also State v. Wiseman, 816 N.W.2d 689, 694-95 (Minn. Ct. App. 2012) (court explicitly rejected the argument that a test under the implied consent law could ever be voluntary under the Fourth Amendment).

The facts show that before the officers "asked" Brooks whether he would take a test, Brooks was told that Minnesota law required him to take a test and he was threatened with criminal prosecution if he refused. His acquiescence was not at all the product of his free will. Accordingly, the consent exception to the warrant requirement does not apply and the evidence obtained from the warrantless searches should have been suppressed.

CONCLUSION

On April 17, 2013, the United States Supreme Court resolved a split among the states regarding the applicability of the Fourth Amendment's warrant requirement to DWI investigations. The Court's holding made clear that Minnesota was on the wrong side of that split when it repeatedly held that search warrants are never required. Unfortunately, the failure to recognize Schmerber's correct precedent has permeated not only our jurisprudence over the last four decades, but also our legislation. Minnesota is now left with a forty-page Impaired Driving Code that offends the United States Constitution and hundreds of appellate court decisions based in whole or in part on an erroneous premise.

Given the Supreme Court's mandate in McNeely and the other United States Supreme Court decisions cited here, there can be no doubt that even if the officers' investigations in these cases followed the "normal" procedures employed by Minnesota officers in the past, they offend the Fourth Amendment. For the forgoing reasons, Brooks respectfully requests that the court reverse the district courts' orders refusing to suppress the test results and vacate Brooks' convictions.

DATED: _____ STRANDEMO, SHERIDAN & DULAS, P.A.

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