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Court Of Appeals No. 35273-1-III

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON, Plaintiff/Respondent,

vs.

THOMAS J. NELSON, Defendant/Petitioner.

PETITION FOR REVIEW BY THE WASHINGTON STATE SUPREME COURT

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TABLE OF CONTENTS Page

TABLE OF AUTHORITIES

Federal and Out of State Authority **Page**

...

Washington State Authority

Other Authority

A. Identity of Petitioner

Thomas John Nelson was convicted of driving under the influence after three separate trials in the East Wenatchee District Court following an arrest on January 20, 2014. The trial court denied his motion to suppress breath test evidence as the result of an unlawful search, which decision was affirmed on appeal by the Douglas County Superior Court and, in a split decision, by Division Three of the Washington State Court of Appeals.

B. Decision

Petitioner asks This Court to accept review and reverse the published decision of the Court of Appeals Division Three, issued on February 14, 2019, and amended on February 19, 2019.[1]

Division Three adopted the federally-grounded analysis in Birchfield vs. North Dakota, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), to conclude that Mr. Nelson's breath test was the product of a constitutional search-incident-to-arrest (SITA). The majority rejected Mr. Nelson's contention that State vs. Baird, 187 Wash.2d 210, 386 P.3d 239 (2016), failed to apply independent state constitutional grounds under Article 1, Section 7. The majority also suggested that adopting Mr. Nelson's position would invalidate Washington's entire implied consent scheme, a contention he strongly disputes.

Chief Judge Lawrence-Berrey issued a dissenting opinion decrying the paucity of Baird's consideration for the enhanced privacy protections found in our

[1] A copy of the ruling with the order amending opinion is attached hereto as Appendix A.

state jurisprudence, and arguing that the majority's warrant exception entirely subsumes the rule against unauthorized searches. Judge Lawrence-Berrey would give force to the often-cited proposition that warrant exceptions be applied narrowly and be "jealously guarded." He also recognized that our implied consent jurisprudence would survive, and possibly be more meaningful, without applying a categorical SITA exception.

C. Issues Presented for Review

Does Article 1 Section 7 demand a SITA exception narrowly-tailored to its underlying justifications to satisfy the Washington State constitutional prohibition against government interference into individual privacy without authority of law?

Is there a qualitative difference between the search of tangible objects and searching nebulous material such as breath alcohol concentrations locked inside a person's body, necessitating a non-categorical approach to warrantless searches incident to arrest?

D. Statement of the Case

Mr. Nelson was arrested after being stopped for speeding on the Obadashian Bridge. Even though his breath test results were under the legal limit (.078/.079), the State initiated a prosecution for driving under the influence. The first trial resulted in a hung jury. Mr. Nelson was convicted in a second trial, however his conviction was overturned on appeal due to prosecutorial misconduct.

Prior to the third trial, Mr. Nelson brought a motion to suppress the breath test on the basis that it resulted from an unconstitutional search. At the pretrial motion hearing on February 1, 2016, the officer confirmed that he did not seek judicial approval for a search warrant to secure a sample of Mr. Nelson's breath or blood. CP at 113.[2] Instead, he presented Mr. Nelson with Washington's Implied Consent warnings and requested submission to a test. The implied consent warnings informed Mr. Nelson, *inter alia*, that a refusal to submit to the test would result in a revocation of his driving privileges for at least one year (as opposed to 90 days upon a test result at/above .08), and that the refusal could penalize him in a criminal trial.[3] CP at 110.

Officer Ward admitted that: 1) breath testing is not part of his search-incident-to-arrest (SITA) procedure (CP at 113); 2) a telephonic and/or electronic warrant process was available to him at the time of Mr. Nelson's arrest (CP at 114); 3) he was trained in how to obtain a search warrant for alcohol testing (CP at 113); 4) breath testing does not reveal the presence of weapons or prevent evidence destruction (CP at 112); 4) a person's alcohol concentration cannot be obtained through general proximity or contact. Id.

The State argued that breath testing *did not constitute a search* for constitutional purposes, distinguishing blood tests as more invasive. CP at 154-155. The prosecutor posited that because officers are statutorily required to read implied consent warnings before breath testing, constitutional consent "is just not

[2] "CP" refers to the Clerk's Papers filed in the Court of Appeals; relevant excerpts are attached hereto as Appendix B.

possible." He agreed that Mr. Nelson's consent was compelled because the implied consent law is "inherently coercive" (CP at 154) but argued that the defense failed to prove the statute unconstitutional beyond a reasonable doubt.[4] The State did not contend that breath testing is justified as a SITA.

The trial court denied the defense suppression motion, ruling that RCW 46.20.308 was not unconstitutional "as applied to Mr. Nelson in this particular case." CP at 162. Judge McCauley did not explain the basis for that conclusion, nor did she make any factual findings, oral or otherwise, in support of her ruling as required by CrRLJ 3.6; likewise, the State did not offer any.

After a trial wherein the breath test was highly contested, the jury returned a guilty verdict. Mr. Nelson timely appealed to the Douglas County Superior Court and argued *inter alia* that the trial court erroneously admitted the breath test results. The Superior Court ruled that the breath test was properly admitted because no state court had yet found it an unconstitutional search under Washington State law,[5] and that the remaining errors did not require a new trial.

Mr. Nelson's motion for discretionary review was granted by Division Three on the question of whether, under Article 1, Section 7 of the Washington State Constitution, a warrantless breath test is a permissible SITA. In a split decision the Court of Appeals held that This Court's plurality decision in State vs.

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[3] A breath test result is not only potential evidence of guilt but is a sentence enhancement. *See* RCW 46.61.517 and RCW 46.61.5055.

4 Mr. Nelson clarified that he was not arguing any facial invalidity of the statute, but rather an "as applied" challenge to the specific facts of his case.
Interestingly, the Superior Court, like the trial court, declined to undergo any analysis as part of its oral ruling. The Order on RALJ Appeal likewise contains no substantive analysis. CP at 736-737.

Baird, 187 Wash.2d 210, 386 P.3d 239 (2016), settled the question despite its fleeting reference to Article 1 Section 7.

E. Argument

1. Summary of Grounds for Review

RAP 13.4(b)(3) provides for appellate review where a lower court decision involves a significant question of law under the Washington State Constitution. As discussed below, the right to be free from warrantless searches is to be scrupulously guarded under Article 1, Section 7. An appellate court has split on the question of whether Article 1 Section 7 compels a different result than would be garnered under the Fourth Amendment balancing test announced in Birchfield vs. North Dakota, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016).[6]

The categorical extension of SITA's to breath testing constitutes a momentous upheaval of constitutional law and should not be dictated by default. State vs. Baird, 187 Wash. 2d 210, 386 P.3d 239 (2016), simply did not decide this issue because its holding relied on federal constitutional grounds.[7] A careful review reveals that the Baird majority did not conduct any substantive evaluation of Article 1 Section 7; the Court devoted only one paragraph to SITAs:

> In Birchfield, the Supreme Court considered whether criminal penalties for refusing to take a breath test under Minnesota's and North Dakota's implied consent laws were constitutional. The Court held that because the 'impact of breath tests on privacy is slight, and the need for BAC testing is great,' the Fourth Amendment permits breath tests as a search incident to arrest for drunk driving. Id. at 2184. Because a breath test is a permissible search incident to arrest, 'the **Fourth Amendment** did not require officers to

[6] The question has also been raised before Division Two of the Washington Court of Appeals in the matter of State of Washington vs. Rognlin, 52834-7-II, where Mr. Rognlin's motion for discretionary review is currently pending.

[7] To counsel's knowledge, no supplemental briefing or argument following publication of Birchfield vs. North Dakota, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), was presented to This Court for consideration in Baird.

> obtain a warrant prior to demanding the test, and [petitioner] had no right to refuse it.' Id. at 2186. A driver thus has no *constitutional* right to refuse a breath test because the breath tests fall under the search incident to arrest exception to the warrant requirement. State vs. Baird, 187 Wash. 2d 210, 222, 386 P.3d 239, 245–46 (2016) (italic emphasis in original; bold emphasis added).

"It is well established that Article I, Section 7 qualitatively differs from the Fourth Amendment and in some areas provides greater protections than does the federal constitution. Therefore, we have previously held that when a new issue arises pursuant to Article I, Section 7, parties and courts are not required to conduct a Gunwall analysis before engaging in an independent state law analysis on the merits. State vs. Mayfield, 434 P.3d 58, 65 (Wash. 2019) (internal citations omitted).

Likewise, RAP 13.4(b)(4) provides for appellate review of issues involving continuing and significant public interest "in order to provide future guidance to lower courts." In re Welfare of B.D.F., 126 Wash. App. 562, 569, 109 P.3d 464, 467 (2005), *citing* In re Marriage of Horner, 151 Wash.2d 884, 891, 93 P.3d 124 (2004). In Eide vs. Department of Licensing, 101 Wash. App. 218, 3 P.3d 208 (2000), the Court of Appeals reiterated the relevant analysis: "[i]n determining whether an issue involves a sufficient public interest, we consider the public or private nature of the question, the need for future guidance provided by an authoritative determination, and the likelihood of recurrence."

In City of Mount Vernon vs. Mount Vernon Municipal Court, 93 Wash. App. 501, 973 P.2d 3 (1998), Division One found a significant issue of public interest where the alleged error occurred approximately one hundred times per year. There, the question was the propriety of DUI prosecutions where breath test machines malfunction and the Court of Appeals concluded that recurring

instances of questionable evidentiary tests satisfied the public interest requirement.

Here, the right of Washington citizens to be protected from disclosure of intimate personal information without authority of law has widespread application in every case involving breath testing. In fact, This Court accepted direct interlocutory review in Baird because of its widespread application.[8] An identical issue presents itself herein under independent state grounds. Of particular concern, the Court of Appeals appears to conclude that individual privacy expectations are necessarily and categorically subordinate to governmental interests in convenient evidence-gathering, without offering any justification for bypassing magisterial review. Respectfully, the citizens of this state disagree:

2. The Washington State Constitution Provides Enhanced Privacy Protections Beyond Its Federal Counterpart.

"Because article I, section 7 prohibits unlawful governmental intrusions into one's home or private affairs without express limitation, we have held that the 'authority of law' prong requires that exceptions to the warrant requirement be jealously guarded. State vs. Hendrickson, 129 Wash.2d 61, 72, 917 P.2d 563 (1996). This is in contrast to the Fourth Amendment, where the uncertain relationship between the reasonableness clause and the warrant clause has resulted in consideration vacillation, at the federal level, between strictly

[8] "The State petitioned King County Superior Court for an interlocutory writ of review; review was granted and the cases consolidated. In the interests of justice, the superior court requested direct review from this court, finding that the district court rulings substantially altered the status quo regarding thousands of breath test and breath test refusal DUI cases." State vs. Baird, 187 Wash. 2d at 210 (2016).

requiring warrants and applying a general reasonableness standard." State vs. Chenoweth, 160 Wash. 2d 454, 463, 158 P.3d 595, 600 (2007).

"A Washington court must presume that a warrantless search violates both the Fourth Amendment to the United States Constitution and Article I, Section 7 of the Washington State Constitution. The State carries the heavy burden to prove that a narrowly drawn exception to the warrant requirement applies to make the search lawful." State vs. VanNess, 186 Wash. App. 148, 344 P.3d 713 (2015).

"When parties allege violation of rights under both the United States and Washington Constitutions, this court will first independently interpret and apply the Washington Constitution in order, among other concerns, to develop a body of independent jurisprudence, and because consideration of the United States Constitution first would be premature." City of Seattle vs. Mesiani, 110 Wn.2d 454, 456, 755 P.2d 775 (1988) (emphasis added), *citing* State vs. Coe, 101 Wn.2d 364, 373–74, 679 P.2d 353 (1984).

"It is already well established that Article I, Section 7, of the State Constitution has broader application than does the Fourth Amendment of the United States Constitution." State vs. Ladson, 138 Wash.2d 343, 348, 979 P.2d 833 (1999) (internal citations omitted). "Our Supreme Court has held that Article I, Section 7 'clearly recognizes an individual's right to privacy with no express limitations, and places greater emphasis on privacy than does the Fourth

Amendment.'" Robinson vs. City of Seattle, 102 Wash. App. 795, 809, 10 P.3d 452, 459–60 (2000) (internal citations omitted).[9]

"When lines need to be drawn in creating rules, they should be drawn thoughtfully along the logical contours of the rationales giving rise to the rules, and not as artificial lines drawn elsewhere that are unrelated to those rationales." State vs. Rowell, 144 N.M. 371, 188 P.3d 95, 101 (2008). Applying this rule to the justifications underlying SITAs, it is clear that Washington's constitutional protection against unauthorized intrusions into individual privacy compels a result contrary to Birchfield.

3. Mr. Nelson's Breath Test Was The Product Of An Unjustified, Coercive, Warrantless Search.

a. Breath testing is a search requiring constitutional justification.

It has been firmly and finally determined that breath testing constitutes a search for constitutional purposes; the State's argument to the contrary in Mr. Nelson's case has been soundly rejected. *See* Birchfield vs. North Dakota, ----U.S.----, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016); State vs. Baird, 187 Wash. 2d 210, 386 P.3d 239 (2016); Skinner vs. Railway Labor Executive's Assoc., 489 U.S. 602, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989). Generally, warrantless

[9] *See Also* State vs. O'Neill, 148 Wash.2d 564, 62 P.3d 489 (2003); Missouri vs. McNeely, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), *citing* Virginia vs. Moore, 553 U.S. 164, 128 S.Ct. 1598 (2008) (states may choose to protect privacy beyond the level required by the Fourth Amendment); State vs. Young, 123 Wash. 2d 173, 178–79, 867 P.2d 593, 596 (1994) ("The federal constitution provides the minimum protection afforded citizens against unreasonable searches by the government. Greater protection may be available under the Washington constitution.") (internal citations omitted); State vs. Morse, 156 Wash.2d 1, 10, 123 P.3d 832 (2005).

searches are *per se* unconstitutional, and only lawfully conducted under narrowly drawn exceptions. State vs. Walker, 136 Wash.2d 678, 965 P.2d 1049 (1998).

b. No exigency justified a warrantless search in Mr. Nelson's case.

Previous case law suggested the dissipation of alcohol created a *per se* exigency that justified dispensing with a search warrant, but the U.S. Supreme Court in Missouri vs. McNeely, 133 S.Ct. 1552, 1556, 185 L.Ed. 696 (2013), debunked this proposition.[10] McNeely at 1556. Here, there were no "special facts" suggesting a warrant was unobtainable. Telephonic warrants are available where Mr. Nelson was arrested and the police investigation was not unusually delayed; the State has not alleged that a timely warrant was improbable.

c. Washington's Constitution does not permit warrantless searches of a person's internal body cavity incident to arrest.

An arrestee's alcohol concentration does not pose a safety danger to law enforcement officers and is not subject to imminent destruction by the subject; thus, there is no justification to require a breath test as a SITA. Searches-incident have been defined in Washington as:

> ...necessary to permit a search for weapons or destroyable evidence where a risk is posed because, should a weapon be secured or evidence of the crime destroyed, the arrest itself may likely be rendered meaningless—either because the arrestee will escape physical custody or because the evidence implicating the arrestee will be destroyed. State vs. Valdez, 167 Wash. 2d 761, 773, 224 P.3d 751, 757 (2009).

Washington law previously distinguished between searches of the person, which are generally permitted, and searches of locked containers, which are generally prohibited. For example, in State vs. Byrd, 178 Wn.2d 611, 310 P.3d

[10] Baird acknowledged that previous state case authority was rooted in the Schmerber analysis and no longer legally sound; it instead adopted the McNeely totality of circumstances test for exigency. State vs. Baird, 187 Wash.2d at 245. Surprisingly, the Court of Appeals here continues to rely on outdated state caselaw premised on the Schmerber exigency justification.

793 (2013), the Court noted that searches of an arrestee's person and possessions are *per se* permissible because they *presumptively* enhance officer safety and eliminate the destruction of evidence.

On the other hand, this presumption has not been extended to locked containers. In both State vs. Valdez, 167 Wash.2d 761, 224 P.3d 751 (2009), and State vs. Van Ness, 186 Wash. App. 148, 344 P.3d 713 (2015), warrantless searches violated Article 1 Section 7 of Washington's Constitution because "[w]here a container is locked and officers have the opportunity to prevent the individual's access to the contents of that container so that officer safety or the preservation of evidence of the crime of arrest is not at risk, there is no justification under the search incident to arrest exception to permit a warrantless search of the locked container." State vs. VanNess, 186 Wash. App. 148, 344 P.3d 713 (2015).

Locked containers are not the only category of material exempted from SITAs. In Riley vs. California, 134 S.Ct. 2473, 189 L.Ed. 430, (2014), the United States Supreme Court departed from its earlier decision in U.S. vs. Robinson, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed. 427 (1973), and held that digital data in seized "smartphones" could not be searched without a warrant.

While recognizing the philosophical benefits of a *per se* SITA exception, the Court nonetheless found its application to this to "category of effects" would "untether the rule from underlying justifications." Riley vs. California, 134 S.Ct. at 2485. In reaching its conclusion, Riley considered the qualitative difference between physical objects and digital data, finding that the data itself could not

possibly increase the risk of either physical harm to officers or destruction of evidence. Riley at 2485.

Riley also recognized that, as with the content of locked containers and of an individual's lungs, data on cell phones is normally just as secure at the time of arrest and seizure as it is when a post-warrant search can be conducted. As the Court noted, "[the] need to effect the arrest, secure the scene and tend to other pressing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away." Riley vs. California 134 S.Ct. at 2487.[11]

Riley's narrowing of Robinson was recognized by Washington courts in State vs. VanNess, 186 Wash. App. 148, 344 P.3d 713 (2015), which called into doubt state case law relying on Robinson. The Court noted: "the Supreme Court's subsequent decision in Riley vs. California significantly narrowed the primary authority cited in Byrd for the scope of a warrantless search incident to arrest." State vs. VanNess, 186 Wash. App. 148, 156, 344 P.3d 713, 718 (2015).[12]

Alveolar air from within one's body is more akin to digital data within a cell phone than to physical objects held by an arrestee. Mr. Nelson's alcohol concentration was secured within his body in the custody of law enforcement, obviously posing no safety threat to law enforcement and not subject to his imminent destruction. Like digital data, it had no potential to implicate concerns justifying SITAs.

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11 Notably, in this case Officer Ward acknowledged that his search of Mr. Nelson incident-to-arrest did not include a breath test. Evidentiary testing did not occur until Mr. Nelson had been transported to the precinct.

While Riley also relied heavily on the extent to which personal information would be exposed (e.g. photos, web history, and communications with others), invasions of one's internal body cavity implicate similar privacy concerns. "The privacy interest in the body and bodily functions is one Washington citizens have held, and should be entitled to hold, safe from government trespass." Robinson vs. City of Seattle, 102 Wash. App. 795 (2000).

Indeed, Washingtonians have historically lived under an umbrella of protection against these types of warrantless searches. For example, in York vs. Wahkiakum Sch. Dist. No. 200, 163 Wash.2d 297, 178 P.3d 995 (2008), mandatory urinalysis testing was struck down because, even though student athletes have somewhat diminished privacy expectations and the level of physical intrusion was "relatively unobtrusive," requiring students to produce bodily fluids constituted a "significant [privacy] intrusion." York at 308. This Court recently spoke on the topic in State vs. Mecham, 186 Wash. 2d 128, 380 P.3d 414 (2016):

> Individuals have a constitutionally protected interest in the privacy of their internal bodily functions and fluids. We have held that the State infringes on this interest when it takes someone's blood, DNA, urine, or breath. These activities infringe on a person's privacy interests on multiple levels: the physical intrusion associated with drawing blood and urine or of extracting "deep lung" breath intrudes on an individual's privacy; and the chemical analysis associated with these tests provide a wealth of private medical information that, as the United States Supreme Court has held, infringes on the reasonable expectations of privacy. State vs. Mecham, 186 Wash. 2d 128, 145, 380 P.3d 414, 426 (2016) (internal citations omitted)

In State vs. Garcia-Salgado, 170 Wash. 2d 176, 185, 240 P.3d 153 (2010), This Court found a cheek-swab implicated "interests in human dignity and

[12] In State vs. Samalia, 186 Wash.2d 262, 375 P.3d 1082 (2016), This Court adopted the Riley rule for cell phones because they implicate intimate personal information historically protected as private. State vs. Samalia at 270-71.

privacy" akin to breath testing because it involved an intrusion into the sphere of personal bodily integrity. The mere fact that breath testing reveals only one's alcohol concentration does not obviate the need to shield internal body functions from government intrusion. Further, just as Mr. Riley retained an expectation of privacy in the contents of his cell phone despite being arrested, Mr. Nelson's status as an arrestee did not divest him of an expectation of privacy in his bodily integrity, nor did Mr. Garcia-Salgado's status as a formally accused defendant subject him to unfettered searching. "The fact that an arrestee has diminished privacy interests does not mean that the [constitutional protection] falls out of the picture entirely." Riley vs. California, 134 S.Ct. 2473, 2488 (2014).[13]

This Court previously adopted the proposition that "the location of a search is indeterminative when inquiring into whether the State has unreasonably intruded into an individual's private affairs." State vs. Boland, 115 Wash. 2d 571, 580, 800 P.2d 1112, 1117 (1990) (internal citation omitted). In Boland, government agents seized and searched the contents of trash cans set out for curbside collection. The State argued that transfer of the cans from private property to a public area dispossessed Mr. Boland of his expectation of privacy therein, but This Court rejected that idea.[14] Likewise here, the fact that Mr. Nelson himself was within the public realm, or even that he had been arrested and held in a police facility, did not expose the internal contents of his body cavity.

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[13] Indeed, where the search is strictly for prosecutorial purposes, an even tighter rein on police power may be necessary to prevent overzealous intrusions by law enforcement.

[14] Importantly, Boland represents one area where our state constitutional jurisprudence demanded a different result than was reached under a Fourth Amendment analysis. *See E.g.* California vs. Greenwood, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988).

In an analogous context, State vs. Young, 123 Wash. 2d 173, 181, 867 P.2d 593, 597 (1994), struck down the use of infrared devices aimed externally at a private residence. There, police lawfully stood on a public street in front of Mr. Young's house but used thermal detection devices to penetrate the home and observe activity within. As the Court explained, using the device allowed law enforcement officers to see more than what was exposed to the public generally: "[w]ith this device the officer was able to, in effect, 'see through the walls' of the home. The device goes well beyond an enhancement of natural senses." Id. at 183. Thus, the collected information encompassed protected information.

The State here used infrared spectroscopy to "see through the body cavity" and analyze alcohol molecules within Mr. Nelson's lungs to expose information not otherwise available. This procedure went far above the use of normal senses, and, like the use of infrared technology and intrusions into secured boxes and cell phones, was therefore an unlawful search to obtain private protected information.

Searches for breath alcohol concentration are also qualitatively different from pat-downs, frisks, or property searches because they require the active participation of the subject; conversely, the SITA exception does not contemplate the assent or cooperation of the arrestee. In fact, applying the rule to breath testing would criminalize a subject's failure to participate (a result rejected in Birchfield), because individuals could be charged with obstruction.

Finally, "[a]t some point, a significant delay between the arrest and the search renders the search unreasonable because it is no longer contemporaneous with the arrest." State vs. Boursaw, 94 Wash. App. 629, 632, 976 P.2d 130, 132

(1999).[15] For example, State vs. Boyce, 52 Wash. App. 274, 758 P.2d 1017 (1988), declared the search of a zipped case unconstitutional because the subject had been arrested, handcuffed, removed from the property and taken to the police station. Recognizing that the justifications underlying SITA's would not be advanced in such circumstances, Boyce declined to extend the exception in cases involving significant delay between arrest and search, particularly where the search area was contained. Likewise here, Mr. Nelson was arrested, frisked, and transported to the police station before the search occurred; given that the evidence was captured within his body and not subject to his destruction, there was no immediate need to bypass judicial review.[16]

Simply put, as regards breath testing it does not make sense to "presume exigencies" as in cases like State vs. MacDicken, 179 Wash.2d 936, 310 P.3d 31 (2014), that involve physical objects, particularly where a *per se* presumption of exigency was explicitly abrogated by Missouri vs. McNeely, 569 U.S. 141, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2016). Likewise, This Court should reject the Fourth Amendment balancing in Birchfield vs. North Dakota, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016), because it adopts the very justification McNeely concluded should not be construed categorically.

Indeed, Mr. Nelson's position tracks changes to automobile search-incident jurisprudence, where a long-standing bright-line presumption was recently

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[15] Baird did not address Washington's caselaw as it related to unreasonably attenuated searches-incident.

[16] Notably, delayed breath testing has been previously upheld in Washington to suit the needs of law enforcement. *See E.g.* City of Sunnyside vs. Sanchez, 57 Wash. App. 299, 303, 788 P.2d 6, 8 (1990), (officers could conduct breath tests beyond two hours to obtain a complete breath test); *Accord* State vs. Brokman, 84 Wash. App. 848, 930 P.2d 354 (1997).

recognized as "untethered" from its underlying justifications and too broadly applied. This Court's summary in State vs. Afana, 169 Wn. 2d 169, 177 (2010),[17] is instructive:

> In Gant,[18] the United States Supreme Court repudiated what it characterized as other courts' "broad reading" of its decision in New York vs. Belton, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981). Gant, 129 S. Ct. at 1719. This decision is significant because courts around the country had been of the view that under Belton an automobile search did not run afoul of the Fourth Amendment to the United States Constitution as long as it was incident to a recent occupant's arrest, even if there was no possibility of the arrestee gaining access to the automobile at the time the search was conducted. Id. at 1718-19; *see also* Michigan vs. Long, 463 U.S. 1032, 1049 n. 14, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (observing that the "'bright line'" drawn in Belton "clearly authorizes [an automobile] search whenever officers effect a custodial arrest"). In Gant, the Supreme Court, seemingly reining in the reach of Belton, held that under the Fourth Amendment, "[p]olice may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." Gant, 129 S. Ct. at 1723.

Similarly, the "presumed per se exigency" exception outlined in Schmerber vs. California, was significantly narrowed by McNeely, and This Court should follow suit by tethering the SITA exception to justifications that actually make sense, rejecting the Court of Appeals' arbitrary replacement of one *per se* presumption with another.

> "Article I, section 7 is a jealous protector of privacy. As recognized at common law, when an arrest is made, the normal course of securing a warrant to conduct a search is not possible if that search must be immediately conducted for the safety of the officer or to prevent concealment or destruction of evidence of the crime of arrest. However, when a search can be delayed to obtain a warrant without running afoul

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17 Afana is yet another example of how Article 1, Section 7's protection against intrusions into individual privacy compels a different result than would be reached under Fourth Amendment jurisprudence. *See* State vs. Eserjose, 171 Wash.2d 907, 259 P.3d 172 (2011) (recognizing that Washington applies the exclusionary rule in situations beyond federal limitations).

18 Arizona vs. Gant, 556 U.S. 332, 129 S.Ct. 1710, 173 L. Ed2d 485 (2009).

> of those concerns (and does not fall under another applicable exception), the warrant must be obtained." State vs. Valdez, 167 Wash. 2d 761, 777, 224 P.3d 751, 759 (2009).

Mr. Nelson's Consent to Breath Testing Was Coerced.

The definition of consent under federal and state constitutional principles follows the "voluntariness test" of Schneckloth vs. Bustamonte, 412 U.S. 218, 36 L.Ed.2d 854 (1973), and the government bears the burden of proving proper consent by clear and convincing evidence. U.S. vs. Rothman, 492 F.2d 1260 (9th Circuit) (1973); State vs. Nelson, 47 Wash. App. 157, 734 P.2d 516 (1987); State vs. Counts, 99 Wash.2d 54, 659 P.2d 1087 (1983).

"The right to continue the exercise of a privilege granted by the state cannot be made to depend upon the grantee's submission to a condition prescribed by the state which is hostile to the provisions of the federal Constitution." United States vs. Chicago, M., St. P. & P.R. Co., 28 U.S. 311, 328-329, 51 S.Ct. 159 (1931). *See Also* Sherbert vs. Verner, 374 U.S. 398, 83 S.Ct. 1790 (1963) ("Indirect discouragements" often have same coercive effect as other punishments, and State cannot condition benefit or privilege upon relinquishing constitutional protection).

Washington's Implied Consent Law, RCW 46.20.308, requires that individuals consent to a future search (i.e. breath test), as a condition of driving, and imposes penalties upon drivers who refuse to submit. Those penalties include revocation of a driver's license, enhanced jail time upon conviction, and the potential for their refusal to be admitted against them in a criminal prosecution.[19]

[19] *See* RCW 46.20.308; RCW 46.61.5055; State vs. Gauthier, 174 Wash. App. 257, 298 P.2d 126 (2013).

Since "[t]he purpose of the implied consent law is to coerce submission to chemical testing by the threat of statutory penalties of license suspension and the admission into evidence in a DUI proceeding of the fact of refusal,"[20] it may improperly compel drivers for whom avoiding these penalties is of paramount necessity.

Legal consent requires that it be free from duress or coercion, which is implicit when "under color of badge." While the State may be able to prove voluntary consent in other cases, it did not meet its burden here; instead, it conceded that Mr. Nelson's consent was compelled.

F. Conclusion

Review is appropriate to determine whether breath testing falls within the jealously-guarded search-incident exception to warrantless searches. One appellate court is divided on the question and the issue has broad implications for future cases. Finally, the right of Washington citizens to be free of intrusions without lawful justification is a matter of high public interest, which merits thoughtful and detailed consideration by This Court.

DATED this 10th day of March, 2019.

Respectfully Submitted,

Diana Lundin

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Attorney for Petitioner
WSBA#: 26394

[20] Cuthbertson vs. Kansas Dept. of Revenue, 42 Kan. App.2d 1049, 220 P.3d 379 (2009).

Appendix A

FILED
FEBRUARY 14, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON, Respondent, v. THOMAS J. NELSON, Petitioner.	)	No. 35273-1-III PUBLISHED OPINION

KORSMO, J. — This court granted discretionary review of Thomas Nelson's driving while under the influence (DUI) conviction in order to consider his challenge to the implied consent statute. Concluding that this claim is governed by the decision in *State v. Baird*, 187 Wn.2d 210, 386 P.3d 239 (2016) (plurality opinion), and that a breath sample can be obtained incident to the arrest of an impaired driver, we affirm.

FACTS AND PROCEDURAL HISTORY

This matter has a lengthy history, due in part to the fact that three trials were required in the district court. It began with a traffic stop for speeding in Douglas County. Trooper[1] Mark Ward stopped the vehicle being driven by Mr. Nelson for speeding across the U.S. Highway 2 bridge from Chelan County to Douglas County.

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[1] Ward joined the Wenatchee Police Department the following year and was a member of that department during the trial of this case.

Noticing an odor of alcohol, the trooper inquired about Mr. Nelson's use of alcohol. Admitting that he had consumed two 16-ounce cans of beer while golfing, Mr. Nelson agreed to perform physical sobriety tests. After performing the tests, the trooper arrested Mr. Nelson for DUI. He was transported to the jail and given the implied consent warnings. Mr. Nelson consented to provide breath samples. They measured .078 and .079.

Charges were filed in the Douglas County District Court. Mr. Nelson moved to suppress the breath test results on several grounds, including an argument that it was a warrantless search prohibited by *Missouri v. McNeely*, 569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013). The district court denied the motion, determining that the breath test was not the product of an unlawful search. Ultimately, a jury convicted Mr. Nelson of DUI and first degree negligent driving. On appeal, the superior court affirmed the conviction. A commissioner of this court granted discretionary review to consider Mr. Nelson's argument that the breath test constituted an improper warrantless search in violation of art. I, § 7 of the Washington Constitution.

A panel of this court heard oral argument of the case.

ANALYSIS

Mr. Nelson contends that the warrantless search of his breath was prohibited by art. I, § 7 of our state's constitution. His position, which necessarily would invalidate large sections of our implied consent law, is inconsistent with our search incident to

arrest jurisprudence, and is inconsistent with the result in *Baird*. We discuss, in order, our implied consent law and the recent federal cases involving implied consent statutes, Washington's treatment of the search incident to arrest doctrine, and *Baird*, before applying those discussions to Mr. Nelson's case.

Implied Consent

Washington's implied consent law, codified at RCW 46.20.308, was adopted by the people of this state when they approved Initiative 242 during the 1968 election. *State v. Moore*, 79 Wn.2d 51, 52, 483 P.2d 630 (1971). The acknowledged purpose of implied consent legislation is to address the long-standing problem of drunk driving. *Id.* at 53. Although the statute has been modified several times over the last half century, the essence of the provision at the heart of this case reflects the trade-off approved by the voters in 1968. That trade-off is related in the opening sentence of the statute:

> Any person who operates a motor vehicle within this state is deemed to have given consent, . . . to a test or tests of his or her breath for the purpose of determining the alcohol concentration in his or her breath if arrested for any offense where, . . . the arresting officer has reasonable grounds to believe the person had been driving . . . while under the influence of intoxicating liquor.

RCW 46.20.308(1).

The implied consent recognized in this statute is not final. Prior to obtaining a breath sample, the officer must advise the driver that he or she still has the right to refuse

to consent to the test, but that a license revocation and use of that refusal at trial are among the consequences that follow if the driver declines the test. RCW 46.20.308(2).

The constitutionality of this statute was at issue in *Moore*. Our court concluded that the statute did not violate either the Fifth Amendment to the United States Constitution protection against self-incrimination or the protection of art. I, § 9 from being compelled to give evidence against oneself. 79 Wn.2d at 57. The court also rejected a challenge to the validity of the consent provision, finding it to be within the police power of the state to compel the breath sample. *Id.* at 57-58.

Over the years, the court has addressed other constitutional challenges to the implied consent statute. One issue addressed in *State v. Curran*, 116 Wn.2d 174, 804 P.2d 558 (1991), *abrogated in part on other grounds by State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997), concerned the validity under art. I, § 7[2] of a compelled blood alcohol test under former RCW 46.20.308(3) for one suspected of vehicular homicide. *Id.* at 179, 183. The court unanimously[3] ruled that while the blood draw was a search under both the Fourth Amendment and art. I, § 7, it also was reasonable and constitutional under both provisions. *Id.* at 183-85. The court had reached the same

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[2] "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

[3] Justice Utter, joined by Justice Smith, concluded that art. I, § 7 permitted the blood draw in cases of homicide as long as there was statutory authorization. *Curran*, 116 Wn.2d at 189 (Utter, J., concurring).

conclusion in an earlier vehicular homicide case, *State v. Judge*, 100 Wn.2d 706, 711-12, 675 P.2d 219 (1984) (taking blood was a reasonable search and seizure under both constitutions).

Similarly, the United States Supreme Court on occasion has had opportunity to consider challenges to various aspects of state implied consent laws. *E.g.*, *California v. Trombetta*, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984) (due process did not require preservation of breath sample tested by state); *South Dakota v. Neville*, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983) (State could use evidence of refusal to consent to blood alcohol test at trial without offending privilege against self-incrimination); *Mackey v. Montrym*, 443 U.S. 1, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (1979) (due process did not require hearing prior to revocation of driver's license for refusal to consent to testing).

That Court also has had the opportunity to consider blood alcohol testing cases that arose outside of a state's implied consent law. In *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), the Court faced a situation where officers at a hospital had obtained a blood sample from a suspected drunk driver who had refused to consent to the blood draw. 384 U.S. at 758-59. After concluding that the Fifth Amendment did not apply, the Court turned to the Fourth Amendment. *Id.* at 760-66. Recognizing that a search warrant "ordinarily" would be required, the court nonetheless upheld the search due to the dissipation of alcohol and the delay caused by taking the

defendant to the hospital. *Id.* at 770-72. In those circumstances, the acquisition of the blood alcohol "was an appropriate incident to petitioner's arrest." *Id.* at 771.

Nearly a half century later, the Court revisited *Schmerber* in *Missouri v. McNeely*, 569 U.S. 141. As in the earlier case, the suspected drunk driver refused to consent to a test and blood was thereafter taken from him at a hospital. *Id.* at 145-46. After the lower courts had suppressed the evidence, the United States Supreme Court considered Missouri's argument that *Schmerber* authorized a per se rule permitting the warrantless taking of blood in all drunk driving cases. *Id.* at 146-48. Rejecting the per se rule, the Court stressed that the exigent circumstances exception was *always* dependent on the totality of the circumstances. *Id.* at 156. In its analysis, the Court noted that a search incident to arrest was a categorical exception to the warrant requirement and did "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.* at 150 n.3. Because there was no exigency established, the Court affirmed the suppression ruling. *Id.* at 165.

The Court soon thereafter had the opportunity to look at the intersection of state implied consent laws and the Fourth Amendment in *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160, 195 L. Ed 2d 560 (2016). At issue in those consolidated cases were state implied consent laws that purported to offer a choice to refuse testing, but then treated a refusal as a crime. 195 L. Ed. 2d at 571-74. One petitioner was convicted of a

crime for refusing to take a blood test, one was convicted for refusing to take a breath test, and the third consented to a blood test, but lost his license as a consequence of the test results. *Id.* Noting that exigent circumstances were not at issue in the consolidated cases, the Court turned to the issues presented: (1) the application of the search incident to arrest doctrine to the breath and blood tests, and (2) the effect of criminalizing a refusal to consent on the informed consent decision. *Id.* at 574.

The Court stated that it had been recognized long before the constitution was adopted that officers could lawfully search the person they had arrested. *Id.* at 576-78. The Court stressed that the search incident to arrest exception was categorical, its prior decision in *Riley v. California*, 573 U.S. ___, 134 S. Ct. 2473, 189 L. Ed. 2d 430 (2014), notwithstanding. *Id.* at 578, 586. When confronted with the scope of a search incident to arrest for evidence or items not existent at the time the constitution was adopted, the Court applied a two-part test created in *Riley* that looked at the degree of intrusion on an individual's privacy and the governmental interest. *Id.* at 578-79.

Applying the *Riley* test, the *Birchfield* Court concluded that a warrantless breath test was a proper search incident to an arrest because it did not implicate significant privacy concerns. *Id.* at 579-80, 587. With respect to blood testing, however, the bodily intrusion of seizing blood was not within the scope of a search incident to arrest. *Id.* at 580, 587. Blood testing was significantly more invasive than breath testing. *Id.* at 580.

The Court then briefly turned to the impact of implied consent laws on the cases. Noting that it generally had approved implied consent statutes that imposed noncriminal penalties for refusal, the Court concluded that its decision did not cast doubt on such legislation. *Id.* at 588-89. However, imposition of criminal penalties for refusing to consent to a search presented a new matter entirely: "There must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* at 589. The Court then concluded that "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense." *Id.*

The Court then turned to the disposition of the three cases before it. The Court overturned the conviction of the driver who was convicted of a crime for refusing a blood draw, but upheld the conviction of the driver who had refused a breath test. *Id.* The Court remanded the case of the driver whose license was suspended after he consented to a blood draw on pain of criminal prosecution. In that instance, the lower court was required to determine whether the driver's consent was valid in light of the improper advice given to him. *Id.* at 589-90.

In summary, the Court concluded that states could compel warrantless breath tests under their implied consent laws, but could not compel warrantless blood tests. States were free to impose criminal penalties for refusing a breath test, but not for refusing to consent to a blood draw. Although administrative and evidentiary sanctions could be

imposed for refusing to consent to either blood or breath testing, those sanctions needed to be based on correct legal advice. State implied consent laws concerning breath testing remain valid.

Search Incident to Arrest in Washington

Mr. Nelson contends that Washington treats searches incident to arrest differently than the United States Supreme Court and would not consider breath testing within the scope of that search. His argument requires us to consider Washington's treatment of the search incident to arrest doctrine vis-à-vis the federal standard.

Modern federal analysis of the search incident to arrest doctrine traces to *United States v. Robinson*, 414 U.S. 218, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973). There police had arrested a man and found a cigarette package containing heroin in his coat pocket. 414 U.S. at 222-23. The Court concluded that the search was proper incident to the arrest, recognizing that while the scope of the search of the area around an arrestee had varied over the years, the Court had always permitted searches of the arrestee's person. *Id.* at 224-26. The Court concluded that two purposes undergirded the search: the need for officer safety and the need to preserve evidence. *Id.* at 234-35. The authority to search the person was categorical and did not need to be justified by either of the two purposes supporting the search incident doctrine. *Id.* at 235. In turn, area searches were governed by the rule of *Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d

685 (1969). The question presented there was whether the area was within the arrestee's "'immediate control.'" 395 U.S. at 763.

Washington likewise has recognized the same two purposes, both before and after *Robinson*, as the justification for a search incident to arrest under the Washington Constitution. *State v. Brock*, 184 Wn.2d 148, 154, 355 P.3d 1118 (2015); *State v. Hughlett*, 124 Wash. 366, 370, 214 P. 841 (1923) ("It has always been held that a peace officer, when he makes a lawful arrest, may lawfully, without a search warrant, search the person arrested."), *overruled on other grounds by State v. Ringer*, 100 Wn.2d 686, 699, 674 P.2d 1240 (1983). In turn, Washington recognizes the same scope for the two possible searches incident to arrest:

> A warrantless search of the arrestee's person is considered a reasonable search as part of the arrest of the person. Such a search presumes exigencies and is justified as part of the arrest; therefore it is not necessary to determine whether there are officer safety or evidence preservation concerns in that particular situation. In contrast, a warrantless search of the arrestee's surroundings is allowed only if the area is within an arrestee's "immediate control." Such searches are justified by concerns of officer safety or the preservation of evidence and are limited to those areas within reaching distance at the time of the search.

State v. MacDicken, 179 Wn.2d 936, 940-41, 319 P.3d 31 (2014) (internal citations omitted).

The theoretical justifications for a search incident to arrest are the same under both state and federal constitutions. Similarly, the areas that can be searched—the person of the arrestee and the area within his reach—are the same.

State v. Baird

At issue in the two consolidated cases in *Baird* was whether evidence of refusal to submit to breath testing was admissible after *McNeely*.[4] The drivers argued that the search was unconstitutional and, therefore, they had a constitutional right to refuse consent and the State could not use that choice against them. 187 Wn.2d at 212-13. Our court issued three opinions: a lead opinion by Justice Madsen expressing the views of four justices, a concurring opinion by Justice González that was joined by Justice Yu, and a dissent by Justice Gordon McCloud that expressed the view of three justices.

The lead opinion concluded that (1) the implied consent statute did not authorize a warrantless search, (2) there was no constitutional right to refuse a breath test because it was a valid search incident to arrest, and (3) evidence of refusal to consent was admissible as evidence of guilt under the implied consent statute. *Id.* at 214. With respect to the constitutionality of the breath test search, the drivers argued that the searches were unconstitutional under both the Fourth Amendment and art. I, § 7. *Id.* at 221-22. The lead opinion promptly answered that argument by turning to *Birchfield*: "[T]ests conducted subsequent to an arrest for DUI fall under the search incident to arrest exception to the warrant requirement." *Id.*

[4] *Birchfield* was released a year after argument in *Baird* and six months prior to the release of the *Baird* opinion.

Justice González wrote separately to emphasize that a breath test after an arrest for DUI "is a limited and reasonable search" and that refusal to consent "has no constitutional implications" under the Fourth Amendment or art. I, § 7. *Id.* at 229 (González, J., dissenting). He also agreed that the search incident to arrest doctrine was categorical and applied to this case. *Id.* at 231 n.10. He questioned whether there was any reasonable expectation of privacy in a driver's breath subsequent to an arrest for DUI. *Id.* at 231. Turning then to the "authority of law" component of art. I, § 7, he focused on the lengthy history of the implied consent law in this state and the minimal intrusiveness of a breath test to conclude that a DUI driver's private affairs were not disturbed by the testing. *Id.* at 231-32.

The dissent criticized the majority for applying the search incident to arrest analysis of *Birchfield*[5] under our constitution, contending that doctrine in Washington had never "applied it to bodily contents." *Id.* at 234-35 (Gordon McCloud, J., dissenting). The dissent also took issue with the lead opinion's view that the implied consent law acted to waive challenges to the admissibility of refusal evidence. *Id.* at 237.

In summary, a majority of the court concluded that a breath test conducted under our implied consent law is a valid search incident to arrest under our state constitution.

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[5] Our dissenting colleague misreads the *Baird* dissent. The dissenters challenged the lead opinion's analysis under art. I, § 7. They did not claim that the lead opinion failed to address the art. I, § 7 argument. *See* 187 Wn.2d at 234 (Gordon McCloud, J., dissenting); *cf.*, 187 Wn.2d at 222 (lead opinion).

Application to Mr. Nelson's Case

With apologies for that lengthy introduction, we can finally turn to the claim presented by Mr. Nelson. Criticizing[6] the failure of the *Baird* Court to conduct an analysis under *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986), he ignores the rule of that case while conducting his own *Gunwall* analysis. He contends that the search incident to arrest doctrine[7] is not applicable to "non-physical data such as alcohol concentration." Br. of Appellant at 14.

Unlike Mr. Nelson, this court does not have the luxury of ignoring *Baird*. *E.g.*, *State v. Gore*, 101 Wn.2d 481, 487, 681 P.2d 227 (1984) (lower courts are bound by ruling of Washington Supreme Court). While the outcome of *Baird* ultimately is dispositive of this case, we nevertheless have to consider his *Gunwall* argument in order to reach that conclusion.

Under art. I, § 7, the consideration is whether a defendant's "private affairs" have been invaded without authority of law. *State v. Myrick*, 102 Wn.2d 506, 510, 688 P.2d 151 (1984). That term "focuses on those privacy interests which citizens of this state

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[6] Br. of Appellant at 12.

[7] Mr. Nelson also argues that the purposes of the search incident to arrest doctrine do not support taking breath alcohol samples. We disagree. Although the dissipation of alcohol in the blood stream does not by itself constitute an exigency, the dissipation still is a relevant consideration in rapidly obtaining a sample to preserve the evidence. A search conducted incident to the arrest provides the most timely evidence of DUI.

have held, and should be entitled to hold, safe from governmental trespass absent a warrant." *Id.* at 511.

Gunwall set forth six nonexclusive criteria to be applied when analyzing whether to accord a provision of the state constitution a different reading than that given to parallel provisions of the federal constitution. 106 Wn.2d at 61. Those criteria are:

> 1. The textual language of the state constitution.
> 2. Significant differences in the texts of parallel provisions of the federal and state constitutions.
> 3. State constitutional and common law history.
> 4. Preexisting state law.
> 5. Differences in structure between the federal and state constitutions.
> 6. Matters of particular state interest or local concern.

Id. at 61-62. Because criteria 1, 2, 3, and 5 were analyzed in *Gunwall* with respect to art. I, § 7 and the Fourth Amendment, they need not be addressed on every occasion when comparing those two provisions; only criteria 4 and 6 need to be analyzed. *State v. Hudson*, 124 Wn.2d 107, 120, 874 P.2d 160 (1994); *State v. Boland*, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990). In essence, the four fixed *Gunwall* factors address whether a provision can be interpreted differently, while the other two ask whether it should be so interpreted in the context of the particular case.

Here, Mr. Nelson argues that pre-existing law favors diverging from *Birchfield*, focusing on cases where Washington has found that the privacy protections of art. I, § 7

prohibit interference with bodily functions. *E.g.*, *Blomstrom v. Tripp*, 189 Wn.2d 379, 402 P.3d 831 (2017) (urinalysis required from DUI defendants released pending trial unconstitutional without statutory authorization); *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 178 P.3d 995 (2008) (school policy requiring mandatory urinalysis testing of student athletes struck down). He also argues that cases from other states should be considered in determining whether to follow *Birchfield*. Although cases from other states construing constitutional provisions similar to ours could be informative, the mere fact that some other states disagree with *Birchfield* is not "pre-existing law" under *Gunwall* that provides much aid to construing the scope of the Washington Constitution.

We believe that Mr. Nelson's focus on this factor is inaccurate. At issue is the search incident to arrest exception to the warrant requirement. Our case law in this area does not favor Mr. Nelson's position. As detailed previously, the search incident to arrest doctrine under art. I, § 7 not only serves the same purposes (evidence preservation, officer safety)[8] as the Fourth Amendment, but our analysis[9] of a search incident to arrest has been the same, particularly in the area of impaired drivers arrested and tested under the implied consent statute. Thus, both *Judge* and *Curran* recognized warrantless blood

[8] *Brock*, 184 Wn.2d at 154.
[9] *MacDicken*, 179 Wn.2d at 940-41.

draws as lawful searches under art. I, § 7 prior to the United States Supreme Court revising its view of the requirements of the Fourth Amendment in *McNeely*.[10]

After the United States Supreme Court reconsidered its Fourth Amendment treatment of state implied consent laws in *Birchfield*, it reaffirmed that breath testing did not implicate the federal constitution despite *McNeely*. When confronted with the *Birchfield* issue in *Baird*, a majority of our court determined that warrantless breath testing of suspected impaired drivers was valid under art. I, § 7. Regardless of what Mr. Nelson may think of the adequacy of *Baird*'s analysis, the result is clearly the most relevant example of pre-existing state law on his issue.

None of the most relevant case authority supports Mr. Nelson. He relies principally on the fact that Washington cases do not permit a search of a locked[11] container found in the course of an arrest, citing to *State v. VanNess*, 186 Wn. App. 148, 162, 344 P.3d 713 (2015) (locked box in backpack was not subject to search incident to arrest). That case, in addition to being unique, is clearly distinguishable, even if we assume that a backpack in one's possession at the time of arrest is the same as an item on

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[10] After *McNeely*, the legislature promptly amended the implied consent statute to ensure that blood could be obtained from an impaired driver by means of a search warrant. *See* LAWS OF 2013, 2d Spec. Sess., ch. 35, § 36.

[11] Unlocked containers found on an arrestee's person are subject to search. *E.g.*, *State v. White*, 44 Wn. App. 276, 278, 722 P.2d 118 (1986) (cosmetics case was subject to search incident to arrest); *State v. Garcia*, 35 Wn. App. 174, 176, 665 P.2d 1381 (1983) (wallet was subject to search incident to arrest).

the person. Borrowing from our case law on inventory searches, the *VanNess* court ruled that locked containers found near an arrestee could not be searched without a warrant, relying on two automobile search cases involving locked containers that had been analyzed under the *Chimel* area analysis. *Id.* at 160-61. We do not believe that police can do indirectly what they cannot do directly. Locked containers are not searchable in the course of an inventory search, and that fact should not change just because the container was found in close proximity to an arrestee. *VanNess* is only marginally helpful to an analysis of the fourth *Gunwall* factor in this context.[12]

Even if we consider searches incident to arrest outside of the impaired driver context, as appellant does, pre-existing law is not particularly helpful to Mr. Nelson. One example is *State v. Cheatam*, 150 Wn.2d 626, 81 P.3d 830 (2003). There police had arrested the defendant and placed his clothing, including a pair of shoes, in storage at the jail. *Id.* at 642. The court concluded that the defendant had no reasonable expectation of privacy in property that he had exposed to the public (and police) view. *Id.* In a similar vein, although not a search incident to arrest case, is *State v. Surge*, 160 Wn.2d 65, 156 P.3d 208 (2007). There the court upheld, also against an art. I, § 7 challenge, a statute that authorized the taking of DNA samples from those convicted of felonies. *Id.* at 71-74

[12] *VanNess* also read *Riley v. California* as rejecting a categorical approach to searches incident to arrest. 186 Wn. App. at 156-60. Two years later, the *Birchfield* court rejected that reading of *Riley* and reaffirmed the categorical nature of a search incident to arrest. *Birchfield*, 195 L. Ed. 2d at 578, 586.

(lead opinion), 83 (Owens, J. concurring). In contrast to *Surge*, a DNA swab of a person awaiting trial can only be ordered by a judge who determines that probable cause exists to take the sample. *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010). There the court distinguished *Judge* and *Curran* due to the fact that DNA, unlike alcohol, does not dissipate and, therefore, can await judicial authorization. *Id.* at 185. The court also concluded that the warrant requirement can be satisfied by a court order. *Id.* at 186.

Given the extensive number of cases litigated under art. I, § 7, undoubtedly other case examples could be discussed. However, we believe we have identified, and discussed, the most relevant authorities. In this context, the fourth *Gunwall* factor does not favor finding a greater privacy right in breath alcohol testing. If anything, our history strongly suggests that arrestees have a diminished expectation of privacy in their breath alcohol levels.

The sixth *Gunwall* factor is whether the issue is of particular state interest or local concern. *Gunwall*, 106 Wn.2d at 62. How one views this factor depends in large part on how the issue is framed. If the question is defined at a high level of generality, such as one of personal privacy or enforcement of state law, the factor will always favor an independent interpretation. However, our court does not consider this a fixed, static factor, so we believe that the true question is focused on the specific privacy right claimed—whether a driver arrested on the public highways has a privacy interest in his breath alcohol. Although there is strong national interest in the problem of impaired

driving, and the national highway system represents a significant portion of the public roadways, we still consider the issue to primarily be one of local concern. Thus, this *Gunwall* factor somewhat favors Mr. Nelson's argument for greater privacy than that afforded by the Fourth Amendment.

Nonetheless, in light of the long history of both our implied consent statute and of our case law rejecting arguments for giving art. I, § 7 an expanded interpretation in this context, we decline Mr. Nelson's argument to ignore *Baird* and reach a different result than that court did. Washington does not have a history of recognizing expanded privacy protection for an arrested driver's blood or breath alcohol level. We therefore conclude that the implied consent law provides authority of law to conduct a warrantless breath test[13] as a search incident to arrest and, thus, Mr. Nelson's consent to provide breath samples was valid.

We are not unmindful of the consequences of accepting Mr. Nelson's argument for rejecting application of the search incident to arrest doctrine in this context.[14]

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[13] According to the 2016 statistics of the Federal Bureau of Investigation, there were 23,209 arrests in this state for DUI. *See* https://ucr.fbi.gov/crime-in-the-u.s/2016/crime-in-the-u.s.-2016/topic-pages/tables/table-22 (last visited Feb. 7, 2019). It would be a daunting problem to provide judges to cover 23,000 additional search warrants across the state.

[14] At oral argument, Mr. Nelson's attorney agreed that fingerprinting an arrestee could not be justified under either rationale of the search incident to arrest doctrine. *See* oral argument, December 5, 2018, No. 352731, at 10:49:04: http://www.courts.wa.gov/appellate_trial_courts/appellateDockets/index.cfm?fa=appellateDockets.showDateList&courtId=a03.

Requiring a warrant for each breath test would render the current implied consent warnings of RCW 46.20.308(2) inaccurate, leading to the suppression of test results in all pending cases. *E.g.*, *State v. Whitman County Dist. Court*, 105 Wn.2d 278, 286-87, 714 P.2d 1183 (1986). Very little of the implied consent law would remain valid—and even less of it would be useful—and it is difficult to conceive of how a revised law could be crafted if there is indeed a state constitutional right to refuse the search. It also is questionable how well a search warrant could compel a valid breath sample if there were no valid consequences for refusing to comply. As a practical matter, blood would probably be drawn in every instance where a search warrant was obtained. These concerns do not factor into our analysis, but they do provide a further caution against a radical reversal of 50 years of precedent and practice.

The judgment of the district court is affirmed.

Korsmo, J.

I CONCUR:

Siddoway, J.

No. 35273-1-III

LAWRENCE-BERREY, C.J. (dissenting) — The majority does a masterful job setting forth Washington State and federal decisions discussing implied consent laws and the search incident to arrest exception to the warrant requirement. I dissent because I disagree with the majority on two points.

First, the majority misconstrues the lead opinion in *State v. Baird*, 187 Wn.2d 210, 386 P.3d 239 (2016) (plurality opinion). The majority construes the lead opinion as answering no to whether article I, section 7 of the Washington Constitution prohibits a warrantless breath test. Similar to the *Baird* dissent, I construe the lead opinion as not answering the state constitutional question:

> It is surprising that the lead opinion begins and ends its answer to this question with the Fourth Amendment [to the United States Constitution]. Our court has consistently recognized that "[a]rticle I, section 7 is more protective of individual privacy than the Fourth Amendment, and we turn to it first when both provisions are at issue." The lead opinion doesn't even turn to article I, section 7 second.
>
> . . . I think we should turn to article I, section 7 first. . . .

Baird, 187 Wn.2d at 234-35 (second alteration in original) (citations omitted) (Gordon McCloud, J., dissenting). The lead opinion did not even respond to or deny the dissent's point that it failed to decide the state constitutional question. Because the lead opinion in *Baird* did not decide the state constitutional question, our resolution of that issue is not controlled by *Baird*.

Second, the majority misconstrues *State v. MacDicken*, 179 Wn.2d 936, 310 P.3d 31 (2014), which cited *State v. Byrd*, 178 Wn.2d 611, 310 P.3d 793 (2013). Those cases do say that a search of an arrestee's person and personal effects "always implicate[s] *Chimel*[1] concerns for officer safety and evidence preservation." *Byrd*, 178 Wn.2d at 618 (search of purse on lap of the defendant); *accord MacDicken*, 179 Wn.2d at 940-41 (search of bag carried by the defendant). The statement, although true for purses and bags on a defendant, is not true for blood and breath. It is hard to imagine how alcohol in the blood or breath of a defendant presents an officer safety concern. Yet, it is possible to imagine how the natural dissipation of alcohol in the blood or breath raises evidence preservation concerns. In those instances where the natural dissipation of alcohol in the blood or breath precludes obtaining a warrant, the exigent circumstances exception to the warrant requirement applies. *See Baird*, 187 Wn.2d at 220-21 (natural dissipation of alcohol in blood or breath may support finding of exigent circumstances, but "exigency" must be determined on case-by-case basis). But as noted by Justice Sotomayor in her dissent in *Birchfield v. North Dakota*, ___ U.S. ___, 136 S. Ct. 2160, 2192-93, 195 L. Ed. 2d 560 (2016), the ease of quickly obtaining telephonic warrants renders the natural dissipation of alcohol in one's blood or breath an uncommon concern.

These observations lead me to ask: Just how jealously do Washington courts guard the exceptions to the warrant requirement for searches? In most cases involving article I,

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[1] *Chimel v. California*, 395 U.S. 752, 763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), *overruled in part by Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

section 7, we reiterate: "Under article I, section 7, a warrantless search is per se unreasonable unless the State proves that one of the few 'carefully drawn and jealously guarded exceptions' applies." *Byrd*, 178 Wn.2d at 616 (quoting *State v. Bravo Ortega*, 177 Wn.2d 116, 122, 297 P.3d 57 (2013)). The answer to my question depends on whether we permit warrantless searches to expand beyond the justifications that underlie the carefully drawn exceptions to the warrant requirement.

In *State v. Valdez*, 167 Wn.2d 761, 774-75, 224 P.3d 751 (2009), our highest court unanimously held:

> [T]he search incident to arrest exception has been stretched beyond these underlying justifications, permitting searches beyond what was necessary for officer safety and preservation of the evidence of the crime of arrest. This trend in article I, section 7 jurisprudence was substantially adopted from a similar trend in Fourth Amendment jurisprudence. As characterized by Justice Frankfurter in the Fourth Amendment context, the trend of cases "merely prove[s] how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision." *United States v. Rabinowitz*, 339 U.S. 56, 75, 70 S. Ct. 430, 94 L. Ed. 653 (1950) (Frankfurter, J., dissenting).
>
> . . . .
>
> [This trend was because] cases departed from the principles upon which the search incident to arrest exception was based and have since been overruled. Yet they serve as clear reminders of the danger of wandering from the narrow principled justifications of the exception, even if such wandering is done an inch at a time. . . .

(Second alteration in original; some citations omitted.) I would jealously guard our individual liberties by requiring warrants for searches not supported by the justifications underlying the carefully drawn exceptions.

The majority opinion ends by noting various concerns with requiring warrants for most breath searches. These concerns are overstated.

First, the implied consent warnings can be withdrawn and substituted by a warning that if the person does not consent to provide a breath sample, the officer will request a telephonic warrant from a judge. As noted in Justice Sotomayor's dissent, requiring warrants for most breath tests would not overly task the judiciary: "[A] significant majority of drivers voluntarily consent to breath tests, even in states without criminal penalties for refusal." *Birchfield*, 136 S. Ct. at 2193 (Sotomayor, J., dissenting).

Second, law enforcement might start warning persons now, that if they refuse to consent to a breath test, law enforcement will request a telephonic warrant from a judge. This warning will prompt actual consent to a breath test in the vast majority of cases. For those few who do not consent, a telephonic warrant can be requested. If after obtaining a telephonic warrant a person persists in refusing to provide a sample, law enforcement can give the additional implied consent warnings. Adjusting to this practice now will prevent the harsh result, possible in the future, that warrantless breath tests will be suppressed.

Lawrence-Berrey, C.J.

FILED
FEBRUARY 19, 2019
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

COURT OF APPEALS, DIVISION III, STATE OF WASHINGTON

STATE OF WASHINGTON,	)	**No. 35273-1-III**
	)	
Respondent,	)	
	)	
v.	)	**ORDER AMENDING**
	)	**OPINION**
THOMAS J. NELSON,	)	
	)	
Petitioner.	)	

THE COURT hereby amends the dissenting opinion of Judge Robert Lawrence-Berrey that was filed on February 14, 2019.

The following sentence shall be added at the end of the last sentence on page 3, which ends "not supported by the justifications underlying the carefully drawn exceptions:"

> Absent evidence preservation concerns, a warrant should be required for blood and breath searches for alcohol.

FOR THE COURT:

Lawrence-Berrey C.J.
ROBERT LAWRENCE-BERREY
CHIEF JUDGE

Appendix B

IN THE DISTRICT COURT OF THE STATE OF WASHINGTON
IN AND FOR DOUGLAS COUNTY

STATE OF WASHINGTON,	)	
Respondent,	)	**No. 16-1-00073-1**
	)	**Dt. Ct. No. C951805**
v.	)	
	)	
THOMAS J. NELSON,	)	
Appellant,	)	

THE HONORABLE JUDITH McCAULEY
3.5/3.6/READINESS HEARING
February 1, 2016
(Pages 1 - 173)

APPEARANCES:

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Q: Okay.

Now, these implied consent warnings, do you just kind of -- are those just created by the department or are they required by law?

A: I'm required, I believe, by law, by RCW to read them to the person when I'm doing the BAC process, the breath test process.

Q: Okay. So you're following the law when you're, when you're advising him of these implied consent warnings?

A: Yes.

Q: Okay. Let's see, in one of these warnings does that talk about his, his potential loss of a driver's license?

A: Yes, it does.

Q: Okay. And how would, how would he lose his driver's license?

A: Two different ways. One, if he refuses the breath test he'll lose it for at least one year, and then or if he submits to the breath test and blows over a .08, then the Department of Licensing would suspend it for at least 90 days.

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A: Yes.

Q: Alright. And when you asked him to participate in roadside testing, you had not given it back to him?

A: That is correct.

Q: Right? You continued to hold onto it?

A: Correct.

Q: In other words, if he just drove away, he would be driving without a license on his person?

A: Oh, I would've chased him down, yes.

Q: Yeah, exactly.

A: Because he wasn't free to leave.

Q: Exactly my point. Alright.

So, let me ask you now a little bit about the implied consent warnings.

A: Okay.

Q: Alright? You read them to TJ, correct?

A: That is correct.

Q: And you read them line by line, correct?

A: Correct.

Q: And you specifically told him that if he refused to take

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the breath test, he will lose his license for at least one year, correct?

A: That is correct.

Q: You also told him that if he took the test and failed it, meaning a .08 or higher, that he would lose his license for at least 90 days?

A: Correct.

Q: In fact, you made sure that he understood the difference in terms of the sanctions, correct?

A: Yes. Yeah, I asked him if he understood and he stated, after reading them to him a second time, that he did.

Q: Right. And, then, after the first time you read it through him (sic) you asked him if he understood and he said, "No," right?

A: Correct.

Q: Then he asked you read it again, yes?

A: Correct.

Q: And you did?

A: Yes.

Q: And, then, you asked him if he was willing to take the

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breath test, correct?

A: After I asked him again if he understood them --

Q: Right.

A: -- and he stated he did. And, then, yes, the next question is, I read it verbatim, "Will you now submit to a breath test?"

Q: And it was at this point in time that he said to you, "I want to speak to a lawyer," correct?

A: That is correct.

Q: So TJ did not make a decision to take a breath test until he spoke to the lawyer on the phone?

A: Correct.

Q: Alright. And he spoke to the lawyer on the phone, right?

A: Yes.

Q: And, then, when he was done speaking to the lawyer, that's when he said to you that he will take the test?

A: Correct.

Q: Right?

A: Yes.

Q: Alright.

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Also, earlier, as it relates to breath testing, you did give TJ a portable breath test, correct?

A: Yes.

Q: And it was right after the portable breath test reading that you arrested TJ?

A: Correct.

Q: Right?

A: Yes.

Q: Okay.

Now, it is true, right, that you would not know TJ's alcohol content at the police station doing it fast that can be used in Court unless he specifically participated in the testing procedures?

A: Correct.

Q: Right? That's the only way --

A: Yes.

Q: -- you can know his alcohol content on his breath, correct?

A: Correct.

Q: Alright. You can't tell what it is from the smell?

A: No.

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Q: Or from any of the other observations that we've talked about here today?

A: No, I can't.

Q: Alright. And, also, when you asked him to do the breath test, you did not ask him to do the breath test as a search incident to arrest, correct?

A: No.

Q: In fact, you were doing it under the implied consent law.

A: Correct.

Q: Right. And it is true, is it not, that you have been trained on how to secure a warrant to have someone's blood sample taken and have the blood sample tested?

A: Correct.

Q: Right? And you do know that now in the State of Washington you may apply for a search warrant over the phone?

A: Correct.

MR. VALAAS: Objection, relevance.

MR. DUARTE: This goes to the --

THE COURT: This is part of the motion.

A: Yes.

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Q: So you do know that, right?

A: Yes.

Q: And once you get a, a judge on the phone, your job is to tell the truth about the facts that you have gathered so that the Judge can issue a warrant, correct?

A: Correct.

Q: And that takes a few minutes to do?

A: Depends. The only blood warrant I've done over the phone, I believe it was about a half-hour, 20 minutes to a half-hour.

Q: Alright. So you've been able to accomplish that within half-an-hour, 20 minutes to half-an-hour.

A: That is the reading it on the phone. That does not include the initial investigation, the typing up of the warrant and then --

Q: Right.

A: -- but, yeah.

Q: Right. In fact, when you do that, you can accomplish that within two hours from the time that you stopped an individual from driving?

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A: To secure the warrant? Generally, yes.

Q: Right.

A: It's close, but, yes, it can be done.

Q: And in this particular case, TJ took a breath test within two hours, correct?

A: Correct. Yes. I believe so.

Q: Well, why don't you check because we want to make sure.

A: I don't have the breath test in here.

Q: Alright. Does your police report help you recall that?

A: No, I don't have the time that the breath test was done.

The only time that I have listed that I can correlate anything to is the arrest was at 17:39 hours.

THE COURT: Officer, did you need a glass of water?

WITNESS: No, I'm okay. I'm getting over a cold and it's --

THE COURT: Uh-huh (affirmative).

WITNESS: I'm in the final stages trying to get everything out. Sorry.

MR. DUARTE: If I may approach the witness, Your Honor?

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immediately agreed to perform them. The field sobriety tests have been -- are admissible, they have passed the *Fry* test, they're relevant to the case to show potential alcohol consumption, as well as impairment.

In regards to whether there was probable cause to arrest Mr. Nelson for DUI, Officer Ward had more than enough evidence at the point of arrest to establish probable cause. He had Mr. Nelson driving 30 miles over the speed limit. Mr. Nelson was exhibiting signs of alcohol consumption, including bloodshot, watery eyes, an odor of alcohol emanating from his person. Furthermore, Mr. Nelson admitted to drinking multiple drinks earlier in the day. Finally Mr. Nelson failed multiple field sobriety tests, he failed the HGN test, he failed the walk and turn test, exhibited five of eight clues on the walk and turn and six of six clues on the HGN, and ultimately he blew a PBT of .10, over the legal limit. All these factors, the totality of these circumstances far exceeded the minimum threshold to establish probable cause.

In regards to the, the BAC, whenever a BAC test

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is, is conducted, officers are required to follow the statute and the statute mandates that they read them the implied consent warnings, so that -- the hypothetical scenario where, where they actually comply with the constitutional consent is just not possible with that statute in place. Even if this person came up and said, "Hey, look, I want to take the BAC, I want to take the BAC," an officer would be unable to comply with the constitutional consent because the statute requires that even if a person comes up and all indications say they want to get the BAC done, the officer nevertheless still has to go through implied consent; the statute requires it any time a BAC test is conducted.

And, and I would, I would concede that if a breath test was a constitutional search that implied consent warnings do not -- are not voluntary consent because they, they raise the issue of license revocation; that, that is coercive in nature, that encourages people to take the test. So if it was a constitutional search, implied consent's just inherently coercive because of that -- of the license implications. A BAC test is not a constitu-

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tional search. And, furthermore, if the Court was to find it was a constitutional search, that would essentially invalidate the statute, that would make the statute unconstitutional and its face and no, no case in Washington has held that that statute is unconstitutional at this point and, therefore, statutorial (sic), presumed constitutional, and defendants have a, have a extremely high burden to show that they're unconstitutional. They have to prove statues are unconstitutional beyond a reasonable doubt; that, that simply hasn't been done here.

Blood -- A blood draw is different, it is a constitutional search, it's more invasive than a breath test. Breath tests are not constitutional searches and today, yesterday and for the past however many years, that statute's been constitutional and in this case it was complied with, so I'd ask that, that the BAC results come in, as well. And I think that's, that's all the State has.

THE COURT: Thank you.

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I know that has been -- my understanding is that is what has been up before the Supreme Court since about last summer for a definitive ruling. My understanding was, and I may be wrong, it was on both the FTAs and whether that breath test, where the 242 warnings themselves tell a person, and the officer's mandated by statute even before giving the breath test, to read that 242 warning, which advises the person that a failure to take the test will result in sanctions, failure to take the test is also admissible as evidence at the time of trial. In this case I am going to find that the complied consent (sic) statute -- I know Counsel has not argued that it was unconstitutional in, in totality, but unconstitutional as applied in this particular case or as to this particular set of facts for Mr. Nelson, but I am finding that this is -- the test is allowed to be introduced into evidence. Would not find it is unconstitutional as applied to Mr. Nelson in this particular situation and would not suppress the breath test.

The defense statements -- 3.5 was part of the motion here, but there actually has been no test (sic) -- no

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