

**No. 46000-9-II**

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**COURT OF APPEALS, DIVISION TWO  
STATE OF WASHINGTON**

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**STATE OF WASHINGTON,**

**Respondent,**

**v.**

**IGOR SIROTKIN,**

**Appellant,**

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**APPELLANT'S OPENING BRIEF**

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## **I. INTRODUCTION**

During trial on a charge of Driving Under the Influence (DUI), the prosecutor introduced evidence, through the testimony of the arresting officer, that Mr. Sirotkin refused to submit to a breath alcohol test. In closing argument, the prosecutor asked the jury, “If you were not intoxicated, why would you choose to refuse? What is the logical explanation?” The jury returned a guilty verdict.

Mr. Sirotkin challenges the State’s use of this evidence on constitutional grounds, arguing the evidence was an impermissible comment on his constitutional right to refuse to consent to a search. This Court granted discretionary review to consider this issue.

## **II. ASSIGNMENTS OF ERROR**

1. The trial court erred in permitting the State to introduce evidence of Mr. Sirotkin's refusal to submit to a post-arrest breath alcohol test administered under the Implied Consent law.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

1. Is a breath alcohol test a search under Art. I, §7 and the Fourth Amendment?
2. Does a breath alcohol test invade recognized privacy rights of the individual?
3. Does exigency as exception to warrant requirement apply to breath alcohol testing?
4. Does *McNeely* decision require Washington courts to re-evaluate authority of law necessary to support warrantless breath alcohol testing?
5. Does the consent exception to warrant requirement support warrantless breath alcohol testing?
6. Does State's use of refusal evidence violate constitutional protections under Art. I, §7?
7. Was admission of refusal evidence harmless?

#### **IV. STATEMENT OF THE CASE**

Igor Sirotkin was charged with one count of Driving Under the Influence (DUI) in Clark County District Court.<sup>1</sup>

A trooper first observed Mr. Sirotkin weaving in his lane and speeding.<sup>2</sup> The trooper stopped Mr. Sirotkin and commenced a DUI investigation.<sup>3</sup> Mr. Sirotkin was slow to respond to the trooper, and denied speeding.<sup>4</sup> Mr. Sirotkin had glassy eyes and a thousand yard stare.<sup>5</sup> The trooper detected an odor of intoxicants on Mr. Sirotkin breath, but Mr. Sirotkin denied drinking.<sup>6</sup>

The trooper arrested Mr. Sirotkin and drove him to a police precinct to administer a breath alcohol test.<sup>7</sup> There, the trooper read an Implied Consent warning.<sup>8</sup> The warning advised Mr. Sirotkin that he had the right to refuse the test, but he faced a longer license suspension for doing so and the refusal may be used at trial.<sup>9</sup> Mr. Sirotkin refused.<sup>10</sup>

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<sup>1</sup> CP 4. Mr. Sirotkin was also charged with Driving While License Suspended in the first degree. This charge is not relevant to the present appeal.

<sup>2</sup> CP 432

<sup>3</sup> CP 436

<sup>4</sup> CP 438

<sup>5</sup> CP 438-439

<sup>6</sup> CP 438; 443

<sup>7</sup> CP 445

<sup>8</sup> CP 445

<sup>9</sup> CP 447

<sup>10</sup> CP 448

Prior to trial Mr. Sirotkin's lawyer argued the breath alcohol test refusal should be excluded from trial.<sup>11</sup> The court denied the motion.<sup>12</sup> Mr. Sirotkin did not testify at trial.<sup>13</sup>

During closing arguments, the prosecutor referred to the refusal evidence.

“Now going back to the – the police station, the defendant chose to refuse the breath test. It is his right to refuse a breath test, and that's what he did. And as I went through direct examination with Trooper Hughes, I was – you know, talked about this implied consent form and how it states that if you submit to a breath test, you know, your license could be revoked for 90 days. And if you refuse, our license will be suspended for at least one year. And the defendant chose to refuse the breath test.

I submit to you that the logic – you know, what's the logical explanation of that? Why would you choose to have a nine – at least a nine month revocation of your license if you were – had been sobered [sic]. If you were not intoxicated, why would you choose to refuse? What is the logical explanation?”<sup>14</sup>

After discussing Mr. Sirotkin's contact with a lawyer, the prosecutor returned the earlier point.

“Was it reasonable for the defendant to refuse a breath test when he, you know, chose the – stiffer penalty? I

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<sup>11</sup> CP 186; 412

<sup>12</sup> CP 415

<sup>13</sup> CP 421-490

<sup>14</sup> CP 583

submit to you to think logically. Why would someone choose a stiffer penalty if they were sober?”<sup>15</sup>

Counsel for Mr. Sirotkin sought to dismiss the significance of the refusal by questioning whether the lawyer who told Mr. Sirotkin to refuse gave him good advice.<sup>16</sup> The prosecutor returned to the subject in rebuttal.

“Is [sic] his decision explicitly – explicitly states in the implied consent warning that you are choosing the higher revocation for refusing the test. No matter what an attorney told you to do, I ask you logically, why would someone that is human choose that?”<sup>17</sup>

The jury returned a guilty verdict.<sup>18</sup>

On RALJ appeal, the Clark County Superior Court affirmed the conviction.<sup>19</sup> However, counsel for Mr. Sirotkin failed to raise this issue.<sup>20</sup> Mr. Sirotkin sought discretionary review with this Court.<sup>21</sup> A court commissioner initially declined to grant review.<sup>22</sup> This Court, however, reversed the commissioner’s decision and granted Mr. Sirotkin’s motion to modify.<sup>23</sup> This issue is now before the Court.

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<sup>15</sup> CP 585

<sup>16</sup> CP 589-590

<sup>17</sup> CP 592

<sup>18</sup> CP 234; 509

<sup>19</sup> CP 556

<sup>20</sup> CP 252

<sup>21</sup> CP 562

<sup>22</sup> Ruling Denying Review; May 29, 2014

<sup>23</sup> Order Granting Motion to Modify; August 5, 2014

## **V. ARGUMENT**

**Mr. Sirotkin's conviction for Driving Under the Influence should be reversed because the State used evidence of his refusal to submit to a breath test as substantive evidence against him at trial.**

### **1. Breath alcohol testing is a search under Art. I, §7 and the Fourth Amendment.**

The U.S. Supreme Court has long acknowledged that a breathalyzer (breath-alcohol or "BAC") test is a search under the Fourth Amendment.

"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 (1996). . . .

Much the same is true of the breath-testing procedures required under Subpart D of the regulations. 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."

*Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602, 616-617, 109 S.Ct. 1402 (1989).

Mr. Sirotkin's argument, however, is based on principles of privacy unique to the Washington State Constitution; Article I, §7.<sup>24</sup> When presented with arguments under both the state and federal constitutions, courts review the state constitution arguments first. *State v. Carter*, 151 Wn.2d 118, 125, 85 P.3d 887 (2004).

State constitutional claims are reviewed using a list of six non-exclusive factors discussed in *State v. Gunwall*.<sup>25</sup> It is now accepted that Art. I, § 7 is more protective than the Fourth Amendment, and a *Gunwall* analysis is no longer necessary. *State v. Athan*, 160 Wn.2d 354, 365, 158 P.3d 27 (2007); *State v. Jackson*, 150 Wn.2d 251, 259-260, 76 P.3d 217 (2003). The relevant question is whether Art. I, §7 affords enhanced protections in the particular context. *Athan, Id.* However, Art. I, §7 necessarily encompasses those legitimate expectations of privacy protected by the Fourth Amendment. *State v. Garcia-Salgado*, 170 Wn.2d 176, 183, 240 P.3d 153 (2010).

Our State Constitution is not merely more protective of privacy; it evaluates privacy rights in a fundamentally different way than the Fourth Amendment. Art. I, §7 does not regulate government searches using the

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<sup>24</sup> "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."

<sup>25</sup> 106 Wn.2d 54, 720 P.2d 808 (1986).

words “reasonable” or “unreasonable.” *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007). This distinction in privacy was articulated by Supreme Court Justice Sanders (ret.);

“Art. I, § 7, is explicitly broader than that of the Fourth Amendment as it “ ‘clearly recognizes an individual's right to privacy with no express limitations’ ” and places greater emphasis on privacy. *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994) (quoting *State v. Simpson*, 95 Wn.2d 170, 178, 622 P.2d 1199 (1980)). Further, while the Fourth Amendment operates on a downward ratcheting mechanism of diminishing expectations of privacy, Art. I, § 7, holds the line by pegging the constitutional standard to “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a *warrant*.” *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984) (emphasis added).”

*State v. Ladson*, 138 Wn.2d 343, 348-349, 979 P.2d 833 (1999).

This qualitative difference in analysis has been repeated in subsequent decisions and is firmly engrained in our State’s jurisprudence.

“Although they protect similar interests, “the protections guaranteed by article I, section 7 of the state constitution are qualitatively different from those provided by the Fourth Amendment to the United States Constitution.” *State v. McKinney*, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). The Fourth Amendment protects only against “unreasonable searches” by the State, leaving individuals subject to any manner of warrantless, but reasonable searches. U.S. Const. amend. IV (“The right of the people to be secure in their . . . houses . . . against unreasonable searches . . . shall not be violated. . . .”);

*Illinois v. Rodriguez*, 497 U.S. 177, 187, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990) ("[W]hat is at issue . . . is not whether the right to be free of searches has been waived, but whether the right to be free of unreasonable searches has been violated.").

By contrast article I, section 7 is unconcerned with the reasonableness of the search, but instead requires a warrant before any search, reasonable or not. Const. art. I, § 7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law."). This is because "[u]nlike in the Fourth Amendment, the word 'reasonable' does not appear in any form in the text of article I, section 7 of the Washington Constitution." *State v. Morse*, 156 Wn.2d 1, 9, 123 P.3d 832 (2005). Understanding this significant difference between the Fourth Amendment and article I, section 7 is vital to properly analyze the legality of any search in Washington."

*State v. Eisfeldt*, 163 Wn.2d 628, 634-635, 185 P.3d 580 (2008).

This fundamental difference in privacy analysis has led our Supreme Court to find privacy protections under Art. I, §7 absent under the Federal Constitution. Under Art. I, §7, a right to privacy exists in garbage placed in a can for disposal; *State v. Boland*, 115 Wn.2d 571, 800 P.2d 1112 (1990); whereas no privacy right exists under the Fourth Amendment. *California v. Greenwood*, 486 U.S. 35, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988). Pen registers violate the right to privacy under Art. I, §7; *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986); but do not violate privacy rights under the Fourth Amendment. *Smith v. Maryland*,

442 U.S. 735, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1974). GPS tracking violates the right to privacy under Art. I, §7; *State v. Jackson*, 150 Wn.2d 251, 76 P.3d 217 (2003); but does not violate privacy rights under the Fourth Amendment. *United States v. Knotts*, 460 U.S. 276, 103 S.Ct. 1081, 75 L.Ed.2d 55 (1983). Further, a right to privacy in one's DNA exists under Art. I, §7; *State v. Garcia-Salgado*, 170 Wn.2d 176, 240 P.3d 153 (2010); but does not exist under the Fourth Amendment. *Maryland v. King*, --- U.S. ---, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013).

Under Art. I, §7, our Courts do not engage in a comparative analysis of state actions to determine whether one form of a search is more or less invasive (or reasonable) than another. Contrary to any analysis under the Fourth Amendment, under Art. I, §7, our Courts simply must determine whether any form of a warrantless search invades a recognized privacy interest. Once this threshold is met, the State must establish an exception to the warrant justified the search.

**2. Breath alcohol testing invades expectation of privacy against physical intrusions of the body and reveals private information of the individual.**

The fundamental question under Art. I, §7 is whether the state action (i.e. search) constitutes a disturbance of one's private affairs. See *State v. Surge*, 160 Wn.2d 65, 71, 156 P.3d 208 (2007). The "private

affairs” inquiry focuses on “ ‘those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.’ *Id*; citing *State v. Young*, 123 Wn.2d at 181.

Courts have acknowledged two forms of privacy invasions pertinent here: physical intrusions of the body, and state action seeking to reveal private information of the person. This distinction is explained by the Supreme Court in *Skinner*. There, the Court distinguished invasions of privacy involving the procedures for a breath test and a urine test. A breath test implicated Fourth Amendment protections because the testing procedure implicated “bodily integrity” in that the person was required to expel deep lung air to perform the test. *Skinner*, 489 U.S. at 617. A urine test raised no issues of bodily integrity, yet a privacy interest was implicated because a urine test could reveal private medical information. *Skinner, Id*. Therefore, one means of invading privacy is no more or less deserving of protection than the other.

Our courts have reached similar conclusions. Citing *Skinner*, and specifically noting the invasive nature of a breath test, our State Supreme Court in *Garcia-Salgado* held that a cheek swab to procure a DNA sample constitutes a search under the Fourth Amendment and Art. I, §7. *Garcia-Salgado*, 170 Wn.2d at 184.

“Swabbing a cheek to procure a DNA sample constitutes a search under the Fourth Amendment and Art. I, §7. The United States Supreme Court has recognized “that a ‘compelled intrusio[n] into the body for blood to be analyzed for alcohol content’ ” is a search. *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (alteration in original) (quoting *Schmerber v. California*, 384 U.S. 757, 768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). Similarly, the Court found Breathalyzer tests to “implicate[ ] similar concerns about bodily integrity” and constitute searches as well. *Id.* at 617. We find that the swabbing of a person's cheek for the purposes of collecting DNA evidence is a similar intrusion into the body and constitutes a search for the purposes of the Fourth Amendment and Art. I, §7.”

Further, our Courts have recognized the privacy interest in the body and bodily functions where state intrusion may reveal private information about the person. See *Robinson v. Seattle*, 102 Wn. App. 795, 818-819, 10 P.3d 316 (2000). *Robinson* involved compulsory urine testing for employment purposes. The Court found that “pre-existing state law reflects a consistent protection of privacy of the body and bodily functions.” *Robinson*, at 810 (Citing to instances of medical treatment and testing receiving an expectation of privacy.)

Both aspects of privacy (physical intrusion and revelation of private information) are invaded in a breath test. A breath test requires a person to provide “end-expiratory air” into a machine for a quantitative

measurement of alcohol concentration.<sup>26</sup> There is more alcohol in the last part of a person's breath, which comes from deeper portions of the lungs where alcohol is transferred from the blood to lung air. *State v. Brayman*, 110 Wn.2d 183, 188-189, 751 P.2d 294 (1988). The test measures alcohol concentration in air from well within the human body that is not commonly expelled through normal breathing and most closely resembles the alcohol concentration directly in blood. Without question this meets the invasion of bodily integrity criteria applied in *Garcia-Salgado*. Likewise, the test can also reveal private medical information such as whether a person suffers from pulmonary conditions affecting lung capacity which would be manifested by the person's ability or inability to provide deep lung air for the test.

Supreme Court precedent holds that a test of breath for alcohol-content is a search. Unlike the Fourth Amendment, no issue arises whether the test is a minimal or reasonable invasion of privacy. Instead, any warrantless invasion of privacy must be evaluated under Art. I, §7 to determine whether an accepted exception to the warrant requirement may uphold the legitimacy of the search.

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<sup>26</sup> WAC 448-16-050(7): 'End expiratory air' means the last portion of breath to be delivered to the instrument once the appropriate sample acceptance criteria have been met.

**3. *McNeely* decision rejects categorical “per se” exigency in DUI cases.**

If the State has disturbed a privacy interest, the second step is to determine whether the authority of law required by Art. I, § 7, justifies the intrusion. Warrantless searches violate Art. I, §7 unless they fall under one of “a few jealously guarded exceptions.” *State v. Afana*, 169 Wn.2d 169, 176, 233 P.3d 879 (2010). These exceptions include consent, exigent circumstances, searches incident to a valid arrest, inventory searches, plain view searches, and investigative stops. *State v. Duncan*, 146 Wn.2d 166, 171, 43 P.3d 513 (2002).

Since 1968, and the passage of Initiative 242, post-arrest breath alcohol testing has been regulated through the Implied Consent law. See RCW 46.20.308; *Laws of 1969*; ch. 1. This law sets forward a set of circumstances under which law enforcement may seek warrantless testing of breath (and in limited circumstances blood) to collect evidence of alcohol or drug concentration to be used in criminal prosecutions. RCW 46.20.308.

The genesis of this law was the 1966 Supreme Court decision in *Schmerber v. California*.<sup>27</sup> The Court held that, under the facts of the case,

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<sup>27</sup> 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

a lawful arrest coupled with the natural dissipation of alcohol in blood over time created exigent circumstances permitting a warrantless blood test. *Schmerber*, 384 U.S. at 770-771; *State v. Wetherell*, 82 Wn.2d 865, 869, 514 P.2d 1069 (1973).

In 2013, the Supreme Court clarified its holding in *Schmerber*. See *Missouri v. McNeely*, --- U.S. ---, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). There, the Court rejected the argument that alcohol dissipation in blood alone created a “per se” existence of exigent circumstances to support a warrantless blood test.

“The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases. We conclude that it does not, and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based on the totality of the circumstances.”

*McNeely*, at 1556.

In *McNeely*, the defendant was arrested for DUI and refused a breath test after being advised of the Missouri Implied Consent law. *McNeely*, at 1557. The officer commenced with a compulsory blood test. *Id.* The Court ultimately rejected the State's argument that *Schmerber* created a “per se” justification to obtain warrantless blood alcohol testing

in DUI cases. Instead, the Court retained the traditional fact specific totality of the circumstances approach to review use of exigency as a warrant exception. *McNeely*, at 1561-1563. While the Court noted that under certain facts a warrantless blood test may be appropriate, the Court also noted that technological improvements have expedited the time necessary to obtain judicial approval for a search. *Id.*

The Supreme Court's emphatic rejection of a per se finding of exigency under *Schmerber* constitutes a fundamental shift in constitutional analysis for DUI and Implied Consent laws. No longer may the warrantless search undertaken through the Implied Consent laws be premised on the presumption that the exigent circumstances exception to the warrant requirement applies to every case.

**4. *McNeely* requires Washington courts to re-evaluate “authority of law” for warrantless breath alcohol testing.**

To be clear; every Washington case evaluating the constitutionality of the warrantless search for breath and blood under Implied Consent has assumed that a per se exigent circumstances exception applied.<sup>28</sup> This assumption was expressed by the State Supreme Court where it wrote;

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<sup>28</sup> See *State v. Curran*, 116 Wn.2d 174, 804 P.2d 558 (1991), reversed on other grounds in *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997); *State v. Judge*, 100 Wn.2d 706,

“Both the United States Supreme Court and this court have held that the State can constitutionally force a defendant to submit to a blood alcohol or breathalyzer test.” *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); *State v. Moore*, 79 Wn.2d 71, 483 P.2d 630 (1971).

*State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995).

Subsequent to *Bostrom*, the Court of Appeals in *In State v.*

*Baldwin*,<sup>29</sup> upheld a warrantless blood test under the Implied Consent law based on exigent circumstances and cited to both *Schmerber* and *Bostrom*.

“It is now well established by both the United States Supreme Court and the Washington Supreme Court that the State can constitutionally force a defendant to submit to a blood alcohol test. *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995) citing *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). *Schmerber*, 384 U.S. at 770-771, 86 S.Ct. 1826. held that a blood test can be taken without consent to determine alcohol intoxication because the delay necessary to obtain a warrant threatens the destruction of the evidence. Alcohol dissipates quickly after drinking stops, and there may be little time to seek out a magistrate and secure a warrant. *Id.* Consequently, the warrantless seizure of blood is justified if incident to a lawful arrest and if warranted by a reasonable emergency. *State v. Wetherell*, 82 Wn.2d 865, 870, 514 P.2d 1069 (1973).

*State v. Baldwin*, at 523.

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675 P.2d 219 (1984); *State v. Steinbrunn*, 54 Wn. App. 506, 774 P.2d 55 (1989); *State v. Hill*, 48 Wn. App. 344, 739 P.2d 707 (1987).

<sup>29</sup> 109 Wn. App. 516, 37 P.3d 1220 (2001).

These cases are based on a fatal error in reasoning and lack any precedential value after *McNeely*.

Likewise, case law nationally upholding warrantless breath and blood alcohol testing under implied Consent laws has relied exclusively on the same faulty analysis under *Schmerber*.<sup>30</sup> See *United States v. Reid*, 929 F.2d 990, 993 (4<sup>th</sup> Circ. 1991) (Finding exigency because of the dissipation of alcohol in bloodstream.); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1449-1450 (9<sup>th</sup> Circ. 1986) (Finding exigency based on dissipation of alcohol content in blood.); *State v. Hoover*, 916 N.E.2d 1056, 1060 (Ohio 2009) (Finding that exigency supported warrantless blood test to prevent loss of evidence.); and *State v. Netland*, 762 N.W.2d 202, 212 (Minn. 2009) (Finding that rapid dissipation of alcohol in blood created exigency for warrantless blood test.).<sup>31</sup>

Most recently, the Supreme Court of South Dakota has ruled to suppress blood alcohol test results in a DUI prosecution based on *McNeely*. See *State v. Fierro*, 853 N.W.2d 235 (S.D. 2014). Specifically, under the facts of the case, the Court held the State failed to establish any

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<sup>30</sup> These cases were cited by the State in its brief opposing discretionary review.

<sup>31</sup> But see *State v. Brooks*, 838 N.W.2d 563, 567 (Min.. 2013)(Court reversed *Netland* based on Supreme Court ruling in *McNeely*.)

exigent circumstances necessitating a warrantless search, and the recitation of statutory implied consent warnings did not establish consent.

More importantly, however, the Court rejected the argument that the implied consent law itself created an independent basis to perform a warrantless search for blood-alcohol evidence.

“[The implied consent statute], by itself, does not provide an exception to the search warrant requirement in South Dakota and any argument to the contrary cannot be reconciled with the United States Supreme Court and this Court's Fourth Amendment warrant requirement jurisprudence. We have never held that SDSL 32-23-10, by itself, constitutes one of the “few specifically established and well-delineated exceptions” to the Fourth Amendment warrant requirement and decline to do so today. See *Mincey v. Arizona*, 437 385, 390, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978 (quoting *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967))). Furthermore, our precedent is clear that the Legislature cannot enact a statute that would preempt a citizen's constitutional right, such as a citizen's Fourth Amendment right. See *Poppen v. Walker*, 520 N.W.2d 238, 242 (S.D. 1994), *superseded by constitutional amendment*, November 8, 1994, amendment to S.D. Const. art. III, §25, *as recognized in Brendto v. Nelson*, 2006 S.D., 71, 720 N.W.2d 670 (providing that “[t]he legislature cannot define the scope of a constitutional provision by subsequent legislation”); *Rupert v. City of Rapid City*, 2013 S.D. 13, ¶ 43 n. 10, 827 N.W.2d 55, 71 n. 10 (stating “[a]s the Constitution is the ‘mother law,’ any statutory framework must conform to it and not vice versa”) (quoting *Poppen*, 520 N.W.2d at 242 Without more, SDCL 32-23-10 is not an exception to the warrant requirement.”

*Fierro*, at 243.

It is clear that *McNeely* forces this State to re-address constitutional standards for breath and blood alcohol testing under implied consent.

In the State's earlier briefing to this Court, they cite to several cases, based on *Schmerber*, to hold that a warrantless blood test was a reasonable search incident to arrest. See *United States v. Reid*, 929 F.2d at 994; *Burnett v. Municipality of Anchorage*, 806 F.2d at 1449; and *Commonwealth v. Davidson*, 545 N.E.2d at 56. But *Schmerber* never permitted warrantless testing as a search incident to arrest independent of exigent circumstances of dissipating alcohol levels in blood. *Schmerber*, at 771.

In any event, Our State Supreme Court, under both the Fourth Amendment and Art. I, §7, has rejected use of this exception as an independent basis to perform a warrantless test that intruded the body. *State v. Garcia-Salgado*, 170 Wn.2d 176, 185, 240 P.3d 153 (2010) (DNA swab test.) The Court relied on *Schmerber* and held that it only permitted a post-arrest warrantless test of the human body when exigent circumstances existed. *Id.* Considering *McNeely*, it is now clear that under Art. I, §7, the "search incident to arrest" exception may not be used to compel a

warrantless breath or blood alcohol test absent the existence of exigent circumstances, which must now be considered on a case-by-case analysis.

It should be noted that Washington DUI laws are written such that exigent circumstances are unlikely to occur in the collection of breath alcohol evidence. The State is not required to establish a BAC level at the time of driving. Instead, the State is only required to obtain a test result exceeding .08 “within two hours after driving.” RCW 46.61.502(1). Even where test results are obtained more than two hours after driving, the State may still prove that the test results exceeded .08 within two hours of driving. RCW 46.61.502(4). Thus, it would be a rare situation where exigency would be applicable to a DUI case. There is no indication from the testimony in this case that the trooper was faced with any exigent circumstances necessitating a warrantless search.<sup>32</sup>

The State’s reliance on exigent circumstances no longer satisfies the “authority of law” requirement to justify a warrantless search under Implied Consent.

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<sup>32</sup> CP 445-448; 455

**5. State must establish “consent” as exception to the warrant requirement to justify warrantless breath alcohol testing.**

As the name implies, the Implied Consent statute operates on the “implied consent” of a driver to agree to submit to a test of breath where an officer has reasonable grounds to believe the driver is driving under the influence of alcohol. RCW 46.20.308(1).<sup>33</sup>

Consent is recognized as an independent basis for a warrantless search. *State v. Tyler*, 177 Wn.2d 690, 707, 302 P.3d 165 (2013). To be valid, consent must be freely and voluntarily given. *State v. O’Neill*, 148 Wn.2d 564, 588, 62 P.3d 489 (2003). The factors considered are (1) the education and intelligence of the consenting person; (2) whether *Miranda* warnings, if applicable, were given prior to consent; and (3) whether the consenting person was advised of his right not to consent. *State v. Ruem*, 179 Wn.2d 195, 207, 313 P.3d 1156 (2013); citing *State v. Shoemaker*, 85 Wn.2d 207, 533 P.2d 123 (1975). No single factor

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<sup>33</sup> RCW 46.20.308(1): Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath for the purpose of determining the alcohol concentration, THC concentration, or presence of any drug in his or her breath if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

is dispositive, but consent granted “only in submission to a claim of lawful authority” is not considered voluntary. *Ruem, Id.*

A necessary element of “consent” is the ability to limit or revoke it. See *Florida v. Jimeno*, 500 U.S. 248, 252, 111 S.Ct 1801, 114 L.Ed.2d 297 (1991). Consent, once voluntarily given, may be withdrawn at any time. *Ruem*, at 208; citing *Florida v. Jimeno*, supra.

The concept of revoking previously given consent was re-affirmed in *Ruem*. There, police sought consent to search a mobile home. A person present (*Ruem*) initially allowed police to enter, but then changed his mind. Police entered anyway and found marijuana plants leading to his arrest. *Ruem*, at 198. In finding consent not existent under these facts, the Court was clear that whatever consent was initially provided had been clearly revoked. *Ruem*, at 208. Therefore, police lacked lawful authority to proceed with the warrantless search. *Id.*

The Implied Consent law operates under the assumption that a driver “consents” to breath alcohol testing by driving a motor vehicle on state roads. RCW 46.20.308(1). Based on *Ruem*, such consent is not irrevocable, and may be withdrawn by the driver at any time.

The application of constitutional “consent” to the Implied Consent statute has a fundamental effect on a driver’s refusal to submit to a breath

test. The statute provides that a driver's refusal to submit to a test may be used at trial. RCW 46.20.308(2). Based on the faulty assumption that exigent circumstances operated as the exception permitting a warrantless search, State courts frequently referred to the driver's right to refuse a breath test as an act of "legislative grace." *State v. Bostrom*, 127 Wn.2d at 590 citing *State v. Zwicker*, 105 Wn.2d 228, 242, 713 P.2d 1101 (1986).<sup>34</sup>

In light of *McNeely*, it is clear that the legislature lacks authority to control a driver's choice to exercise the constitutional right to refuse to submit to a search. The right to refuse is no longer an act of legislative grace, but is a constitutional right.

**6. State may not comment on a person's constitutional right to refuse to consent to a search.**

As a constitutional right, the State is not permitted to comment on a person's exercise of the right to refuse to consent to a search. This issue was recently addressed by the Court of Appeals in *State v. Gauthier*.<sup>35</sup> There, a defendant accused of rape initially agreed to provide a voluntary DNA sample, but later refused. *Gauthier*, at 261. At trial, the prosecutor portrayed the refusal as consciousness of guilt evidence. At 262.

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<sup>34</sup> *Bostrom* referred to alleged state power to perform compulsory blood alcohol test. *Id.*

<sup>35</sup> 174 Wn. App. 275, 298 P.3d 126 (2013)

The Court in *Gauthier* cited to *United States v. Prescott*,<sup>36</sup> a Ninth Circuit case, to hold that the State may not offer a person's refusal to consent to a search as evidence at trial.

“The Ninth Circuit concluded that, because the Fourth Amendment gives individuals a constitutional right to refuse consent to a warrantless search it is privileged conduct that cannot be considered as evidence of criminal wrongdoing. *Id.*, at 1351. This is so, the court explained, regardless of the individual's motivations. *Id.*, at 1351. The right to refuse consent exists for both the innocent and the guilty. *Id.*, at 1352. If the government could use such a refusal against an individual, it would place an unfair and impermissible burden upon the assertion of a constitutional right. *Id.*, at 1351.”

*Gauthier*, at 264.

Accordingly, the Court held that the State may not comment on a person's refusal to consent to a search.

“The constitutional violation was that Gauthier's lawful exercise of a constitutional right was introduced against him as substantive evidence of his guilt. Whether defendants invoke their Fifth Amendment rights or their Fourth Amendment rights, exercising a constitutional right is not admissible as evidence of guilt. See *Griffin*, 380 U.S. at 614; *Burke*, 163 Wn.2d at 212. Moreover, the Washington Supreme Court has shown no tendency to distinguish between the Fourth and Fifth Amendments in such cases. See *Jones*, 168 Wn.2d at 725. Indeed, the *Burke* court, analyzing the Fifth Amendment, stated that “[c]ourts are appropriately reluctant to penalize anyone for

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<sup>36</sup> 581 F.2d 1343 (9<sup>th</sup> Cir. 1978)

the exercise of *any* constitutional right.” 163 Wn.2d at 221 (emphasis added).

We hold that the prosecutor's use of Gauthier's invocation of his constitutional right to refuse consent to a warrantless search as substantive evidence of his guilt was a manifest constitutional error properly raised for the first time on appeal. The error deprived Gauthier of his right to invoke with impunity the protection of the Fourth Amendment and Art, I, §7. To hold otherwise would improperly penalize defendants for the lawful exercise of a constitutional right.”

*Gauthier*, at 267.

Application of *Gauthier* under these circumstances supports Mr. Sirotkin’s argument and demonstrates the trial court error. Mr. Sirotkin should have the same protections as Mr. Gauthier and others who are asked to submit to testing without a warrant. Mr. Sirotkin should be permitted to refuse to consent to the search, and his refusal should not be used as substantive evidence against him.

**7. Erroneous admission of breath test refusal evidence was not harmless.**

Based on the erroneous admission of refusal evidence, this Court must evaluate the prejudice to Mr. Sirotkin’s trial using the constitutional harmless error test. Constitutional error is harmless only if the Court is convinced beyond a reasonable doubt that any reasonable jury would reach the same result absent the error, and where the untainted evidence is

so overwhelming that it necessarily leads to a finding of guilt. *Gauthier*, at 270; citing *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). The State bears the burden of proving the error harmless. *State v. Lynch*, 178 Wn.2d 487, 494, 309 P.3d 482 (2013). Where the error is not harmless, the defendant must have a new trial. *State v. Easter*, 130 Wn.2d at 242.

In *Gauthier*, the Court found the error was not harmless. The State used the refusal evidence to prove to the jury that “refusal to consent is consistent with someone who is guilty.” *Gauthier*, at 271. The refusal evidence and argument conceivably tipped the scales against Gauthier who claimed there was no rape, only consensual sex. *Id.*

Here, even though Mr. Sirotkin did not testify, the refusal evidence and argument served the same purpose. The State made the similar arguments asking to the jury to consider the refusal as consciousness of guilt evidence.<sup>37</sup> Based on the manner and context of the way the State used this evidence, it cannot show beyond a reasonable doubt that the error was harmless.

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<sup>37</sup> CP 583

**VI. CONCLUSION**

The State impermissibly commented on his constitutional right to refuse to consent to a search. For the foregoing reasons Mr. Sirotkin asks this Court to reverse his conviction for Driving under the Influence.

RESPECTFULLY SUBMITTED this 20<sup>th</sup> day of October, 2014.

A handwritten signature in black ink, appearing to read 'R. Robertson', written over a horizontal line.

Ryan B. Robertson, WSBA #28245  
Attorney for Appellant

**ROBERTSON LAW PLLC**

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**COURT OF APPEALS - DIVISION II  
STATE OF WASHINGTON**

**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**IGOR SIROTKIN,**

**Petitioner.**

**NO. 46000-9-II**

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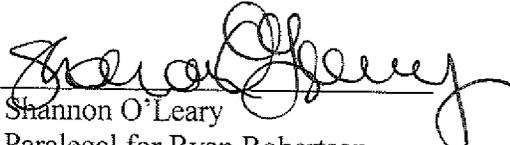
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17 Petitioner: (copy)  
18 Mr. Igor Sirotkin  
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Seattle, WA 98104

19 **I swear under penalty of perjury under the laws of the State of Washington the  
20 foregoing is true and correct.**

Signed in Seattle, WA the 21st day of October, 2014.

21  
22  
23  
  
Shannon O'Leary  
Paralegal for Ryan Robertson

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