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SUPREME COURT NO. 90419-7

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Appellant,

v.

DOMINIC BAIRD,

Respondent,

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ON DIRECT REVIEW FROM THE SUPERIOR COURT OF THE  
STATE OF WASHINGTON FOR KING COUNTY

The Honorable Andrea Darvas, Judge

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ANSWER TO BRIEFS OF AMICI CURIAE

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A. INTRODUCTION

It is well established that warrantless searches are per se unreasonable and the results inadmissible at trial. Amici Department of Licensing and Washington State Patrol (WSP/DOL), Mothers Against Drunk Driving (MADD), and the Washington Association of Prosecuting Attorneys (WAPA) have failed to establish the existence of any exception to this general rule. There are no exigent circumstances because there has been no showing that a search warrant could not have been obtained in the 53 minutes between Baird's arrest and his breath test. The 53-minute delay and the intrusion beyond the surface of his body place the breath test outside the parameters of the search incident to arrest exception. Without some other exception to the warrant requirement that might permit police to compel the breath test, Baird's consent was impermissibly coerced by the threat that his refusal would be used against him at trial.

A common thread runs through amici's briefs: the dangers of driving under the influence (DUI) and law enforcement's need for the best possible evidence. But the constitution does not guarantee access to the best possible evidence as the state seeks to ferret out, punish, and deter crime. It does, however, guarantee individuals protection from unreasonable searches.

Applying to alcohol breath tests the same constitutional standards that apply to other evidentiary searches will not prevent enforcement of DUI

laws any more than those standards prevent enforcement of other criminal laws. Moreover, thanks to the work of organizations such as amicus MADD, awareness of the dangers of DUI has gone from virtually non-existent to nearly omnipresent. Criminal penalties for impaired driving have increased dramatically.<sup>1</sup> Those deterrents will not vanish merely because police must, if time permits, obtain a search warrant before testing a driver's breath for alcohol.

B. ARGUMENT IN RESPONSE TO AMICI'S ARGUMENTS

1. THE NEED FOR EVIDENCE IN DUI CASES DOES NOT CREATE A PER SE EXIGENCY IN EVERY CASE.

MADD's brief does not expressly tie its argument to any of the legal arguments made in this case, but points out the need for timely evidence gathering and the disadvantages to the State of delay. MADD argues any delay in obtaining a suspect's blood alcohol content (BAC) reading risks permanent loss of evidence and allows defendants to argue delayed readings are flawed or inaccurate. Brief of Amicus Curiae, MADD at 3. This argument ignores the inevitability of some delays and fails to recognize the parameters of the exigent circumstances exception to the warrant requirement.

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<sup>1</sup> See, e.g., City of Richland v. Michel, 89 Wn. App. 764, 766-67, 950 P.2d 10 (1998) (noting statute effective September 1, 1995 increased mandatory minimum sentence for DUI with a prior offense in the past five years); Laws of 2006, ch. 73 (making a fourth conviction for DUI in ten years a class C felony).

As the Court recognized in Missouri v. McNeely, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), not every delay risks permanent loss of evidence. Unlike much evidence, blood alcohol content is not an “all or nothing” scenario. Blood alcohol content dissipates, but it does not do so instantly. “Regardless of the exact elimination rate, . . . because an individual’s alcohol level gradually declines soon after he stops drinking, a significant delay in testing will negatively affect the probative value of the results.” McNeely, \_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1560-61. However, some delays are insignificant, particularly in light of other factors that make delay inevitable.

The impact of delay is further diminished by the time frame required for conviction. The law recognizes that some delay in testing is inevitable. This is, presumably, the reason for the two-hour window provided for by RCW 46.61.502(1)(a). As amicus Washington Foundation for Criminal Justice (WCFJ) points out, a blood alcohol concentration of more than .08 will result in a conviction if it is found any time within two hours of driving; it need not be tied to the precise moment a driver is pulled over. RCW 46.61.502(1)(a).

Moreover, as amicus’ discussion of peak alcohol content makes clear, some delays may actually *increase* the likelihood of a conviction. A driver’s blood alcohol content continues to rise for some time after

consumption has ceased. See MADD at 13-15. Thus, a test delayed may result in a higher concentration that will be more persuasive to a jury. Delays can also improve the quality of the evidence when the delays involve following the correct procedures for breath testing under the law, such as the 15-minute required observation period. RCW 46.61.506(4); WAC 448-16-050.

However, even assuming a driver's blood alcohol content might be so high as to be legally impaired one instant, and the next instant drop so low as to be unhelpful as evidence, this would not create exigent circumstances in every case because some delays are inevitable.

The exigent circumstances exception is not concerned with "any delay." It is concerned only with delay that is caused solely by the need to obtain a search warrant. See McNeely, \_\_\_ U.S. at \_\_\_, 1333 S. Ct. at 1561 (no plausible justification for not obtaining a warrant when warrant could be obtained during the necessary delay to transport the person to the hospital for the blood test). When a search warrant can be obtained during an inevitable delay, then a warrant must be obtained. Id. This scenario is only becoming more likely as modern technology increases the speed and ease with which warrants can be obtained. See McNeely, \_\_\_ U.S. at \_\_\_, 1333 S. Ct. at 1573 (Roberts, C.J., concurring in part) (noting Kansas County where judges can email warrants back to officers in less than 15 minutes).

Baird concedes that, sometimes, there may not be time to obtain a search warrant. But MADD's brief does not support the conclusion that this is true in all, or even most, cases. MADD fails to cite any statistics or figures on how long it takes to obtain a search warrant or how long, on average, the time is between arrest on suspicion of DUI and administration of a breath test. As amicus WFCJ points out, the breath test in Baird's case was not administered until nearly an hour after he was initially stopped. Baird was pulled over at approximately 10 p.m. CP 160, 162. The breath test began at 10:56, nearly an hour later. CP 164. There is no evidence a search warrant could not have been obtained in that amount of time.

In large part, MADD's argument highlights the problem of impaired driving and the importance of reliable evidence. Those points are undisputed. But McNeely held that when evidence dissipates gradually and naturally and some delay is inevitable, a per se exigency does not exist in every case. \_\_\_ U.S. at \_\_\_, 1333 S. Ct. at 1563. MADD offers no reason to depart from this conclusion.

2. THE SEARCH INCIDENT TO ARREST EXCEPTION DOES NOT APPLY BECAUSE THE BREATH TEST WAS AN INTRUSION INTO THE BODY AND WAS NOT CONTEMPORANEOUS WITH THE ARREST.

Amicus WAPA argues warrantless breath tests in DUI cases should be permitted as part of the search permitted incident to a lawful arrest. Brief

of Amicus Curiae, WAPA at 2-9. This argument should be rejected for two main reasons. First, searches incident to arrest do not encompass intrusions beyond the surface of the body. Schmerber v. California, 384 U.S. 757, 769, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966). Second, searches incident to arrest must be contemporaneous (or nearly) with the arrest, but the breath test in this case occurred several miles away and nearly an hour after the arrest. State v. Valdez, 137 Wn. App. 280, 286-87, 152 P.3d 1048 (2007) aff'd, 167 Wn.2d 761 (2009) (quoting United States v. Tank, 200 F.3d 627, 631 (9th Cir. 2000)).

a. Intrusion Beneath the Surface of the Body Is Not Permitted Merely Because a Person Has Been Arrested.

Regarding the scope of the intrusion, WAPA argues that anything short of a surgical intrusion into the body or nudity is a permissible part of a search incident to arrest regardless of any exigency or need to protect officer safety. WAPA at 6. But intrusions into the body are different. Schmerber, 384 U.S. at 769. Also, any search that goes beyond the items found on person at the time of arrest requires a warrant unless another of the “jealously and carefully drawn” exceptions applies. See Riley v. California, \_\_\_ U.S. \_\_\_, 134 S. Ct. 2473, 2484-85, 189 L. Ed. 2d 430 (2014) (search of information found on arrestee’s cell phone not permissible part of search incident to arrest); State v. VanNess, \_\_\_ Wn. App. \_\_\_, 344 P.3d 713

(2015) (search of locked container found in appellant's backpack not permissible part of search incident to arrest).

WAPA cites State v. Byrd, 178 Wn.2d 611, 310 P.3d 793 (2013), for the proposition that “a warrantless search of the arrestee’s person is presumed to be justified by the arrest itself.” WAPA at 3. But Byrd did not involve an intrusion into the body. 178 Wn.2d at 614 (“This case concerns the search of an arrestee’s purse incident to her arrest.”). In Byrd, this Court held police may search a person and any items found on or closely associated with the person at the time of arrest, without any justification beyond the fact of the arrest. Id.

But requiring production of deep lung breath for alcohol testing is not a search of the person or items found on or closely associated with the person. It entails a much greater intrusion into the body – deep into the lungs – and reveals far more information about the inner workings of the body than a mere object found in the person’s possession. Skinner v. Ry. Labor Executives’ Ass’n, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1423; 103 L. Ed. 2d 639 (1989); Schmerber, 384 U.S. at 769-70; Ronald E. Henson, Breath Alcohol Testing, Aspatore, 2013 WL 6140725, at \*16, \*20 (Oct. 2013). Thus, even assuming Byrd is still good law in light of Riley, breath testing goes beyond what would be permitted under Byrd merely based on the fact of a lawful arrest: Schmerber, 384 U.S. at 769-70.

However, since Byrd, Riley restricted the scope of the search incident to arrest relying on its original justifications in officer safety and preventing escape or destruction of evidence. VanNess, \_\_\_ Wn. App. at \_\_\_, 344 P.3d at 718. Riley “significantly narrowed the primary authority cited in *Byrd* for the scope of a warrantless search incident to arrest.” VanNess, \_\_\_ Wn. App. at \_\_\_, 344 P.3d at 718. Under Riley and United States v. Robinson, 414 U.S. 218, 224, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973), the mere fact of a lawful arrest “does not permit an unlimited search of items on an arrestee’s person when an arrestee has a significant privacy interest in the item to be searched.” VanNess, \_\_\_ Wn. App. at \_\_\_, 344 P.3d at 719. This is true even considering the diminished privacy expectations of arrestees. Id.

Because breath alcohol testing intrudes beyond the surface of the body, it implicates greater privacy concerns than a mere search of the body's surface and clothing. See Schmerber, 384 U.S. at 770 (search incident to arrest does not apply to “searches involving intrusions beyond the body’s surface”).<sup>2</sup> Because of this greater privacy interest, a search is permissible only when “government interests in officer safety and evidence preservation exceed an arrestee’s privacy interest.” VanNess, \_\_\_ Wn. App. at \_\_\_, 344 P.3d at 719-20. Neither the State nor amici has shown that a delay to obtain a warrant would have threatened officer safety or destruction of the evidence in this case. Thus, these interests cannot outweigh Baird’s privacy interest, and the breath alcohol testing was not permissible as an incident to arrest.

WAPA also cites Maryland v. King, \_\_\_ U.S. \_\_\_, 133 S. Ct. 1958, 186 L. Ed. 2d 1 (2013), for the proposition that the minimal intrusion of a DNA cheek swab may be permissible as an incident to arrest. WAPA at 4. But, as discussed in the Brief of Respondent, the rationale behind permitting

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<sup>2</sup> One commentator explained:

Thus, the test is about analyzing air from deep in the lungs and is not simply a passive detection of exhalations. Of course, one could use the same reasoning to argue that urine tests do not intrude beneath the body’s surface because police are not collecting urine from the bladder directly but are only collecting the urine once the suspect expels it. As we have seen, courts are unlikely to accept such an argument for urine. The argument is only slightly less implausible for breath.

Paul A. Clark, Do Warrantless Breathalyzer Tests Violate the Fourth Amendment?, 44 N.M. L. Rev. 89, 119 (2014).

the cheek swab in King was that the purpose was to identify the arrestee, not to obtain evidence of a crime. \_\_\_ U.S. at \_\_\_, 133 S. Ct. at 1958, 1972. That is not the case with breath alcohol testing, and King does not support WAPA's argument.

b. The Breath Test Was Not a Permissible Search Incident to Arrest Because It Was Not Contemporaneous With the Arrest.

A search incident to arrest must be “roughly contemporaneous” with the arrest itself. Valdez, 137 Wn. App. at 286-87 (quoting Tank, 200 F.3d at 631). The search and the arrest must be “closely related in time and place.” State v. Lemus, 103 Wn. App. 94, 105, 11 P.3d 326 (2000) (citing State v. Smith, 119 Wn.2d 675, 683, 835 P.2d 1025 (1992), abrogated on other grounds by Byrd, 178 Wn.2d 611). Federal and state cases have approved of delays of up to 17 minutes as contemporaneous with the arrest. United States v. Porter, 738 F.2d 622, 627 n.4 (4th Cir. 1984) (15 minutes); Smith, 119 Wn.2d at 683 (17 minutes). However, delays of 30 minutes to an hour between arrest and search have been deemed unreasonable, and the searches impermissible as an incident to arrest. United States v. Chadwick, 433 U.S. 1, 15, 97 S. Ct. 2476, 53 L. Ed. 2d 538 (1977) (more than an hour); United States v. Vasey, 834 F.2d 782, 787-88 (9th Cir. 1987) (30 to 45 minutes).

The delay in this case was at least 53 minutes between the arrest and the breath test. CP 160, 162, 164. That is far longer than the 15- and 17-

minute delays approved of in Porter and Smith. The breath test in this case was not a permissible search incident to arrest because it was not “roughly contemporaneous” with Baird’s arrest. Chadwick, 433 U.S. at 15; Vasey, 834 F.2d at 786.

3. THE STATE MAY NOT LAWFULLY PENALIZE THE REFUSAL OF CONSENT TO A SEARCH THAT WOULD OTHERWISE BE UNCONSTITUTIONAL.

Amici WSP/DOL argue the warrantless breath test was permissible because Baird gave his consent. WSP/DOL at 7-12. Amici cite South Dakota v. Neville, 459 U.S. 553, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983), for the proposition that punishing refusal with license revocation and use of the refusal as substantive evidence of guilt is not impermissible coercion. WSP/DOL at 9. Neville does not support this argument.

Neville argued admission of his refusal of a blood alcohol test as evidence of guilt violated the Fifth Amendment privilege against coerced self-incrimination because of the penalties attached to refusal under South Dakota’s implied consent law. Neville, 459 U.S. at 554-57. The Court held his refusal was not impermissibly coerced because, under Schmerber, South Dakota could lawfully compel alcohol testing. Neville, 459 U.S. at 554, 559. Since McNeely’s clarification that the exigent circumstances that supported the Schmerber decision do not automatically exist in every case, the continued validity of Neville is doubtful, at best. But even

assuming Neville is still good law after McNeely, it does not support WSP/DOL's argument that the breath test in this case could be upheld under the consent exception to the warrant requirement.

With respect to the Fifth Amendment, Schmerber held that blood alcohol testing was physical evidence, not testimony, and thus the protections against coerced self-incrimination in the Fifth Amendment simply did not apply. 384 U.S. at 765 ("Petitioner's testimonial capacities were in no way implicated."). The Neville court, however, declined to rest its decision on this reasoning, and instead concluded that the coercion (*i.e.* the penalty attached by law to a refusal) was permissible for two reasons. Neville, 459 U.S. at 561-62. First, Neville conceded that, regardless of his consent the state could, constitutionally compel him to submit to the blood alcohol test. Id. at 563. Second, the court agreed with this concession, citing Schmerber's conclusion that exigent circumstances warranted the intrusion under the Fourth Amendment. Id. (citing Schmerber, 384 U.S. at 771). The court concluded Neville could be forced to choose between self-incrimination and undergoing a procedure that he conceded was lawful. Neville, 459 U.S. at 563-64.

But this case is not Neville. Baird does not concede the existence of exigent circumstances or any other authority for the State to compel the intrusion into his privacy.

The Neville court was not asked about the choice Baird was presented with in this case: a choice between self-incrimination and submitting to an unlawful search in violation of his or her constitutional rights. The Neville court's decision rested on the government's lawful authority to compel the test *whether Neville consented or not*. 459 U.S. at 563. If, as Baird argues, no other warrant exception applies, then the State did *not* have authority, independent from his consent, to compel the test in this case. Without lawful authority to compel the test, the coercion is not permissible under Neville. And it is circular logic to argue that Baird's consent provided lawful authority for the coercion used to compel his consent.

Neville stands for the proposition that the state may impose a penalty on a free choice so long as that penalty is independently lawful. 459 U.S. at 563. But when consent is the only basis for a search, then penalizing the decision to refuse violates the Fourth Amendment and Article I, Section 7. United States v. Prescott, 581 F.2d 1343, 1351 (9th Cir. 1978); State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010); State v. Mecham, 181 Wn. App. 932, 946, 331 P.3d 80 (2014), rev. granted 337 Wn.2d 325 (Nov. 5, 2014); State v. Gauthier, 174 Wn. App. 257, 267, 298 P.3d 126 (2013). The implied consent law manufactures a fiction of consent and penalizes the decision to withhold that consent,

without any other lawful basis for invading a person's privacy via a warrantless search. Thus, the penalties imposed by the implied consent law are unlawful because they violate constitutional privacy rights under Gauthier, Prescott, Jones, and Mecham. Without some other exception to the warrant requirement, such as the exigent circumstances that existed in Schmerber, police had no lawful authority to compel Baird's consent to a warrantless search by penalizing his refusal. Gauthier, 174 Wn. App. at 267.

4. AMICI'S PARADE OF HORRIBLES DOES NOT  
WARRANT DISREGARDING INDIVIDUAL  
CONSTITUTIONAL PRIVACY RIGHTS.

WSP/DOL argue that, if breath tests are not permissible without a warrant, then all drivers will be forced into involuntary blood draws under search warrants. WSP/DOL at 3. Amici argue this will be necessary because a breath test cannot be performed on one who refuses. WSP/DOL at 19. This argument assumes that requiring search warrants or actual exigent circumstances will result in more refusals. This prediction should be rejected because amici have provided no evidence to assume more people will refuse a search that is properly authorized by law. Without the fiction of implied consent, the State could still properly penalize refusal to comply with lawful authority under a search warrant or a warrant

exception. Mecham, 181 Wn. App. at 946; State v. Nordlund, 113 Wn. App. 171, 187, 53 P.3d 520 (2002).

WSP/DOL also appears to suggest that requiring search warrants is inconsistent with the legislature's determination that officers should not use force to secure a breath test. WSP/DOL at 3. But obtaining a search warrant is not using force. It is relying on the lawful authority of a neutral magistrate. And resort to search warrants is expressly contemplated by the statute. RCW 46.20.308 ("Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood."). To the extent that the implied consent law reduces uncertainty by imposing a standardized protocol, the search warrant procedure does the same, and officers should be well familiar with the process.

WSP/DOL also argues the Department of Licensing relies on the implied consent law to quickly and efficiently suspend the licenses of those caught driving while impaired by alcohol or other substances. WSP/DOL at 3-4. This may be true but it is beside the point. If a search warrant can be obtained quickly enough to obtain reliable evidence of intoxication, that will almost certainly be soon enough for the Department to perform its administrative functions. It has not been asserted that the Department of Licensing has staff on call at all hours of the night to instantly suspend licenses when a person is arrested on suspicion of DUI.

It is difficult to imagine how a short delay to obtain a warrant can significantly impact this process.

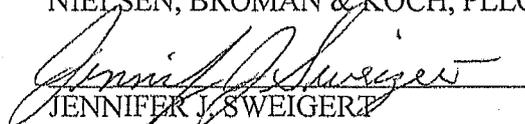
C. CONCLUSION

“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.” VanNess, \_\_\_ Wn. App. at \_\_\_, 344 P.3d at 716-17 (footnote omitted). “The State carries the heavy burden to prove that a narrowly drawn exception to the warrant requirement applies.” Id. The trial court here correctly determined the State failed to meet that burden. Amici’s arguments to the contrary should be rejected.

DATED this 28<sup>th</sup> day of April, 2015.

Respectfully submitted,

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Attorney for Appellant

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON	)	
	)	
Appellant,	)	
	)	NO. 90419-7
v.	)	
	)	
DOMINIC BAIRD,	)	
	)	
Respondent.	)	

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**DECLARATION OF SERVICE**

I, PATRICK MAYOVSKY, DECLARE UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOLLOWING IS TRUE AND CORRECT:

THAT ON THE 28<sup>TH</sup> DAY OF APRIL 2015, I CAUSED A TRUE AND CORRECT COPY OF THE **ANSWER TO BRIEFS OF AMICI CURIAE** TO BE SERVED ON THE PARTY / PARTIES DESIGNATED BELOW BY DEPOSITING SAID DOCUMENT IN THE UNITED STATES MAIL AND/OR VIA EMAIL.

[X] DOMINIC BAIRD  
8650 44<sup>TH</sup> AVENUE S.  
SEATTLE, WA 98118

SIGNED IN SEATTLE WASHINGTON, THIS 28<sup>TH</sup> DAY OF APRIL 2015.

X Patrick Mayovsky

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**Subject:** State v. Dominic Baird, No. 90419-7 / Answer to Briefs of Amici Curiae

Attached for filing today is the answer to briefs of amici curiae for the case referenced below.

State v. Dominic Baird

No. 90419-7

Answer to Briefs of Amici Curiae

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