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No. 90419-7

SUPREME COURT

OF THE STATE OF WASHINGTON

King County Superior Court No. 14-2-12557-7

STATE OF WASHINGTON
Plaintiff/Petitioner

vs.

COLLETTE ADAMS
Defendant/Respondent

BRIEF OF RESPONDENT

Shira J. Stefanik, WSBA #41247
Attorney for Respondent Collette Adams
119 1st Ave S, ste 260
Seattle, WA 98104
Ph. (206) 355-0064
Fax. (206) 922-5665
shira@stefanikdefense.com

Jacey L. Liu, WSBA #43207
Attorney for Respondent Collette Adams
310 W 11th St
Vancouver, WA 98660
Ph. (360) 823-3931
Fax. (206) 319-1634
jaceyliu@dui-defender.net

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I. INTRODUCTION

Collette Adams was charged with Driving Under the Influence (DUI) with the punitive enhancement alleging that she refused the evidentiary breath test. Ms. Adams moved the district court to suppress the refusal evidence on constitutional grounds, arguing that evidence was an impermissible comment upon her right to refuse consent to a search. This Court granted direct review to consider this issue.

The parties do not dispute that a breath test is a search for constitutional purposes. Like the majority of other jurisdictions that have considered the issue, Washington courts have previously applied the exigent circumstances exception under the Fourth Amendment to the United States Constitution and Article I, section 7 of the Washington Constitution to allow the introduction of chemical tests and refusals that arise from a lawful DUI arrest based upon the inherent evanescence of such evidence.

The United States Supreme Court has unequivocally clarified that the totality of the circumstances test is now necessary to support a finding of exigent circumstances in DUI cases. This query evaluates

the specific facts of each arrest to determine if an officer could not have obtained a warrant within a reasonable time.

No facts were introduced below to suggest that Trooper Kiehl could not have obtained a warrant within a reasonable time. Because Adams refused the breath test, the consent exception is inapplicable. As no other valid exceptions to the warrant requirement are present in her case, Adams had a constitutional right to refuse the breath test. Evidence touching upon the invocation of Adams' right to refuse consent to the search is therefore inadmissible at trial. The Respondent respectfully requests this Court affirm the district court.

II. STATEMENT OF THE CASE

Collette Adams was charged with one count of Driving Under the Influence (DUI) in King County District Court, Northeast Division, Redmond.¹

On April 6, 2013, in Bellevue, WA, Trooper Kiehl observed Ms. Adams driving with her right headlight out.² He initiated a stop and Ms. Adams pulled safely off the roadway into a garage.³ The trooper noted a faint odor of alcohol coming from Ms. Adams' car, and she admitted to having one drink.⁴ Ms. Adams exhibited some balance issues getting out of the car and the trooper then noted a moderate odor of alcohol and slurred speech.⁵

The trooper placed Ms. Adams under arrest and transported her to the Clyde Hill Police Department,⁶ where he advised Ms. Adams of her Miranda rights⁷ and read her the Implied Consent Warning.⁸ The warning advised Ms. Adams' that she had the right to refuse the test, but she faced a longer license suspension for doing so, and that the refusal may be used

¹ Clerk's Papers (CP) 366

² CP 369

³ CP 369

⁴ CP 369

⁵ CP 369

⁶ CP 370

⁷ CP 269

⁸ CP 370

at trial.⁹ Ms. Adams opted to exercise her right to refuse the breath test.¹⁰

In a pretrial motion, Ms. Adams challenged the admissibility of her refusal to submit to the breath test under the Fourth Amendment and Article I, section 7, pursuant to *State v. Gauthier*.¹¹ The district court granted Ms. Adams' motion to suppress evidence of her refusal in the State's case in chief.¹²

The State subsequently petitioned the King County Superior Court for a writ reviewing the King County District Court's suppression order.¹³ Simultaneously, the State sought an order for direct review to the Washington State Supreme Court.¹⁴ Ms. Adams contested the writ.¹⁵ The King County Superior Court granted the State's petition¹⁶, and granted the State's petition for direct review to this Court.¹⁷

Ms. Adams joined in the State's request for direct review to this Court to seek affirmation of the district court's suppression order. This Court granted direct review. This issue is now before the Court.

⁹ CP 267

¹⁰ CP 267, 369

¹¹ CP 375, 385 - 389

¹² CP 355

¹³ CP 201 - 222

¹⁴ CP 88 - 96

¹⁵ CP 260 - 265

¹⁶ CP 78 - 86

¹⁷ CP 95, 97

III. ISSUES PERTAINING TO PETITIONER'S ASSIGNMENTS OF ERROR

1. Was the warrantless demand for Adams' breath unjustified given the absence of exigent circumstances?
2. Did Adams have a constitutional right to withhold or withdraw her consent to a test of her breath?
3. Did the district court properly suppress evidence of Adams' exercise of her right to refuse consent to the breath test as an impermissible comment on her exercise of a constitutional right?

IV. ARGUMENT

Standard of review

An unchallenged finding of fact is a verity on appeal. *State v. Hill*, 123 Wn.2d 641, 644, 870 P.2d 313 (1994). An appellate court reviews conclusions of law de novo. *State v. Kipp*, 179 Wn.2d 718, 726, 317 P.3d 1029 (2014).

1. No exigent circumstances justified a request for Ms. Adam's breath pursuant to *Missouri v. McNeely*.

A. *Missouri v. McNeely* forecloses the State's per se exigency argument.

The Fourth Amendment establishes the *minimum* level of protection against unreasonable searches and seizures. *State v. Chrisman*, 100 Wn.2d 814, 817, 676 P.2d 419 (1984). Article I, section 7 of the Washington Constitution "provides greater protection to an individual's right of privacy than that guaranteed by the Fourth Amendment." *State v. Parker*, 139 Wn.2d 486, 493, 987 P.2d 73 (1999).

Article 1, section 7 is explicitly broader than the Fourth Amendment. *State v. Ladson*, 138 Wn.2d 343, 348-49, 979 P.2d 833 (1999); *State v. Ferrier*, 136 Wn.2d 103, 960 P.2d 927 (1998); *State v. Young*, 123 Wn.2d 173, 180, 867 P.2d 593 (1994); *State v. Williams*, 102 Wn.2d 733, 742, 689 P.2d 1065 (1984). Unlike the Fourth Amendment, the Washington provision is "not

limited to subjective expectations of privacy but, more broadly, protects 'those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.' " *Parker*, 139 Wn.2d at 494 (citing *State v. Myrick*, 102 Wn.2d 506, 511, 688 P.2d 151 (1984)).

Warrantless searches are presumptively illegal under both the state and federal constitutions. *State v. Walker*, 136 Wn.2d 678, 682, 965 P.2d 1079 (1998); *Chrisman*, 100 Wn.2d at 818; *Coolidge v. New Hampshire*, 403 U.S. 443 (1971). "Where the police have ample opportunity to obtain a warrant, we do not look kindly on their failure to do so." *State v. Leach*, 113 Wn.2d 735, 744, 782 P.2d 1035 (1989) (citing *United States v. Impink*, 728 F.2d 1228, 1231 (9th Cir. 1984)).

To overcome the presumption that a warrantless search is unlawful, the State must prove that it falls within one of the narrowly drawn and jealously guarded exceptions to the warrant requirement. *Williams*, 102 Wn.2d at 736. The State "bears a heavy burden to prove the warrantless searches at issue fall within the exception it argues for." *Parker*, 139 Wn.2d at 496.

A breath test to determine alcohol concentration, like a blood test, is a search. "Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or 'deep lung' breath for chemical analysis, implicates similar concerns about bodily integrity" as a blood test. *Skinner v.*

Railway Labor Executives' Ass'n, 489 U.S. 602, 616-617 (1898); *State v. Rogers*, 37 Wn. App. 728, 732 n.2, 683 P.2d 608 (1984) (“Although blood and breath tests fall within the Fourth Amendment's prohibition of unreasonable searches and seizures, a warrant is unnecessary so long as the subject has been arrested.”) (citing *State v. Wetherell*, 82 Wn.2d 865, 871, 514 P.2d 1069 (1973)).

Washington courts have historically upheld warrantless breath tests under a blanket application of the exigency exception to the warrant requirement in DUI cases. Like many jurisdictions, Washington courts previously interpreted the relevant precedent to mean that a search of a blood or breath sample by any subject lawfully under arrest for DUI fell within the parameters of the exigency exception to the warrant requirement due to the inherent evanescence of the evidence:

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. Baldwin, 109 Wn. App. 516, 523, 37 P.3d 1220 (2001) (citing *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995) and *Schmerber v. California*, 384 U.S. 757, 770-71 (1966)). In this context, the right to refuse a breath test was merely a statutory right:

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 Wash.2d 51, 483 P.2d 630 (1971). Washington, however, has chosen to give drivers the right to refuse a breath test. RCW 46.20.308. The choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace.

Bostrom, 127 Wn.2d at 590.

The basis for the longstanding rule in Washington that the State may, without a warrant, lawfully compel a chemical test by any subject lawfully under arrest for DUI was our state's courts' reading of *Schmerber* as providing a per se exigency exception:

Schmerber, 384 U.S. at 770–71, 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.*

Baldwin, 109 Wn. App. at 523.

Baldwin, who had refused to provide a blood sample to test for drugs following his arrest, challenged the constitutionality of the implied consent statute as applied to him, arguing that no similar exigency justifies a warrantless attempt by the State to demand a blood sample to test for substances other than alcohol:

Citing studies that show how long various controlled drugs stay in a person's body, Mr. Baldwin contends no reasonable emergency supports a warrantless seizure of blood for drug testing. He notes that the State's expert witness testified that amitriptyline has a half-life of from 10 to 30 hours, providing plenty of time to obtain a search warrant from a neutral and detached magistrate. *Schmerber*,

384 U.S. at 770, 86 S.Ct. 1826. He further argues that although the half-lives of the various controlled substances vary greatly, police officers are not required by the implied consent statute to know these half-lives, leaving room for indiscriminate searches and seizures based on less than probable cause to believe a drug is in a particular suspect's system.

Id. at 523-24.

Applying a per se exigency exception under *Schmerber*, the Court rejected Baldwin's argument:

Although Mr. Baldwin's statement suggested that the drug might be amitriptyline, any number of drugs with any variety of half-lives might have been present in his blood. . . . Without knowing what drugs have been ingested or how long a particular drug stays in the system of a particular person, the arresting officer faces an emergency situation when the facts and circumstances indicate that a suspect has been driving under the influence of drugs or drugs and alcohol. The implied consent statute reflects the Legislature's recognition that the exigencies of a DUI drug arrest and investigation warrant the search and seizure of a suspect's blood, as long as the blood test is based on reasonable grounds and is conducted by a qualified person as provided in RCW 46.61.506(4). RCW 46.20.308(2). A blood test for drugs is both efficient and reliable. Because the implied consent statute meets the *Schmerber* requirements and the Legislature's objective to gather reliable evidence of drug intoxication, Mr. Baldwin fails to overcome the presumption that the statute is constitutional.

Id. at 524-25.

However, when moved by the State of Missouri to formally acknowledge the "per se" exigency exception for blood alcohol level, The United States Supreme Court instead reaffirmed the government's obligation to demonstrate particularized exigency in every case. *Missouri v. McNeely*,

___ U.S. ___, 133 S.Ct. 1552 (2013).

Contrary to the State's contention, the United States Supreme Court's 2013 *McNeely* decision did not clarify that *Schmerber* applied to nonconsensual blood draws, which is an undisputed point that never drew a split of authority.¹⁸ Rather, *McNeely* resolved the split of authority surrounding whether alcohol dissipation alone constitutes a categorical emergency sufficient to support a warrantless search. *Byars v. State*, 336 P.3d 939, 943 (Nev. 2014) (discussing *pre-McNeely* split of authority); *McNeely*, 133 S.Ct. at 1561. The Court explained:

The State properly recognizes that *the reasonableness of a warrantless search under the exigency exception to the warrant requirement must be evaluated based on the totality of the circumstances*. But the State nevertheless seeks a per se rule for blood testing in drunk-driving cases. The State contends that whenever an officer has probable cause to believe an individual has been driving under the influence of alcohol, exigent circumstances will necessarily exist because BAC evidence is inherently evanescent. As a result, the State claims that so long as the officer has probable cause and the blood test is conducted in a reasonable manner, it is categorically reasonable for law enforcement to obtain the blood sample without a warrant. . . .

But it does not follow that we should depart from careful case-by-case assessment of exigency and adopt the categorical rule proposed by the State and its *amici*.

Id. at 1560-61 (Citations omitted; emphasis added).

The Court's bright line holding is that, with regard to any warrantless

¹⁸ Pet. Br. (BP) at 20-21.

search, the exigency exception to the warrant requirement stands or falls on the merits of the specific facts of each case under the totality of the circumstances. *Id.* at 1561-1563. “In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so.” *Id.* at 1561.

The *McNeely* Court identified a number of factors important to the determination of whether an officer is presented with an emergency in a specific case sufficient to overcome the precondition of a warrant. The Court observed that “advances in the 47 years since *Schmerber* was decided [allow] for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple.” *Id.* at 1561-62. Requiring a case-specific showing of exigency, according the Court, properly encourages jurisdictions to pursue these technological advances and implement “progressive approaches” to warrant procedures that “preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.” *Id.* at 1563.

In addition, the Court found it significant that “BAC evidence from a drunk-driving suspect naturally dissipates over time in a gradual and relatively predictable manner.” *Id.* at 1561. In general, “experts can work backwards

from the BAC at the time the sample was taken to determine the BAC at the time of the alleged offense,” a fact negating exigency. *Id.* at 1563. However, a *significant* delay could raise questions about the accuracy of the calculation. Thus, “while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.” *Id.*

In the wake of *McNeely*, the *Bostrom* and *Baldwin* courts’ precedential basis for upholding the State’s blanket authority to conduct “a compelled intrusion into the human body” no longer exists. *Id.* at 1565. The United States Supreme Court has clarified what the Fourth Amendment has always commanded, that the State has no authority to categorically seize and search from within a driver’s body without a warrant, legislative pronouncements notwithstanding, absent a case-specific showing of exigency or a separate exception to the warrant requirement.

The State points to no Washington case authorizing warrantless chemical tests in drunk driving cases under the Fourth Amendment or article I, section 7 that does so without explicit reliance upon the now untenable reading of *Schmerber* that the natural metabolization of alcohol is an emergency in all cases that permits a warrantless search where probable cause exists for a DUI

arrest.

Nonetheless, the State argues that the implied consent statute, buttressed by our courts' historical "three-factor test" reading of *Schmerber*, "defines" the exigency exception to the warrant requirement as to breath testing.¹⁹ Because the challenged search in *McNeely* was a blood test, according to the State, no showing of case-specific exigency is necessary in *breath test cases*.²⁰

The State speculates, independent of the *McNeely* majority opinion, that the Court "would" approve of a breath test exemption if the issue were presented.²¹ This is not the current state of the law. Unless and until the United States Supreme Court in fact announces a breath test exemption, the majority's bright line rule dictates that the exigency exception to the warrant requirement, even in drunk driving cases, depends on the specific facts of each case under the totality of the circumstances.

The implied consent statute is not itself an exception to the warrant requirement. *See, e.g., State v. Fierro*, 853 N.W.2d 235, 243 (S.D. 2014) ("[South Dakota's 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

¹⁹ BP at 15; 26 - 27

²⁰ BP at 26

²¹ BP at 22 -23

Court and this Court's Fourth Amendment warrant requirement jurisprudence"); *Illinois v. Hasselbring*, ___ N.E.2d ___, 2014 WL 6612568 (Ill. App. 2014) (upholding Illinois' implied consent statute as not facially unconstitutional by construing it not to create a "per se exception to the Fourth Amendment").

The "special facts" in *Schmerber* that justified a belief that an additional delay to obtain a warrant would significantly undermine the efficacy of the search were the period of time that had already elapsed during the investigation of the collision in which the driver was injured and in transporting him for treatment prior to his arrest at the hospital. *Schmerber*, 384 U.S. at 770-71; *McNeely*, 133 S.Ct. at 1561.

In Ms. Adams' case, the State did not admit evidence of any special facts that made it impractical for Trooper Kiehl to get a warrant, and the State makes no argument of case specific exigency on review. There was no unique emergency here beyond the mere dissipation of alcohol that the Court rejected as a categorical exigency in *McNeely*. There is no evidence suggesting, for example, that Trooper Kiehl attempted to get a telephonic warrant or that a judge was unavailable.

In summary, there is no reason to believe that Trooper Kiehl could not have obtained a warrant within a reasonable period of time. As in *McNeely*, Ms. Adams' is "unquestionably a routine DWI case" without any particular

facts making a warrant impractical. *McNeely*, 133 S.Ct. at 1557. Regardless of whether Ms. Adams' arrest invoked the implied consent statute, then, her arrest did not give the State blanket authority to demand a warrantless search of her breath; *McNeely* neither preserved Washington's misreading of *Schmerber* for breath tests nor created a "breath test exemption" to its exigency jurisprudence.

B. The purported "reasonableness" of Trooper Kiehl's request for Ms. Adams' breath did not justify his request in the absence of exigent circumstances.

Despite the applicability of *McNeely*'s bright line rule requiring a totality of the circumstances analysis to support the exigency exception, the State invites this Court to fashion a new rule, balancing the governmental interest in DUI enforcement against the intrusiveness of a breath test and categorically justify these warrantless searches as otherwise "reasonable."²² The "reasonableness" of a blood test was apparent in *Schmerber*, and understood by the *McNeely* Court, yet even the State recognizes that *McNeely* mandates a warrant, exigent circumstances, or actual consent for a blood draw.²³

[W]e are satisfied that the test chosen to measure petitioner's blood-alcohol level was a reasonable one. Extraction of blood samples for

²² BP at 32 - 33

²³ BP at 25.

testing is a highly effective means . . . Such tests are a commonplace in these days of periodic physical examination and experience with them teaches that the quantity of blood extracted is minimal, and that for most people the procedure involves virtually no risk, trauma, or pain.

Schmerber, 384 U.S. at 771. There is no reasonable reading of *McNeely* that supports using the "reasonableness" of the method of extraction to determine whether exigent circumstances exist.

The State is correct that a weighed consideration of governmental necessity and privacy interests has proven relevant in the formulation of other exceptions to the Fourth Amendment warrant requirement. However, *McNeely* declined to adopt a balancing or reasonableness test in the exigency context and its more stringent analysis in this regard is controlling. The other precedents that the State cites in explicit and implicit support of its argument address warrant exceptions that are inapplicable to this case: a special needs exception²⁴ and investigatory stops²⁵.

For example, the State makes several citations to *Skinner* in support of its reasonableness argument.²⁶ In that case, the Court explicitly balanced the governmental interest against the level of intrusiveness of a breath test under the requisite test to determine whether the non-law enforcement search fell within the special needs exception to the Fourth Amendment warrant

²⁴ BP at 23; 34

²⁵ BP at 33

²⁶ BP at 23; 34

requirement. *Skinner*, 489 U.S. 602 at 616-619-620.

A similar analysis for DNA swabs taken at booking for identification, as opposed to evidence of criminal wrongdoing, appears in *Maryland v. King*, ___ U.S. ___, 133 S.Ct. 1958, 1978 (2013).²⁷ Thus, even in the absence of the contrary *McNeely* holding, these authorities provide no Fourth Amendment justification for a search motivated purely by a desire to secure evidence for criminal prosecution. *York v. Wahkiakum School Dist. No. 200*, 163 Wn.2d 297, 311, 178 P.3d 995 (2008) (“For there to be a special need, not only must there be some interest beyond normal law enforcement but also any evidence garnered from the search or seizure should not be expected to be used in any criminal prosecution against the target of the search or seizure.”)

The Washington Constitution provides an additional obstacle to the State’s proposed reasonableness or balancing test. State constitutional claims are reviewed using a list of six non-exclusive factors discussed in *State v. Gunwall*, 106 Wn.2d 54, 720 P.2d 808 (1986). It is now accepted that Article I, section 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 Article I, section 7

²⁷ BP at 23

affords enhanced protections in the particular context. *Id.* However, Article I, section 7 is necessarily as protective as 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. Unlike the Federal Constitution, the Washington Constitution does not regulate government searches using the words “reasonable” or “unreasonable.” *State v. Day*, 161 Wn.2d 889, 896, 168 P.3d 1265 (2007). In other words:

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 Article I, section 7 that are absent under the Federal Constitution. For example, 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 (1988). Pen registers violate the right to privacy under Article I, section 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 (1974). GPS tracking violates the right to privacy; *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 (1983).

Under Article I, section 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 Article I, section 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 that justified the search.

For all these reasons, this Court has declined to exempt from the warrant requirement under Article I, section 7 the very “special needs” category of non-law enforcement searches that the State relies upon in urging this Court to distinguish *McNeely* and adopt a balancing test. *York*, 163 Wn.2d at 314-316 (“[W]e have not created a general special needs exception or adopted a strict scrutiny type analysis that would allow the State to depart from the warrant requirement whenever it could articulate a special need beyond the normal need for law enforcement. . . . As stated earlier, we require a warrant except for rare occasions, which we jealously and narrowly guard.”)

Thus, the State cannot demand a breath test, no matter how “reasonable” it believes its demand to be, without the same showing of particularized exigency as that required for a search of blood under both the Fourth Amendment and Article I, section 7 of the Washington Constitution.

C. The State’s policy arguments against applying the *McNeely* exigency test are misplaced.

The State argues that numerous negative consequences would flow from applying the *McNeely* exigency analysis here. First, the State predicts that if warrants are necessary for breath tests, as they are now by statute for

blood tests in the absence of particularized exigency or voluntary consent²⁸, law enforcement officers will face a dilemma due to the risk of noncompliance with breath testing. According to the State, officers will have a resulting incentive to bypass breath testing in favor of obtaining a warrant for a more invasive blood draw from the outset to avoid the risk of losing evidence.²⁹

The State's argument ignores actual practice. Law enforcement officers are free to simultaneously request a warrant for a breath and a blood test to eliminate the need to obtain a second warrant in the event of noncompliance with breath testing. Indeed, officers now routinely request two warrants in DUI cases, one for the seizure of blood and one for its eventual analysis.³⁰ Officers will therefore retain the incentive to seek the less intrusive, more efficient, and more cost-effective option of a breath test before resorting to blood testing.

The State also predicts that, of the approximately 30,000 DUI prosecutions per year, "nearly all cases" will require the officer to request a warrant and argues that this warrant frequency is excessive, apparently based upon observations in the *McNeely* plurality opinion.³¹ Apart from its failure to provide legal authority for ignoring *McNeely's* majority holding, the

²⁸ RCW 46.20.308(3).

²⁹ BP at 25.

³⁰ See *State v. Martines*, 182 Wn. App. 519, 331 P.3d 105 (2014).

³¹ BP at 34

State's tabulation fails to make a realistic appraisal of how many cases will not require a warrant due to an officer obtaining voluntary consent and/or making a determination of particularized exigency.

2. Ms. Adams had a constitutional right to withhold or withdraw her consent to a warrantless search of her breath.

Post-*McNeely*, there is no longer support for the maxim that “[t]he choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace.” *Bostrom*, 127 Wn.2d at 590. Indeed, “individuals have a constitutional right to refuse consent” to warrantless searches. *State v. Gauthier*, 174 Wn. App. 257, 263, 298 P.3d 126 (2013).

A split of authority has emerged surrounding the question of whether implied consent becomes actual consent for Fourth Amendment purposes if a driver submits to testing.³² No matter how, or whether, this Court elects to resolve that question, however, the consent exception is inapplicable as Ms. Adams withdrew any consent to a search of her breath that may have been implied by statute.

“Consent, once voluntarily given, may be withdrawn. A person

³² BP at 39; *But see, e.g., State v. Butler*, 232 Ariz. 84, 88, 302 P.3d 609 (2013) (“[I]ndependent of [the implied consent statute,] the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw.”)

consenting to a search has the right to restrict or revoke that consent at any time.” *State v. Ruem*, 179 Wn.2d 195, 207, 313 P.3d 1156 (2013). *See also Forsyth v. State*, 438 S.W.3d 216, 223 (Tex. App. 2014) (“The State cannot meet [its burden to prove consent] when the suspect has refused to give a specimen of breath or blood because the suspect has clearly not given consent freely and voluntarily.”)

The State correctly asserts that a constitutional right to refuse the test would not exist if some other valid exception to the warrant requirement applied to the request for the search.³³ But its reliance on *State v. Nordlund*, 113 Wn. App. 171, 53 P.3d 520 (2002), which upheld the admissibility of the defendant’s refusal to comply with a court *order* for a hair sample, is misplaced. A court order is in fact “authority of law” in every significant way under Article 1, section 7. However, because no valid exception to the warrant requirement did exist in Ms. Adams’ case, the district court properly ruled that Ms. Adams had a constitutional, not statutory, right to refuse the breath test, and that her exercise of that right is inadmissible at trial.³⁴

³³ BP at 36 - 37

³⁴ CP at 355

3. The exercise of a constitutional right to withhold or withdraw consent to a warrantless search is inadmissible at trial.

Withholding consent to a search under the Fourth Amendment or Article 1, section 7 is a privileged exercise of a constitutional right. As such, the prosecution may not use a refusal to consent to a search as substantive evidence of a crime:

[B]ecause 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. . . . The right to refuse consent exists for both the innocent and the guilty. 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. As a result, future consents would not be “ ‘freely and voluntarily given.’ ”

Gauthier, 174 Wn. App. at 264 (citing *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978) (citations omitted)). Thus, allowing admission of his refusal to consent to a search “deprived Gauthier of his right to invoke with impunity the protection of the Fourth Amendment and article I, section 7. To hold otherwise would improperly penalize defendants for the lawful exercise of a constitutional right.” *Id.* at 267; *See also State v. Nemitz*, 105 Wn. App. 205, 215, 19 P.3d 480 (2001).

The *Gauthier* court relied upon this Court’s holding in *State v. Burke*, 163 Wn.2d 204, 221-22, 181 P.3d 1 (2008), in which the defendant’s exercise of his Fifth Amendment right to remain silent when questioned by the police

regarding the criminal allegations was held inadmissible at trial as substantive evidence of guilt. This Court reasoned that silence was ambiguous and its probative value therefore uncertain, and to invite an inference of guilt on this basis would “penalize individuals for lawfully exercising a constitutional privilege.” *Gauthier*, 174 Wn. App. at 130, citing *Griffin v. California*, 380 U.S. 609, 614 (1965) and *Burke*, 163 Wn.2d at 221. This same rationale applied equally to a Fourth Amendment search in *Prescott*, cited in *Burke*, confirming that there are reasons other than guilt for a person to decline a search, which is an inherent invasion of one’s privacy. *Id.* at 131.

Gauthier also cites *State v. Jones*, 168 Wn.2d 713, 725, 230 P.3d 576 (2010), in which this Court addressed Jones’ claim that the State engaged in misconduct by arguing that his refusal to consent to a search should be viewed as evidence of his guilt. This Court held:

Since Jones had a Fifth Amendment right to remain silent with the police, and a Fourth Amendment right to refuse to provide a DNA swab sample, we affirm the Court of Appeals ruling that these comments were improper. ***We go so far as to say that the court’s imprimatur is now upon the State and that such argument is improper and should not be repeated on remand.***

Id. at 582 (Emphasis added). The State properly concedes that, should the trial court admit refusal evidence at trial, it does so in violation of the Fourth

Amendment and Article I, section 7.³⁵

However, this Court need not find that RCW 46.61.517 is unconstitutional on its face to reach this conclusion. The statute reads:

The refusal of a person to submit to a test of the alcohol or drug concentration in the person's blood or breath is *admissible* into evidence at a subsequent criminal trial.

RCW 46.61.517 (Emphasis added).

Evidence deemed by statute to be “admissible” for some purpose does not command that it “shall be admitted” for all purposes, and each independent objection must be analyzed on a case-by-case basis. The statute does not specifically state for which purposes a refusal is “admissible”, nor does it mandate that such evidence be admitted in every case. It simply obviates one unspecified threshold evidentiary hurdle. It does not address the separate issue of admissibility *in the State's case in chief, as consciousness of guilt*.

The District Court ruled that “[i]f a statute can be interpreted in a manner that avoids offending the constitution, the Court will so interpret it. FN *Dep't of Ecology v. Campbell & Guinn*, 146 Wn.2d 1, 11 (2002); *City of Seattle v. Montana*, 129 Wn.2d 583, 589-590 (1996).”³⁶

Although the exercise of a constitutional right to refuse a search is inadmissible as substantive evidence of guilt in the State's case in chief, this Court need not interpret this statute as mandating such an unconstitutional

³⁵ BP at 37

³⁶ CP 347

exercise. The statute may be read instead to allow a more sensible and lawfully permissible result, namely that there is no statutory bar to the admissibility of refusal evidence. “It follows that advice that evidence ‘*may* be offered against you’ is a true statement, and it advises of a consequence that the constitution does not forbid in at least two situations.” *State v. Moore*, 318 P.3d 1133, 1140 (Or. 2013).

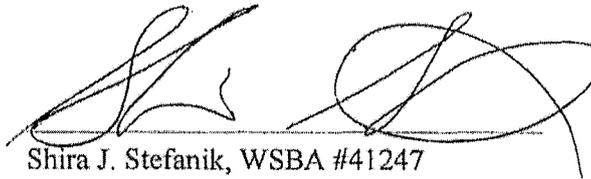
Thus, a refusal could potentially be introduced as impeachment in the event that the defendant opened the door, offered solely to show that a witness is not truthful by comparing inconsistent statements. *State v. Burke*, 163 Wn.2d 204, 222, 181 P.3d 1 (2008). This narrow exception to the bar against comment on a defendant’s invocation of a constitutional right is in harmony with the type of admissibility made possible by the statute in question. *Id.*

There was no actual exigency beyond the natural dissipation of alcohol to justify a warrantless search in the respondent’s case. Thus, the district court properly held that Ms. Adams had a constitutional, not statutory, right to refuse the breath test, which is inadmissible at trial in the State’s case in chief.

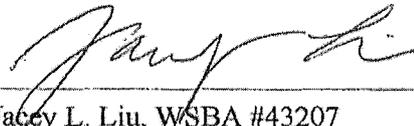
V. CONCLUSION

This Court should affirm the district court, which correctly ruled that the breath test is a warrantless search under the Fourth Amendment and Article I, section 7, which Ms. Adams has a constitutional right to refuse, and which is inadmissible in the State's case in chief.

Respectfully submitted this 22nd day of December, 2014.



Shira J. Stefanik, WSBA #41247
Attorney for Respondent Collette Adams



Jacey L. Liu, WSBA #43207
Attorney for Respondent Collette Adams

CERTIFICATE OF SERVICE

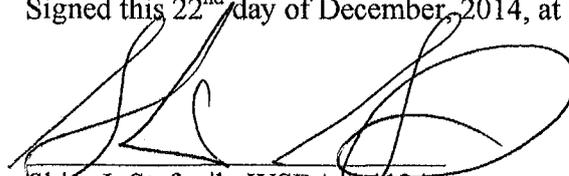
I hereby certify under penalty of perjury under the laws of
the state of Washington that on DECEMBER 22, 2014, I caused
the BRIEF OF RESPONDENT for STATE V. COLLETTE
ADAMS, Cause No. 90419-7, in the Supreme Court for the State
of Washington, to be filed with the Washington Supreme Court,
and one true and correct copy of the same to be served on counsel
for Respondent Baird in following in the manner indicated below:

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E-mail

Jennifer Sweigert
Neilsen Broman & Koch PLLC
1908 E. Madison
Seattle, WA 98122
SweigertJ@nwattorney.net

Signed this 22nd day of December, 2014, at Seattle, WA.



Shira J. Stefanik, WSBA #41247
Attorney for Ms. Adams
119 1st Ave S, ste 260
Phone. (206) 355-0064
Fax. (206) 922-5665
Email: shira@stefanikdefense.com

CERTIFICATE OF SERVICE

Todd Dearinger declares as follows:

RECEIVED BY E-MAIL

I am over the age of 18, am competent to testify in this matter, am not a party to this matter, and make this declaration based on my personal knowledge and belief.

I hereby certify under penalty of perjury under the laws of the state of Washington that on DECEMBER 22, 2014, I caused the BRIEF OF RESPONDENT for STATE V. COLLETTE ADAMS, Cause No. 90419-7, in the Supreme Court for the State of Washington, to be personally served on Petitioner in the following manner:

Hand delivery at 2:14 pm
Alison at front desk

Brandy Gevers
King County Prosecuting Attorney's Office
516 3rd Ave, W554
Seattle, WA 98104

Signed this 22nd day of December, 2014, at Seattle, WA.



Todd Dearinger
119 1st Ave S, ste 260
Seattle, WA 98104
Phone. (206) 355-0064

CERTIFICATE OF SERVICE

Todd Dearinger declares as follows:

I am over the age of 18, am competent to testify in this
matter, am not a party to this matter, and make this declaration
based on my personal knowledge and belief.

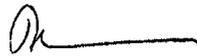
I hereby certify under penalty of perjury under the laws of
the state of Washington that on DECEMBER 22, 2014, I caused
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ADAMS, Cause No. 90419-7, in the Supreme Court for the State
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Melissa at front desk

Washington Foundation for Criminal Justice
c/o Ryan Robertson
Robertson Law PLLC
1000 Second Ave, suite 3670
Seattle, WA 98104
ryan@robertsonlawseattle.com

Signed this 22nd day of December, 2014, at Seattle, WA.



Todd Dearinger
119 1st Ave S, ste 260
Seattle, WA 98104
Phone. (206) 355-0064

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Subject: State v. Adams, 90419-7, Brief of Respondent

Attached for filing today is the brief of respondent for the case referenced below.

State v. Collette Adams

No. 90419-7

Brief of Respondent

Filed by:
Shira J. Stefanik
WSBA #41247

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Shira J. Stefanik
Attorney at Law
119 1st Ave S, ste 260
Seattle, WA 98104
Ph (206) 355-0064
Fax (206) 922-5665

shira@stefanikdefense.com

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State v. Collette Adams

No. 90419-7

Certificates of Service

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Shira J. Stefanik
WSBA #41247

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Shira J. Stefanik
Attorney at Law
119 1st Ave S, ste 260
Seattle, WA 98104
Ph (206) 355-0064
Fax (206) 922-5665

shira@stefanikdefense.com