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**SUPREME COURT
OF THE STATE OF WASHINGTON**

King County Superior Court No. 14-2-11693-4 KNT
and 14-2-12557-7 SEA

STATE OF WASHINGTON,

Petitioner,

v.

DOMINIC BAIRD and
COLLETTE ADAMS,

Respondents.

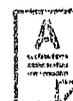
PETITIONER'S REPLY

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ORIGINAL

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A. ISSUES PRESENTED FOR REPLY

1. Whether a minimally intrusive warrantless breath test administered pursuant to RCW 46.20.308 is constitutional.
2. Whether, post-McNeely, a driver lawfully arrested for DUI has a constitutional right to refuse a breath test.
3. Whether Article I, section 7 of the state constitution affords lawfully-arrested drunk drivers more protection in their breath alcohol concentration than the Fourth Amendment.
4. Whether the doctrine of unconstitutional conditions applies to these cases.

B. ARGUMENT IN REPLY

Baird and Adams cast the State's argument as a request for a "vast new exception" to the warrant requirement. Br. of Resp't Baird at 7; see Br. of Resp't Adams at 16. The State makes no such request. Rather, the State asks this Court to once again affirm the constitutionality of RCW 46.20.308 as it has repeatedly done for almost 50 years.

Baird and Adams rely only on Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), for the proposition that the law has now changed. This reliance is misplaced. McNeely's holding is limited to forced blood draws administered

outside of any implied consent statute. No court has extended McNeely's holding to implied consent breath testing. In fact, courts that have addressed this issue to date have continued to uphold the constitutionality of warrantless breath tests administered pursuant to implied consent statutes. See Stevens v. Comm'r of Pub. Safety, 850 N.W.2d 717 (Minn. Ct. App. 2014); State v. Won, 139 Haw. 59, 332 P.3d 661, 682 (Haw. Ct. App. 2014) (review granted by Haw. No. SCWC-23-0000858). This Court should likewise hold that breath testing in Washington under RCW 46.20.308 is constitutional.

1. A WARRANTLESS BREATH TEST ADMINISTERED PURSUANT TO RCW 46.20.308 IS CONSTITUTIONAL BECAUSE IT IS LESS INTRUSIVE THAN A BLOOD TEST; IT DOES NOT INVADE BODILY INTEGRITY IN THE WAY THAT A BLOOD DRAW DOES.

Baird and Adams concede that a breath test is less invasive than a forced blood draw, but argue that that fact is meaningless in an exigent circumstances analysis. Br. of Resp't Adams at 20, 22; Br. of Resp't Baird at 11, 13. This assertion is incorrect.

The level of intrusion or "reasonableness" of the search is relevant in determining whether the circumstances justify a

warrantless search. Indeed, it is a "crucial factor." Winston v. Lee, 470 U.S. 753, 761, 765, 105 S. Ct. 1611, 84 L. Ed. 2d 662 (1985). A court should always balance the level of intrusion against the exigent circumstances presented. See Winston, 470 U.S. at 765 (no amount of exigency justifies a surgical procedure to remove evidence); Cupp v. Murphy, 412 U.S. 291, 296, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973) (a warrantless search of a suspect's fingernails justified in part because it is minimally intrusive). See also Maryland v. King, ___ U.S. ___, 133 S. Ct. 1958, 1969, 186 L. Ed. 2d 1 (2013) (a "buccal swab [for DNA] is a far more gentle process than a venipuncture to draw blood" and "the fact that an intrusion is negligible is of central relevance"). In McNeely, the Court did precisely that. Because of the invasive nature of forced blood draws, described in vivid detail by the Court, something more than mere dissipation of alcohol is required to justify the warrantless extraction of blood from a DUI suspect. 133 S. Ct. at 1563.

Breath tests are fundamentally different than forced blood draws. Unlike blood draws, breath tests are minimally intrusive and do not require a piercing of the skin or an invasion of bodily integrity. Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 625-26,

109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989). Breath tests reveal limited information about a person—breath alcohol concentration, and nothing more. Id. The lead opinion in McNeely explicitly recognized this very important distinction, with four of the justices signaling approval of warrantless breath testing. 133 S. Ct. at 1566 (implied consent breath tests and accompanying refusal penalties are “legal” alternative to forced blood draw). While this language was not necessary to decide the case, it is nonetheless important in determining the reach of McNeely's holding and should not be ignored. Moreover, the language of the opinion in its entirety illustrates the explicitly narrow holding: that special facts beyond the mere dissipation of alcohol are required for a highly-invasive forced blood draw. See Br. of Pet'r at 20-21. McNeely did not extend its holding to breath tests, and instead spoke favorably of implied consent breath testing as a viable and legal alternative to forced blood draws. 133 S. Ct. at 1566.

2. ADAMS'S RIGHT TO REFUSE A BREATH TEST IS STATUTORY, NOT CONSTITUTIONAL.

The Legislature has set an explicit price for refusing a breath test after an arrest for DUI: the refusal is admissible in a criminal

trial as substantive evidence of guilt, and carries enhanced licensing and sentencing consequences if the driver is convicted. RCW 46.61.517; RCW 46.61.5055. In South Dakota v. Neville, 459 U.S. 553, 560 n. 10, 103 S. Ct. 916, 74 L. Ed. 2d 748 (1983), the Supreme Court characterized such a price as “unquestionably legitimate,” in part because a DUI arrestee has no constitutional right to refuse the test.

Adams argues that McNeely revealed a constitutional right to refuse a breath test that has never before been recognized by Washington courts or the United States Supreme Court. See Br. of Resp’t Adams at 23. This argument falls. In McNeely, the lead opinion relied on Neville and reiterated that refusal evidence is a legal alternative to a forced blood draw. 133 S. Ct. at 1566. McNeely did not overrule Neville, either explicitly or implicitly, nor did it abrogate the universal recognition by Washington, federal, and foreign state courts that a person lawfully arrested for DUI has no constitutional right to refuse a breath test. See State v. Bostrom, 127 Wn.2d 580, 590, 902 P.2d 157 (1995); United States v. Reid, 929 F.2d 990, 994-95 (4th Cir. 1991); Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1450 (9th Cir. 1986). Post-McNeely, courts have continued to affirm the constitutionality

of refusal statutes. See e.g.; State v. Bernard, 844 N.W.2d 41 (Minn. Ct. App. 2014); State v. Birchfield, 2015 ND 6, ___ N.W.2d ___ (N.D. 2015).

Adams's argument also conflicts with State v. Long, 113 Wn.2d 266, 778 P.2d 1027 (1989). In Long, this Court interpreted RCW 46.61.517 and held that refusal evidence is admissible to show consciousness of guilt. Id. at 268-70. The Court could "perceive no credible reason why this legislative determination should not be honored," and found no federal or state constitutional barriers to admission of refusal evidence. Id. at 271-72; see State v. Baldwin, 109 Wn. App. 516, 526-27, 37 P.3d 1220 (2001) (reviewing various amendments and observing legislative intent to admit relevant evidence of DUI).

Adams ignores the clear holdings of Neville and Long by relying instead on State v. Gauthier, 174 Wn. App. 257, 298 P.3d 126 (2013), and United States v. Prescott, 581 F.2d 1343 (9th Cir. 1978). Those cases are easily distinguished. In Gauthier, a rape case, the defendant was asked to provide a cheek swab of his DNA. 174 Wn. App. at 261. The defendant invoked his constitutional right to refuse, and the State used that refusal at trial to infer guilt. Id. at 261-62, 267. In Prescott, police sought entry

into the defendant's apartment to search for another suspect. 581 F.2d at 1347. The defendant exercised her constitutional right to refuse, but police forcefully entered the residence anyway and charged the defendant as an accessory after the fact. Id. In both Gauthier and Prescott, the defendants were improperly punished for exercising a constitutional right to refuse a search. In this case, Adams had no constitutional right to refuse the breath test. These cases, therefore, are inapposite.

3. ARTICLE I, SECTION 7 DOES NOT PROVIDE BROADER PROTECTION TO A DRUNK DRIVER'S BREATH ALCOHOL CONCENTRATION THAN THE FOURTH AMENDMENT.

Adams suggests that, even if the request for a warrantless breath test is permitted by the Fourth Amendment, it is prohibited by article I, section 7 of the state constitution. Br. of Resp't Adams at 18-21. This argument should be rejected.

Article I, section 7 *may* but does not *always* provide broader protection than the Fourth Amendment. State v. McKinney, 148 Wn.2d 20, 26, 60 P.3d 46 (2002). Whether article I, section 7 provides broader protection depends on the particular context, and

is determined by reference to the six Gunwall¹ factors. State v. Young, 123 Wn.2d 173, 179, 867 P.2d 593 (1994).

Adams is correct that a Gunwall analysis is unnecessary in this case, but for the wrong reason. This Court has already considered whether article I, section 7 provides broader protection than the Fourth Amendment in the context of a blood draw in a vehicular homicide case. State v. Curran, 116 Wn.2d 174, 184, 804 P.2d 558 (1991) (abrogated on other grounds by State v. Berlin, 133 Wn.2d 541, 947 P.2d 700 (1997)). In Curran, this Court held that the protections afforded by article I, section 7 and the Fourth Amendment are coextensive in that particular context. Id. at 185. It therefore stands to reason that article I, section 7 and the Fourth Amendment apply coextensively to less intrusive breath testing under the implied consent statute.² Br. of Resp't Adams at 22. For this reason, Adams's argument fails.

¹ State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986).

² Even if Curran does not control, Gunwall factors four and six—"preexisting state law" and "matters of particular state or local concern"—are necessarily contingent on the particular context of the claimed constitutional violation. See State v. Boland, 115 Wn.2d 571, 576, 800 P.2d 1112 (1990); State v. Surge, 160 Wn.2d 65, 85-86, 156 P.3d 208 (2007) (Chambers, J., concurring). Adams does not address these factors. Where the Gunwall factors are not adequately briefed, this Court should not consider the issue. State v. Cantrell, 124 Wn.2d 183, 190 n.19, 875 P.2d 1208 (1994).

4. THE DOCTRINE OF UNCONSTITUTIONAL CONDITIONS DOES NOT APPLY.

RCW 46.20.308 provides that "any person who operates a motor vehicle within this state is deemed to have given consent...to a test or tests of his or her breath for the purpose of determining alcohol concentration..." RCW 46.20.308(1). In Won, the Hawai'i Court of Appeals relied on similar language in Hawai'i's implied consent statute and held that a driver validly consented to a breath test merely by the act of driving. 332 P.3d at 680.

Baird claims that the consent implied by RCW 46.20.308 imposes an unconstitutional condition on the privilege of driving, and therefore, does not constitute valid consent. Br. of Resp't Baird at 27-28. Baird did not raise this doctrine below.

Notwithstanding the language in RCW 46.20.308, the State agrees with Baird that constitutionally-valid consent to the breath test may not be implied simply by the act of driving. See Forsyth v. State, 438 S.W.3d 216, 223 (Tex. Ct. App. 2014) (consent, even if voluntarily given, may later be limited, qualified, or withdrawn). If this Court considers actual consent as an alternate basis for administration of a breath test post-McNeely, it should evaluate whether a driver has given knowing, intelligent, and voluntary

consent at the time of the test, not infer it from the act of driving. See e.g., State v. Moore, 354 Or. 493, 318 P.3d 1133 (2013); State v. Brooks, 838 N.W.2d 563 (Minn. 2013). Therefore, the doctrine of unconstitutional conditions, i.e., whether it is constitutional to imply consent in exchange for the privilege to drive, does not apply here.

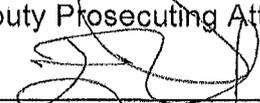
C. CONCLUSION

The reasonableness of the intrusion is a crucial factor in the exigent circumstances exception. The district court erred by disregarding this distinction, extending McNeely to breath tests, and suppressing Baird's breath test and Adams's breath test refusal. Its decision conflicts with long-standing precedent and is unsupported by McNeely and the decades of authority that precede it. This Court should reverse the district court.

DATED this 21st day of January, 2015.

Respectfully submitted,
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King County Prosecuting Attorney


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Today I deposited in the mail of the United States of America, a postage prepaid, properly stamped and addressed envelope containing a copy of the PETITIONER'S REPLY, in STATE V. DOMINIC BAIRD AND COLLETTE ADAMS, Cause No. 90419-7, in the Supreme Court, for the State of Washington, directed to:

Shira Stefanik & Jacey Liu, attorney for Respondent Adams,
at:

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119 1st Avenue South, Ste 260
Seattle, WA 98104-3450

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I certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Dated this 21st day of January, 2015



Brandy L. Gervers
Done in Seattle, Washington

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Good morning,

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Thank you,

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