

NO. 46000-9-II

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

STATE OF WASHINGTON, Respondent

v.

IGOR Y SIROTKIN, Appellant

FROM THE SUPERIOR COURT FOR CLARK COUNTY
CLARK COUNTY SUPERIOR COURT CAUSE NO.

BRIEF OF RESPONDENT

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A. **RESPONSE TO ASSIGNMENTS OF ERROR**

- I. **IMPLIED CONSENT STATUTES ARE CONSTITUTIONAL AND BREATH TESTING PURSUANT TO WASHINGTON'S IMPLIED CONSENT STATUTE DOES NOT VIOLATE A SUSPECT'S RIGHT TO PRIVACY.**
- II. **A DRIVER DOES NOT HAVE A CONSTITUTIONAL RIGHT TO REFUSE A BREATH TEST LAWFULLY REQUESTED UNDER THE IMPLIED CONSENT STATUTE AND THE ADMISSION OF A DRIVER'S REFUSAL DOES NOT VIOLATE ARTICLE 1, SECTION 7.**
- III. **ACTUAL CONSENT IS AN ALTERNATIVE BASIS FOR ADMITTING BREATH TEST EVIDENCE.**
- IV. **IV. SIROTKIN DID NOT PRESERVE THIS ERROR FOR REVIEW AND THE ERROR, IF ANY, WAS HARMLESS.**

B. **STATEMENT OF THE CASE**

I. **FACTUAL HISTORY**

On September 10, 2010, the Department of Licensing (hereinafter DOL) issued a notice of revocation indicating that on October 10, 2010, the DOL would revoke Sirotkin's driving privilege for seven years as a habitual traffic offender. This notice was sent to Sirotkin's address of record. Defendant's Appendix 3 (Letter Department of Licensing).

On November 25, 2011, Washington State Patrol Trooper Matthew Hughes initiated a traffic stop of Sirotkin, which after contact was expanded into a DUI investigation. During this investigation, but prior to arrest, Sirotkin handed Trooper Hughes an attorney's business card with numerous statements relating to a DUI investigation. Sirotkin refused the Field Sobriety Tests and the Preliminary Breath Test. Trooper Hughes arrested Sirotkin for Driving While under the Influence of Intoxicants. Trooper Hughes read Sirotkin the Implied Consent Warnings after which he refused to submit to an analysis of his breath and did not request an independent test.

II. **PROCEDURAL HISTORY**

Sirotkin was arrested on November 25, 2011, for Driving While under the Influence of Intoxicants. While the matter was pending trial in District Court, Sirotkin filed a motion to suppress evidence. The trial court held a hearing on February 11, 2013. Judge John Hagensen of the Clark County District Court denied Sirotkin's motion to suppress, motion to dismiss, and motion to sever the two counts. The court entered Findings of Fact and Conclusions of Law on May 29, 2013. Defendant's Appendix 1 (Trial Court's Findings of Fact and Conclusions of Law for the Defendant's Motion to Dismiss).

The trial court found that the trooper read the defendant his rights and the defendant did not request an additional test on his own and that the trooper had no duty to take him to the hospital to get an alternative test. *Id.* The court further held that the Department of Licensing's mailing the notice to the defendant's address of record was reasonably calculated to give him notice of the license revocation. *Id.* at 6. Sirotkin then proceeded to a stipulated bench trial on the Driving While Suspended in the First Degree count on August 2, 2013, and was found guilty. See RP 111.

The court then held a jury trial on the Driving While under the Influence of Intoxicants. The defense moved to exclude the defendant's refusal to submit to a breath test, which the court denied. At trial, the trooper testified that he read the defendant the implied consent warnings regarding breath and that Sirotkin refused the breath test. *Id.*

The jury returned to the courtroom indicating they had reached a verdict. After polling, it was revealed that the verdict was not unanimous. The court sent the jury back to continue deliberations. RP at 231. Neither the State nor the defense objected to the court's sending the jury back to continue deliberations. RP 231-232. The jury returned a guilty verdict, was polled, and found to be unanimous; the verdict was received and filed. RP 233-234. Sirotkin moved for a mistrial, which was denied. RP 237.

Sirotkin appealed his conviction to the Superior Court. The Superior Court heard argument on January 24, 2014. The Superior Court filed its Opinion and Order affirming the District Court conviction on February 7, 2014. Defendant's Appendix 5 (Ruling on RALJ Appeal from Clark County District Court). The Superior Court found that the trial court did not err in finding that there was due process violation in the revocation of Sirotkin's license; that the officer did not "unreasonably interfere" with Sirotkin's right to an independent test; that the court's inclusion of the officer's opinion testimony regarding Sirotkin's intoxication was properly admitted; that the trial judge did not err in sending the jury back to deliberate after polling revealed the verdict was not unanimous; and that the trial court did not abuse its discretion in sentencing. *Id.*

This Court granted discretionary review on the sole question of whether the district court erred in not excluding evidence of the appellant's refusal to take a breath test.

The State provided briefing in this matter in its response to the motion for discretionary review. Because this issue is currently under review by the Washington Supreme Court in the consolidated King County cases of *State v. Baird* and *State v. Adams*, Sup. Ct. No. 90419-7, it is important to the State to have comity of our responses on this issue. As such, the briefing provided below is borrowed almost entirely, and

with permission, from the briefing filed by the King County Prosecuting Attorney in those cases. Additionally, the State asks this Court to stay its review of this case until the Supreme Court renders its decision in *Baird* and *Adams*.

C. **ARGUMENT**

A breath test is a search subject to constitutional protections. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 616-17, 109 S. Ct. 1402 (1989). Generally, warrantless searches are per se unreasonable and violate both the federal and state constitutions unless one of the few jealously guarded exceptions to the warrant requirement exists. *State v. Byrd*, 178 Wn.2d 611, 613, 310 P.3d 793 (2013). The State bears the burden of showing one of these exceptions applies. *Id.*

I. **IMPLIED CONSENT STATUTES ARE CONSTITUTIONAL AND BREATH TESTING PURSUANT TO WASHINGTON'S IMPLIED CONSENT STATUTE DOES NOT VIOLATE A SUSPECT'S RIGHT TO PRIVACY.**

The Supreme Court has upheld Washington's implied consent law as constitutional. In *State v. Moore*, 79 Wn.2d 51, 483 P.2d 630 (1971), the Supreme Court held that the statute (1) was a valid exercise of police power; (2) did not violate the Fifth Amendment privilege against self-incrimination; and (3) was not rendered unconstitutional by purporting to

impliedly waive a constitutional right (against self-incrimination). *Moore* at 54-58. The Court also held that “[w]hether an accused’s consent to the [breath] test be voluntary or involuntary, the law...is constitutionally sustainable...” *Moore* at 57-58.

Implied consent statutes have repeatedly withstood challenges under the Fourth Amendment. The United States Supreme Court first decided the constitutionality of a warrantless test for alcohol concentration in *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826 (1966). In that case, a police officer directed a doctor to draw a DUI suspect’s blood without his consent while he was being treated at a hospital for injuries sustained in a collision. *Schmerber* at 758. The Court held that a warrantless blood draw was justified under these “special facts,” i.e., the natural dissipation of alcohol in the body and the fact that the defendant had to be taken to the hospital. *Schmerber* at 771. Under *Schmerber*, a warrantless test for alcohol in a DUI case is constitutional when three conditions are satisfied: (1) probable cause; (2) reasonable procedures; and (3) a threat of the destruction of evidence. See *State v. Curran*, 116 Wn.2d 174, 184-185, 804 P.2d 558 (1991) (applying three factor *Schmerber* test to a nonconsensual blood draw in a vehicular homicide case) (abrogated on other grounds).

The Washington Supreme Court has followed *Schmerber* for over 30 years. In *State v. Judge*, 100 Wn.2d 706, 708-09, 718-19, 675 P.2d 219 (1984), the Supreme Court unanimously affirmed a conviction for negligent homicide after a drunk driver struck four children and killed three, and a warrantless blood draw revealed a 0.17 BAC. Under the Fourth Amendment and article 1, section 7, the blood draw was constitutional because it “met the ‘reasonableness’ requirements of *Schmerber*.” *Judge* at 712; see also *Curran*, *supra*, at 183-85 (applying *Schmerber* and holding that article 1, section 7 does not provide broader protection to implied consent testing). In *State v. Baldwin*, 109 Wn.App. 516, 524, 37 P.3d 1220 (2001), the Court of Appeals recognized that RCW 46.20.308 codified the warrant exception announced in *Schmerber*. It observed that “the implied consent statute reflects the Legislature’s recognition that the exigencies of a DUI drug arrest and investigation justify 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...” *Baldwin* at 525.

Federal courts have reached this same conclusion with respect to implied consent *breath* testing. *United States v. Reid*, 929 F.2d 990, 993-94 (4th Cir. 1991); *Burnett v. Municipality of Anchorage*, 806 F.2d 1447, 1450 (9th Cir. 1986).

Appellate courts have also routinely upheld the admission of refusal evidence, universally recognizing that a person lawfully arrested for DUI has no constitutional right to refuse a breath test reasonably requested under an implied consent law. See e.g. *Baldwin*, supra, at 523-24 (admission of refusal to submit to blood test did not violate the Fourth Amendment or article 1, section 7); *Reid*, supra, at 994-95 (consent to breath test not coerced by threat of using refusal at trial because defendants had no constitutional right to refuse); *Burnett*, supra, at 1450 (convictions for refusing a breath test upheld because no constitutional right to refuse). Put another way, “[t]he choice to submit to or refuse the test is not a constitutional right, but rather a matter of legislative grace.” *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995).

The United States Supreme Court has twice upheld the admission of refusal evidence under an implied consent statute. In *South Dakota v. Neville*, 459 U.S. 553, 559-64, 103 S. Ct. 916 (1983), the Court analyzed an implied consent statute that declared an arrestee’s refusal “may be admissible into evidence at the trial.” The Court held that the statute was not fundamentally unfair and did not violate due process or the Fifth Amendment privilege against self-incrimination. *Id.* at 564-66. The Washington Supreme Court reached a similar conclusion in *State v. Zwicker*, 105 Wn.2d 228, 241-42, 713 P.2d 1101 (1986).

The United States Supreme Court has also twice upheld a state's ability to revoke a driver's license for refusing to take a lawfully requested breath test, holding that the statutes did not violate due process. *Illinois v. Batchelder*, 463 U.S. 1112, 1119, 103 S. Ct. 3513 (1983); *Mackey v. Montrym*, 443 U.S. 1, 19, 99 S. Ct. 2612 (1979).

In Washington, RCW 46.61.517 is the evidentiary counterpart to the implied consent statute. It provides: "The refusal of a person to submit to a test of the alcohol or drug concentration in the person's blood or breath under RCW 46.61.308 is admissible into evidence at a subsequent criminal trial." RCW 46.61.517. If the State proves the fact of a refusal to a jury, RCW 46.61.5055(9)(c) mandates a longer license revocation for a driver who refuses to take a breath test. The mandatory minimum term of imprisonment is also enhanced for refusal. RCW 46.61.5055(2)(a)-(b).

Each amendment to RCW 46.61.517 since its enactment in 1983 has removed impediments to the use of refusal evidence at a criminal trial. *State v. Long*, 113 Wn.2d 266, 268-70, 778 P.2d 1027 (1989). Following the Supreme Court's ruling in *Zwicker*, for example, the legislature amended the statute to abrogate the Court's holding that evidence of a refusal was not relevant and deleted the prohibition on the inference of guilt. Laws of 1986, ch. 64, section 2. The Court interpreted the amended statute in *Long*, holding that refusal evidence is properly admissible in the

State's case-in-chief to show consciousness of guilt, subject only to a prejudice analysis under ER 403. *Long* at 272-73. This Court "perceive[d] no credible reason why this legislative determination should not be honored," and found no federal or state constitutional barriers to admission of such evidence. *Long* at 271-72.

a. *McNEELY DOES NOT RENDER IMPLIED CONSENT STATUTES UNCONSTITUTIONAL.*

i. *McNeely* applies only to forced blood draws

In *Missouri v. McNeely*, ___ U.S. ___, 133 S. Ct. 1552 (2013), the United States Supreme Court accepted review on a narrow issue: "whether the natural metabolization of alcohol in the bloodstream present a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving caes." *Id.* at 1556. The Court limited its opinion to the exigent circumstances exception; it did not consider any other bases for taking McNeely's blood. *Id.* at 1559 n.3.

McNeely's DUI was routine. He was stopped for speeding and crossing the center line and he exhibited several physical signs of impairment. *Id.* at 1556. He performed poorly on field sobriety tests, declined to use a portable breath testing device at the road side, and admitted to consuming "a couple of beers." *Id.* at 1556-57. After arresting

McNeely, the officer offered a breath test under Missouri's implied consent statute, but McNeely refused. *Id.* at 1557. The officer then took McNeely to a hospital and asked him to submit to a blood draw. *Id.* McNeely again refused, but the office directed the hospital staff to draw McNeel's blood anyway. *Id.*

The *McNeely* Court began by stressing the privacy interests at stake with a highly invasive blood draw:

... the type of search...involved a compelled physical intrusion beneath McNeel's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's most personal and deep-routed expectations of privacy.

Id. at 1558 (internal citations and quotations omitted). The Court returned to the point throughout its opinion. *Id.* at 1565-66. Given the level of intrusiveness inherent in a nonconsensual blood draw, the Court refused to hold that alcohol dissipation would always justify a warrantless blood draw. *Id.* at 1561. Instead, the Court held that validity of a warrantless, forced blood draw is to be determined on a case-by-case basis under the totality of the circumstances. *Id.* at 1561, 63. The Court reaffirmed *Schmerber*, noting that the blood draw in that case was justified by its "specific facts." *Id.* at 1560.

Critically, the *McNeely* Court did not once mention breath testing, except insofar as it did so favorably when discussing implied consent statutes as a legal alternative to forced blood draws. Justice Sotomayor, joined by Justices Ginsburg, Kagan, and Scalia, spoke with approval of implied consent breath testing:

States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to a BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution.

Id. at 1566; see *Stevens v. Comm'r of Pub. Safety*, N.W.2d 717 (Minn. Ct. App. 2014) (these comments support the conclusion that implied consent breath testing is constitutional); *State v. Won*, 139 Haw. 59, 332 P.3d 661, 682 (Haw. Ct. App. 2014) (review granted, Haw. No SCWC-12-0000858, oral argument heard September 4, 2014) (“*McNeeley* does not address breath tests or the validity of implied consent statutes, and neither *McNeely*'s holding nor its reasoning compels the conclusion that HRS § 291 E-68 [the Hawaii implied consent statute] is unconstitutional.”). Thus, at least five United States Supreme Court justices would approve of

implied consent breath testing to minimize forced blood draws: Justice Sotomayor, joined by three other justices, endorsed implied consent statutes, see *id.* at 1566, and it is apparent that Justice Thomas, writing in dissent, would always find a warrantless breath test after a lawful DUI arrest constitutionally permissible. See *id.* at 1575-78 (rejecting the majority’s conclusion that the dissipation of alcohol is not a per se exigent circumstance).

ii. A breath test is not intrusive like a blood draw; normal exigencies of a DUI arrest justify taking a breath sample.

In *Skinner*, supra, the United States Supreme Court recognized that, unlike the compelled physical intrusion beneath a person’s skin and into his veins, a breath test is a minimally intrusive procedure. *Skinner*, 489 U.S. at 625-26. “Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment.” *Id.* Breath tests reveal limited information – solely the alcohol concentration in a person’s breath, and nothing more. *Id.*; see also, *Maryland v. King*, __ U.S. __, 133 S. Ct. 1958, 1969-70, 180 L. Ed. 2d 1 (2013) (reaffirming that a minimally intrusive search is far more easily justified under the Fourth Amendment than a more intrusive search).

The Washington Court of Appeals and the Ninth Circuit Court of Appeals have both observed that a breath test is less intrusive than a blood test. See *O'Neill v. Dep't of Licensing*, 62 Wn.App 112, 120, 813 P.2d 166 (1991); *Burnett*, supra, 806 F.2d at 1450 (“the breath test...is clearly a less objectionable intrusion than the compulsory blood samples allowed under *Schmerber*”). Post *McNeely*, this distinction is critical. See *Won*, 332 P.3d at 679-81 (a breath test is less intrusive than a blood test, and therefore, administering a warrantless breath test is constitutionally reasonable even after *McNeely* under both the federal and state constitution).

Washington’s implied consent statute employs the distinction between breath and blood. It provides that “the test administered shall be the breath only.” RCW 46.20.308(3). A blood draw is no longer authorized under the statute, and may be obtained only with a warrant or if some other warrant exception applies. See *id.* Thus, the statute honors the *McNeely* Court’s concern with “a motorist’s privacy interest in preventing an agent of the government from piercing his skin.” *McNeely*, 133 S. Ct. at 1565.

iii. Applying *McNeely* to the implied consent statute will conflict with the United States Supreme Court's interest in minimizing highly invasive blood draws.

Extending *McNeely* to implied consent breath testing will inevitably lead to more forced blood draws. Officers will be faced with a choice between: (1) obtaining a warrant for a minimally-intrusive breath test, taking the risk that an arrestee will fail to cooperate and that more evidence will be lost before the officer can obtain a *second* warrant for blood; or (2) obtain a warrant for a forced blood draw from the outset.¹ Given this choice, a rational officer would chose to obtain a warrant for a blood draw, in part because it will also yield evidence of impairment from drugs. But a rule that increases the rate of blood draws cannot be reconciled with the Supreme Court's and Legislature's stated preference that officers obtain evidence using the less intrusive means of a breath test. See *McNeely*, 133 S. Ct. 16 1565, 1567; RCW 46.20.308(3). Given the Court's narrow concern with "preventing an agent of the government from piercing [an arrestee's] skin"² without sufficient cause, the Court's language approving of implied consent statutes, and the wealth of

¹ RCW 46.20.308(1) provides that an officer may obtain a search warrant for blood notwithstanding the implied consent statute. If an officer requests breath test pursuant to the implied consent statute, and the driver refuses, "no test shall be given except as authorize by a search warrant." RCW 46.20.308(4).

² *McNeely*, 133 S. Ct. at 1565.

authority upholding such statutes as constitutional, *McNeely* cannot be read to encourage such as expanded use of forced blood draws.

b. UNDER SCHMERBER, EXIGENT CIRCUMSTANCES JUSTIFY A BREATH TEST.

i. The Implied consent statute codifies the circumstances required to justify a breath test.

Exigent circumstances is a well-recognized exception to the warrant requirement under both the federal and state constitutions. *McNeely*, 133 S. Ct. at 1558 (Fourth Amendment); *State v. Tibbles*, 169 Wn.2d 364, 369-70, 236 P.3d 885 (2010) (article 1, section 7). This exception applies when “obtaining a warrant is not practical because the delay inherent in securing a warrant would compromise officer safety, facilitate escape or permit the destruction of evidence.” *Tibbles*, 169 Wn.3d at 370.

McNeely requires a case-by-case assessment of exigency for highly invasive blood draws, but it does not require case-by-case assessment for implied consent *breath* testing. Instead, the implied consent statute defines the exigent circumstances required to justify a warrantless breath test.

Along with the manner and scope of the intrusion, an analysis of exigent circumstances always includes such factors as the seriousness of the offense, whether police have trustworthy information that the suspect is guilty, and the risk of losing evidence. *State v. Terrovona*, 105 Wn.2d

632, 644, 716 P.2d 295 (1996) (identifying factors to justify warrantless entry into a home). The implied consent law codifies each of these factors.

First, an officer's authority to request a breath sample exists only upon a lawful arrest for DUI and only when an officer has reasonable grounds to believe that the driver is under the influence. RCW 46.20.308(1), (2); *State v. Avery*, 103 Wn.App. 527, 539, 13 P.3d 226 (2000) ("reasonable grounds" within the meaning of the implied consent statute...is the equivalent of probable cause). In general, an exigent circumstances search does not require a lawful arrest. See *United States v. Chapel*, 55 F.3d 1416, 1420 (9th Cir. 1995). However, it is an important factor that weighs in favor of exigency, see *Schmerber*, 384 U.S. at 769, and is an indispensable element to an implied consent breath test. *State v. Wetherell*, 82 Wn.2d 865, 869, 514 P.2d 1069 (1973).

Second, the exigent circumstances exception always requires a court to determine whether the search itself is conducted in a reasonable manner. *Schmerber*, 384 U.S. at 771; see *McNeely*, 133 S. Ct. 1560. The implied consent statute meets this requirement. A breath test is typically administered at a police station and involves no pain or discomfort. Strict statutory guidelines govern the officer's request for the test, and the test itself is subject to rigorous criteria to ensure scientific accuracy and

reliability.³ The results implicate no significant privacy concerns. *Skinner*, 489 U.S. at 625-26.

Third, the statute necessarily codifies an attempt to secure evanescent evidence. See *City of Seattle v. St. John*, 166 Wn.2d 941, 947, 215 P.3d 194 (2009) (one purpose of the implied consent statute is to gather evidence of intoxication). In an exigency inquiry, it is not necessary to demonstrate the precise rate of dissipation for a particular individual, which may depend on various factors such as weight, gender, and alcohol tolerance. *McNeely*, 133 S. Ct. at 1560. Instead, it may be presumed that “an individual’s alcohol level gradually declines soon after he stops drinking, [and] a significant delay in testing will negatively affect the probative value of the results.” *Id* at 1561. Dissipation, in fact, is a “biological certainty.” *Id* at 1570 (Roberts, C.J., concurring and dissenting in part).

The need to prevent the destruction of rapidly dissipating evidence is compelling. The Legislature has specifically defined the crime of DUI, in part, as having a breath alcohol concentration of 0.08 g/100 mL or high within two hours of driving, and has directed increased criminal penalties

³ RCW 46.20.308(2)-(3). General scientific foundational requirements for admissibility of the breath test are enumerated in RCW 46.61.506(4)(a)(i)-(viii). In addition, the testing instrument must be approved by the State Toxicologist. RCW 46.61.506(4)(a); WAC 448-16-020. The officer administering the test must be certified by the State Toxicologist. WAC 448-16-090. Deviation from these requirements to a person’s prejudice may result in suppression. See *State v. Bartels*, 112 Wn.2d 882, 890, 774 P.2d 1183 (1989).

for driving with an alcohol concentration great than 0.15 g/100 mL.⁴ RCW 46.61.502(1)(a); RCW 46.61.5055(1)(b) *et seq.* Thus, it makes no difference that alcohol dissipates over time rather than all at once, because alcohol concentration “can make a difference not only between guilt and innocence, but between different crimes and different degrees of punishment.” *McNeely*, 133 S. Ct. 16 1571 (Roberts, C.J.). While it is true that the State may use retrograde extrapolation⁵ to estimate a defendant’s alcohol concentration at the time he was driving, this is only “second-best evidence.” *Id.* And, extrapolation may or may not be possible, given the particular facts of a case.

Even though alcohol was dissipating from McNeely’s blood at a constant rate, a warrantless search that pierced McNeely’s skin, inserted a needle into his vein, and withdrew blood from his arm only 25 minutes after his arrest was not justified. A breath test offered pursuant to the statute satisfies the constitution because it requires probable cause to search and strict adherence to reasonable procedures, and is a nonintrusive means of obtaining evidence already in the process of destruction. See

⁴ The United States Congress has conditioned federal highway grants on a state’s adoption of laws prohibiting operation of a motor vehicle with a BAC of 0.08 or greater. 23 U.S.C. § 163(a).

⁵ Retrograde extrapolation is a mathematical formula used to estimate a person’s pre-test BAC at a particular time, given a verified BAC obtained at a later time. *State v. Wilbur-Bobb*, 134 Wn.App. 627, 633, 141 P.3d 665 (2006).

Schmerber, 384 U.S. at 770-71. While *McNeely* may demand more to justify a highly-invasive forced blood draw, it does not reach breath tests.

ii. The implied consent statute reasonably carries out the compelling state interest in enforcing DUI laws without unreasonably intruding on a driver's privacy interests.

In contrast to the minimally intrusive nature of a breath test, the public safety threat presented by drunk driving is significant. The United States Supreme Court has consistently expressed dismay at the "terrible toll" exacted upon our society by drunk drivers. *McNeely* at 1565.

Washington's implied consent statute serves three objectives: (1) to discourage driving a motor vehicle while under the influence of alcohol or drugs, (2) to remove the driving privileges of those disposed to driving while intoxicated, and (3) to provide an efficient means of gathering reliable evidence of intoxication. *Bostrom*, *supra*, at 588. Indeed, the express purpose of the implied consent statute is to combat the grave societal ill of drunk driving. See Laws of 2004, ch. 68, section 1 ("[P]roperty loss, injury, and death caused by drinking drivers continue at unacceptable levels.") The most probative evidence to combat this problem is proof of a driver's breath alcohol concentration. The implied consent statute provides an efficient, minimally intrusive, and constitutionally permissible means of gathering that evidence.

A driver's expectation of privacy is diminished at the time of the test because the procedures necessarily follow a lawful arrest for DUI, predicated upon probable cause. See e.g. *State v. White*, 44 Wn.App. 276, 278, 722 P. 2d 118 (1986). Thus, the State's interest in enforcing DUI laws through the implied consent statute is even more compelling because both the federal and state constitutions contemplate a balancing test between the level of intrusion and the justifications for its performance. See *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861 (1979).

Should this Court adopt the position proffered by Sirotkin, law enforcement officers will be required to seek warrants in thousands more cases than they currently do. Requesting thousands of search warrants would add little to the protections already afforded by the implied consent statute, but would, in many cases, frustrate the compelling state interest in effectively enforcing DUI laws. See *Skinner*, 489 U.S. at 623-24. In *McNeely*, the statutory restrictions on when officers are authorized to take blood, and the resultant rarity of blood draws compared to breath tests, convinced the Court that its holding would not negatively impact law enforcement efforts. *McNeely* at 1562-63.

The practicality of obtaining a warrant should also be measured by the practical impossibility of compelling performance of a breath test. While a court may issue a warrant for a breath test, it is unclear how an

officer could possibly execute one without the arrestee's affirmative cooperation. In comparison, a blood draw conducted pursuant to a warrant does not require the arrestee to affirmatively act.

Because of the impracticality of forcing a suspect to blow into a machine, a police officer is unlikely to waste his or her time seeking a warrant for a breath sample, and will instead anticipate resistance and seek a warrant for a blood draw. Ironically, the far more intrusive practice of blood testing will substantially rise and breath testing will become a rarity. This would turn the Supreme Court's concern in *McNeely* over the intrusiveness of blood testing on its head.

II. **A DRIVER DOES NOT HAVE A CONSTITUTIONAL RIGHT TO REFUSE A BREATH TEST LAWFULLY REQUESTED UNDER THE IMPLIED CONSENT STATUTE AND THE ADMISSION OF A DRIVER'S REFUSAL DOES NOT VIOLATE ARTICLE 1, SECTION 7.**

In *South Dakota v. Neville*, supra, the United States Supreme Court unequivocally stated that a person suspected of drunk driving has no constitutional right to refuse a blood-alcohol test, and approved of refusal evidence as evidence of guilt under the Fifth Amendment. *Neville* at 560. Likewise, Washington, federal and foreign state courts have universally recognized that a person lawfully arrested for DUI has *no constitutional right* to refuse a test that is reasonably requested under an implied consent

law.⁶ Instead, the right to refuse a breath test is statutory. *Bostrom*, supra, at 590.

McNeeley did not create a constitutional right to refuse a breath test, where one did not previously exist. Because the breath test is justified by the exigent circumstances defined in the implied consent statute, admitting refusal evidence does not violate the constitution. See *State v. Mecham*, 181 Wn.App. 932, 941-45, 331 P.3d 80 (2014) (admitting evidence that a driver refused roadside sobriety tests does not violate the constitution because the tests are justified by a warrant exception and a driver therefore has no constitutional right to refuse); see also *State v. Nordlund*, 113 Wn.App. 171, 187-89, 53 P.3d 520 (2002) (prosecutor properly argued that refusal to provide a hair sample showed consciousness of guilt when the State had a court order to collect the sample).

If the effect of *McNeely* is to effectively eliminate implied consent breath testing, admitting refusal evidence or imposing penalties for refusal does violate the Fourth Amendment and article 1, section 7. See *State v. Gauthier*, 174 Wn.App. 257, 261, 267, 298 P.3d 126 (2013). *McNeely*, however, did not invalidate implied consent breath testing. Thus, the State

⁶ See e.g. *State v. Baldwin*, 109 Wn.App. at 523-24; *Reid* at 929 F.2d at 994-95; *Burnett*, 806 F.2d at 1450; *State v. Hoover*, 123 Ohio St.3d 418, 916 N.E.2d 1056, 1061 (2009); *Rowley v. Commonwealth*, 48 Va.App. 181, 629 S.E.2d 188, 191 (2006); *Commonwealth v. Davidson*, 545 N.E.2d 55, 56-57 (Mass. 1989).

may admit a refusal as substantive evidence under RCW 46.61.517, and a court must impose enhanced criminal penalties if the fact of refusal is proven beyond a reasonable doubt. RCW 46.61.5055(1)(b), *et seq.*

III. **ACTUAL CONSENT IS AN ALTERNATIVE BASIS FOR ADMITTING BREATH TEST EVIDENCE.**

Consent is an exception to the warrant requirement. *State v. Bustamante-Davila*, 138 Wn.2d 964, 981, 983 P.2d 590 (1999). To be valid, the consent must be voluntary. *Id.* Whether consent is voluntary depends on the totality of the circumstances, which includes: “(1) Whether *Miranda* warnings had been given prior to obtaining consent; (2) the degree of education and intelligence of the consenting person; and (3) whether the consenting person had been advised of his right to consent.” *Id.* “No one factor is dispositive.” *Id.* However, the consent must not be the product of coercion, express or implied. *Shneckloth v. Butamonte*, 412 U.S. 218, 227, 93 S. Ct. 2041 (1973).

Washington courts have held that actual consent to an implied consent breath test is irrelevant. *State v. Avery*, 103 Wn.App. 527, 534, 13 P.3d 226 (2000); *State v. Kreig*, 7 Wn.App. 20, 23, 497 P.2d 621 (1972). Post-*McNeely*, actual consent applied to implied consent breath testing remains an unsettled and rapidly changing area of the law. Courts in other

states have now relied on this exception to justify a breath test administered under an implied consent law. See *State v. Moore*, 354 Or. 493, 318 P.3d 1133, 1137 (2013); *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013); *State v. Smith*, 2014 ND 152, 849 N.W.2d 599 (N. Dak. Ct. App. 2014). If *McNeely* extends to breath tests and invalidates Washington's implied consent statute, consent is an alternative argument accepted in many states, and should be accepted in Washington.

IV. **SIROTKIN DID NOT PRESERVE THIS ERROR FOR REVIEW AND THE ERROR, IF ANY, WAS HARMLESS.**

The trial court's admission of Sirotkin's refusal to submit to breath testing was proper, and review of that decision was not preserved and should not be renewed for purposes of discretionary review. Moreover, any error was harmless because there was sufficient evidence apart from the refusal on which the jury would likely have found Sirotkin guilty (speeding, slow reaction time, odor of intoxicants, and Trooper Hughes' observations about Sirotkin's appearance and behavior all would support conviction absent the refusal evidence).

D. **CONCLUSION**

Initially, consideration of this case should be stayed pending the Washington Supreme Court's decision in the consolidated cases of *State v.*

Baird and State v. Adams. Should this Court proceed with consideration of this matter, it should affirm the district court of Clark County.

DATED this 26th day of January, 2015.

Respectfully submitted:

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