

No. 90419-7

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SUPREME COURT  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Petitioner,

v.

DOMINIC BAIRD and COLLETTE ADAMS,

Respondents,

Filed *E*  
Washington State Supreme Court

APR 08 2015

Ronald R. Carpenter  
Clerk *by h*

BRIEF AMICUS CURIAE OF  
WASHINGTON FOUNDATION FOR CRIMINAL JUSTICE

On Behalf of the Washington Foundation for Criminal Justice:  
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*Differences between Roadside and Subsequent Evidential  
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## **I. IDENTITY AND INTEREST OF AMICUS**

The Washington Foundation for Criminal Justice (“WFCJ”) is a non-profit organization dedicated to educating criminal defense attorneys on representation of citizens accused of impaired driving crimes.<sup>1</sup> Since 1983, the WFCJ has held an annual seminar to educate lawyers on pertinent issues related to the defense of citizens accused of DUI.

The WFCJ has an interest in protecting the right of citizens accused of DUI (and DUI-related crimes) to receive a fair trial. The present appeal raises significant constitutional issues related to breath-alcohol testing. The WFCJ is committed to advocating for the proper assessment of breath-alcohol testing in criminal prosecutions.

## **II. ISSUES PRESENTED ON AMICUS**

1. Breath-alcohol testing requires a person to blow deep lung air into a machine by exhaling air not normally exhaled with normal breathing pattern.
2. This Court must evaluate breath-alcohol testing under Art. I, §7 of the State Constitution because breath-alcohol testing invades a protected privacy interest in bodily integrity.
3. This Court must hold the State accountable to the established principles justifying a warrantless search under exigent circumstances; this Court should not condone manufactured exigency under the implied consent law.

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<sup>1</sup> The amicus authors wish to recognize attorney and WFCJ member Ms. Patricia Fulton for contributing legislative history research within the amicus brief.

4. This Court must hold that where the State fails to satisfy exigent circumstances requirements, warrantless breath-alcohol testing must be premised on the person's actual consent, and the decision to withhold consent may not be used against the defendant at trial.

### **III. STATEMENT OF THE CASE**

The parties have provided a factual description of each case.

### **IV. ARGUMENT**

*"Art. I, §7 is a jealous protector of privacy."*<sup>2</sup>

The parties agree that a breath-alcohol test is a "search."<sup>3</sup> The parties disagree, however, on the analysis this Court must undertake where the State elects not to seek a warrant to obtain this evidence.

The State argues this Court should evaluate a search for breath-alcohol evidence under the Fourth Amendment.<sup>4</sup> By doing so this Court may use a "reasonableness" test because it is "less invasive" than a blood test. Therefore, the recent *McNeely*<sup>5</sup> decision does not apply to breath-alcohol testing, and this Court may uphold warrantless testing because the implied consent law represents a codification of "de facto" exigency.

The WFCJ asks this Court to reject the State's arguments, and hold

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<sup>2</sup> *State v. Valdez*, 167 Wn.2d 761, 777, 224 P.3d 751 (2009) (J. Sanders (ret.)).

<sup>3</sup> Brief of Petitioner, pg. 11; Brief of Respondent (Adams), pg. 7-8; Brief of Respondent (Baird), pg. 7-8. See, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989).

<sup>4</sup> Brief of Petitioner, pg. 31; Petitioner's Reply, pg. 7-8.

<sup>5</sup> *Missouri v. McNeely*, ---U.S. ---, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).

that breath-alcohol testing is a constitutionally protected search under Art. I, §7, and a warrantless search is not justified under the State's exigency argument. This Court has repeatedly held our State Constitution is more protective of privacy rights and does not employ a reasonableness test.<sup>6</sup> The essential holding of *McNeely*, that dissipation of alcohol does not create de facto exigency to excuse the State from seeking a warrant, is equally applicable to blood and breath testing procedures. Finally, the implied consent law, and Washington DUI law in general, fails to establish or support a finding of exigency to support a warrantless search.

**1. Breath-alcohol testing requires a person to blow deep lung air into a machine by exhaling air not normally exhaled with normal breathing pattern.**

A breath-alcohol test requires a person to blow air into a machine.<sup>7</sup> This process of blowing is very different from the causal inhale-exhale pattern one might experience while reading this brief.

The Washington State Patrol tells us that alcohol found in blood gets transferred to the lung tissue and ultimately expelled out of our body

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<sup>6</sup> *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009); *State v. Eisfeldt*, 163 Wn.2d 628, 185 P.3d 580 (2008); *State v. Morse*, 156 Wn.2d 1, 123 P.3d 832 (2005); *State v. Ladson*, 138 Wn.2d 343, 979 P.2d 833 (1999).

<sup>7</sup> The Washington State Patrol uses two machines: The Datamaster and Draeger 9510.

on our breath.<sup>8</sup> The breath test process requires a person to blow “end-expiratory air,” which means the air found deepest in the lungs, into the machine.<sup>9</sup> There is more alcohol in the last part of a person’s breath, which comes from deeper portions of the lungs.<sup>10</sup>

To get to this air officers instruct the person to blow steadily into the machine for at least 10-15 seconds and until told to stop.<sup>11</sup> The person must blow hard enough to make a flashing “please blow” sign change to a steady solid light.<sup>12</sup> In reality, this test requires a person to breathe in a manner not typically performed during the course of a normal day and exhale breath from well within the human body that is not commonly expelled through normal breathing patterns.

**2. This Court must evaluate breath-alcohol testing under Art. I, §7 of the State Constitution because breath-alcohol testing invades a protected privacy interest in bodily integrity.**

It is universally recognized that Art. I, §7 extends greater privacy

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<sup>8</sup> Datamaster Operator Information Manual, Wash. State Patrol, Breath Test Section, Oct. 2000, pg. 8.; Breath Test Program Training Manual, Wash. State Patrol, Impaired Driving Section, Forensic Laboratory Services Bureau, Rev. Nov. 2014, pg. 9.

<sup>9</sup> WAC 448-16-050(7)

<sup>10</sup> *State v. Brayman*, 110 Wn.2d 183, 188-189, 751 P.2d 294 (1988).

<sup>11</sup> Breath Test Program Training Manual, Wash. State Patrol, Impaired Driving Section, Forensic Laboratory Services Bureau, Rev. Nov. 2014, pg. 30-31.

<sup>12</sup> *Id.*

protections to the citizens of this State than the federal constitution.<sup>13</sup> This Court no longer requires litigants to articulate an independent state constitutional claim under Art. I, §7.<sup>14</sup>

**a. Under Art. I, §7, the reasonableness of a search is not a factor in determining whether an invasion of privacy requires a warrant or warrant exception.**

The critical difference between the Fourth Amendment and Art. I, §7 has to do with this Court’s analysis after finding that a “search” invades a recognized privacy interest. “Virtually any “intrusio[n] into the human body,” will work an invasion of “ ‘cherished personal security’ that is subject to constitutional scrutiny.”<sup>15</sup> Under the Fourth Amendment, however, this is not the end of the analysis; rather a court must engage in a balancing of interests including the magnitude of the privacy interest violated to determine whether the search was “reasonable.”<sup>16</sup> “[A] crucial factor in analyzing the magnitude of the intrusion ... is the extent to which the procedure may threaten the safety or health of the individual.”<sup>17</sup> Using this criteria, the Supreme Court has held that while a breath test is a

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<sup>13</sup> “No person shall be disturbed in his private affairs, or his home invaded, without authority of law.”

<sup>14</sup> *McNabb v. Dept of Corrections*, 163 Wn.2d 393, 400, 180 P.3d 1257 (2008) (Recognition that Art. I, §7 provides broader privacy protections now “commonplace.”)

<sup>15</sup> *Maryland v. King*, --- U.S. ---, 133 S.Ct. 1958, 1969, 186 L.Ed.2d 1 (2013).

<sup>16</sup> *King*, at 1969.

<sup>17</sup> *King*, at 1979.

“search,” it is a reasonable one because the magnitude of the privacy violation is minimal and does not invade a significant privacy interest.<sup>18</sup>

Under Art. I, §7, a finding that a search violates a recognized privacy interest ends the analysis, and this Court requires the State to establish the “authority of law” to justify the invasion with either a warrant or an exception to the warrant requirement.

“[Art. I, §7] prohibits not only unreasonable searches, but also provides no quarter for ones which, in the context of the Fourth Amendment, would be deemed reasonable searches and thus constitutional. See *id.* This creates “an almost absolute bar to warrantless arrests, searches, and seizures, with only limited exceptions...” *State v. Ringer*, 100 Wn.2d 686, 690, 674 P.2d 1240 (1983), overruled in part by *State v. Stroud*, 106 Wn.2d 144, 150-151, 720 P.2d 436 (1986).”

“[This Court’s] inquiry under Art. I, §7 requires a two-part analysis: First, we must determine whether the state action constitutes a disturbance of one’s private affairs.... Second, ... our analysis asks whether authority of law justifies the intrusion. The “authority of law” required by Art. I, §7 is satisfied by a valid warrant, limited to a few jealously guarded exceptions. *Id.*; *York*, 163 Wn.2d at 306.”<sup>19</sup>

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<sup>18</sup> *Skinner*, 489 U.S. at 626.

<sup>19</sup> *State v. Valdez*, 167 Wn.2d 761, 771-772, 224 P.3d 751 (2009) (Emphasis added).

The application of this analytical difference is best described in cases evaluating the warrantless collection of DNA evidence. In *King*, the Supreme Court reviewed a law authorizing the warrantless collection of DNA samples. The collection procedure, buccal cell collection, involved rubbing a cotton swab against the inside of a person’s mouth.<sup>20</sup> The intrusion into the human body constituted an invasion of privacy, but for Fourth Amendment purposes it was “negligible.”<sup>21</sup> The Court contrasted it to the collection of blood-alcohol evidence<sup>22</sup> and whereas a blood test punctured the skin the buccal swab was “a gentle rub along the inside of the cheek.”<sup>23</sup> Thus the warrantless collection of DNA was reasonable and did not violate the Fourth Amendment.

This Court in *State v. Garcia-Salgado*<sup>24</sup> evaluated the same collection method (buccal swab) and held it was a search under Art. I, §7. But rather than engage in a reasonableness the Court wrote;

“The United States Supreme Court has recognized “that a ‘compelled intrusio[n] into the body for blood to be analyzed for alcohol content’ ” is a search. *Skinner v. Ry.*

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<sup>20</sup> *King*, at 1967-1968.

<sup>21</sup> *King*, at 1969.

<sup>22</sup> *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

<sup>23</sup> *King*, at 1979.

<sup>24</sup> *State v. Garcia-Salgado*, 170 Wn.2d 176, 184, 240 P.3d 153 (2010). A trial court authorized the collection of DNA evidence by issuing a court order. Ultimately, this Court held that while a court order was the functional equivalent to a warrant, the court did not satisfy the “authority of law” requirement under Art. I, §7.

*Labor Exec. Ass'n*, 489 U.S. 602, 616, 109 S.Ct. 1402, 103 L.Ed.2d 639 (1989) (alteration in original) (quoting *Schmerber v. California*, 384 U.S. 757, 768, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966)). Similarly, the Court found Breathalyzer tests to “implicate[ ] similar concerns about bodily integrity” and constitute searches as well. *Id.* At 617. We find that the swabbing of a person's cheek for the purposes of collecting DNA evidence is a similar intrusion into the body and constitutes a search for the purposes of the Fourth Amendment and Art. I, §7.

Because a cheek swab to procure a DNA sample is a search, the search must be supported by a warrant unless the search meets one of the “ ‘jealously and carefully drawn’ ” exceptions to the warrant requirement.”<sup>25</sup>

This Court’s application of Art. I, §7 demonstrates that once a recognized privacy interest is violated, there is no consideration of “reasonableness.” This distinction is lacking in the State’s argument.

**b. Breath-alcohol testing invades a protected privacy interest in bodily integrity.**

When inquiring about private affairs, this Court looks to “those privacy interests which citizens of this state have held, and should be entitled to hold, safe from governmental trespass absent a warrant.”<sup>26</sup> “In determining if an interest constitutes a ‘private affair,’ we look at the

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<sup>25</sup> *Garcia-Salgado*, at 184.

<sup>26</sup> *York v. Wahkiakum Sch. Dist. No. 200*, 163 Wn.2d 297, 307, 178 P.3d 995 (2008).

historical treatment of the interest being asserted, analogous case law, and statutes and laws supporting the interest asserted.”<sup>27</sup>

From a historical perspective our legislature has recognized the privacy interests inherent in breath and blood alcohol testing by requiring police to obtain consent as well as protecting the right to withhold consent. In 1949, legislation prohibited compulsory testing and excluded refusal evidence from trial.<sup>28</sup> In 1965, legislation required police to warn people that they had a “constitutional right” not to submit to a breath or blood test.<sup>29</sup> Only after *Schmerber* (1966) did Washington enact an implied consent law,<sup>30</sup> which courts have construed as authorizing a warrantless a test based on exigency.<sup>31</sup> The implied consent law does not establish that privacy rights at issue here are diminished; rather it presumes exigent circumstances exist to intrude upon a privacy interest without a warrant.

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<sup>27</sup> *State v. Athan*, 160 Wn.2d 354, 366, 158 P.3d 27 (2007).

<sup>28</sup> “Nothing herein contained shall be construed as requiring any person to submit to a chemical analysis of his blood, and the refusal to submit to such an analysis shall not be admissible in evidence in any criminal prosecution for a violation of the provisions of this section or in any civil action.” *Laws of 1949*, c. 196 §4.

<sup>29</sup> “Evidence of the chemical analysis or scientific breath test of any kind of such person's blood shall not be admissible unless such person shall have been advised ... that such person has the constitutional right not to submit to such test. Evidence taken in violation of this act shall not be admitted in evidence in any criminal or civil proceeding.” *Laws of 1965*, ex.s. c. 155 §60.

<sup>30</sup> *Laws of 1969*, c. 1 (Initiative Measure No. 242); RCW 46.20.308.

<sup>31</sup> See *State v. Baldwin*, 109 Wn. App. 516, 523, 37 P.3d 1220 (2001).

*Garcia-Salgado* establishes the privacy interest affected by breath-alcohol testing: “bodily integrity.” “Bodily integrity” is recognized as a fundamental liberty interest.<sup>32</sup> Bodily integrity means the State may not intrude within the body to obtain evidence without a warrant. Removing material from the inside of the mouth constituted an invasion of bodily integrity and was protected by Art. I, §7.<sup>33</sup> Here, there is no distinction between entering the oral cavity and having a person blow into a tube to capture deep lung air in the sample chamber of a breath test machine. The State is collecting evidence from within the body. This search implicates the recognized privacy protection in bodily integrity and thus invokes the heightened privacy protections found in Art. I, §7.

**c. *State v. Curran* does not establish that privacy rights involved in breath-alcohol testing are co-extensive under Art. I, §7 and the Fourth Amendment.**

The State argues that in *Curran*<sup>34</sup> this Court concluded that Art. I, §7 does not provide heightened protections to the collection of blood-

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<sup>32</sup> *American Legion Post #149 v. Wash. St. Dept. of Health*, 164 Wn.2d 570, 600, 192 P.3d 306 (2008). Fundamental liberty interests include the right to marry, to have children, to direct the education and upbringing of one's children, to marital privacy, to use contraception, to bodily integrity, and to abortion.

<sup>33</sup> *Garcia-Salgado*, at 184. In contrast, no privacy violation occurred when the State collected DNA evidence off a licked envelope. Voluntary exposure is relevant to whether there is a privacy violation. See *State v. Athan*, 160 Wn.2d at 366.

<sup>34</sup> 116 Wn.2d 174, 184, 804 P.2d 558 (1991); abrogated on other grounds; *State v. Berlin*, 133 Wn.2d 541, 947 P.2d 700 (1997).

alcohol evidence. A careful review of *Curran* establishes the State's reliance on the opinion is misplaced.

*Curran* commences with a flawed application of Art. I, §7, stating, “[B]oth [the Fourth Amendment and Art. I, §7] prohibit only unreasonable searches and seizures;” citing *State v. Judge*<sup>35</sup> as authority.”<sup>36</sup> *Judge*, however, makes no claim that Art. I, §7 and the Fourth Amendment are co-extensive.<sup>37</sup> *Judge* cites to *Meacham*;<sup>38</sup> a case addressing a court ordered blood test to determine paternity. The Court only briefly addressed the ramifications of the blood test as a search, stating it was reasonable under a Fourth Amendment balance test.<sup>39</sup> Since neither *Meacham* nor *Judge* engaged in any meaningful analysis under Art. I, §7, the State's reliance on *Curran* is not persuasive.

The State's only legal authority to support its argument comes from states that employ a Fourth Amendment reasonableness test.<sup>40</sup> The State compares apples and oranges. The distinctions between a breath and blood test are only relevant if a reasonableness test is used within the

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<sup>35</sup> *State v. Judge*, 100 Wn.2d 706, 711-712, 675 P.2d 219 (1984).

<sup>36</sup> *Curran*, at 184.

<sup>37</sup> *Judge*, at 711.

<sup>38</sup> *State v. Meacham*, 93 Wn.2d 735, 612 P.2d 795 (1980).

<sup>39</sup> *Meacham*, at 738-739.

<sup>40</sup> Brief of Petitioner, pg. 23; 28; 32-33; Petitioner's Reply, pg. 2-3; 8.

constitutional analysis. This Court should reject the State's invitation to evaluate breath-alcohol test evidence under a reasonableness test here.

**3. This Court must hold the State accountable to the established principles justifying a warrantless search under exigent circumstances; this Court should not condone manufactured exigency under the implied consent law.**

The State asserts that because breath testing is less invasive, this Court need not employ a totality of the circumstances test to determine if exigency supports a warrantless search.<sup>41</sup> Instead, the implied consent law establishes codified exigency regardless of the facts of a case.<sup>42</sup>

The State ignores the most fundamental aspect of any exigency based search; the State must show a "need for particular haste."<sup>43</sup> Only once this is established does this Court consider any of the bases for exigency.<sup>44</sup> A court must look to the totality of the circumstances.<sup>45</sup>

**a. The State is asking this Court to deviate from established principles justifying a finding of exigent circumstances by permitting a warrantless search without ever having to explain why a warrant cannot be obtained under the specific facts of each case.**

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<sup>41</sup> Brief of Petitioner, pg. 26.

<sup>42</sup> Brief of Petitioner, pg. 26.

<sup>43</sup> *State v. Tibbles*, 169 Wn.2d 364, 371, 236 P.3d 885 (2010).

<sup>44</sup> "This court has identified five circumstances from federal cases that "could be termed 'exigent' " circumstances. They include "(1) hot pursuit; (2) fleeing suspect; (3) danger to arresting officer or to the public; (4) mobility of the vehicle; and (5) mobility or destruction of the evidence." *Id.* (citations omitted).

<sup>45</sup> *Tibbles*, at 371.

Exceptions to the warrant requirement are not mere formalities to legitimize warrantless searches; rather they are “narrowly tailored,” “carefully drawn,” and jealously guarded” exceptions permitting the state to invade our privacy interests.<sup>46</sup>

In *Valdez*<sup>47</sup> this Court re-aligned the search incident to arrest exception to its historical roots as an exception borne out of a necessity to promote officer safety and prevent destruction of evidence, and to conduct a search because “time is of the essence.”<sup>48</sup> This Court expressed concern that it had been improperly broadened over time “beyond these underlying justifications.”<sup>49</sup> While cases permitting this unwarranted expansion have been largely overruled, “they serve as clear reminders of the danger of wandering from the narrow principled justifications of the exception ...”<sup>50</sup>

Exigency historically is premised on actual necessity for a search dictated by the unique facts of the case; not mere convenience to the officer.<sup>51</sup> This limitation was recognized in *Schmerber*<sup>52</sup> and *McNeely*.<sup>53</sup>

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<sup>46</sup> *Ladson*, 138 Wn.2d at 356; *State v. Byrd*, 178 Wn.2d 611, 616, 310 P.3d 793 (2013).

<sup>47</sup> *State v. Valdez*, 167 Wn.2d 761, 224 P.3d 751 (2009).

<sup>48</sup> *Valdez*, at 773.

<sup>49</sup> *Valdez*, at 774.

<sup>50</sup> *Id.* Influencing the Court was the decision in *Arizona v. Gant*, 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). The Court corrected the unwarranted expansion of the search incident to arrest expansion in vehicle searches.

<sup>51</sup> *State v. Patterson*, 112 Wn.2d 731, 735, 774 P.2d 10 (1989).

The State is asking this Court to broaden exigency beyond the underlying justifications for the exception. This Court should reject this needless wandering from established principles supporting exigency as a “narrowly tailored” and “jealously guarded” warrant exception.

**b. Washington’s “two hour rule” presumes alcohol concentration does not change after arrest; defeating the State’s claim the “normal exigencies” of a DUI arrest establish exigent circumstances.**

Washington’s DUI law operates such that exigency is rarely an issue that calls for warrantless breath or blood testing.<sup>54</sup> Since 1993, a person is guilty of DUI if he or she drives a motor vehicle and, *within two hours after driving*, have an alcohol concentration of 0.08 or higher. RCW 46.61.502(1)(a).<sup>55</sup> This Court remarked, “We are satisfied ... it was the Legislature's prerogative to determine that there is a relevant relationship between a driver's alcohol concentration ... within two hours of driving,

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<sup>52</sup> *Schmerber* acknowledged the justifications for a search incident to arrest, but wrote where a search intrudes beyond the body’s surface the need for a warrant is “indisputable and great.” At 769. The officer faced “special” facts and was justified in collecting blood without a warrant, but its decision may be different under different facts. *Id.*

<sup>53</sup> *McNeely* reiterated that exigency must be based on a fact specific inquiry; At 1559, and rejected the argument that alcohol dissipation alone creates a basis to perform a warrantless search. At 1563. Under the facts of the case, exigency was never established.

<sup>54</sup> The State asserts that a warrantless search is justified by the “normal exigencies” of a DUI arrest; Brief of Petitioner, pg. 26, but never describes what that is. Case law describes a “normal” exigency as antithetical to exigent circumstances. See *Rotker v. Rotker*, 195 Misc.2d 768, 776, 761 N.Y.S.2d 787 (2003); *Hallett v. Stone*, 216 Kan. 568, 578, 534 P.2d 232 (1975); and *Allen v. Webb*, 87 Nev. 261, 268, 485 P.2d 677 (1971).

<sup>55</sup> See *Laws of 1993*, ch. 328.

and the ability of that driver to have safely operated a motor vehicle within the previous two hours.”<sup>56</sup>

The State must acknowledge that the “two hour rule” is premised on scientific research that finds the alcohol concentration in blood does not dissipate as quickly after consumption as previously thought.<sup>57</sup> Rodney Gullberg, a prominent researcher for the State Patrol, concluded in 1991;

“Breath alcohol measurements performed within two hours of driving certainly provide a reasonable estimation, within experimental limitations, of the [breath alcohol concentration] at the time of driving for forensic purposes.”<sup>58</sup>

Since alcohol concentration in blood is static for a significant period of time, and our DUI law is premised on this concept, the State is hard-pressed to establish the need for codified exigency for every DUI breath test. The State routinely relies on breath test results obtained within two hours of driving to prosecute DUI crimes regardless if the test was actually taken fifteen minutes<sup>59</sup> after driving or one hour and fifty-nine minutes after driving. Each test is admissible under the two hour rule.

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<sup>56</sup> *State v. Crediford*, 130 Wn.2d 747, 754, 927 P.2d 1129 (1996).

<sup>57</sup> Rodney G. Gullberg, Wash. State Patrol Breath Test Section, *Differences between Roadside and Subsequent Evidential Breath Alcohol Results and Their Forensic Significance*, 52 J. of Stud. on Alcohol No. 4 pg. 311 (July 1991)).

<sup>58</sup> *Id.*, at 316.

<sup>59</sup> A breath test must be preceded by a fifteen minute wait period. RCW 46.61.506(4)(a)(ii & iii).

**c. No special facts exist in Baird and Adams to excuse the State from seeking a warrant prior to a breath-alcohol test.**

Nothing in the record of either Baird or Adams suggests exigent circumstances existed to perform a warrantless test. Adams was arrested at 2:07 am.<sup>60</sup> For the next 33 minutes the trooper (1) showed Adams that her front headlight was not working, (2) waited for a tow truck, and (3) then drove her to a local police station.<sup>61</sup> Once there she was read a Miranda warning (2:40 am), spoke with a lawyer (2:56 am to 3:16 am), and was read the implied consent warning (3:19 am), after which she refused to consent to a breath test.<sup>62</sup> Had she consented, considering the fifteen minute wait period, the test would have occurred at approximately 3:34 am, or one hour and twenty-seven minutes after driving; well within the two hour rule. Baird was arrested at approximately 10:00 pm and waited at the scene for a tow truck and second officer to arrive.<sup>63</sup> A second trooper read Baird the implied consent warning at 10:34 pm and a breath test was started at 10:56 pm; 56 minutes after the arrest.<sup>64</sup>

No explanation is provided why officers could not seek a warrant

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<sup>60</sup> CP 370

<sup>61</sup> CP 370

<sup>62</sup> CP 267, 269, 370

<sup>63</sup> CP 160; 162

<sup>64</sup> CP 164; 166

in either case.

**d. The State Patrol has resources to expedite a search warrant request in a DUI investigation.**

CrRLJ 2.3(c) states that authorization for a warrant may be done through any “reliable method.” The State Patrol posts on its website a formatted search warrant and declaration that can be filled in on a computer and emailed to a judge.<sup>65</sup> The State Patrol is working with other agencies to create the ELIAS project<sup>66</sup> which is a web-based application linking police, prosecutors, and judges in one integrated system to expedite the search warrant process statewide. These technological advances demonstrate the practicability in almost all DUI cases for police to obtain a warrant. In particular to Baird and Adams, there is no reason to excuse the State from the exigency requirements expected by this Court.

**4. This Court must hold that where the State fails to satisfy exigent circumstances requirements, warrantless breath-alcohol testing must be premised on the person’s actual consent, and the decision to withhold consent may not be used against the defendant at trial.**

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<sup>65</sup> See [www.wsp.wa.gov/breathtest/dredocs.php](http://www.wsp.wa.gov/breathtest/dredocs.php) (visited March 26, 2015).

<sup>66</sup> Electronic Law Enforcement Interface for the Application of Search Warrants. [http://www.trafficrecordsforum.org/program/presentations/Presentations\\_2014\\_trf/S\\_33\\_lebya\\_search\\_warrants.pptx](http://www.trafficrecordsforum.org/program/presentations/Presentations_2014_trf/S_33_lebya_search_warrants.pptx) (visited March 26, 2015)

The State acknowledges that a warrantless breath-alcohol test may be administered with the person's actual consent.<sup>67</sup> Consent is an independent basis for a warrantless search.<sup>68</sup>

**a. Absent exigency, the right to withhold consent is a constitutional right, not a matter of legislative grace.**

Inherent within "consent" is the ability to revoke it.<sup>69</sup> The implied consent law operates under the assumption that a driver "consents" to breath-alcohol testing by driving.<sup>70</sup> Accordingly, such consent may be withdrawn at any time.<sup>71</sup>

The application of constitutional "consent" to the implied consent law has a clear effect on the decision to withhold consent. The law states that a refusal may be used at trial.<sup>72</sup> Based on the assumption that exigent

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<sup>67</sup> Brief of Petitioner, pg. 38.

<sup>68</sup> *State v. Tyler*, 177 Wn.2d 690, 707, 302 P.3d 165 (2013).

<sup>69</sup> *State v. Ruem*, 179 Wn.2d 195, 208, 313 P.3d 1156 (2013); *Florida v. Jimeno*, 500 U.S. 248, 252, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991). In *Ruem*, police sought consent to search a mobile home. Ruem allowed police to enter, but changed his mind. Police entered anyway and found marijuana leading to his arrest. At 198. In finding consent not existent, the Court was clear that whatever consent was initially provided had been clearly revoked. At 208.

<sup>70</sup> RCW 46.20.308(1).

<sup>71</sup> The implied consent law imposes licensing consequences on this decision, which are not relevant to this appeal. RCW 46.20.308(2); RCW 46.20.3101.

<sup>72</sup> RCW 46.20.308(2). The State asserts that Respondents' argument renders the implied consent law, and RCW 46.61.517, unconstitutional. There are, however, several scenarios where a person's refusal to submit a breath sample may be admissible evidence without a warrant. A person may give consent to a test and then subsequently manipulate the breath test tube or purposefully fail to provide a valid sample of breath to frustrate the testing process. Under such circumstances this evidence may be admissible at trial.

circumstances permits a warrantless search, courts frequently refer to the right to refuse as an act of “legislative grace.”<sup>73</sup> In light of *McNeely*, it is clear that the implied consent law cannot operate as de facto exigency; therefore the right to withhold consent is no longer a function of legislative grace, but is the assertion of a constitutional right.

**b. Absent exigency the State has no authority to comment on a person’s decision to withhold consent to a search for breath-alcohol evidence.**

The State is not permitted to comment on a person’s exercise of the right to withhold consent. This issue was addressed in *State v. Gauthier*.<sup>74</sup>

“[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. *Id.*, at 1351. This is so, the court explained, regardless of the individual's motivations. *Id.* The right to refuse consent exists for both the innocent and the guilty. *Id.*, at 1352. If the government could use such a refusal against an individual, it would place an unfair and impermissible burden upon the assertion of a constitutional right.”<sup>75</sup>

“The constitutional violation was that Gauthier's lawful exercise of a constitutional right was introduced against him as substantive evidence of his guilt.”<sup>76</sup>

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<sup>73</sup> *State v. Bostrom*, 127 Wn.2d 580, 590, 902 P.2d 157 (1995). *Bostrom* referred to alleged state power to perform compulsory blood alcohol test. *Id.*

<sup>74</sup> *State v. Gauthier*, 174 Wn. App. 257, 298 P.3d 126 (2013). A defendant accused of rape agreed to provide a voluntary DNA sample, but later refused. *Gauthier*, at 261. At trial, the prosecutor portrayed the refusal as consciousness of guilt evidence. At 262.

<sup>75</sup> *Gauthier*, at 264.

<sup>76</sup> *Gauthier*, at 267.

“The error deprived Gauthier of his right to invoke with impunity the protection of the Fourth Amendment and Art, I, §7. To hold otherwise would improperly penalize defendants for the lawful exercise of a constitutional right.”<sup>77</sup>

Application of *Gauthier* under these circumstances supports Adams’ argument. By failing to articulate exigent circumstances, the State has no basis to compel a warrantless breath-alcohol test. This situation is distinguishable from *State v. Mecham*<sup>78</sup> and *State v. Nordlund*,<sup>79</sup> where courts held the State could comment on withholding consent because an independent warrant exception justified the request to search making consent constitutionally irrelevant. Here, consent is everything.

#### **V. CONCLUSION**

For the reasons herein stated the WFCJ asks this Court to rule against the State and affirm the trial court rulings in Baird and Adams.

Respectfully submitted the 27<sup>th</sup> day of March, 2015.



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Jonathan Rands, WSBA #32793  
George Bianchi, WSBA #12292

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<sup>77</sup> *Gauthier*, at 267.

<sup>78</sup> 181 Wn. App. 932, 946, 331 P.3d 80 (2014).

<sup>79</sup> 113 Wn. App. 171, 187, 53 P.2d 520 (2002).

## OFFICE RECEPTIONIST, CLERK

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Dear Clerk,

Attached for filing in this matter, State of Washington v. Dominic Baird & Collette Adams, Case #90419-7, is the following document(s):

- (1) Motion of Washington Foundation for Criminal Justice to file Amicus Curiae Memorandum
- (2) Brief Amicus Curiae of Washington Foundation for Criminal Justice and Appendix for Amicus Curiae
- (3) Declaration of Service

All other parties are being served a copy of these items by Legal Messenger or US Mail, and also by email. Please contact us if there are any problems with the attachment coming through in this submission.

Shannon O'Leary, Paralegal

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