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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.

BRIEF OF PETITIONER

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ORIGINAL

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A. INTRODUCTION

Washington's implied consent statute, RCW 46.20.308, provides that "[a]ny 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 the alcohol concentration..." after he or she is lawfully arrested for driving under the influence ("DUI"). No warrant is required to test the driver's breath. By statute, the refusal to take the breath test is admissible into evidence at a subsequent criminal trial, and a driver suffers adverse licensing consequences and enhanced criminal penalties for refusing. For over four decades, the warrantless testing of breath authorized by the implied consent statute has been upheld against constitutional challenges. See e.g., State v. Judge, 100 Wn.2d 706, 675 P.2d 219 (1984) (citing Schmerber v. California, 384 U.S. 757, 70-71, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966)).

In Missouri v. McNeely, ___ U.S. ___, 133 S. Ct. 1552, 185 L. Ed. 2d 696 (2013), the United States Supreme Court re-examined Schmerber in the context of a forced warrantless blood draw taken outside the scope of Missouri's implied consent law. The Court held that the dissipation of alcohol was not an exigent circumstance

that standing alone justified such an invasive search in every DUI case. Id. at 1568. McNeely did not overrule Schmerber; rather, it clarified that Schmerber applied to forced blood draws, and that blood could be drawn only based on exigent circumstances specific to the case.

Dominic Baird and Collette Adams were each lawfully arrested for DUI in separate incidents. Arresting officers provided Baird and Adams with the implied consent warnings required by statute, and asked each to submit to a breath test to measure breath alcohol concentration ("BAC"). Baird agreed to take the test; Adams refused the test.

Baird moved to suppress evidence of the BAC results, while Adams moved to suppress her refusal. Although a blood draw was not an issue in either case, the King County District Court concluded that McNeely fundamentally changed the law with respect to implied consent *breath* testing and granted the motions. In Baird's case, the court further ruled that Baird's implied consent to the breath test under RCW 46.20.308(1) was insufficient, and that his consent to the test was coerced. In Adams's case, the court suppressed Adams's refusal under the theory that a person

may refuse to consent to a warrantless search. State v. Gauthier, 174 Wn. App. 257, 267, 298 P.3d 126 (2013).

The State respectfully argues that the district courts erred by applying McNeely beyond its narrow scope. McNeely is limited to blood draws because they are invasive; it did not limit breath testing pursuant to an implied consent statute. Unlike the forced blood draw at issue in McNeely, a breath test is a minimal intrusion that does not implicate significant privacy concerns. It is administered only with probable cause and using reasonable means, and it preserves rapidly dissipating evidence of intoxication. Under Schmerber, a warrantless breath test administered pursuant to the implied consent statute is still constitutional. This Court should reverse the district court suppression orders.

B. ASSIGNMENTS OF ERROR

1. The district court erred in State v. Baird by ruling that a breath test administered pursuant to RCW 46.20.308 requires a warrant.
2. The district court erred in State v. Baird by finding that no exigent circumstances justified Baird's breath test.

3. The district court erred in State v. Baird by entering an order suppressing Baird's breath test for trial.

4. The district court erred in State v. Adams by ruling that no exigent circumstances justified the request for Adams's breath.

5. The district court erred in State v. Adams by ruling that Adams had a constitutional right to refuse the breath test offered pursuant to RCW 46.20.308.

6. The district court erred in State v. Adams by entering an order suppressing Adams's refusal to submit to the breath test.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. After Missouri v. McNeely, do exigent circumstances justify a warrantless breath test offered under RCW 46.20.308?

2. RCW 46.20.308 authorizes a warrantless breath test when a driver is lawfully arrested for DUI. Baird was lawfully arrested for DUI, provided the required implied consent warnings, and agreed to take the breath test. Did the district court err by suppressing Baird's breath test results because the test was administered without a warrant?

3. RCW 46.61.517 provides that a person's refusal to submit to a breath test "is admissible into evidence at a subsequent criminal trial." RCW 46.61.5055 imposes an enhanced mandatory minimum DUI sentence if the refusal is proven beyond a reasonable doubt. Did the district court err by concluding that admitting evidence of Adams's refusal to take the breath test would violate her Fourth Amendment and article 1, section 7 rights?

D. STATEMENT OF THE CASE

1. STATE V. DOMINIC BAIRD

On November 21, 2012, at about 9:40 pm, Washington State Patrol ("WSP") Trooper Phil Riney was on patrol on State Route 167 in south King County when he saw a vehicle, driven by Dominic Baird, repeatedly drift over the lane line by at least one tire width and "jerk" back into its own lane.¹ 2RP 8-10; Clerk's Papers (CP) 141. Baird's speed fluctuated between 45 and 70 miles per hour in the posted 60 mile per hour zone. 2RP 10-11; CP 141-42. Trooper Riney conducted a traffic stop. 2RP 12; CP 142.

¹ The verbatim record of proceedings consists of three volumes, cited as follows: 1RP = 1/23/14, 3/27/14; 2RP = 4/10/14; 3RP = 5/21/14.

Baird's eyes were bloodshot and watery, and both his breath and his vehicle smelled like alcohol. 2RP 12-14; CP 142. He told Trooper Riney that he had only one drink over an hour earlier. 2RP 13, CP 142. Baird agreed to perform field sobriety tests, and showed all six "clues" of horizontal gaze nystagmus. 2RP 14, 16; CP 142. He performed poorly on the Walk and Turn test, and at one point placed his hand on Trooper Riney's patrol car to maintain his balance. 2RP 18; CP 142. At 10:00 p.m., Trooper Riney arrested Baird for DUI. 2RP 19-20; CP 142.

WSP Trooper Christopher Poague responded to the scene and took custody of Baird for DUI processing. 2RP 28, 30, 37; CP 143. Trooper Poague drove Baird to the Kent Police Department, where he provided Baird with the implied consent warnings. 2RP 33; CP 143, 166. Baird agreed to a breath test, and signed the form. 2RP 34-35; CP 143, 166. After the required 15 minute observation period, Baird provided two breath samples measuring 0.138 g/100 mL and 0.130 g/100 mL, well above the legal breath alcohol concentration limit of 0.08 g/100 mL. 2RP 35-36; CP 143; 164.

The State charged Baird with one count of DUI in King County District Court. CP 159. Baird stipulated that Trooper Riney had

probable cause to arrest him for DUI, but moved to suppress the breath test results, arguing that McNeely rendered the implied consent statute unconstitutional. 2RP 56-57; CP 127-38. Further, although he agreed to take the test, he argued that his consent to the test was coerced because the implied consent warning advised him that his refusal may be offered against him in a criminal trial. 2RP 57; CP 129-133.

On April 25, 2014, the court entered a written order granting Baird's motion. CP 141-157. Relying on McNeely, the court found that no exigent circumstances existed in Baird's case, and that his breath test was not a search incident to arrest. CP 150-56. The court also concluded, based on an apparent concession from the prosecutor during argument, that Baird's consent to the breath test was involuntary because the language of the implied consent warning coerced him to take the test. CP 156-57. Finding that no other warrant exception applied to the search of Baird's breath, the court granted Baird's motion to suppress. CP 157.

2. STATE V. COLLETTE ADAMS

On April 6, 2013, WSP Trooper David Kiehl was on patrol in downtown Bellevue, near the intersection of 108th Avenue and Northeast 8th Streets, when he saw Collette Adams drive through the intersection with a burned out headlight. 1RP 10, 14-15; 352. It was around 2:00 a.m., so Trooper Kiehl conducted a traffic stop. 1RP 14, 16.

Adams failed to respond to the emergency lights. 1RP 16. She drove four more blocks and entered a parking garage. 1RP 16-17; CP 352. After Trooper Kiehl used his public address system to ask Adams to stop, Adams complied. 1RP 17; CP 353.

Adams's breath smelled like alcohol and she had bloodshot eyes. 1RP 17, 19. When she stepped out of her car, she rocked backwards and nearly lost her balance. 1RP 18-19; CP 353. With slurred speech, she told Trooper Kiehl that she had only one drink, about an hour earlier. 1RP 18-19; CP 353.

When Trooper Kiehl asked Adams if she would participate in field sobriety tests, she replied, "I have an attorney. I'll take a blood test." CP 353. After Trooper Kiehl explained that he could not offer Adams a blood test on the side of the road, Adams agreed to the field

sobriety tests. 1RP 21. She displayed all six "clues" of horizontal gaze nystagmus. 1RP 26. On the Walk and Turn test, Adams could not follow all the instructions. 1RP 30. She attributed her poor balance to her anatomy, not intoxication. 1RP 31.

Trooper Kiehl arrested Adams for DUI and drove her to the Clyde Hill Police Station for processing. 1RP 33-34; CP 353. Once there, Adams requested to speak to an attorney. 1RP 35. Trooper Kiehl reached a public defender, with whom Adams spoke for 20 minutes. 1RP 34-35. Trooper Kiehl then read Adams the implied consent warnings, and she declined to take the breath test. 1RP 36-37; CP 353.

The State charged Adams with one count of DUI and the sentencing enhancement allegation for refusing a breath test. CP 366. Adams moved to suppress evidence of her refusal, arguing specifically that McNeely "fundamentally undermined the legal foundation of warrantless searches and implied consent," and that after McNeely, no warrant exception applied to her case. CP 386. She argued, therefore, that her refusal to submit to the breath test was inadmissible, both for trial and sentencing purposes. CP 388. The district court agreed and suppressed the refusal. CP 355.

3. STATUTORY WRIT OF REVIEW

The State petitioned the King County Superior Court for an interlocutory writ of review under RCW 7.16.040 and City of Seattle v. Holifield, 170 Wn.2d 230, 244-45, 240 P.3d 1162 (2010). CP 1-36; 201-57; see generally 3RP. The superior court consolidated the two cases, and on May 29, 2014, granted the State's petition. CP 78-87. The superior court recognized the minimally intrusive nature of a breath test, as opposed to a blood test, and that McNeely seemed to approve of implied consent breath testing and the various penalties for refusing such a test. CP 82-83. It concluded, therefore, that "McNeely arguably does not alter the application of the exigent circumstances exception to a breath test administered pursuant to an implied consent law." CP 82.

The superior court further recognized that the district court's pronouncement that a person now has a constitutional right to refuse a breath test conflicted with numerous holdings by Washington appellate courts. CP 84.

The State and Adams joined the superior court's request for direct review by this Court. Baird explicitly took no position. This Court granted review.

E. 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, 103 L. Ed. 2d 639 (1989). As a general rule, warrantless searches are per se unreasonable and violate both the federal and state constitutions. State v. Byrd, 178 Wn.2d 611, 616, 310 P.3d 793 (2013); U.S. Const. amend IV; Wash. Const. art. I, § 7. There are, however, a few jealously guarded exceptions to the warrant requirement; the State bears the burden of showing that an exception exists. Id.

The district court's rulings suppressing Baird's breath test and Adams' refusal are in direct conflict with numerous cases, with RCW 46.20.308 (which authorizes a warrantless breath test after a lawful arrest for DUI), and with RCW 46.61.517 (which explicitly provides that a refusal "is admissible in a subsequent criminal trial"). The rulings present two critical issues: (1) whether McNeely forbids a warrantless breath test administered under RCW 46.20.308; and (2) whether RCW 46.61.517 violates the constitutional right to be free from a warrantless search. These are

questions of law reviewed *de novo*. See State v. Abrams, 163 Wn.2d 277, 282, 178 P.3d 1021 (2008).

This Court should reverse the district court. A breath test requested pursuant to the implied consent statute is permissible under Schmerber and numerous Washington decisions. While McNeely changed the analysis with respect to highly invasive forced blood draws, it did not change the well-settled and long-standing application of Schmerber to implied consent breath testing.

1. IMPLIED CONSENT STATUTES ARE CONSTITUTIONAL.

All 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle, to submit to a breath alcohol test if lawfully arrested for DUI. McNeely, 133 S. Ct. at 1566 (citing Nat'l Highway Traffic Safety Admin., Alcohol and Highway Safety: A Review of the State of Knowledge 173 (No. 811374, Mar. 2011)). "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.

Before the enactment of Washington's implied consent law, no driver was required to submit to a breath or blood test for alcohol content, and a driver's refusal to submit to a test was not admissible into evidence in a criminal trial or subject to any civil penalties. See State v. Long, 113 Wn.2d 266, 268-73, 778 P.2d 1027 (1989) (reviewing history of implied consent and refusal evidence).

On November 5, 1968, the people of this State adopted the implied consent law through the initiative process. Initiative 242, Laws of 1969, ch.1, § 5. A person arrested for DUI was thereafter deemed to have consented to a breath or blood test. Long, 113 Wn.2d at 268. A driver retained the right to withdraw that statutory consent by refusing to take the test. Id. In its current form, the statute provides in relevant part:

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 the alcohol concentration...in his or her breath if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or

was in actual physical control of a motor vehicle while under the influence of intoxicating liquor....

RCW 46.20.308(1); Appendix A.

This Court has upheld Washington's implied consent law as constitutional. In State v. Moore, 79 Wn.2d 51, 483 P.2d 630 (1971), this 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). Id. at 54-58. This Court also held that, "[w]hether an accused's consent to the [breath] test be voluntary or involuntary, the law...is constitutionally sustainable..." Id. 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. 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. 384 U.S. 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. Id. 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 the three-factor Schmerber test to a nonconsensual blood draw in a vehicular homicide case) (abrogated on other grounds).

This Court has followed Schmerber for over 30 years. In Judge, this 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. 100 Wn.2d at 708-09, 718-19. Under the Fourth Amendment and article 1, section 7, the blood draw was constitutional because it “met the ‘reasonableness’ requirements of Schmerber.” Id. at 712.; see also Curran, 116 Wn.2d at 183-85 (applying Schmerber and holding that article I, 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....” Id. 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, 109 Wn. App. at 523–24 (admission of refusal to submit to blood test did not violate the Fourth Amendment or article I, section 7); Reid, 929 F.2d 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, 806 F.2d at 1450 (convictions for refusing a breath test upheld because no constitutional right to refuse); State v. Hoover, 123 Ohio St. 3d 418,

2007-Ohio-2295, 916 N.E.2d 1056, 1061 (2009) (sentence enhancement for refusing breath test affirmed because no constitutional right to refuse); Rowley v. Commonwealth, 48 Va. App. 181, 629 S.E.2d 188, 191 (2006) (conviction for refusing breath test affirmed 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, 74 L. Ed. 2d 748 (1983) the Court analyzed an implied consent statute that declared an arrestee’s refusal “may be admissible into evidence at the trial.”² 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; see also Pennsylvania v. Muniz, 496 U.S. 582, 604–05, 110 S. Ct. 2638, 110 L. Ed. 2d 528 (1990) (no Fifth Amendment violation by admitting audio and video evidence of a defendant refusing a

² Construing former S.D. Codified Laws §§ 32-23-10 and 19-13-28-1.

lawfully-requested breath test). This 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, 77 L. Ed. 2d 1267 (1983); Mackey v. Montrym, 443 U.S. 1, 19, 99 S. Ct. 2612, 61 L. Ed. 2d 321 (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 46.20.308 is admissible into evidence at a subsequent criminal trial." RCW 46.61.517. If the State proves the fact of refusal to a jury, see e.g., Alleyne v. United States, ___ U.S. ___, 133 S. Ct. 2151, 186 L. Ed. 2d 314 (2013), RCW 46.61.5055(9)(c) mandates a longer license revocation for a driver who refuses to take a breath test. Appendix B. 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. See Long, 113 Wn.2d at 268-70 (discussing various amendments and precedent interpreting those amendments). For example, in State v. Zwicker, this Court analyzed the former version of RCW 46.61.517, and held that because the statute explicitly prohibited an inference of guilt, refusal evidence was not relevant as a matter of law. 105 Wn.2d at 238, 240-42.

After Zwicker, the legislature amended the statute to abrogate this Court's holding, deleting the prohibition on the inference of guilt. Laws of 1986, ch. 64, § 2. This 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. 113 Wn.2d 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. Id. at 271-72.

2. McNEELY DOES NOT RENDER IMPLIED
CONSENT STATUTES UNCONSTITUTIONAL.

a. McNeely applies only to forced blood draws.

In McNeely, the United States Supreme Court accepted review on a narrow issue: "whether the natural metabolization of alcohol in the bloodstream presents a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." 133 S. Ct. 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 officer directed the hospital staff to draw McNeely'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 McNeely'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-rooted expectations of privacy.

Id. at 1558 (internal citations and quotations omitted). The Court returned to that 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 the 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 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.

133 S. Ct. at 1566; see Stevens v. Comm'r of Pub. Safety, 850 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) ("McNeely 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 § 291E-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).

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

In Skinner, 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. 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, 186 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, 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 of 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." 133 S. Ct. at 1565.

- c. 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.³ 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. at 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"⁴ without sufficient

³ 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 a breath test pursuant to the implied consent statute, and the driver refuses, "no test shall be given except as authorized by a search warrant." RCW 46.20.308(4).

⁴ 133 S. Ct. at 1565.

cause, the Court's language approving of implied consent statutes, and the wealth of authority upholding such statutes as constitutional, McNeely cannot be read to encourage such an expanded use of forced blood draws.

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

- a. 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 I, 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 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.⁵ 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

⁵ 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).

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 higher within two hours of driving, and has directed increased criminal penalties for driving with an alcohol concentration greater than 0.15 g/100 mL.⁶ 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. at 1571 (Roberts, C.J.).

⁶ 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).

While it is true that the State may use retrograde extrapolation⁷ 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 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, like the one administered to Baird and refused by Adams.

⁷ 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).

- b. 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, 133 S. Ct. at 1565; see Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 451, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990) ("For decades, this Court has 'repeatedly lamented the tragedy' [of drunk driving]"). The Legislature has specifically found that drunk driving wreaks havoc.

Despite every effort, the problem of driving or controlling a vehicle while under the influence of alcohol or drugs remains a great threat to the lives and safety of citizens. Over five hundred people are killed by traffic accidents in Washington each year and impaired vehicle drivers account for almost forty-five percent, or over two hundred deaths per year. That is, impairment is the leading cause of traffic deaths in this state[.]

RCW 46.55.350(1)(a). This Court recognized this problem over four decades ago in Moore. 79 Wn.2d at 53 ("The intoxicated driver is undoubtedly an increasing public menace of alarming proportions.").

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, 127 Wn.2d at 588. Indeed, the express purpose of the implied consent law is to combat the grave societal ill of drunk driving. See Laws of 2004, ch. 68, § 1 ("[P]roperty loss, injury, and death caused by drinking drivers continue at unacceptable levels. This act is intended to convey the seriousness with which the legislature views this problem...[and] to ensure swift and certain consequences for those who drink and drive"). 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. See State v. White, 44 Wn. App. 276, 278, 722 P.2d 118 (1986) (arrested persons have a diminished expectation of privacy).

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, 60 L. Ed. 2d 447 (1979) (the Fourth Amendment requires "a balancing of the need for the particular search against the invasion of personal rights that the search entails"); see State v. Duncan, 146 Wn.2d 166, 177, 43 P.3d 513 (2002) (article I, section 7 permits a higher level of police intrusion for higher risk crimes); State v. Patterson, 112 Wn.2d 731, 735, 774 P.2d 10 (1989) ("Necessity, a societal need to search without a warrant, provides the underlying theme... Against societal need, we balance privacy interests provided by article 1, section 7 of our own constitution"). In the DUI context, the Court of Appeals applied such a balancing test when it upheld the warrantless administration of field sobriety tests because "a drunk driver presents a grave danger to the public" and "the degree of intrusion is not excessive and a field sobriety test is an appropriate technique to measure the suspect's intoxication." State v. Mecham, No. 69613-1-I, Slip. Op. at *9 (Wash. Ct. App. June 23, 2014).

Prosecutors filed approximately 31,730 misdemeanor DUI cases in 2013, and almost 5,000 in the first two months of 2014. CP 100. Should this Court adopt the district court's rationale, it is reasonable to assume that this State's judges would be asked to review an additional 30,000 warrants per year, most likely in the middle of the night. At the same time, law enforcement officers will be off the road for much longer periods of time. 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. See 133 S. Ct. at 1562-63. The same does not hold true for implied consent breath testing.

The practicality of obtaining a warrant should also be measured by the practical impossibility of compelling performance of the 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. See WAC 448-16-050 (a person must exhale air twice into the instrument with a value sufficient to allow for measurement); RCW 46.61.506(4). In comparison, a blood draw conducted pursuant to a warrant does not require the arrestee to affirmatively act.

Against the weight of authority, the district court simply discarded all of these considerations as "policy arguments," CP 155, and summarily rejected the distinction between breath tests and forced blood draws. CP 349. This was clear error. Given the minimally intrusive nature of breath testing and the reasonable means used to carry it out, a breath test administered pursuant to the implied consent law is a constitutionally sound method of carrying out the public's interest in enforcing DUI laws.

4. A DRIVER DOES NOT HAVE A CONSTITUTIONAL RIGHT TO REFUSE A BREATH TEST LAWFULLY REQUESTED UNDER THE IMPLIED CONSENT STATUTE.

In Neville, 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.

459 U.S. at 560 n.10, 563-64. 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.⁸ Instead, the right to refuse a breath test is statutory. Bostrom, 127 Wn.2d at 590.

McNeely 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 Mecham, Slip. Op. at *10, 12 (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

⁸ See e.g., Baldwin, 109 Wn. App. at 523-24; Reid, 929 F.2d at 994-95; Burnett, 806 F.2d at 1450; Hoover, 916 N.E.2d at 1061; Rowley, 629 S.E.2d at 191; Commonwealth v. Davidson, 545 N.E.2d 55, 56-57 (Mass. 1989).

showed consciousness of guilt when the State had a court order to collect the sample).⁹

If the district court is correct that the effect of McNeely is to effectively eliminate implied consent breath testing, admitting refusal evidence or imposing refusal penalties *does* violate the Fourth Amendment and article 1, section 7. See Gauthier, 174 Wn. App. at 261, 267 (evidence and argument that a rape suspect refused a DNA sample violated his right to be free from a warrantless search, absent a warrant exception); see also State v. Jones, 168 Wn.2d 713, 725, 230 P.3d 576 (2010) (reversing conviction on other grounds but noting that prosecutor's argument that defendant refused to take a DNA test was improper because he had a Fourth Amendment right to refuse the search); United States v. Prescott, 581 F.2d 1343, 1353 (9th Cir. 1978) (refusal to allow warrantless search of an apartment not admissible). But for

⁹ Post-McNeely, only a few foreign state courts have addressed refusal evidence. See, e.g., State v. Bernard, 844 N.W.2d 41, 46 (Minn. Ct. App. 2014) (review granted, Minn. No. 13-1245, oral argument heard September 24, 2014) (holding that because an officer had probable cause to search and *could have* obtained a warrant, the defendant's refusal was both admissible and punishable); State v. Padley, 2014 WI App 66, 354 Wis.2d 545, 849 N.W.2d 867, 876-81 (2014) (Wis. Ct. App.) (the implied consent law does not actually authorize any search, and instead, constitutionally authorizes a choice between two options, either to consent or to refuse); State v. Moore, 354 Or. 493, 318 P.3d 1133, 1138-39 (2013) (assuming but not deciding that refusal evidence may, in some cases, violate a person's right to be free from a warrantless search).

all of the reasons explained above, the district court erred.

McNeely did not invalidate implied consent breath testing. Thus, the State 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.*

5. ACTUAL CONSENT AS AN ALTERNATE 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., but the consent must not be the product of coercion, express or implied. Schneckloth v. Bustamonte, 412 U.S. 218, 227, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

To date, Washington courts have held that actual consent to an implied consent breath test is irrelevant. See Avery, 103 Wn. App. at 534; State v. Krieg, 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 law. Courts in other states have now relied on this exception to justify a breath test administered under an implied consent law. See Moore, 354 P.3d at 1137; 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 this Court holds that McNeely extends to breath tests and invalidates Washington's implied consent statute, it should consider this alternative argument accepted by many states.

Below, Baird argued that his consent to the breath test was coerced because the warnings informed him that, if he refused, his driver's license "will be revoked" and his refusal "may be used in a criminal trial." CP 166. At the suppression hearing, the prosecutor acknowledged that advising a suspect like Baird about the administrative and criminal penalties for refusing a breath test *may* be construed as coercive, such that Baird's consent to the test was not entirely voluntary. 2RP 62-63.

The prosecutor's acknowledgment at the hearing is not without precedent. In State v. Machuca, 231 Or. App. 232; 218 P.3d 145, 150-53 (2009) (Machuca I) (overruled by Moore, 318 P.3d at 1140), the Oregon Court of Appeals concluded that a defendant's consent to blood and urine tests was involuntary after he was advised, pursuant to Oregon's implied consent statute, that he would be penalized if he did not consent. His consent was unconstitutionally coerced by the threat of adverse consequences. Id. at 150; see e.g., Forsyth v. State, 438 S.W.3d 216 (Tex. Ct. App. 2014) ("We decline to hold that implied consent...is the equivalent to voluntary consent as a recognized exception to the warrant requirement). Mindful of this authority, the State did not rely on the consent exception below.

An appellate court, however, is not bound by an erroneous concession of law. State v. Lewis, 62 Wn. App. 350, 351, 814 P.2d 232 (1991). Post-McNeely, foreign state courts have now adopted the "consent" argument. The Oregon Supreme Court reversed course and overruled Machuca I in Moore, holding that the implied consent warnings are not unconstitutionally coercive. 318 P.3d at 1140. Likewise, the Minnesota Supreme Court found valid consent in Brooks, post-McNeely. 838 N.W.2d at 572. In Won, the Hawaii

Court of Appeals avoided the issue, simply concluding that “by driving on a public road, the driver has consented to testing.” 332 P.3d at 680; compare State v. Butler, 232 Ariz. 84, 302 P.3d 609, 613 (2013) (the state must make an independent showing of voluntary consent, notwithstanding the implied consent statute). Although this exception has never been considered by Washington courts, this Court may certainly adopt the rationale in this case.

F. CONCLUSION

The constitutionality of a breath test administered pursuant to Washington’s implied consent statute is well-settled and remains unchanged, even after McNeely. The district court’s decisions suppressing breath test and breath test refusal evidence conflict with long-standing precedent and significantly undermine the compelling state interest in effectively and efficiently combatting drunk driving. This Court should reverse the district court.

DATED this 22nd day of October, 2014.

Respectfully submitted,
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Appendix A: RCW 46.20.308

RCW 46.20.308

Implied consent — Test refusal — Procedures.

(1) Any person who operates a motor vehicle within this state is deemed to have given consent, subject to the provisions of RCW 46.61.506, to a test or tests of his or her breath for the purpose of determining the alcohol concentration, THC concentration, or presence of any drug in his or her breath if arrested for any offense where, at the time of the arrest, the arresting officer has reasonable grounds to believe the person had been driving or was in actual physical control of a motor vehicle while under the influence of intoxicating liquor or any drug or was in violation of RCW 46.61.503. Neither consent nor this section precludes a police officer from obtaining a search warrant for a person's breath or blood.

(2) The test or tests of breath shall be administered at the direction of a law enforcement officer having reasonable grounds to believe the person to have been driving or in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or any drug or the person to have been driving or in actual physical control of a motor vehicle while having alcohol or THC in a concentration in violation of RCW 46.61.503 in his or her system and being under the age of twenty-one. The officer shall inform the person of his or her right to refuse the breath test, and of his or her right to have additional tests administered by any qualified person of his or her choosing as provided in RCW 46.61.506. The officer shall warn the driver, in substantially the following language, that:

(a) If the driver refuses to take the test, the driver's license, permit, or privilege to drive will be revoked or denied for at least one year; and

(b) If the driver refuses to take the test, the driver's refusal to take the test may be used in a criminal trial; and

(c) If the driver submits to the test and the test is administered, the driver's license, permit, or privilege to drive will be suspended, revoked, or denied for at least ninety days if:

(i) The driver is age twenty-one or over and the test indicates either that the alcohol concentration of the driver's breath is 0.08 or more or that the THC concentration of the driver's blood is 5.00 or more; or

(ii) The driver is under age twenty-one and the test indicates either that the alcohol concentration of the driver's breath is 0.02 or more or that the THC concentration of the driver's blood is above 0.00; or

(iii) The driver is under age twenty-one and the driver is in violation of RCW 46.61.502 or 46.61.504; and

(d) If the driver's license, permit, or privilege to drive is suspended, revoked, or denied the driver may be eligible to immediately apply for an ignition interlock driver's license.

(3) Except as provided in this section, the test administered shall be of the breath only. If an individual is unconscious or is under arrest for the crime of felony driving under the influence of intoxicating liquor or drugs under RCW 46.61.502(6), felony physical control of a motor vehicle while under the influence of intoxicating liquor or any drug under RCW 46.61.504(6), vehicular homicide as provided in RCW 46.61.520, or vehicular assault as provided in RCW 46.61.522, or if an individual is under arrest for the crime of driving while under the influence of intoxicating liquor or drugs as provided in RCW 46.61.502, which arrest results from an accident in which there has been serious bodily injury to another person, a breath or blood test may be administered without the consent of the individual so arrested pursuant to a search warrant, a valid waiver of the warrant requirement, or when exigent circumstances exist.

(4) If, following his or her arrest and receipt of warnings under subsection (2) of this section, the person arrested refuses upon the request of a law enforcement officer to submit to a test or tests of his or her breath, no test shall be given except as authorized by a search warrant.

(5) If, after arrest and after the other applicable conditions and requirements of this section have been satisfied, a test or tests of the person's blood or breath is administered and the test results indicate that the alcohol concentration of the person's breath or blood is 0.08 or more, or the THC concentration of the person's blood is 5.00 or more, if the person is age twenty-one or over, or that the alcohol concentration of the person's breath or blood is 0.02 or more, or the THC concentration of the person's blood is above 0.00, if the person is under the age of twenty-one, or the person refuses to submit to a test, the arresting officer or other law enforcement officer at whose direction any test has been given, or the department, where applicable, if the arrest results in a test of the person's blood, shall:

(a) Serve notice in writing on the person on behalf of the department of its intention to suspend, revoke, or deny the person's license, permit, or privilege to drive as required by subsection (6) of this section;

(b) Serve notice in writing on the person on behalf of the department of his or her right to a hearing, specifying the steps he or she must take to obtain a hearing as provided by subsection (7) of this section and that the person waives the right to a hearing if he or she receives an ignition interlock driver's license;

(c) Serve notice in writing that the license or permit, if any, is a temporary license that is valid for sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or until

the suspension, revocation, or denial of the person's license, permit, or privilege to drive is sustained at a hearing pursuant to subsection (7) of this section, whichever occurs first. No temporary license is valid to any greater degree than the license or permit that it replaces;

....

(6) The department of licensing, upon the receipt of a sworn report or report under a declaration authorized by RCW 9A.72.085 under subsection (5)(d) of this section, shall suspend, revoke, or deny the person's license, permit, or privilege to drive or any nonresident operating privilege, as provided in RCW 46.20.3101, such suspension, revocation, or denial to be effective beginning sixty days from the date of arrest or from the date notice has been given in the event notice is given by the department following a blood test, or when sustained at a hearing pursuant to subsection (7) of this section, whichever occurs first.

....

Appendix B: RCW 46.61.5055

RCW 46.61.5055

Alcohol and drug violators — Penalty schedule.

(1) No prior offenses in seven years. Except as provided in RCW 46.61.502(6) or 46.61.504(6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has no prior offense within seven years shall be punished as follows:

(a) Penalty for alcohol concentration less than 0.15. In the case of a person whose alcohol concentration was less than 0.15, or for whom for reasons other than the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than one day nor more than three hundred sixty-four days... ; and

(ii) By a fine of not less than three hundred fifty dollars nor more than five thousand dollars....; or

(b) Penalty for alcohol concentration at least 0.15. In the case of a person whose alcohol concentration was at least 0.15, or for whom by reason of the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than two days nor more than three hundred sixty-four days....; and

(ii) By a fine of not less than five hundred dollars nor more than five thousand dollars...

(2) One prior offense in seven years. Except as provided in RCW 46.61.502(6) or 46.61.504(6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has one prior offense within seven years shall be punished as follows:

(a) Penalty for alcohol concentration less than 0.15. In the case of a person whose alcohol concentration was less than 0.15, or for whom for reasons other than the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than thirty days nor more than three hundred sixty-four days and sixty days of electronic home monitoring....; and

(ii) By a fine of not less than five hundred dollars nor more than five thousand dollars....; or

(b) Penalty for alcohol concentration at least 0.15. In the case of a person whose alcohol concentration was at least 0.15, or for whom by reason of the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than forty-five days nor more than three hundred sixty-four days and ninety days of electronic home monitoring...; and

(ii) By a fine of not less than seven hundred fifty dollars nor more than five thousand dollars...

(3) Two or three prior offenses in seven years. Except as provided in RCW 46.61.502(6) or 46.61.504(6), a person who is convicted of a violation of RCW 46.61.502 or 46.61.504 and who has two or three prior offenses within seven years shall be punished as follows:

(a) Penalty for alcohol concentration less than 0.15. In the case of a person whose alcohol concentration was less than 0.15, or for whom for reasons other than the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than ninety days nor more than three hundred sixty-four days, if available in that county or city, a six-month period of 24/7 sobriety program monitoring pursuant to RCW 36.28A.300 through 36.28A.390, and one hundred twenty days of electronic home monitoring....; and

(ii) By a fine of not less than one thousand dollars nor more than five thousand dollars...; or

(b) Penalty for alcohol concentration at least 0.15. In the case of a person whose alcohol concentration was at least 0.15, or for whom by reason of the person's refusal to take a test offered pursuant to RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) By imprisonment for not less than one hundred twenty days nor more than three hundred sixty-four days, if available in that county or city, a six-month period of 24/7 sobriety program monitoring pursuant to RCW 36.28A.300 through 36.28A.390, and one hundred fifty days of electronic home monitoring...; and

(ii) By a fine of not less than one thousand five hundred dollars nor more than five thousand dollars...

...

(9) Driver's license privileges of the defendant. The license, permit, or

nonresident privilege of a person convicted of driving or being in physical control of a motor vehicle while under the influence of intoxicating liquor or drugs must:

(a) Penalty for alcohol concentration less than 0.15. If the person's alcohol concentration was less than 0.15, or if for reasons other than the person's refusal to take a test offered under RCW 46.20.308 there is no test result indicating the person's alcohol concentration:

(i) Where there has been no prior offense within seven years, be suspended or denied by the department for ninety days;

(ii) Where there has been one prior offense within seven years, be revoked or denied by the department for two years; or

(iii) Where there have been two or more prior offenses within seven years, be revoked or denied by the department for three years;

(b) Penalty for alcohol concentration at least 0.15. If the person's alcohol concentration was at least 0.15:

(i) Where there has been no prior offense within seven years, be revoked or denied by the department for one year;

(ii) Where there has been one prior offense within seven years, be revoked or denied by the department for nine hundred days; or

(iii) Where there have been two or more prior offenses within seven years, be revoked or denied by the department for four years; or

(c) Penalty for refusing to take test. If by reason of the person's refusal to take a test offered under RCW 46.20.308, there is no test result indicating the person's alcohol concentration:

(i) Where there have been no prior offenses within seven years, be revoked or denied by the department for two years;

(ii) Where there has been one prior offense within seven years, be revoked or denied by the department for three years; or

(iii) Where there have been two or more previous offenses within seven years, be revoked or denied by the department for four years.

...

(11) Conditions of probation. (a) In addition to any nonsuspendable and nondeferable jail sentence required by this section, whenever the court imposes up to three hundred sixty-four days in jail, the court shall also suspend but shall not defer a period of confinement for a period not exceeding five years. The court shall impose conditions of probation that include: (i) Not driving a motor vehicle within this state without a valid license to drive and proof of liability insurance or other financial responsibility for the future pursuant to RCW 46.30.020; (ii) not driving or being in physical control of a motor vehicle within this state while having an alcohol concentration of 0.08 or more or a THC concentration of 5.00 nanograms per milliliter of whole blood or higher, within two hours after driving; and (iii) not refusing to submit to a test of his or her breath or blood to determine alcohol or drug concentration upon request of a law enforcement officer who has reasonable grounds to believe the person was driving or was in actual physical control of a motor vehicle within this state while under the influence of intoxicating liquor or drug. The court may impose conditions of probation that include nonrepetition, installation of an ignition interlock device on the probationer's motor vehicle, alcohol or drug treatment, supervised probation, or other conditions that may be appropriate. The sentence may be imposed in whole or in part upon violation of a condition of probation during the suspension period.

(b) For each violation of mandatory conditions of probation under (a)(i), (ii), or (iii) of this subsection, the court shall order the convicted person to be confined for thirty days, which shall not be suspended or deferred.

(c) For each incident involving a violation of a mandatory condition of probation imposed under this subsection, the license, permit, or privilege to drive of the person shall be suspended by the court for thirty days or, if such license, permit, or privilege to drive already is suspended, revoked, or denied at the time the finding of probation violation is made, the suspension, revocation, or denial then in effect shall be extended by thirty days. The court shall notify the department of any suspension, revocation, or denial or any extension of a suspension, revocation, or denial imposed under this subsection.

...

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Subject: State v. Dominic Baird & Collette Adams, Supreme Court No. 90419-7

Good afternoon,

Please accept for filing the attached Brief of Petitioner and a certificate of service.

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