IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPELLANT'S BRIEF

STATE OF SOUTH DAKOTA
Plaintiff and Appellee,

vs.

RONALD RAY FISCHER, JR.
Defendant and Appellant.

DOCKET #27455

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

HONORABLE BRUCE V. ANDERSON
Presiding Circuit Judge

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JURISDICTIONAL STATEMENT

The Appellant was arrested in Charles Mix County, South Dakota, following a double fatality accident and charged by Indictment with one count of Driving or Control of a Vehicle with Alcohol in Blood or While Under the Influence of Alcohol or Drug; two counts of First Degree Manslaughter; two counts of Vehicular Homicide; one count of Possession of Marijuana; and one count of Ingesting Non-alcoholic Substance to Become Intoxicated. Prior to trial, the Appellant moved to suppress the blood samples, medical records, and related evidence seized from his person at the Wagner Community Memorial Hospital (WCH) in Wagner, South Dakota, based upon a violation of his statutory and constitutional rights.[1] The Honorable Bruce V. Anderson, Circuit Court Judge, First Judicial Circuit, State of South Dakota, heard the Appellant's motion and denied same in all respects as to the blood samples and medical records form WCH. Judge Anderson's Memorandum Decision (Motion to Suppress) was dated September 2, 2014, and filed on September 3, 2014. Appx. 1. Findings of Fact and Conclusions of Law RE: Motion to Suppress and Order Denying Defendant's Motion to Suppress were entered on September 22, 2014. Appx. 2. The Appellant waived his right to a jury trial and the above matter was tried to Judge Anderson on September 29 and 30, 2014. Upon the conclusion of the court trial and after the parties had submitted briefs on the issues in

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[1]The Appellant's motion to suppress actually included blood sample evidence and medical records from Avera McKennan Hospital (McKennan) in Sioux Falls, South Dakota. The State, however, stipulated to the suppression of the law enforcement blood draw at McKennan based upon the State v. Fierro, 2014 S.D. 62 decision. The medical records from McKennan relative to the medical blood draw were not obtained by either party and, therefore, said evidence was not introduced by the State at trial. CT, pp. 9-10.

dispute, Judge Anderson returned a verdict of guilty for the charges of Driving or Control of a Vehicle with Alcohol in Blood or While Under the Influence of Alcohol or Drug; two counts of Vehicular Homicide; one count of Possession of Marijuana; and one count of Ingesting Non-alcoholic Substance to Become Intoxicated. The Appellant was acquitted on both counts of First Degree Manslaughter and the lesser included offense of Second Degree Manslaughter.[2] A Second Amended Judgment of Conviction was entered by the Court on April 23, 2015.[3] Appx. 3. The Appellant timely filed his Notice of Appeal on May 14, 2015. Appx. 4. This appeal is from the Second Amended Judgment of Conviction because the trial court denied the Appellant's motion to suppress and allowed the unconstitutionally seized evidence to be admitted at trial.

The Appellant shall hereinafter be referred to as "Fischer". The Appellee shall be referred to herein as "State". References to the hearing on Fischer's Motion to Suppress will be by "MH" followed by the page number and line number if necessary. References to the court trial transcript will be by "CT" followed by the page number and line

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[2]Although the Appellant was convicted of the Driving or Control of a Vehicle with Alcohol in Blood or While Under the Influence of Alcohol or Drug he was not sentenced on same in accordance with the governing law and pursuant to the stipulation of the parties. Likewise, although the Appellant was convicted of Possession of Marijuana and Ingesting Non-alcoholic Substance to Become Intoxicated, he was not sentenced on the Possession of Marijuana conviction in accordance with the governing law and pursuant to the stipulation of the parties.

[3]The initial Judgment of Conviction was entered by the Court, but amended due to various disputes between the parties regarding the language in the Judgment and errors therein. The Amended Judgment of Conviction was amended because of additional disputes between the parties regarding the language in the Amended Judgment of Conviction and additional errors therein. This appeal is taken from the Second Amended Judgment of Conviction which is the final judgment.

numbers if necessary. References to the settled record shall be by "SR" followed by the page number for the beginning of the document. South Dakota State Trooper Michael Peterson (Peterson) was a material witness to this case and was scheduled to be deployed to Afghanistan for a one year tour of duty. As a result of Trooper Peterson's service deployment, his deposition was taken for trial. References to Trooper Peterson's deposition transcript will be by "Peterson Depo" followed by the page number and line numbers if necessary. References to trial exhibits shall be by "Exh." followed by the exhibit number or, if used, the exhibit letter. References to exhibits from the motion hearing shall be by "MH Exh." followed by the exhibit number or, if used, the exhibit letter.

STATEMENT OF THE LEGAL ISSUE

ISSUE 1: Whether the trial court committed reversible error by failing to grant Fischer's motion to suppress regarding the blood samples and related evidence from Wagner Community Memorial Hospital and allowing said evidence at trial.

The trial court denied Fischer's motion to suppress and allowed the State to introduce at trial the blood sample evidence seized from Fischer, the opinions generated as a result of the blood samples, and other evidence derivative from the blood samples.

Relevant South Dakota Supreme Court cases:

1. Missouri v. McNeely, ---- U.S. ----, 133 S.Ct. 1552, 185 L.Ed.2d. 696 (2013)
2. State v. Fierro, 2104 S.D. 62, ---- N.W.2d. ----
3. State v. Dillon, 2007 S.D. 77, 738 N.W.2d 57
4. State v. Vandergrift, 95 SDO 382, 535 N.W.2d 428 (S.D. 1995)

Relevant South Dakota Statutes/Constitutional provisions:

1. United States Constitution, Amendment IV.
2. SDCL 23A-35-4.2.
3. SDCL 23A-35-5.
4. SDCL 23A-35-6

STATEMENT OF THE CASE

On July 8, 2013, in Charles Mix County, South Dakota, a double fatality accident occurred in the parking lot of the Dakota Inn Motel located in Pickstown, South Dakota, which is adjacent to and south of the intersection of South Dakota Highway 46 and U.S. Highway 18. CT, pp. 89, 122, 125. Upon the arrival of witnesses and officers at the scene of the accident they observed Fischer in the driver's seat of a white Chrysler Town & Country van that was obviously damaged by the accident, and two victims from the accident laying on the golf course area adjacent to the parking lot. CT, pp. 76-79, 102-104, 113-114, 138, 223-224. At the scene of the accident Fischer was provided medical assistance and then removed therefrom by ambulance to the WCH. CT, pp. 83-84, 103-105, 139-142, 209, 247-248. At the WCH Fischer's blood was drawn from his person for purposes of testing same to determine his blood alcohol content on July 8, 2013. CT, pp. 249, 264-266. One blood sample was taken and tested by the WCH staff at the hospital and the other was taken and delivered to law enforcement to be tested by the South Dakota State Chemical Laboratory. CT, pp. 141-143. After receiving medical treatment and assistance at WCH, Fischer was transferred to the trama center at Avera McKennan Hospital (McKennan) in Sioux Falls, South Dakota, via air ambulance. MH, pp. 9-10,

CT, p. 275. The blood samples at WCH were taken without any application for a search warrant by any law enforcement officer to a neutral magistrate, without a search warrant having been issued by a neutral Magistrate or Circuit Court Judge, and without Fischer consenting to a search of his person. MH, pp. 62-63, 87, 96-98, 125-126, 157-158. The exigent circumstances exception to the warrant requirement was the basis for the warrantless search and seizure of evidence from Fischer by law enforcement and the "medical use" theory was the basis for the hospital blood alcohol evidence. An evidentiary hearing on Fischer's Motion to Suppress was held on November 22, 2013, and the motion was subsequently denied as to both of the blood samples drawn and seized at the WCH and the evidence related thereto. CT, pp. 9-10; SR, p. 933.

A court trial was held on September 29-30, 2014, and Fischer was convicted of the charges of Driving or control of a vehicle with Alcohol in Blood or While Under the influence of Alcohol or Drug; two counts of Vehicular Homicide; one count of Possession of Marijuana; and one count of Ingesting Non-alcoholic Substance to become Intoxicated. Fischer was acquitted on both counts of First Degree Manslaughter and the lesser included offense of Second Degree Manslaughter.

STATEMENT OF THE FACTS

The determination of the issue on appeal in this case is factually driven. Consequently, a detailed statement of the facts is necessary herein.

At approximately 8:44 p.m. on July 8, 2013, Charles Mix County Deputy Sheriffs received a dispatch to respond to an accident near Pickstown, South Dakota. MH, p. 115. Charles Mix County Deputy Sheriffs Derik Rolston (Rolston) and Dawn Lake (Lake)

responded to the call and were the first officers to arrive at the accident scene. MH, pp. 52-53, 115, 131, MH Exh B and C . Rolston arrived at the scene first at 8:47 p.m. with Lake arriving at the scene only seconds thereafter. Id. Rolston and Lake both considered Lake to be the senior and supervising officer at the scene and Lake, in fact, assumed this role in all respects. MH, pp. 94, 123, 133, 137, 139, 144.

Rolston's first observation about the scene was that clearly a serious accident had occurred, there are two bodies on the golf course covered up, and there is a male sitting in a white van. MH, pp. 115-116, 124. In addition, Rolston immediately observed one medical person on scene along with EMT personnel and fire department personnel. Id. The medical person observed by Rolston was later identified as a Physician's Assistant from a local hospital who happened to be golfing at the time of the accident. Id. At the scene, Rolston first assisted with the extraction of Fischer from the white van. MH, pp. 116, 121-122. When Rolston assisted with the removal of Fischer from the white van, he detected the odor of an alcoholic beverage coming from Fischer. Id. Thereafter, Rolston began taking photographs of the scene. MH, p. 116. Rolston did not recall being in the white van assisting Fischer, but testimony from Lake indicated that Rolston may have been inside the white van holding Fischer's head while medical personnel rendered assistance to him. Id.; MH, pp. 121, 135; MH Exhs. E and F. It was clear to Rolston when he first had contact with Fischer at the white van that, at the very least, the case would result in a charge of driving or control of a motor vehicle while under the influence (DUI). MH, p. 120. In addition, Rolston knew that the odor of an alcoholic beverage

coming from Fischer was an important fact in the investigation of the accident and the crime associated therewith. MH, p. 122.

Lake's first action at the scene was to assess the scene. MH, pp. 146-147. Within minutes of arriving at the scene Lake determined that it was a crime scene, which prompted Lake to immediately begin taking photographs to preserve the scene and the evidence thereat. MH, pp. 148-149. Lake photographed everything she could gain access to and in the process took the time to take at least two detailed and close up photographs of Fischer while he was in the driver's seat of the white van. MH, pp. 91-93, 147-148, 164; MH Exhs. E and F. When Lake approached the white van to photograph same she could smell the odor of an alcoholic beverage. MH, pp. 149-150. Lake has training in the detection and apprehension of the drunk driver and has made numerous DUI arrests. MH, p. 159.

Charles Mix County Deputy Sheriff Travis Debuhr (Debuhr) arrived at the scene at approximately 8:48 p.m., which was only a minute or so after Rolston and Lake. MH, pp. 82, 90. When Debuhr arrived at the scene he considered Lake to be the senior and supervising officer. MH, p. 94. Debuhr observed Lake taking photographs of the scene so he proceeded straight to the white van to assist Rolston and the EMTs with the extraction of Fischer from the van. MH, pp. 82-84, 91. Debuhr detected the odor of an alcoholic beverage coming from the white van and Fischer and reported these facts to Lake. MH, p. 91, 95. Debuhr has training in the detection and apprehension of the drunk driver and has made numerous DUI arrests. MH, p. 97. It was very apparent to

Debuhr when he encountered Fischer in the white van that there would be a DUI charge and most likely a vehicular homicide charge as well. MH, p. 96-97.

Charles Mix County Sheriff Randy Thaler (Thaler) was dispatched to the accident scene at approximately 8:55 p.m. and arrived at the scene at approximately 9:10 p.m. MH, p. 55; Exhs. B and C. When Thaler arrived at the scene Rolston, Lake, Debuhr, certain EMT personnel, and fire department personnel were already at the scene. MH, pp. 34, 56-57, 61, 67, 82-83, 90, 101-102. According to Thaler, the ambulance with Fischer had already departed the scene when he arrived. MH, p. 36. Once Thaler arrived on the scene, he was the ranking and supervising officer. MH, pp. 35-36, 122-123, 160. Thaler has extensive training and experience in law enforcement, accident investigation, in the detection and apprehension of the drunk driver, and has made hundreds of DUI arrests. MH, pp. 29-30, 46-47. Officers Rolston, Lake and Debuhr had been at the scene for 15 to 20 minutes before Thaler arrived. MH, pp. 82-84; Exhs. B and C. When Thaler first arrived at the scene he observed the wreckage, the two dead bodies, and was briefed about the investigation. MH, pp. 55-56. Lake did not report to Thaler that any officer or others detected the odor of an alcoholic beverage coming from Fischer. MH, pp. 150-151. Debuhr, however, during his first contact with Thaler at the scene reported to Thaler that he had detected the odor of an alcoholic beverage coming from Fischer. MH, p. 95. Moreover, a fireman, Rodney Bergin (Bergin), approached Thaler within minutes after being near Fischer and reported that he detected the odor of an alcoholic beverage on Fischer as well. MH, p. 37, 226, 231. Bergin stated that the odor of the alcoholic beverage coming from Fischer was apparent and strong. MH, p. 225. Thaler denied that

any officer reported to him that they detected the odor of an alcoholic beverage on Fischer. MH, p. 61. Thaler testified that after he had received the information from Bergin, he directed Debuhr to leave the scene and secure a blood sample from Fischer at the WCH. MH, p. 37, 84. Thaler had the South Dakota Highway Patrol called to the scene, however, he did not advise the responding Troopers that the odor of an alcoholic beverage was detected on Fischer when he was being extracted from the white van. MH, p. 59. Rolston testified that at the crime scene Thaler was standing back and supervising and directing personnel telling them what to do and where to go. MH, pp. 122-123. Debuhr confirmed Rolston's observations of Thaler at the crime scene and testified that Thaler was supervising and directing personnel only and not rendering assistance to any of the deputies, firemen, or EMTs. MH, pp. 103-104.

At 8:40 p.m. a trauma code for a helicopter transport was activated by someone at the accident scene where Fischer was being attended to by EMTs. MH, pp. 10-13; MH Exh. H. Fischer was transported to the WCH, arrived there at 9:24 p.m., and upon his arrival was semi-conscious, lethargic, and semi-cooperative with health care staff. MH, p. 7. WCH follows a protocol that has been established by the American College of Surgeons for treating all trauma patients. MH, p. 8. The protocol is called the advanced trauma life support guidelines. Id. Part of the protocol and trauma procedures at the WCH is for the medical staff to secure a blood sample from a patient to determine treatment needs and procedures for the patient. Id. The WCH staff followed this protocol when treating Fischer. Id. A blood sample was taken from Fischer at 9:25 p.m. and the results from said sample were returned at 9:53 p.m. Id. No law enforcement officers

were with Fischer when he arrived at the WCH nor when the hospital blood sample was taken by medical staff. MH, pp. 84-86; MH Exh. A. Debuhr did not arrive at the WCH until 9:38 p.m. and the law enforcement blood sample was taken at 9:45 p.m. Id. Fischer was discharged from WCH at 10:15 p.m. MH, p. 9. According to the WCH staff, when the blood sample was taken at the WCH it was done by medical personnel for medical purposes only. MH, pp. 8.

Sometime after Thaler had been dispatched to the crime scene he had heard over the radio that either a helicopter or fixed wing aircraft had been sent to the WCH. MH, pp. 37-38. Thaler testified that after Bergin reported to him at the scene that he had detected the odor of an alcoholic beverage coming from Fischer, Thaler sent Debuhr to the WCH to secure a blood sample from Fischer. Id. Debuhr was directed by Thaler at 9:30 p.m. to go to the WCH and secure a blood sample from Fischer. MH, p. 84. Debuhr arrived at the WCH at 9:38 p.m. Id. Debuhr witnesses the State's blood sample at 9:45 p.m. Exh. A. The lapse of time from when the first officer arrived at the accident scene (8:47 p.m.) to when a blood sample was taken from Fischer in the presence of Debuhr at the WCH was approximately one hour (9:45 p.m.). MH, pp. 52-53, 101, 115, 131; MH Exhs A and B.

Thaler and the other officers claimed there were exigent circumstances that prohibited them from securing a search warrant to seize a blood sample from Fischer at WCH. These exigent circumstances were the accident and the nature thereof, the weather, and the fact that the air ambulance was coming to WCH to transport Fischer to Sioux Falls. MH, pp. 39, 60, 72. However, before Fischer's blood sample was taken

from his body at the WCH no officer read him the implied consent card used in DUI arrests, no officer recited the implied consent law to Fischer, nor did any officer advise Fischer that a blood sample was going to be taken from him at the WCH. MH, pp. 62-63, 87, 98, 126. Furthermore, Fischer was non-responsive, incoherent, and could not communicate with medical staff while at the WCH. MH, pp. 7, 87, 98.

The officers involved in this criminal investigation were familiar with the process and procedures required to secure a search warrant and have experience in either securing search warrants or assisting in securing search warrants. MH, pp. 40-42, 102-103, 160-163. Moreover, all of the officers confirmed that search warrants can be obtained by facsimile transmission, e-mail, electronic transmission, or telephone and a written affidavit in support of search warrant need not be produced before a search warrant is issued. MH, pp. 61-62, 102-103, 160. The officers have cellular telephones that are issued to them by the county. MH, p. 110. In order to locate a judge to present evidence to for a search warrant, the officers simply can call the Charles Mix County Law Enforcement Center, request the judge's number, and then call the judge to present their evidence for a search warrant. MH, pp. 110-112. Moreover, in an investigation where more than one officer is involved, any officer can secure a search warrant and it need not be secured by the senior or supervising officer. MH, pp. 71-72. Furthermore, it is typical in serious investigations, such as the one in the case at bar, for officers to rely upon information from other officers and communication among all officers is essential to make sound investigative decisions such as procuring a search warrant. MH, pp. 72, 160-163. The information required to secure a search warrant in this case was within the

knowledge of several officers and certainly within the knowledge of the three officers who initially responded to the scene. MH, p. 69. The facts necessary to secure a search warrant could have been conveyed to a judge in this case within less than five minutes. MH, pp. 76-78. No officer involved in the investigation of this case was instructed or directed to secure a search warrant and no officer made any effort to secure a search warrant for the blood sample to be taken from Fischer at the WCH for law enforcement. MH, pp. 62-63, 96-98, 125-126, 157-158.

Thaler testified that one of the exigent circumstances he faced at the accident scene was the weather. At one point in time during the criminal investigation it began sprinkling at the scene; however, the sprinkling did not mature into a full rain shower, was short lived, and no evidence at the scene was damaged or lost. MH, pp. 72-73. Moreover, all of the evidence at the scene had been preserved by photographs from Lake and Rolston before the light shower occurred. MH, pp. 73-74, 124-125. Also, witness statement forms had been provided to witnesses and the witnesses were in the process of completing same on their own or had already done so. MH, p. 125. The accident scene had been preserved for the South Dakota State Highway Patrol by taping off the area, securing photographs, the removal of Fischer from the scene, covering of the evidence and victim body parts, and a variety of officers were assisting law enforcement at the scene. MH, pp. 73-76, 101-102. In addition, there was no threat to officer safety and there was no life-threatening urgency for the State Troopers to rush to the scene. Id.

Two South Dakota State Troopers responded to the scene of the accident. Trooper Casey Bassett (Bassett) and Trooper Michael Peterson (Peterson). CT, pp. 220-

222; Peterson Depo., pp. 10-11. Peterson is a traffic crash reconstruction specialist. Peterson Depo., p. 6. Bassett and Peterson were the only officers working on mapping the scene and the accident reconstruction once they arrived at the scene. MH, pp. 182-184. Bassett, however, noted several other personnel at the scene which included fire crews, EMS personnel, and several Charles Mix County Deputies, all who had been at the scene longer than Bassett and Peterson. Id. Bassett agreed that one hour is generally a sufficient amount of time to contact a judge to secure a search warrant for a blood sample. MH, pp. 187-188. Bassett also confirmed that search warrants could be secured by telephone, facsimile transmission, and by e-mail. Id.

Fischer was not detained nor arrested by law enforcement officers on July 8, 2013. A Complaint against Fischer and an Arrest Warrant on the Complaint were filed and issued on July 19, 2013. SR, pp. 1, 5. The case against Fischer was presented to the Charles Mix County grand jury, an Indictment was returned, and an arrest warrant on the Indictment issued. SR, pp. 11, 16.

ARGUMENT

ISSUE 1: Whether the trial court committed reversible error by failing to grant Fischer's motion to suppress regarding the blood samples and related evidence from Wagner Community Memorial Hospital and allowing said evidence at trial.

The standard of review on motions to suppress evidence is well settled. The South Dakota Supreme Court has held that

> ... [w]e review the ... court's grant or denial of a motion to suppress involving an alleged violation of a constitutionally protected right under the de novo standard of review. ... The ... court's findings of fact are reviewed under the clearly erroneous standard, but we give no deference

> to the ... court's conclusions of law. ... And although [f]actual findings of the lower court are reviewed under the clearly erroneous standard, . . . once those facts have been determined, 'the application of a legal standard to those facts is a question of law reviewed de novo.' (Citations omitted).

State v. Fierro, 2014 S.D. 62, ¶12, — N.W2d. —. In this appeal, the facts support Fischer's position that no exigent circumstances existed to substantiate the warrantless search of his person and the seizure of his blood. Consequently, the only task for this Court on appeal is to apply the legal standard to those facts de novo.

In addition, the State has the burden to prove that the warrantless search of Fischer's person and the subsequent seizure of his blood in this case falls into a specific exception to the constitutional warrant requirement. Fierro, 2014 S.D. at 62, ¶15; State v. Hess, 2004 S.D. 60, ¶23, 660 N.W.2d 314. There is no question that a person enjoys an expectation of privacy in his blood which is protected by the United States and the South Dakota Constitutions. Missouri v. McNeely, ---- U.S. ----, 133 S.Ct. 1552, 185 L.Ed.2d. 696 (2013); Schmerber v. California, 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966); Fierro, 2014 S.D. 62, ¶16. Further, there is no evidence that Fischer was arrested or detained by law enforcement officers on July 8, 2013, so as to apply the search incident to a lawful arrest argument herein. Consequently, these issues are not in dispute herein and the only issue is whether exigent circumstacnes existed to justify the warrantless search of Fischer and the seizure of his blood pursuant to that search.

A. Warrant Requirement and Applicable Exceptions Thereto.

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,

> and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV; Fierro, 2014 S.D. 62, ¶14. The text of the South Dakota Constitution varies from the federal text, but only in a slight degree. See, *S.D. Const. Art. VI, §11.* The above language is the cornerstone of personal rights and it naturally flows from said language that the general rule of law is that warrantless searches are unreasonable and therefore, unconstitutional unless the search falls into one of the limited exceptions established by the Courts. McNeely, 133 S.Ct. at 1552 (2013); Fierro, 2014 S.D. at 62, ¶16. The only exception which is remotely applicable to this case is the exigent circumstances exception.

The general rule of law governing the exigent circumstances exception to the Fourth Amendment is that "...[e]xigent circumstances exist when 'a situation demand[s] immediate attention with no time to obtain a warrant.' ... (Citations omitted) . State v. Dillon, 2007 S.D. 77, ¶18, 738 N.W.2d 57. The existence of exigent circumstances is dependent upon the facts, circumstances and criteria present in each case. Consequently,

> In determining whether exigent circumstances exist we ask, 'Whether police officers, under the facts as they knew them at the time, would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect[']s escape.' ... The inquiry is one of objective reasonableness. ... Furthermore, '[e]xigency remains 'within the narrow range of circumstances that present real danger to the police or the public or a real danger that evidence or a suspect might be lost.' (Citations omitted).

State v. Dillon, 2007 S.D. 77, ¶18, 738 N.W.2d 57. Exigent circumstances have been the gold standard for the prosecution's arguments to support a warrantless search of a person

and the seizure of their blood in DUI and related cases for years. The argument was based upon the theory that alcohol rapidly dissipates from the blood, however, this theory was squarely rejected as an exigency sufficient to trigger an exception to the warrant requirement by the United States Supreme Court and this Court. See, McNeely, 133 S.Ct. at 1552; Fierro, 2014 S.D. at 62. Moreover, in this case the State cannot possibly argue that there was a present danger to life or a greatly enhanced chance that Fischer would escape if the State took the time to secure a search warrant before it seized his blood. The life threatening event had concluded, two dead bodies lie on the golf course and the only other injured person, Fischer, had been secured by EMT personnel and other emergency personnel. Moreover, Fischer was seriously injured, which prohibited any chance that he might escape from the scene. Consequently, there are only two potential exigent circumstances that the State may rely upon to support the warrantless search of Fischer and the seizure of his blood. Both theories are meritless.

The first exigent circumstances theory is the risk of the destruction of evidence based upon the dissipation of the alcohol content of the blood. As indicated above, this concept has been rejected by the Courts and now it is settled law that risk of dissipation of alcohol from the blood is not an exigent circumstance. McNeely, 133 S.Ct. at 1552; Fierro, 2014 S.D. at 62. Consequently, any reliance on dissipation of alcohol from the blood as an exigent circumstances is entirely misplaced. The second theory is the risk of the destruction of evidence at the scene. This claimed exigent circumstance misses the issue on Fischer's motion to suppress. Fischer is not attempting to secure the suppression of the evidence at the scene, but the blood which was illegally seized from him. The

circumstances advanced by the State that the problems they faced at the scene were sufficient exigent circumstances to forego a warrant only applied to the evidence at the scene and not the blood. The blood was in Fischer and Fischer had left the scene. The problems encountered by the State at the scene were not a sufficient justification, nor an exigent circumstance, for the State to disregard the warrant requirment for the blood. The two concepts are separate and disconnected in all respects.

Finally, it is important to note, as the Courts have cautioned, that the exigent circumstances exception to the warrant requirement is a narrow exception and must be tightly construed and applied on a case by case basis by applying the totality of the circumstances standard. McNeely, 133 S.Ct. at 1559; Schmerber, 384 U.S. at 772; see also, Dillon, 2007 S.D. at 77, ¶18. In addition, the officers cannot seek to create the exigent circumstances by engaging in wrongful, inappropriate or negligent actions. See, Kentucky v. King, 563 U.S. ----; 131 S.Ct. 1849, 1858, 179 L.Ed.2d. 865 (2011).

B. Application of the Facts.

In applying the governing law to the facts of this case it is clear that a search warrant was required before law enforcement officers seized the blood samples at WCH from Fischer and that they had more than sufficient time to secure one. The officers in this matter first arrived at the scene of the accident at 8:47 p.m. which started the clock ticking on the search warrant. The blood sample taken for Debuhr at the WCH was taken at 9:45 p.m.. Consequently, the officers had approximately one full hour to secure a warrant in this case.

EMT personnel were the first to arrive at the accident scene and one of the EMTs made a call from the scene at 8:40 p.m. to arrange for air evacuation from the WCH to McKennan. Before Thaler arrived at the scene he heard the radio communication that one party from the accident would be air evacuated out and that the air transport was on the way. Thaler also had State Troopers called to respond to the scene before he arrived at the scene. The first three officers who arrived on the scene recognized within minutes that it was a serious and clearly criminal matter, but none called Thaler. The three initial responding officers were on the scene for 15 to 20 minutes before Thaler arrived. During this time one officer had sufficient time to not only take at least one photograph of Fischer in the vehicle, but to take one wherein Fischer's face and head are turned just right by the person behind him so that he is clearly pictured. The initial responding officers communicated with each other about detecting the odor of an alcoholic beverage coming from Fischer, but, according to Thaler, none of them told him this fact when he arrived at the scene. Debuhr, however, disputed Thaler's testimony and recalled telling Thaler of the odor of an alcoholic beverage when he first visited with Thaler at the scene. Lake briefed Thaler of the investigation when he arrived at the scene at 9:10 p.m., but Lake neglected to tell Thaler that the officers detected the odor of an alcoholic beverage coming from Fischer. Fireman Bergin advised Thaler of the fact that he detected the strong odor of an alcoholic beverage coming from Fischer and, according to Thaler, it was at this time that he instructed Debuhr to get a blood sample from Fischer at the WCH. Debuhr left the scene at 9:38 p.m. to go to the WCH to get a blood sample. Meanwhile, Thaler was in communication with the two troopers on their way to the

accident scene, but Thaler did not advise them of the circumstances, nor did he suggest to them that a search warrant was necessary.

All three of the officers who initially responded to the scene within minutes after arriving at the scene had sufficient knowledge of the facts of the case to secure a search warrant. Thaler, within minutes of arriving at the scene, also had sufficient knowledge of the facts of the case to secure a search warrant. There was clearly a lack of communication among the officers. Thaler never advised the Troopers of the criminal evidence which was apparent to him and, consequently, when the Troopers arrived they made no effort to secure a search warrant. The officers all claim that they were so busy that they did not have time to make application for and secure a search warrant. The record, however, clearly shows that Thaler was not engaged in actual investigative activities at the scene, but was standing back orchestrating the various personnel in the tasks at the scene. Thaler testified that it was his call not to get a search warrant and he accepted that responsibility. The fact remains, however, that Thaler had plenty of time to make contact with a judge and secure the search warrant and still engage in his supervisory duties. After all, he was directing the flow of work and not participating in same.

In addition, the record shows that any one of the officers at the scene could have provided sufficient information to a magistrate to secure a search warrant for Fischer's blood within less than five minutes. Moreover, the call to find out how and where to contact a magistrate to issue the warrant would have taken only a few minutes. All totaled the officers would have needed less than 7 minutes of their time to secure a search

warrant. All of the officers were familiar with and had access to the technological advancements which allow for the issuance of a search warrant on an expedited basis. The applicable statutes at the time, SDCL 23A-35-4.2 and 23A-35-5, permitted affidavits in support of search warrants to be made by facsimile transmission or orally as the circumstances and need of the case dictated . Moreover, SDCL 23A-35-6 permitted the warrant to be read to the neutral magistrate over the telephone, modified as he/she deemed appropriate, and then signed by either the law enforcement officer or the state's attorney seeking the warrant upon the direction of the neutral magistrate. Consequently, the search warrant could have been secured without any of the officers leaving the scene or interrupting their work at the scene. The excuses for not obtaining the search warrant, however, were legion and included crowd control, witness interviews, weather, photographs of evidence and the scene, air transport arriving at the WCH, and a myriad of other matters. The problem with these excuses is that all are invalid and none can justify the failure to take a few minutes to do the law enforcement job correctly. Furthermore, the record clearly shows that no officer considered a search warrant, it was not discussed, nor was it even suggested by any officer. If a search warrant was not considered, discussed or suggested, then it seems unlikely that the excuses were valid and on the minds of the officers at the scene, but only came to light when the suppression issue reared its head in the criminal prosecution. Also, the record clearly shows that, although it was sprinkling rain at the scene, the sprinkle was short lived and the weather conditions did not mature into a full rain shower. In addition, all of the evidence at the scene had been preserved by photographs from Lake and Rolston and all witness statement forms

had been provided to witnesses and the witnesses were in the process of completing same on their own or had already done so. Furthermore, the accident scene had been preserved for the Troopers by taping off the area, securing photographs, the removal of Fischer from the scene, evidence and victim body parts had been covered, and a variety of officers were assisting law enforcement at the scene. All this had been accomplished before the Troopers had arrived at the scene. In addition, there was no threat to officer safety and there was no life-threatening urgency for the State Troopers to rush to the scene. Under these circumstances, there simply was no exigency which dictated a warrantless draw of Fischer's blood.

In addition, WCH is located in Wagner, South Dakota and was only minutes away from the accident scene. No officer made any attempt to call to the Wagner Police Department and make any arrangements for an officer from that department to secure a search warrant nor to proceed to the WCH to seize the blood sample from Fischer once the warrant had been secured. In the same vein, and most conspicuously, was the lack of involvement of the Charles Mix County State's Attorney. The record is devoid of any attempt by any officer to get the Charles Mix County State's Attorney working on a search warrant in order to seize the blood sample evidence from Fischer while the rest of the officers and volunteers attended to the accident scene.

The bottom line in this case is that the officers focused on the gathering of evidence and preparing for the prosecution of the case against Fischer, but they neglected to consider in the slightest degree their duty to comply with the constitutional rights afforded to Fischer. Law enforcement's neglect and disregard for Fischer's fundamental,

constitutional rights is simply indefensible and completely unreasonable given the facts of this case and the mishandling of same. Moreover, in light of the type of accident and the horrific nature of same, it was incumbent on the part of law enforcement to mobilize every available law enforcement officer and not simply try to handle the crime scene and the attendant aspects of same with just the Sheriff's staff, two highway patrol officers, and volunteer EMTs and fire fighters. The failure to mobilize sufficient staff and officers to handle the extensive accident scene was not Fischer's fault and is not an exigent circumstance that justifies a warrantless search of Fischer's body and the seizure of his blood.

Once the issues are separated and analyzed more closely, it is clear that the neglect and inaction of the officers created the alleged exigent circumstances and same were not the product of the circumstances attendant to the accident nor any other fact. This conduct is not acceptable and cannot be relied upon to justify a warrantless search of Fischer and the seizure of his blood.

C. Hospital Blood Draws.

WCH drew blood from Fischer and tested same. The WCH blood draw was allegedly done for hospital purposes and was not witnessed by any law enforcement officer. The blood was tested at WCH by hospital staff. The trial court allowed the result of the WCH blood tests to be admitted into evidence at the trial of the above matter. Prior to the McNeely decision, the South Dakota Supreme Court held that the South Dakota Implied Consent law did not apply to private blood samples taken by treating physicians for medical purposes. State v. Vandergrift, 95 SDO 382, ¶7, 535 N.W.2d 428

(S.D. 1995). The basis for this conclusion was that the blood was taken for the medical interest and benefit of the suspect and, consequently, the implied consent law did not apply. Id., at ¶8. The Supreme Court, however, specifically limited this holding "... to blood samples extracted for legitimate medical purposes rather than investigatory purposes...". Id. If the impetus for the blood draw was for investigatory purposes, then the medical blood draw is subject to the same analysis as the law enforcement draw. See, Id., at ¶8.

As indicated above, this decision pre-dated McNeely. McNeely clearly applies a Fourth Amendment totality of the circumstances analysis to law enforcement blood samples and the same analysis should apply to the hospital blood draw in this case. This is so in light of the above argument, but also because, at the very least, Thaler was aware, based upon past experiences, that blood sample results could be obtained from the hospital in DUI and accident cases. MH, pp. 63-64. Moreover, DeBuhr, the deputy who ultimately obtained the seized blood sample from Fischer, also knew that medical personnel obtained blood samples from trauma patients and tested same for alcohol content. MH, p. 98. Consequently, it is fair to conclude, based upon Thaler's and DeBuhr's knowledge and experience, that they knew if the law enforcement blood sample was excluded from evidence, they could rely upon the hospital blood sample evidence as a fall back position.

Incredulously, law enforcement and hospital staff asserted at the motion hearing that neither knew anything about the other's intention or actions. This is absurd. In order to accept this assertion it would be necessary to believe that each entity exists in its own

little vacuum and world and has no knowledge of the clear connection between law enforcement and the medical community in criminal matters such as the case at bar. Numerous suspects are taken to hospitals in South Dakota on a daily basis for blood draws associated with DUIs and other criminal conduct or blood draws to test for the presence of drugs or other illegal substances. Officers routinely go to hospitals with the suspects and encounter the emergency room staff and medical personnel while both parties are collecting evidence both before and after the arrest of defendants. To think that neither has any inkling of what evidence can be obtained by the actions of the other is naive and is simply non-sensical in all respects especially given the small communities in Charles Mix County. Moreover, the attempt to erect a wall between hospital staff and law enforcement relative to actions each takes in an emergency, trauma situation such as existed in this case is transparent and weak at best and merely a ruse to get illegally obtained evidence admitted at trial.

In addition, when considering the medical blood draw and related evidence in this case, the Court should not do so with blinders on nor through glasses tinted with specious explanations as to how law enforcement and the medical community are distanced from each other in criminal matters. The accident involved in this case was, according to the law enforcement officers working the scene, one of the most horrific accident scenes they had observed in their careers. The EMTs and fire fighters concurred in this opinion. The helicopter for Fischer had been called and dispatched before law enforcement had arrived at the accident scene. MH, p. 12. Certainly, given these circumstances, the medical staff and law enforcement officers knew of the importance of the blood sample evidence in

this case and should have been held to a standard of performance which passes muster under the analysis dictated by McNeely and Fierro.

In light of the above, it was clear that the blood sample evidence from WCH, the opinions of the witnesses from WCH, and the evidence derivative of the blood samples was seized by law enforcement in violation of Fischer's constitutional rights.

D. Exclusion of Evidence.

The result of searching for and seizing evidence in violation of the Fourth Amendment is that the evidence is suppressed. Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); Fierro, 2014 S.D. at 62, ¶28-29; State v. Madsen, 2009 S.D. 5, ¶16, 760 N.W.2d 370. The primary goal in suppressing evidence seized in violation of constitutional rights is to deter similar conduct by law enforcement. Fierro, 2014 S.D. at 62, ¶25-29. Here, as in the Fierro case, the officers were well aware of the McNeely decision and had received training and direction on how to proceed after said decision. MH, pp. 65-67; 97; 126-127; 158-159; MH Exh. D. In Fierro knowledge of the McNeely decision and its effect on law enforcement activities was more than sufficient to justify suppression of unconstitutionally seized evidence. The same consequences of Fierro should apply to the case at bar and the blood samples seized from Fischer's person at the WCH in violation of his constitutional rights should have been suppressed. In addition, all opinions and other evidence which are derivative of the blood samples in any respect, should have been suppressed as well since without the blood sample, this evidence would not exist. This argument is consistent with the holdings in Fierro and other South Dakota Supreme Court cases addressing evidence seized by

unconstitutional, warrantless searches of a person's body. Fierro, 2014 S.D. at 62, ¶28-29; Madsen, 2009 S.D. at 5, ¶16. The trial court clearly erred by not suppressing the blood samples from WCH and all related and derivative evidence at trial.

CONCLUSION

Based upon the above and foregoing and the error committed by the trial court, this Court should reverse the decision of the trial court, rule that the blood samples from WCH were the product of an unconstitutional search and seizure and the blood evidence and all evidence derivative thereof should be suppressed.

REQUEST FOR ORAL ARGUMENT

Fischer hereby requests that he be granted oral arguments on this appeal.

Dated this 29th day of July, 2015.

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CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellant hereby certifies that the Appellant's Brief complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Appellant's Brief contains 39,503 characters and 7,947 words.

Further, the undersigned relied upon the word count of the word processing system used to prepare the Appellant's Brief.

Dated this 29th day of July, 2015.

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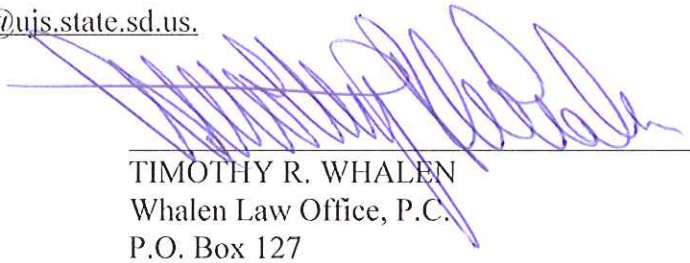
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the Appellant's Brief on the attorneys for the Appellee at their addresses as follows: Marty J. Jackley and Kelly Marnette, South Dakota Attorney General's Office, 1302 East Highway 14, Suite #1, Pierre, SD 57501-8501, atgservice@state.sd.us, and Scott Podhradsky, Charles Mix County Deputy State's Attorney, P.O. Box 370, Lake Andes, SD 57356, scottjpodhradsky@icloud.com, by e-mail and by depositing same in the United States first class mail, postage prepaid, on the 29th day of July, 2015, at Lake Andes, South Dakota.

Further, the undersigned hereby certifies that the original and two copies of the above and foregoing Appellant's Brief were mailed to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070 by depositing same in the United States first class mail, postage prepaid, on the 29th day of July, 2015. Further, one copy of the Appellant's Brief was e-mailed to the

aforesaid Clerk of the Supreme Court on the 29th day of July, 2015, at her e-mail address as follows: SCClerkBriefs@ujs.state.sd.us.



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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27455

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

RONALD RAY FISCHER, JR.,

Defendant and Appellant.

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

THE HONORABLE BRUCE V. ANDERSON
Circuit Court Judge

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Notice of Appeal filed May 14, 2015

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27455

STATE OF SOUTH DAKOTA,

Plaintiff and Appellee,

v.

RONALD RAY FISCHER, JR.,

Defendant and Appellant.

PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellant, Ronald Ray Fischer, Jr., will be referred to as "Defendant." Plaintiff and Appellee, State of South Dakota, will be referred to as "State." All other individuals will be referred to by name. The settled record in the underlying criminal case, *State of South Dakota v. Ronald Ray Fischer, Jr.,* Charles Mix County Criminal File No. 13-224, will be referred to as "SR." The transcript of the motion hearing held on November 22, 2013, will be cited as "MH." The transcript of the court trial held on September 29-30, 2014, will be cited as "CT." All such references will be followed by the appropriate page designation. Any reference to Defendant's brief will be designated as "DB."

JURISDICTIONAL STATEMENT

This matter stems from Defendant's conviction for two counts of Vehicular Homicide, a Class 3 felony, in violation of SDCL 22-16-41; Driving under the Influence, a Class 1 misdemeanor, in violation of SDCL 32-23-1; Possession of Marijuana, a Class 1 misdemeanor, in violation of SDCL 22-42-6; and Ingesting Non-alcoholic Substance to become Intoxicated, a Class 1 misdemeanor, in violation of SDCL 22-42-15. A Second Amended Judgment of Conviction was entered by the Honorable Bruce V. Anderson, Circuit Court Judge, Charles Mix County, First Judicial Circuit, on April 23, 2015. SR 1879-84. Defendant filed a Notice of Appeal on May 14, 2015. SR 1894-95. This Court has jurisdiction as provided in SDCL 23A-32-2.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

DID THE TRIAL COURT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS?

The trial court denied Defendant's Motion to Suppress.

United States v. Jacobsen, 466 U.S. 109, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984).

State v. Vandergrift, 535 N.W.2d 428 (S.D. 1995).

Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

Missouri v. McNeely, 569 U.S. ___, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).

SDCL 23A-35-1

SDCL 23A-35-4

SDCL 23A-35-5

SDCL 23A-35-6

STATEMENT OF THE CASE

On August 5, 2013, Defendant was charged by Indictment with Driving under the Influence (SDCL 32-23-1), two counts of First Degree Manslaughter (SDCL 22-16-15), two counts of Vehicular Homicide (SDCL 22-16-41), Possession of Marijuana (SDCL 22-42-6), and Ingesting Substance, except Alcoholic Beverages, for the Purpose of Become Intoxicated (SDCL 22-42-15). SR 11-14. An arraignment was held on August 26, 2013. SR 1879. Defendant pled not guilty to all of the charges. SR 1879.

On September 30, 2013, Defendant filed a Motion to Suppress the blood samples obtained from him. SR 48-49. An evidentiary hearing was held on November 22, 2013. MH 1-244, SR 469-712. The court denied Defendant's motion. SR 933-51.

Defendant waived his right to a jury trial. SR 1879. A court trial was held on September 29-30, 2014. SR 1190-555. Defendant was convicted of two counts of Vehicular Homicide (SDCL 22-16-41), Driving under the Influence (SDCL 32-23-1), Possession of Marijuana (SDCL 22-42-6), and Ingesting Non-alcoholic Substance to become Intoxicated (22-42-15). SR 1626-48. On March 23, 2015, Defendant was sentenced

to serve fifteen years in the South Dakota State Penitentiary on each felony count, to be served consecutively. SR 1879-84.

STATEMENT OF FACTS

At about 8:30 p.m. on July 8, 2013, Defendant was driving a minivan southbound on a highway in Charles Mix County. He approached a T-intersection with a clearly marked stop sign. CT 41; SR 1230. Instead of slowing down and stopping at the stop sign, Defendant drove through the stop sign into the Dakota Inn Motel parking lot. CT 42-43; SR 1231-32.

Two United States Fish and Wildlife Service employees, Robert Klumb and Maegan Spindler, were standing in the parking lot. CT 60; SR 1249. Defendant struck Robert and Maegan, as well as two vehicles and a boat/trailer. CT 43; SR 1232. Robert and Meagan's bodies were thrown onto the golf course adjoining the motel parking lot. CT 43; SR 1232.

Another person who had been standing in the parking lot immediately called 911. CT 64; SR 1253. Emergency medical personnel were dispatched to the scene and the Wagner Hospital was notified of the incident. MH 9; SR 477. Based on the nature of the trauma code, an air ambulance was dispatched to the hospital. MH 9; SR 477.

A physician's assistant student, Merritt Groh, happened to be golfing at the time. CT 76; SR 1265. Upon hearing the crash he immediately responded. CT 78; SR 1267. Groh checked Robert and

found him deceased. CT 78; SR 1267. He found Meagan to have a weak pulse and knew she would not survive. CT 78; SR 1267. He then went to check on Defendant in the van. CT 79; SR 1268.

Defendant was seated in the driver's seat of the van. CT 79; SR 1268. He was the only occupant of the vehicle. CT 79, 81; SR 1268, 1270. Groh did an initial medical assessment of Defendant. CT 79; SR 1268. He asked another person on scene to hold Defendant's head, stabilizing Defendant's C spine. CT 79; SR 1268. Groh then returned to check on Maegan and found she was deceased. CT 81; SR 1270.

The Charles Mix Sheriff's office was dispatched to the scene. MH 115; SR 583. Sheriff's Deputy Derik Rolston was the first law enforcement officer to arrive. MH 115; SR 583. Sheriff's Deputy Dawn Lake arrived seconds after Deputy Rolston. MH 124; SR 592. Both deputies observed the bodies of Robert and Maegan lying on the golf course. MH 115, 133-34; SR 583, 601-02. Defendant was sitting in the van. MH 115, 134; SR 583, 602.

Deputy Lake was approached by Groh. MH 132; SR 600. Deputy Lake gave him a first aid kit and gloves. MH 133; SR 601. She told Deputy Rolston to go help Groh. MH 133; SR 601. Deputy Lake began taking pictures. MH 135; SR 135.

Charles Mix Sheriff's Deputy Travis DeBuhr arrived at the scene at 8:48 p.m. MH 82; SR 550. He assisted with getting Defendant out of the van. MH 83; SR 551. Once Defendant was extricated from the

minivan, he was loaded into an ambulance to be taken to the Wagner Hospital. MH 230; SR 598. Deputy DeBuhr then began talking to some of the witnesses. He obtained both contact information and accounts of what had occurred. MH 84; SR 552.

Defendant arrived at the Wagner Hospital at 9:24 p.m. MH 16; SR 484. He was on a long board with his spine and neck immobilized. MH 7; SR 475. Defendant was semiconscious, lethargic and uncooperative with medical personnel. MH 7; SR 475. Dr. Jeffery Pinter was the emergency room physician on duty. MH 6-7; SR 474-75. Dr. Pinter ordered standardized tests that are routinely done on all trauma patients. MH 7; SR 475. This included a urine drug screen and a blood alcohol analysis. MH 8; SR 476.

A Wagner Hospital nurse placed an IV in Defendant. CT 265; SR 1454. Prior to connecting any fluids to it, a blood sample was taken through the IV at 9:25 p.m. CT 265; SR 1454. A lab tech took possession of the sample and tested it. CT 265; SR 1454. The results were given to Dr. Pinter at 9:53 p.m. MH 8; SR 476. Defendant's blood alcohol content was .274. MH 24; SR 492.

Based upon the nature of Defendant's injuries, Dr. Pinter decided to have Defendant transported to a trauma center in Sioux Falls. MH 9; CT 248; SR 477, 1437. Dr. Pinter was still stabilizing Defendant when the air ambulance landed at the Wagner Hospital. MH 9; SR 477.

Charles Mix County Sheriff Randy Thaler was at home at the time of the crash. MH 33; SR 501. He was notified at 8:55 p.m. and arrived at the scene at 9:10 p.m. MH 55; SR 523. By this time his deputies were already preserving evidence, interviewing witnesses, and looking for body parts. MH 35, 60; SR 503, 528. It was extremely hectic at the scene. MH 104; SR 572. This was the largest crash crime scene Sheriff Thaler had investigated. MH 68-69; SR 536-37. There were firemen and emergency personnel on scene assisting by covering evidence, though they were not trained in evidence collection. MH 68; SR 536. Even bystanders helped by covering the bodies. MH 134; SR 602. Additionally, law enforcement were confronted with traffic control and crowd control issues. MH 68; SR 536.

The weather became a factor. It had begun to sprinkle at the crime scene when the Sheriff arrived. MH 35, 145; SR 503, 613. Sheriff Thaler was concerned the weather may affect the preservation of evidence. MH 35; SR 503. He believed evidence at the scene would be destroyed if action to preserve it wasn't taken immediately. MH 35; SR 503.

Sheriff Thaler was notified Defendant had the odor of alcohol when Defendant was removed from the driver's seat of the minivan. MH 37; SR 505. Sheriff Thaler knew he needed to obtain a blood draw in order to safeguard the evidence. MH 37; SR 505. Looking at the magnitude of the damage to the vehicles, including Defendant's van, it

appeared Defendant would have sustained serious injuries. MH 37; SR 505. Sheriff Thaler knew he needed to get a blood sample from Defendant but didn't know exactly how long Defendant may be at the Wagner Hospital. MH 38, 80; SR 506, 548. When Sheriff Thaler heard Defendant would be airlifted out of the county, he immediately directed Deputy DeBuhr to go to the Wagner Hospital to obtain a blood draw. MH 37; SR 505. Deputy DeBuhr left the crime scene at 9:30 p.m. MH 84; SR 552.

While driving to the Wagner Hospital, Deputy DeBuhr observed the medical transport fly in to get Defendant. MH 85; SR 553. Deputy DeBuhr, feeling a sense of urgency, raced to the hospital. MH 85, 88; SR 553, 556. Deputy DeBuhr arrived at the Wagner Hospital at 9:38 p.m. MH 84; SR 552.

Upon arrival at the emergency room, Deputy DeBuhr observed Defendant on one of the beds. MH 85; SR 553. Deputy DeBuhr told Dr. Pinter that he wanted a blood sample drawn from Defendant. MH 85; SR 553. Deputy DeBuhr did not know the doctor had already ordered a blood draw to determine Defendant's blood alcohol content. MH 85; SR 553. Deputy DeBuhr's requested sample was drawn at 9:45 p.m. MH 86; SR 554. Shortly thereafter Defendant was placed in the air ambulance and flown to Sioux Falls. MH 86; SR 554.

Two South Dakota Highway Patrol troopers were called in to assist at the scene. MH 172; SR 640, 743. Both troopers arrived at

approximately 10:00 p.m. MH 172; SR 640, 744. The two troopers, along with the Sheriff Thaler and his deputies, spent hours securing the scene, preserving and collecting evidence, interviewing witnesses, covering body parts, taking photographs, taking measurements and mapping the scene, handling crowd and traffic control, and taking the bodies to the funeral home. MH 34-35, 68, 138, 178, 180; SR 502-03, 536, 606, 646, 648. Assistance from the fire department was necessary to cover body parts, put tarps over the vehicles, and keep people from entering the crime scene. MH 57, 101-02, 118, 143; SR 525, 569-70, 586, 611. Everyone was busy at the scene. MH 139; SR 607.

ARGUMENT

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DENIED DEFENDANT'S MOTION TO SUPPRESS.

A. *Standard of Review*

This Court's standard of review on suppression motions is well settled. A motion to suppress based on an alleged violation of a constitutionally protected right is a question of law reviewed de novo. *State v. Sweedland*, 2006 S.D. 77, ¶ 12, 721 N.W.2d 409, 412. A trial court's findings of fact are reviewed under the clearly erroneous standard. *Id.* Under a clearly erroneous standard, the evidence is reviewed "in a light most favorable to the trial court's decision". *State v. Overbey*, 2010 S.D. 78, ¶ 11, 790 N.W.2d 35, 40. Once the facts have been determined, the application of a legal standard to those facts is a

question of law reviewed de novo. *Sweedland*, 2006 S.D. 77, ¶ 12, 721 N.W.2d at 412; *State v. Aaberg*, 2006 S.D. 58, ¶ 8, 718 N.W.2d 598, 600.

B. Analysis

Defendant sought to suppress the two blood draws taken at the Wagner Hospital.[1] The first blood draw was done at the request of Dr. Pinter and was taken for medical purposes. The second blood draw was done at the request of law enforcement under the exigent circumstances exception to the warrant requirement.

1. Wagner Hospital Medical Blood Draw

The Fourth Amendment gives protection against unreasonable searches and seizures. It has long been recognized, however, that its protection applies to governmental action only. *Burdeau v. McDowell*, 256 U.S. 465, 475, 41 S.Ct. 574, 576, 65 L.Ed. 1048 (1921). The Fourth Amendment does not apply "to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official." *United States v. Jacobsen*, 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984). This Court has recognized that the Fourth Amendment is inapplicable when a blood sample is

[1] Defendant initially sought to suppress two additional blood draws taken at a Sioux Falls hospital. SR 48-49. The State did not offer the test results of the Sioux Falls blood draws at trial. This appeal only addresses the admissibility of the test results from the two blood draws taken at the Wagner Hospital.

taken at the direction of a treating physician for medical purposes. *State v. Vandergrift*, 535 N.W.2d 428, 430 (S.D. 1995). If there is no investigatory impetus or purpose for the withdrawal of the blood done at the direction of the physician, the Fourth Amendment does not apply to the withdrawal.

Defendant was transported by ambulance to the Wagner Hospital. MH 7; SR 475. Dr. Pinter, an emergency room physician with more than thirty years of experience, observed Defendant upon arrival. MH 6-7, 19; SR 474-75, 487. Defendant arrived on a long board with his neck and spine immobilized. MH 7; SR 475. Dr. Pinter found Defendant to be semiconscious, lethargic and semi-cooperative. *Id.*

In order to determine the best course of treatment, Dr. Pinter ordered several standardized tests be conducted. *Id.* These tests are part of the protocol developed by the American College of Surgeons. MH 8; SR 476. The tests are used for all trauma patients at the Wagner Hospital. MH 7-8; SR 475-76. Included in the tests is a blood draw to determine a patient's complete blood count, chemistry panel, blood type, and blood alcohol content. MH 8; SR 476.

Defendant's blood was drawn at 9:25 p.m. MH 8; SR 476. The blood sample was tested by an on-site lab. MH 25; SR 493. Dr. Pinter received the results at 9:53 p.m. MH 8; SR 476.

Law enforcement was not involved in Dr. Pinter's decision to have Defendant's blood drawn and tested for medical treatment. MH 8-9;

SR 476-77. Deputy DeBuhr did not even arrive at the hospital until 9:38 p.m., thirteen minutes after Defendant's blood had been drawn pursuant to Dr. Pinter's order. MH 84; SR 552. No law enforcement told Dr. Pinter to take the blood sample or to have it tested. MH 25; SR 493. Deputy DeBuhr did not know about the previous medical blood draw when he requested the law enforcement blood draw. MH 85, SR 553. He only later found out about the blood draw requested by Dr. Pinter after Deputy DeBuhr directed the nurse to take a blood sample for law enforcement purposes. MH 85-86; SR 553-54.

As shown above, the blood draw requested by Dr. Pinter was not done for law enforcement nor was it requested by law enforcement. Therefore, the Fourth Amendment is not implicated by Dr. Pinter's order to withdraw Defendant's blood. A search warrant was not required for Dr. Pinter to obtain Defendant's blood sample.

Defendant suggests Fourth Amendment totality of the circumstances analysis should apply to the blood draw ordered by Dr. Pinter. DB 22-23. The blood draw ordered by Dr. Pinter is not subject to Fourth Amendment analysis because it was taken for medical purposes without law enforcement involvement. The State's access to and use of those results at trial, however, must be reconciled with the physician-patient privilege. SDCL 19-13-7 provides

> A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of his physical, mental, or emotional condition,

> including alcohol or drug addiction, among himself, physician, or psychotherapist, and persons who are participating in the diagnosis or treatment under the direction of the physician or psychotherapist, including members of the patients family.

Here, Defendant waived the physician-patient privilege. Defendant's medical records from the Wagner Hospital were obtained pursuant to a Court Order (SR 204) entered with the consent and stipulation of Defendant. Therefore, the Wagner Hospital medical blood draw results were properly obtained by the State and admitted by the Court at trial.

2. Wagner Hospital Law Enforcment Blood Draw

The Fourth Amendment is applicable to the Wagner Hospital blood draw done at the direction of Deputy DeBuhr. Because time was of the essence, no search warrant was obtained for the blood draw. For the test results to be admissible, an exception to the warrant requirement is necessary. The State has the burden of proving the search in this case falls within a delineated and limited exception. *State v. Hess*, 2004 S.D. 60, ¶ 23, 680 N.W.2d 314, 324. Here, law enforcement obtained Defendant's blood sample pursuant to the exigent circumstances exception to the warrant requirement.

Exigent circumstances exist when "a situation demands immediate attention with no time to obtain a warrant." *State v. Dillon*, 2007 S.D. 77, ¶ 18, 738 N.W.2d 57, 60. In determining the existence of exigent circumstances, this Court considers "whether police officers,

under the facts as they knew them at the time, would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect's escape." *Id.* The analysis is limited to the facts perceived by the officers at the time of the warrantless search, not any facts subsequently uncovered. *Hess*, 2004 S.D. 60, ¶ 23, 680 N.W.2d at 324-25.

The issue of exigent circumstances in the context of a blood draw following an alcohol-involved injury car crash was addressed in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). Schmerber was the driver of a car involved in a crash. *Id.* at 758, 86 S.Ct. at 1829. The police officer called to the scene smelled alcohol on Schmerber and observed his eyes were "bloodshot, watery, sort of a glass appearance." *Id.* at 769, 86 S.Ct. at 1835. Schmerber was taken to the hospital while the officer investigated the crash. *Id.* at 770-71, 86 S.Ct at 1836. About two hours later the officer saw Schmerber at the hospital and observed similar signs of intoxication. *Id.* at 769, 86 S.Ct. at 1835. He placed Schmerber under arrest for driving under the influence. *Id.* at 768-69, 86 S.Ct. at 1834-35. The officer directed a physician to withdraw a sample of Schmerber's blood without a warrant. *Id.* at 758, 86 S.Ct. at 1829. The defendant objected to evidence of the blood sample analysis being admitted at

trial, claiming a violation of his right not to be subjected to an unreasonable search and seizure.[2] *Id.* at 759, 86 S.Ct. at 1829.

The United States Supreme Court upheld the withdrawal of Schmerber's blood based on the exigent circumstances exception to the warrant requirement. This decision was based, in part, upon the fact that the percentage of alcohol in the blood begins to diminish shortly after alcohol consumption stops. *Id.* at 770, 86 S.Ct. at 1836. The Court also considered the time it took to bring Schmerber to the hospital and the time required to investigate the scene of the crash in determining exigent circumstances existed. *Id.* at 771, 86 S.Ct. at 1836.

> The officer in the present case, however, might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened 'the destruction of evidence.' We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to the hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

Id. at 770-71, 86 S.Ct. at 1835-36 (internal citation omitted).

Following that decision, this Court interpreted *Schmerber* to hold that the elimination of alcohol by natural bodily functions alone

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[2] *Schmerber* asserted other grounds to exclude the blood evidence which are not at issue in this case.

presents exigent circumstances which obviate the necessity of obtaining a search. *See State v. Hartman*, 256 N.W.2d 131, 134 (S.D. 1977). This was the law in South Dakota for over thirty-five years.

On April 17, 2013, the United States Supreme Court issued its decision in *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). In *McNeely*, the defendant was arrested for driving under the influence after an "ordinary traffic stop" for speeding and crossing the centerline. *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, 1556, 1568, 185 L.Ed.2d 696 (2013). The question before the Court was whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies the exigent circumstances exception to the warrant requirement in all drunk-driving cases. *Id.* at 1556. The Court held it does not. *Id.* Instead the Court determined the constitutionality of the warrantless search was dependent upon the totality of the circumstances with the natural metabolization of alcohol in the bloodstream being one factor. In doing so, the Court reaffirmed its earlier decision in *Schmerber*. *Id.* The *McNeely* Court, however, over the criticism of the Chief Justice, offered no additional guidance to law enforcement in determining exigent circumstances. *Id.* at 1574 (Roberts, C.J., concurring).

Post-*McNeely*, this Court briefly addressed exigent circumstances in *State v. Fierro*, 2014 S.D. 62, 853 N.W.2d 235. This Court acknowledged the continuing existence of the exigent circumstances

exception to the warrant requirement in DUI blood draw cases. *Id.* at ¶ 17, 853 N.W.2d at 240-41. The court stated "in determining the reasonableness of a warrantless blood draw based on exigent circumstances, a court must consider all of the facts and circumstances of a particular case and base its holding on those facts." *Id.*

Defendant relies heavily on *McNeely* and *Fierro* to assert there were no exigent circumstances justifying a warrantless blood draw. DB 16-17. However, neither case alters the ultimate holding of *Schmerber*. *Schmerber* held that if law enforcement reasonably believes there is an emergency in which the delay necessary to obtain a warrant threatens "the destruction of evidence," a warrant is not required. *Schmerber,* 384 U.S. at 770, 86 S.Ct. at 1836. Contrary to Defendant's assertion (DB 16), the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case. *McNeely*, 133 S.Ct. at 1563.

> In short, while the natural dissipation of alcohol in the blood **may** support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances.

Id. (emphasis added). Therefore, this Court must look at the totality of the circumstances.

Like *Schmerber*, Defendant Fischer was involved in a car crash. However, unlike *Schmerber*, Defendant's crash was much more

complicated than simply skidding, crossing a road and striking a tree. *Schmerber* 384 U.S. at 758, 86 S.Ct. at 1829.

Defendant, traveling at a high rate of speed, failed to stop at a stop sign and plowed into two people standing in a parking lot, killing both of them. Defendant himself suffered serious injuries that required emergency medical care. Medical personnel needed law enforcement assistance removing Defendant from his van. Once Defendant was removed from his van he was taken by ambulance to a local hospital.

There is no dispute this was a major crime scene. The crash needed to be investigated. The weather was threatening to interfere with the investigation. Because of the magnitude of the crash, the Highway Patrol had to be called in. The crash occurred in a public place where there were several witnesses. Evidence covered a large area. Body parts were ejected onto a public golf course. There were traffic control and crowd control issues. Deputy Lake called the fire department to assist. Additionally, law enforcement had to continue to answer other calls for assistance across the 120-mile long county. Defendant's own witness, Fireman Rod Bergin, testified all law enforcement officers were busy, especially in the first hour after the crash, and that they "had way too much stuff to do for the few people." MH 229-30; SR 697-98.

Upon examination at the hospital Dr. Pinter determined Defendant's level of injuries necessitated specialized treatment that

required his immediate air transfer to a Sioux Falls Hospital. Law enforcement believed Defendant's blood sample needed to be obtained before he was flown to Sioux Falls. The alcohol in Defendant's bloodstream was going to continue to dissipate while in flight and during any delays due to medical intervention in Sioux Falls. Dr. Pinter was not going to endanger Defendant's life waiting for law enforcement to obtain a search warrant. MH 26; SR 494. Dr. Pinter would not have kept Defendant at the Wagner Hospital in order for law enforcement to obtain a search warrant. MH 26; SR 494. Under the totality of the circumstances in this case, law enforcement reasonably believed exigent circumstances existed and there was insufficient time to obtain a search warrant.

Defendant claims it would have taken less than seven minutes to obtain a search warrant. DB 19. He further claims no officer would have had to leave the scene or have their work at the scene interrupted to obtain a search warrant. DB 20. These claims do not take into consideration the requirements for obtaining a search warrant in Charles Mix County on July 8, 2013.

Search warrants in South Dakota may be obtained in several ways.[3] An officer may submit an affidavit and warrant, either in person or via facsimile. SDCL 23A-35-4; 23A-35-4.2. Here, this would have

[3] Electronic search warrants are now available, however, they were not an option on July 8, 2013. See SDCL 23A-35-4.2 (as amended in 2014).

required an officer to leave the scene, drive six miles to the Sheriff's office, type the affidavit, and deliver it either in person or via facsimile to a judge.[4] MH 40-43; SR 508-11. The judge would then need to sign the warrant and provide proof to the officer that the warrant had been signed. SDCL 23A-35-4.2. Deputy DeBuhr estimated this process would take at a minimum a half hour up to an hour. MH 107; SR 575. The officer would then need to drive from the Sheriff's office to the Wagner Hospital to execute the search warrant, adding at least an additional twenty minutes. MH 107; SR 575. By that time, Defendant would have been in flight to Sioux Falls.

The other option is to request a search warrant based upon sworn oral testimony. SDCL 23A-35-5. In that event an officer may contact the judge by telephone and provide sworn testimony to support the request for the warrant. Sheriff Thaler and his deputies had never requested a search warrant by telephone. Sheriff Thaler admitted that if he had the necessary information about Defendant at the time he ordered Defendant's blood draw, he could have provided the search warrant affidavit information in a five minute phone call to the judge. MH 69, 77-78; SR 537, 545-46. That, however, does not mean that Sheriff Thaler could have obtained the search warrant within five minutes.

[4] The Charles Mix Sheriff and his deputies do not have computers in their patrol cars.

Whether an officer provides the probable cause necessary to obain a search warrant by written affidavit or by providing sworn oral testimony, a *written* search warrant must be prepared. SDCL 23A-35-1. If there is an oral request for a search warrant, the warrant itself must be read to the judge verbatim. SDCL 23A-35-6. This means the officer must have in his possession the written proposed warrant. Law enforcement on scene did not have computers in their cars or the ability to prepare a warrant on scene. MH 43; SR 511. Sheriff Thaler or one of his deputies would have needed to drive six miles to the Sheriff's office to prepare the warrant. This would have required the officer to abandon his duties at the scene, drive to the Sheriff's office, prepare the warrant, call the judge, give sworn oral testimony, read the warrant to the judge, make any changes to the warrant as required by the judge, and drive to the Wagner Hospital. Realistically, a search warrant obtained by means of oral testimony only eliminates the need to type the affidavit. It does not eliminate the need to prepare a written warrant. Even if law enforcement would have provided sworn oral testimony to establish probable cause for the warrant, a written warrant could not have been obtained before Defendant was flown to Sioux Falls.

Finally, Defendant suggests that law enforcement created the exigency themselves by failing or refusing to call in additional law enforcement. DB 17, 22. Defendant cites *Kentucky v. King*, 563 U.S.

452, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011). That case held that where the conduct of the police preceding the exigency is reasonable and the police do not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and allowed. *Id.* at 1858.

Here, law enforcement did not create the exigency. They faced horrific circumstances created by Defendant's criminal actions. Two people died. Defendant suffered serious injuries. The magnitude of the crime scene made things extremely difficult for the officers. All available Charles Mix county officers responded to the scene. Additionally, two Highway Patrol troopers were called to assist. Even with all of this law enforcement, fire department personnel assistance was necessary to preserve the evidence. Law enforcement acted reasonably in calling in additional officers. They did not create or enhance the exigency by their actions.

Exigent circumstances existed, which justified law enforcement obtaining a sample of Defendant's blood without a warrant. The circumstances include the natural dissipation of alcohol in Defendant's blood, the magnitude of the investigation, Defendant's medical condition which required air transport to another hospital, and the time it would have taken to obtain a warrant under the circumstances of this case. Therefore, the trial court properly denied Defendant's motion to

suppress the results of the blood draw obtained at the direction of law enforcement at the Wagner Hospital.

CONCLUSION

The State respectfully requests that Defendant's conviction and sentence in this matter be affirmed in all respects.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellee's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 5,046 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 15th day of September, 2015.

_____
Brent K. Kempema
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of September, 2015, a true and correct copy of Appellee's Brief in the matter of *State of South Dakota v. Ronald Ray Fischer, Jr.* was served by electronic mail on Timothy R. Whalen at whalawtim@cme.coop.

_____
Brent K. Kempema
Assistant Attorney General

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

APPELLANT'S REPLY BRIEF

STATE OF SOUTH DAKOTA
Plaintiff and Appellee,

vs.

RONALD RAY FISCHER, JR.
Defendant and Appellant.

DOCKET #27455

APPEAL FROM THE CIRCUIT COURT
FIRST JUDICIAL CIRCUIT
CHARLES MIX COUNTY, SOUTH DAKOTA

HONORABLE BRUCE V. ANDERSON
Presiding Circuit Judge

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NOTICE OF APPEAL FILED MAY 14, 2015

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PRELIMINARY STATEMENT

This reply brief is submitted in response to the Appellee's Brief. The Jurisdictional Statement, Statement of Legal Issues, Statement of the Case, and Statement of the Facts will not be restated herein, as the Appellant will rely upon his initial brief for these matters. As in the Appellant's Brief, the Appellant shall be referred to as "Fischer" and the Appellee shall be referred to herein as "State". References to the hearing on Fischer's Motion to Suppress will be by "MH" followed by the page number and line number if necessary. References to the court trial transcript will be by "CT" followed by the page number and line numbers if necessary. References to the settled record shall be by "SR" followed by the page number for the beginning of the document. References to trial exhibits shall be by "Exh." followed by the exhibit number or, if used, the exhibit letter. References to exhibits from the motion hearing shall be by "MH Exh." followed by the exhibit number or, if used, the exhibit letter. This Reply Brief is intended only to be responsive to the arguments contained in the Appellee's Brief. Consequently, Fischer is not abandoning the arguments made in the Appellant's Brief by not restating same herein.

ARGUMENT

A. Exigent Circumstances.

The State has made it clear that the only basis for the failure to secure a search warrant for the seizure of Fischer's blood sample at the Wagner Community Memorial Hospital (WCH) in this matter was that exigent circumstances existed. Exigent circumstances exist when "... a situation demand[s] immediate attention with no time to

obtain a warrant.' ... (Citations omitted) ." State v. Dillon, 2007 S.D. 77, ¶18, 738 N.W.2d 57. The existence of exigent circumstances is dependent upon the facts, circumstances and criteria present in each case. Consequently,

> [i]n determining whether exigent circumstances exist we ask, 'Whether police officers, under the facts as they knew them at the time, would reasonably have believed that delay in procuring a search warrant would gravely endanger life, risk destruction of evidence, or greatly enhance the likelihood of a suspect[']s escape.' ... The inquiry is one of objective reasonableness. ... Furthermore, '[e]xigency remains 'within the narrow range of circumstances that present real danger to the police or the public or a real danger that evidence or a suspect might be lost.' (Citations omitted).

Dillon, 2007 S.D. at 77, ¶18. Contrary to the State's arguments, however, there is absolutely no evidence that circumstances existed on July 8, 2013, which proved Fischer or anyone else posed a grave danger to life, a risk of the destruction of evidence by their intentional actions (no one was capable of destroying the blood in Fischer's body), or that circumstances existed whereby Fischer would escape (Fischer was in and out of consciousness, incoherent, not ambulatory, and in the custody of medical personnel). Consequently, regardless of the State's elaborate argument about the various and sundry "exigent circumstances" that existed on July 8, 2013, the only exigent circumstances it can point to relative to the blood sample taken from Fischer at the WCH is the dissipation of blood from Fischer over time. This argument is largely, if not exclusively, based on the Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) case. The Schmerber argument and rationale has been squarely and decisively rejected by the United States Supreme Court in the McNeely decision and by this Court in the Fierro

decision. See, Missouri v. McNeely, ---- U.S. ----, 133 S.Ct. 1552, 185 L.Ed.2d. 696 (2013); State v. Fierro, 2014 S.D. 62, ¶17 and ¶24, ---- N.W.2d. ----.

Moreover, the State's reliance on the Schmerber case is grossly misplaced. The Schmerber decision was primarily focused on the time element as it related to the dissipation of alcohol from the defendant's blood. The Court's analytical focus in Schmerber is revealed by its initial statement that "... [w]e are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system." Schmerber, 384 U.S. at 770. Clearly, the focus of the Schmerber holding and its consideration of the other factors associated with the blood draw are all inextricably and solely tied to the time element as it relates to the dissipation of alcohol from the blood. Further, the McNeely Court clearly distinguished the Schmerber holding on the basis of the technological advances that have been made in the law enforcement arena and an officer's ability to secure a search warrant electronically and otherwise in the 47 years since Schmerber was decided. McNeely, 133 S.Ct. at 1561. The State, however, ignores the technological strides recognized by the McNeely Court and makes the same arguments that resulted in the Schmerber decision. These arguments were clearly unpersuasive in McNeely and should likewise be unpersuasive here. See, Id., at 1561; Fierro, 2014 S.D. at 62. Clearly, the arguments the State hangs its hat on now to justify the warrantless search of Fischer and seizure of his blood may have once been sanctioned by the Courts, but are now archaic and inapplicable. See, McNeely, 133 S.Ct. at 1561; Fierro, 2014 S.D. at 62.

In addition, the time element argument once critical in the Schmerber decision further deteriorates given the current status of affairs relative to law enforcement and the advances in medical practices. Specifically, at 8:40 p.m. emergency personnel at the accident scene had notified the helicopter transport from Sioux Falls so that it could be at the WCH for an air evacuation of Fischer from the WCH to Sioux Falls. MH, pp. 10-13, MH Exh. H. South Dakota State Trooper Casey Bassett (Bassett) received the dispatch call for his assistance at the accident at 8:45 p.m. MH, pp. 171-172. Bassett notified Trooper Jeremy Gacke (Gacke) in the Sioux Falls area for assistance with this case relative to a blood draw from Fischer at McKennan Hospital in Sioux Falls at 10:31 p.m. MH, pp. 175-178, 209-210. When Gacke arrived at McKennan Hospital at 11:15 p.m. Fischer was already there and medical staff was working on him in the hospital. MH, pp. 211-212. The law enforcement blood draw at the WCH occurred at 9:45 p.m. MH Exh. A. Consequently, less than 45 minutes elapsed from the time when the helicopter left WCH with Fischer until he arrived in Sioux Falls. These expeditious practices were virtually non-existent at the time Schmerber was decided or, at best, in their fledgling stages. Clearly, given the record established at the suppression hearing regarding the methods available to the officers involved in the accident investigation to secure a search warrant, there was ample time to secure a warrant both before Fischer left WCH and by the time he arrived at McKennan hospital in Sioux Falls. This is particularly so given the fact that the record from the suppression hearing indicates that officers really only needed about seven minutes to secure a warrant and South Dakota State Troopers in both Charles Mix County and Sioux Falls were available and working on this case.

Furthermore, the State misses the mark on the Kentucky v. King case as it applies analytically here. The King case, although distinguishable on its facts, is instructional because it gives this Court guidance on how to reach the decision as to whether or not the officers in this particular case "created" the exigent circumstances that they relied upon to avoid getting a constitutionally valid search warrant. King resolved the disagreement among the lower courts as to what specific test applied to determine if officers "created" the exigent circumstances they relied upon to avoid securing a search warrant in a given case. See, Kentucky v. King, 563 U.S. ----, 131 S.Ct. 1849, 179 L.Ed.2d. 865 (2011). The governing rule created by King is that the exigent circumstances exception to the constitutional warrant requirement "... applies when the police do not gain entry to the premises by means of an actual or threatened violation of the Fourth Amendment." King, 131 S. Ct. at 1862. In reaching this conclusion, the King Court discussed the various and sundry tests applied by the lower courts to determine if the officers created the exigency they relied upon to satisfy the exigent circumstances exception to the constitutional warrant requirement. King, 131 S. Ct. at 1857-1862. It does not appear that King nor any of its progeny addressed officer negligence or the failure of officers to take the necessary steps to protect against creating the exigent circumstances. Moreover, in King the court focused exclusively on the actions of the suspects and the potential destruction of evidence and did not discuss nor consider exigent circumstances created by law enforcement officers failing or neglecting to act in accordance with the circumstances attendant to the matter they were handling. Put another way, King gives us a bright line rule on destruction of evidence cases and officers dealing with suspects who are about to

or are actually destroying evidence, but it does not address whether the failure of an officer to act or neglect of an officer to act can constitute an "actual or threatened" violation of the Fourth Amendment. However, the King rationale has been utilized by one other court relative to officer neglect or miscues in investigative tactics. See, United States v. Ramirez, 676 F.3d 755 (8th Cir. 2013). It is the manner in which the Court utilized and applied King in the Ramirez decision that is persuasive here. In Ramirez officers botched their initial attempt to gain entry into a suspects hotel room without a warrant by use of a hotel key card. Id., at 758. After the miscue, officers covered the peep hole in the door, knocked on the door and announced "housekeeping", but no furtive actions were detected from within the room. Id., at 758. The suspect opened the door then immediately closed same when he observed the officers whereupon the officers broke the door down and gained entry to the room and discovered incriminating evidence. Id., at 758. The Eighth Circuit reversed the lower court and held the evidence seized by officers should have been suppressed because officers created the exigent circumstances they relied upon to gain entry into the room by their poor tactics and choice of investigative strategies. Id., at 765. While Ramirez addresses a different factual scenario than the case at bar, it is instructional because the officers failed to act appropriately and/or engaged in negligent actions and then attempted to cover those actions with a claim of exigent circumstances. The appellate court saw through the transparent claim when it examined the officers' conduct, applied the rationale and holding in King, and then concluded that the officers mistake and negligence was a basis to conclude an actual or threatened violation of a suspect's Fourth Amendment rights had occurred.

Under the above law, this Court should likewise conclude that the officers created the exigent circumstances they relied upon to obtain Fischer's blood at the WCH without a warrant due to their failure to act and/or their negligence actions.

Additionally, the King rule is instructional here for other reasons. The King rule is grounded in the Fourth Amendment. King, 131 S. Ct. at 1856. The Courts have consistently held that searches of persons and property without a warrant are presumed unreasonable and, therefore, unconstitutional. Id., at 1856. The aforementioned presumption, however, can be overcome in certain circumstances if the search falls into one of the recognized exceptions to the Fourth Amendment warrant requirement. Id., at 1856. The exceptions to the Fourth Amendment warrant requirement are generally based upon the reasonableness of the search under the attendant circumstances. Id., at 1856. This is so because the "... ultimate touchstone of the Fourth Amendment is reasonableness." Id., at 1856. Based upon these fundamental conclusions, the King Court concluded that an actual or threatened violation of the Fourth Amendment is necessary to establish officer created exigent circumstances. Clearly then, the analysis must also consider whether the conduct of the officers was reasonable or unreasonable under the facts of the case. In the case at bar, three officers immediately upon arriving at the accident scene recognized it as a crime scene and knew that some alcohol related criminal charge was forthcoming. These same three officers detected the odor of an alcoholic beverage coming from Fischer while he was in his vehicle shortly after arriving at the accident scene. All three of these officers, however, neglected to inform the Sheriff of the odor of an alcoholic beverage emanating from Fischer until the eleventh hour.

Moreover, when the Sheriff arrived at the accident scene he failed to make any inquiry of his officers as to whether or not alcohol was implicated in the accident scenario. No effort was made by the Sheriff nor any officer to contact the Wagner Police Department and secure their involvement in securing a search warrant or assisting with Fischer once he arrived at the WCH. The Bureau of Indian Affairs officers from the Yankton Agency in Wagner were not contacted nor involved in the accident investigation in any respect. The officers were all aware of the rules governing search warrants and how to obtain them, but none of the officers gave any consideration to those rules nor attempted to secure a search warrant in any respect. Finally, the Charles Mix County State's Attorney was not contacted nor requested to secure a search warrant for Fischer's blood. The simple fact of the matter is that at the initial and critical stages of the accident investigation all focus was leveled on gathering evidence and preserving the case for prosecution, and absolutely no consideration was given to Fischer's fundamental, constitutional rights.

Lastly, when the State asserts that an exception to the Fourth Amendment warrant requirement is applicable, it has the burden of proving that the warrantless search falls into a specific exception to the constitutional warrant requirement. Fierro, 2014 S.D. at 62; State v. Hess, 2004 S.D. 60, 660 N.W.2d 314. As indicated *supra*, the only exception that applies to Fischer's case is the exigent circumstances exception. In order for the Court to determine if exigent circumstances exist in this case, it must view the facts associated herewith objectively and in light of the totality of the circumstances of the case. Dillon, 2007 S.D. at 77; Fierro, 2014 S.D. at 62. Given the law from King,

however, the Court must also examine the actions of the officers to determine if their conduct constituted an actual or threatened violation of Fischer's Fourth Amendment rights.

In light of the above, the officers' conduct was not reasonable and their neglect and failure to do their job correctly "created" the exigent circumstances because by their actions there was an actual or threatened violation of Fischer's Fourth Amendment rights.

B. Hospital Blood Draws.

Fischer argues that his constitutional rights were implicated and violated when the staff at WCH drew a blood sample from him on July 8, 2013. The State asserts that the WCH blood draw was a non-law enforcement blood draw that was taken purely for medical purposes. This position, while ostensibly correct, fails to examine the totality of the circumstances associated with the medical blood draw and the implications attendant to the events involving Fischer. The South Dakota Supreme Court has held that "... blood samples extracted for legitimate medical purposes rather than investigatory purposes..." are not subject to the same constitutional scrutiny as blood samples drawn for law enforcement purposes. State v. Vandergrift, 95 SDO 382, ¶¶7-8, 535 N.W.2d 428 (S.D. 1995). The question, then, is how does the court determine whether the blood sample was for medical purposes or investigatory purposes? The answer necessarily depends upon the facts of each case. This factual inquiry is consistent with the totality of the circumstances inquiry required by McNeely and Fierro. Moreover, it is also consistent with the inquiry required by King to determine if the law enforcement officers "created" the exigent circumstances they relied upon in this case. It is Fischer's position that the

facts are sufficient to render the WCH blood sample an investigatory sample for law enforcement purposes and thereby render the medical blood sample an illegally obtained sample which constitutes an actual or threatened violation of Fischer's Fourth Amendment rights.

Further, in order for the Court to hold the WCH blood draw was properly admitted and not subject to suppression, the Court must ignore the relationship between the hospital and the law enforcement community in Charles Mix County, South Dakota. It is apparent from the record on the suppression motion that there is a working relationship between law enforcement and the WCH. The record clearly shows that Sheriff Randy Thaler and Deputy Sheriff Travis DeBuhr were aware, based upon past experiences, that blood sample results could be obtained from the hospital in driving under the influence and accident cases. MH, pp. 63-64, 98. Law enforcement officers in small communities such as Charles Mix County become frequent flyers at the emergency rooms in the local hospitals due to the nature of their work and the prevalence of alcohol related offenses in our communities. As a result of the contacts, the medical personnel as well as the law enforcement personnel become familiar with each other and the various and sundry matters that bring them together. The clear implication is that if law enforcement is present or involved in an event, such as a serious accident, then most likely there will be a need for a blood test to determine alcohol content of at least one person and, perhaps, more than one person. While the entities can erect the wall of plausible deniability between them, the facts clearly show that there is a relationship that

is sufficient to constitute the WCH blood sample as one which had, at the very least, a dual purposes of medical and investigatory.

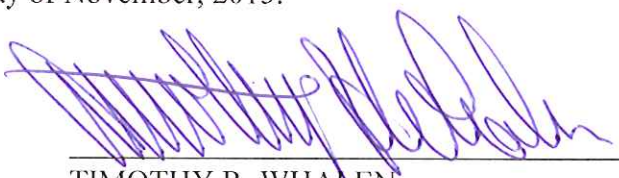
CONCLUSION

Based upon the above and foregoing and the error committed by the trial court, this Court should reverse the decision of the trial court, rule that the blood samples from WCH were the product of an unconstitutional search and seizure and the blood evidence and all evidence derivative thereof should be suppressed.

REQUEST FOR ORAL ARGUMENT

Fischer hereby requests that he be granted oral arguments on this appeal.

Dated this 4th day of November, 2015.



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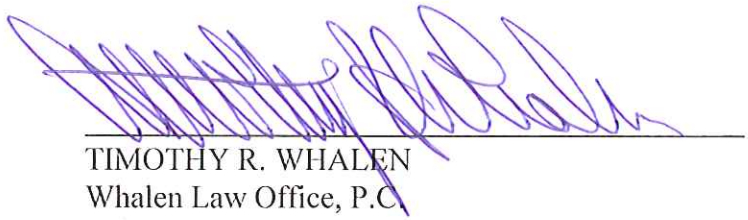
CERTIFICATE OF COMPLIANCE

Timothy R. Whalen, the attorney for the Appellant hereby certifies that the Appellant's Brief complies with the type volume limitations provided for in SDCL 15-26A-66(b)(4). The Appellant's Brief contains 15,668 characters and 3017 words.

Further, the undersigned relied upon the word count of the word processing system used to prepare the Appellant's Brief.

Dated this 4th day of November, 2015.



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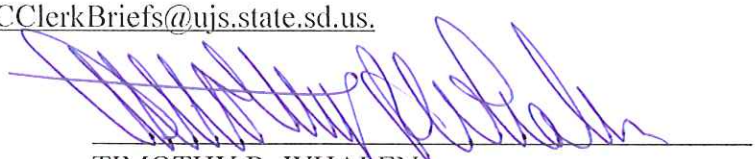
CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served two true and correct copies of the Appellant's Brief on the attorneys for the Appellee at their addresses as follows: Marty J. Jackley and Kelly Marnette, South Dakota Attorney General's Office, 1302 East Highway 14, Suite #1, Pierre, SD 57501-8501, atgservice@state.sd.us, and Scott Podhradsky, Charles Mix County State's Attorney, P.O. Box 370, Lake Andes, SD 57356, scottjpodhradsky@icloud.com, by e-mail and by depositing same in the United States first class mail, postage prepaid, on the 4th day of November, 2015, at Lake Andes, South Dakota.

Further, the undersigned hereby certifies that the original and two copies of the above and foregoing Appellant's Brief were mailed to Shirley Jameson-Fergel, Clerk of the Supreme Court, State Capitol Building, 500 East Capitol Avenue, Pierre, SD 57501-5070 by depositing same in the United States first class mail, postage prepaid, on the 4th

day of November, 2015. Further, one copy of the Appellant's Brief was e-mailed to the aforesaid Clerk of the Supreme Court on the 4th day of November, 2015, at her e-mail address as follows: SCClerkBriefs@ujs.state.sd.us.



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