APPELLANT'S BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

NO. 26823

DONOVAN CRAIG SIERS,

Petitioner and Appellant,

v.

DOUGLAS WEBER,

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE PETER LIEBERMAN

Circuit Court Judge

MARK KADI
Public Advocate's Office
415 North Dakota Avenue
Sioux Falls, SD 57104
Attorney for Appellant.

MARTY JACKLEY
Attorney General
1302 E. Highway 14, #1
Pierre, SD 57501-5070
Attorney for Appellee.

AARON MCGOWAN
Minnehaha Co. State's Attorney
415 North Dakota Avenue
Sioux Falls, SD 57104
Attorney for Appellee.

Notice of Appeal Filed September 30, 2013.

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v.		
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PRELIMINARY STATEMENT

Citations to the settled record will be referred to "SR" followed by the page number. The hearing regarding the State's motion to dismiss occurring on August 30, 2013, will be referred to as "M". The Appellant-Petitioner Donovan Siers will be referred to as "Appellant".

JURSDICTIONAL STATEMENT

This is an appeal of the Order of the Honorable Peter Lieberman denying and dismissing the Appellant's Petition for Habeas Corpus Relief. SR 76-78. This Court possesses jurisdiction of this matter pursuant to SDCL 15-26A-3 and

SDCL 21-27-18.1 permitting appeals of habeas corpus matters following issuance of a certificate of probable cause.

The State initially asserted in a Motion to Dismiss that the Appellant's action was untimely filed. SR 32. The Petitioner filed a response to the State's Motion regarding the timeliness issue. SR 39. The State later retreated from this position and acknowledged the action was not barred from proceeding on that basis. Appendix A.

The State referred to authority cited by the Petitioner in its response arguing that Constitutional Due Process concerns prohibited application SDCL 21-27-3.3 (2012) regarding the filing of the present case. The Petitioner argued that all statutes of limitation must proceed on the idea that the party has full opportunity afforded him to try his right in the courts per Finch v. State, 736 A.2d 1043 (Me. 1999), Wilson v. Iseminger, 185 U.S. 55, 62 (1902) and U.S.Const.Amend XIV. SR 38-39. Statutes of limitation which shorten the time for filing or extinguish existing claims may deprive a party of due process through retroactive application per Finch. A statute which purports to extinguish the existing rights of the claimant without affording a reasonable opportunity for the exercise of those rights may be held to be an unlawful

attempt to extinguish rights arbitrarily, whatever might be the purpose of its provisions per Texaco Inc., v. Short, 454 U.S. 516, 527 n.21 (1982). The filing of the Petitioner's action did not constitute a contested jurisdictional issue in the lower court, nor should it be presently before this Court.

STATEMENT OF THE CASE

The Appellant is currently an inmate of the South Dakota State Penitentiary. He was convicted of Driving Under the Influence 3rd in Second Judical Circuit, Minnehaha County file #08-2735 on November 29, 2009. SR 62, 79; Appendix B. He was also convicted of Felony Failure to Appear in Second Judicial Circuit Minnehaha County file #08-5295 on that same date. SR 62; Appendix B. He was sentenced to the Department of Corrections [hereinafter "DOC"] following an order revoking his suspended sentence on June 16, 2011 regarding his convictions. SR 8-9.

The Appellant filed a petition for habeas corpus alleging that he was wrongfully held in violation of his federal and state constitutional rights arising from, inter alia the 4th, 5th, 6th and 14th Amendments to the U.S. Constitution. SR 53-70; Appendix B. He alleged that he was

wrongfully convicted of a Driving Under the Influence 3rd Offense based on blood alcohol evidence forcibly taken against his will, and that his appointed counsel did nothing at any stage of the proceedings below to challenge the constitutional propriety of such evidence or advise the Appellant of the principles addressed in Schmerber v. California, 384 U.S. 757 (1966) prior to entering a plea or admission. SR 69. The State filed a Return and moved to dismiss the Petition arguing that the petition failed to State a claim for which relief could be granted. SR 32, 36.

A hearing occurred regarding the State's motion on August 30, 2013. SR 75. The trial court granted the State's motion but issued a certificate of probable cause regarding issues concerning whether the recent case of Missouri v McNeely, 133 S.Ct. 1552 (2013) could be applied retroactively conceivably granting the Appellant relief. SR 84; Appendix C, D. The Appellant appeals the trial court's decision dismissing his petition.

LEGAL ISSUES

I. WHETHER THE UNITED STATES SUPREME COURT'S DECISION IN MISSOURI v. MCNEELY, 133 S.CT. 1552 (US 2013) PRESENTED A NEW OR OLD RULE OF CONSTITUTIONAL LAW

The trial court determined a new rule was created.

Missouri v. McNeely, 133 S.Ct. 1552 (US 2013)

II. IF MCNEELY DID NOT PRESENT A NEW RULE, WHETHER THE TESTS OF COWELL V LEAPLEY, 458 N.W.2D 514 (SD 1990) APPLY TO A NEW UNITED STATES SUPREME COURT DECISION CONCERNING AN OLD RULE

The trial court determined the factors of Cowell applied.

Missouri v. McNeely, 133 S.Ct. 1552 (US 2013)

III. WHETHER THE MCNEELY DECISION SHOULD BE GIVEN RETROACTIVE APPLICATION IN A HABEAS CORPUS CASE ARISING BEFORE MCNEELY

The trial court determined the factors of Cowell did not require retroactive application of McNeely.

Missouri v. McNeely, 133 S.Ct. 1552 (US 2013)

STATEMENT OF FACTS

The Appellant, Donovan Siers, is an inmate held in the custody of the DOC. The Appellant sought habeas relief and filed a pro se petition seeking relief on January 4, 2013. SR 13. He subsequently sought the assistance of court appointed counsel. Ultimately, the Office of the Public Advocate of Minnehaha County was appointed to represent him in the habeas corpus matter.

The Appellant filed an amended application for habeas corpus relief which was served on the relevant parties. SR 24. A second amended application was filed. SR 72. The

State filed a Return and filed a motion to dismiss the Appellant's action for failing to state a claim. SR 32, 39.

The Appellant's petition alleged the following. The Petitioner was held pursuant to convictions for Driving Under the Influence 3rd and Felony Failure to Appear. SR 70. The original sentences were entered on November 9, 2009. SR 70. The Appellant was sentenced to the DOC following revocation of his suspended sentences on June 16, 2011. SR 70.

The Driving Under the Influence Conviction arose out of factual allegations that the Appellant was arrested for the offense of Deiving Under the Influence 3rd on May 16, 2008. SR 62, 71. The petition alleged the Appellant was told to provide a blood sample and refused. SR 69. Law enforcement officers then strapped the Petitioner to a restraining chair and withdrew blood from the Appellant forcibly, without his consent, and without a search warrant, in violation of his constitutional rights. SR 69. A blood alcohol sample was obtained and analyzed. The sample was used as the primary evidence supporting the Appellant's conviction of the crime charged. SR 69. The applicable Felony Failure to Appear arose from the

Appellant missing a court hearing arising out of the Driving Under the Influence 3rd charge. SR 68.

The Petitioner was represented by Renae Kruse and Ryan Kolbeck of the Minnehaha County Public Defender's Office at proceedings involving his convictions and probation revocation hearings regarding these offenses. SR 69. These attorneys had been alleged to have been constitutionally ineffective for not pursuing or advising the Appellant of potential 4th Amendment search and seizure issues arising out of Schmerber v. California. SR 68-69.

The petition alleged that neither attorney advised the Petitioner fully and correctly regarding an unconstitutional seizure of blood evidence taken in this case, or of the effect of law enforcement officer's failure to obtain a warrant in the absence of exigent circumstances in that the blood draw occurred in the law enforcement center next to the courthouse where numerous judges are available to review warrants via oral, written or electronic communication, or are otherwise available in the area. SR 68-69. It also alleged that neither attorney sought to alert the court or Appellant to the issue prior the Appellant's guilty plea or during a subsequent revocation hearing in 2011 wherein a sentence to the

penitentiary was imposed, or within two years of said revocation hearing when sentence modifications may be sought. SR 68-69.

It alleged that the act of challenging the constitutional propriety of the blood draw would have resulted in suppression of said evidence, with a dismissal of the Driving Under the Influence charge, or judgment of acquittal of the Petitioner following the close of the State's evidence. SR 68-69. Had the driving charge been resolved in the Petitioner's favor, the petition alleged the Appellant would not have been required to appear in court for a felony matter and would not have been convicted of a felony Failure to Appear. SR 68-69.

The Petition alleged that McNeely and Schmerber applied to the Appellant's case. SR 68. The petition alleged additional facts addressing court resources. SR 65-69. It alleged that application of McNeely would not have a disruptive effect on the Unified Judicial System.

It stated few claims potentially and practically exist compared to what the Unified Judicial System is capable of processing, or otherwise has been historically shown to be capable of processing in past years. SR 66-68. Convictions for driving under the influence 1st and 2nd offenses can only

result in sentences of less than 1 year. As such, as time marches on, fewer and fewer cases involve individuals who might seek relief.

The petition alleged Pre-McNeely sentences are now beyond typical magistrate court appeal deadlines. SR 68. Fewer and fewer individuals remain in custody to potentially seek relief that could be realistically obtained in sufficient time from fewer judicial remedies before any individuals would be released from custody. SR 67-68. Coram Nobis arguably would not present a realistic means to obtain relief for out of custody individuals. Habeas corpus relief is available to individuals in custody. SR 67-68. Those individuals who have since been released from custody cannot pursue habeas corpus actions. SR 67-68.

It further alleged that Department of Corrections Statistic information, [hereinafter "DOC"] is available on the DOC website. SR 67. The website indicates, as of June 20, 2013, 188 inmates are incarcerated for DUI 3rd, 138 inmates are incarcerated for DUI 4th, and 72 inmates are incarcerated for DUI 5th, for a total of 398 inmates jailed on DUI offenses from all judicial circuits in South Dakota SR. The percentage of inmates incarcerated at the DOC for

DUI offenses are the following: DUI 3rd 5.27%; DUI 4th 3.57%; DUI 5th 2.02%.

The petition indicated the Unified Judicial System's statistical information is available on its website. SR 67. It presents DUI statistical information dating back to 2008. DUI charge/case filings for all judicial circuits were as follows: 11,029 in 2008; 10,147 in 2009; 9,246 in 2010; 8,744 in 2011; 10,487 in 2012.

It stated that DUI guilty pleas for all judicial Circuits were as follows: 8,019 in 2008; 7,544 in 2009; 6,865 in 2010; 6,218 in 2011; 6,476 in 2012. SR 67. DUI guilty verdicts for all judicial Circuits were as follows: 73 in 2008; 64 in 2009; 68 in 2010; 58 in 2011; 83 in 2012. Driving Under the Influence case filings increased by 1,743 from 2011 to 2012. The petition alleged that the Unified Judicial System was able to process the increase of 1,743 additional DUI cases without collapsing. SR 67. State prosecutions were not disrupted by an increase of 1,743 additional DUI cases in 2012 as fewer DWI cases were dismissed between 2012 and 2011 (1916 dismissals in 2012 versus 2239 dismissals in 2011).

The petition further alleged that assuming arguendo, in a worst case scenario that all 398 inmates wished to

seek habeas corpus relief based on McNeely grounds alone, and such grounds prejudiced the outcome of each original proceeding, the statistics show that the UJS can absorb or is otherwise capable of handling an additional 398 DUI cases. SR 66-67. It was able to handle 11,029 DUI cases in 2008 – which is 542 cases higher than the 10,487 DUI cases addressed in 2012. It could therefore handle 398 – a lesser number. SR 66-67.

It stated Driving Under the Influence cases present less risk of evidence loss than other criminal cases. SR 66. Primary state witnesses are overwhelmingly police officers whose whereabouts are known. Investigation reports and audio-video evidence are, or could have been, easily preserved (digitally). Blood sample evidence since disposed would not constitute a loss of evidence since McNeely grounds to suppress blood evidence would have been established in the habeas corpus action having a corresponding effect to exclude such evidence from any new trial.

The State's motion to dismiss came before the court for hearing on August 30, 2013. The State conceded that the allegations stated in the petition were to be taken as true for the purposes of ruling on the motion to dismiss.

M8. It advised the court needed to "just look at that document". M8. When the state attempted to advise the court on recent magistrate court positions on McNeely, the trial court indicated "I really want to talk about whether McNeely is retroactive or not". M4

The State argued that McNeely presented a new rule, in terms of it being *a new rule in South Dakota*. M4. The State conceded that McNeely was not a new rule as far as the rest of the country may be concerned. M5 The State challeged the Appellant's use of UJS and DOC statistics by stating there are many individuals out of the penitentiary on parole or probation who *may* come back into custody on a violation and *may* seek habeas relief. M7 The State was not able to present a number: "while we don't have any numbers of those cases, I would submit to the Court that those may be very substantial". M7.

Appellant's counsel voiced concerns, inter alia, about a perceived predisposition among some to characterize a new Supreme Court opinion as an announcement of a "new rule". M10. The Appellant attempted to stress a distinction. The retroactivity factors from Cowell v. Leapley, 458 N.W.2d 514 (SD 1990) "talk not just about a new opinion coming out, they seem to talk about a new opinion coming out *with*

new rules." M15-16 (emphasis *added*). The Appellant cautioned about using phrases regarding how Schmerber v. California was supposedly "clarified", "extended" or "expanded" when the text of the McNeely opinion shows Schmerber was merely restated. M11-12. The Appellant cited portions of the McNeely opinion supporting this argument: "We do not doubt that some circumstance will make obtaining a search warrant impractical such the disposition of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test. That however, is a reason to decide each case on its facts as we did in *Schmerber*, and not to accept the considerable overgeneralization that a per se rule would reflect." M11 (citing Missouri v. McNeely, 133 S.Ct. at 1561)(emphasis *original*).

The habeas court indicated it had little doubt that McNeely imposed a new rule, as from the prospective of the State of South Dakota. M17. The rule created "quite a jolt . . . it was a dramatic new rule *here*." M17 (emphasis *added*). The habeas court indicated that the McNeely decision did not increase the accuracy of trials. M18. It determined that law enforcement officials had justifiable relied on South Dakota case law and statutes for the past

35 years. The court also indicated that retroactive application would have a disruptive effect in that "very few DUI cases would ever be retried if McNeely was applied by this State retroactively." M19. "The state would end up dismissing the great majority, if not all of these cases." M19. The trial court granted the State's motion but indicated it would grant a certificate of probable cause because "we need a definitive decision from the South Dakota Supreme Court." M20. This appeal followed.

ARGUMENT

I. THE UNITED STATES SUPREME COURT'S DECISION IN MISSOURI v. MCNEELY, 133 S.CT. 1552 (US 2013) PRESENTED AN OLD RULE OF CONSTITUTIONAL LAW

To obtain habeas relief based on denial of the constitutional right to fair trial via ineffective assistance of counsel grounds or other causes of action, a petitioner must establish that his trial counsel's performance was deficient and that such deficiency prejudiced the petitioner. Baldridge v. Weber, 746 N.W.2d 12, 20 (SD 2008). This case involves a petition dismissed for failing to state a claim for which relief could be granted.

On appeal, a de novo standard of review is applied. See Gruhlke v. Sioux Empire Federal Credit Union, 756 N.W.2d 399 (SD 2008). Pleadings may be dismissed on such grounds only where it appears beyond a doubt that the petition sets forth no facts to support any claim for relief. See Jenner v. Dooley, 590 N.W.2d 463 (SD 1999).

A reviewing court must regard as true all facts plead by the petitioner when deciding whether dismissal is appropriate. See Richards v. Lenz, 539 N.W.2d 90 (SD 1995). The adequacy of the factual allegations stated in the petition should be viewed in a light which favors the Appellant. See Thurston v. Cedric Sanders Co., 125 N.W.2d 496 (SD 1963). The petition's allegations should be liberally construed with a view of substantial justice among all parties. First Nat. Bank of Jacksonville v. Bragdon, 167 N.W.2d 381 (SD 1969).

The facts as plead are relatively simple. SR 68-70. The Appellant was arrested for driving under the influence (third offense). Blood alcohol evidence was forcibly obtained from him without his permission. No warrant was sought by the State to obtain the evidence. This evidence led to his conviction of a felony driving under the influence offense. The Appellant's prior counsel failed to

advise him of any issues pertaining to challenging use of such evidence, or to advise him of any means to challenge such evidence prior to his incarceration at the DOC. Per Richards, these facts are true for the purposes of this Court's review. The trial court erred in dismissing the petition in that facts exist which conceivably could grant the Appellant relief.

The Respondent-Appellee sought to dismiss the Petitioner's habeas action. It cited Cowell v Leapley, 458 N.W.2d 514 (1990) to support the notion that Missouri v. McNeely, 133 S.Ct. 1552 (2013) cannot be applied retroactively in habeas cases. McNeely, however did not present a new rule. It restated an old one.

In McNeely, the defendant drove and vehicle and was pulled over for speeding. McNeely, 133 S.Ct. at 1556-57. This initial cause expanded into a driving under the influence investigation. Id. The police requested a blood sample and the defendant refused. Id. The policed directed that a blood sample be taken. Id. The blood alcohol evidence was introduced over 4th amendment objections and the defendant was conviction. Id. The defendant appealed the decision arguing the blood sample evidence was taken in violation of his 4th Amendment rights. Id. The United

States Supreme Court held in favor of the defendant indicating that there was no per se application of the exigent circumstances exception to the 4th Amendment's warrant requirement. Id. at 1563.

In Cowell, the S.D. Supreme Court examined whether the U.S. Supreme Court opinions of Edwards v. Arizona, 457 U.S. 477 (1981) and Arizona v Roberson, 486 U.S. 675 (1988) applied retroactively. The Court first examined the "purpose of the *new* rules announced in" those cases. Cowell, 458 N.W.2d at 518 (SD 1990)(emphasis *added*). Secondly, the Court was concerned over whether there was "justified reliance by law enforcement officers on the law *prior to* Edwards and Roberson". Id. at 519 (emphasis *added*). The text of the first two Cowell factors specifically refer to examination of *new* rules – not old ones. Examination of law "prior to" a given case, assumes a new rule has been created by the case to which an old rule is compared. The "purpose of the *new* rule" inquiry also inherently assumes a new rule is present.

In cases like Cowell, the South Dakota Supreme Court defers to the U.S. Supreme Court's determination that it has explicitly pronounced a new rule. Cowell, 458 N.W.2d at 518; See also State v. Garcia, 2013 SD 46, at paragraph 16

(Padilla decision announced a new rule without retroactive effect, per the U.S. Supreme Court's explicit holding in a later case). In McNeely, the United States Supreme Court never explicitly or indirectly stated that a new rule was being pronounced.

The Cowell court noted what constitutes a new rule. A new rule breaks new ground. Cowell, 458 N.W.2d at 518 n.5. It imposes a new obligation upon the state or federal government. Id. The "new" rule is not dictated by existing precedent. Id.

The United States Supreme Court's stated language in McNeely demonstrates that that no new rule was established. McNeely indicated the totality of the circumstances test should be applied to "decide each case on its facts, as we did in Schmerber." McNeely, 133 U.S. at 1561. The phrase "as we did in Schmerber" does not suggest a new rule is present in terms of expanding, modifying or clarifying Schmerber. It merely restates Schmerber. No new obligation upon law enforcement is outlined in McNeely – it remained the same as in Schmerber. Schmerber's exigency circumstance rule utilized in McNeely demonstrates McNeely's holding *was dictated* by Schmerber's existing precedent.

The McNeely decision, while newer in terms of its announcement date, does not present a new *rule*. It is the same rule as in Schmerber. The trial court erred in concluding McNeely presented a new rule.

II. THE TESTS OF COWELL V LEAPLEY, 458 N.W.2D 514 (SD 1990) SHOULD NOT APPLY TO A NEW UNITED STATES SUPREME COURT DECISION CONCERNING AN OLD RULE

The Cowell factors prove to be unworkable in cases involving new opinion restating old rules. It creates conflicts with other recognized constitutional and legal principles. This is particularly the case regarding regarding the factor concerning law enforcement's alleged good faith compliance with the prior law. Conflicts arise with Supremacy Clause of the United States Consitution. The legal principle that ignorance of the law is no excuse is also compromised.

The Supremacy Clause of the United States provides the Constitution, and Laws of the United States . . . shall be the Supreme Law of the Land. U.S.Const.Art. VI(2). Judicial opinions of the United States Supreme Court pertaining to issues of Constitutional law come with the scope of the Supremacy Clause. State v. Hess, 680 N.W.2d 314, 326 (SD 2004). Such decisions are "binding on us by the Supremacy

Clause of the United States Constitution." Id. In 1966, the United States Supreme Court addressed the exigent circumstances rule in Schmerber, and that each case be decided on its own facts. McNeely, 133 S.Ct. at 1561. This principle became the law of the land for all individuals in the United States, including law enforcement officers.

The State sought to split judicial hairs by characterizing McNeely as a new rule *for South Dakota*. This distinction ignores the principles that the law assumes that all individuals know the law, and if federal law supersedes state law, that knowledge may be imputed to them as well. Anyone charged with a violation of law who claims to not know of its existence will be disappointed raising such a defense. See In re Discipline of Laprath, 670 N.W.2d 41, 66 (SD 2003). This Court regards ignorance of the law as no excuse. Gakin v. Rapid City, 698 N.W.2d 493, 498 (SD 2005). Nevertheless, ignorance of federal constitutional law via Schmerber has since become institutionalized, excusable and protected in South Dakota.

Cowell, as presently interpreted by the State, presents an opportunity for state law enforcement officers to opt out of abiding by federal constitutional obligations. The Supremacy Clause requires all to adhere to federal legal

precedent. However, the Cowell factors provide a vehicle upon which a state high court can interpret a federal Supreme Court decision in such a manner which limits the rights of the individual more than the text of United States Supreme Court's decisions would permit. Law enforcement officers are then provided cover and relieved of their requirement to adhere to greater federal constitutional rights actually accorded to each individual by the Bill of Rights. They could proceed in ignorance of federal constitutional law.

Everyone was on notice in 1966 that that law required exceptions to the warrant requirement would be examined on the circumstances of each case. Instead, South Dakota proceeded under the exact opposite premise. Exigent circumstances always existed to justify a warrantless seizures to obtain evidence samples arising from within one's person.

The good faith reliance factor urged by the State appears self executing. Notions of good faith, however, are not subjectively absolute and have limitations. Good faith requires "honesty of intention, and freedom from knowledge of circumstances which ought to put the holder on inquiry". Black's Law Dictionary, 5th Ed., page 623. The honesty of

intention requires one to "abstain from taking any unconscientious advantage of another, even with the technicalities of law, *together with absence of all information, notice or benefit or belief of facts* which render transaction unconscientious." Id. (emphasis *added*).

South Dakota's per se exigent circumstances approach was fully illustrated in State v. Hanson, 588 N.W.2d 885 (SD 1999). In that case, the appellant-defendant's legal counsel alerted the State to existing legal precedence which supported the argument that a per se exigent circumstances exception violates the 4th Amendment. This state, its citizens, judicial officials and law enforcement officers were no longer free from knowledge that might obviate their obligation for further inquiry. They suffered from no "absence of all information" to put them on notice of the constitutional problem. Good faith is not present regarding satisfying the third Cowell factor.

McNeely demonstrated the preference of the United States Supreme Court to avoid per se exceptions to the warrant requirement. General search and seizure jurisprudence dictate that a warrant is required prior to a search. There are, of course, exceptions to the warrant requirement. McNeely, 133 S.Ct at 1558. Exigent

circumstances constitute one such exception. Schmerber, 384 U.S. at 758.

The decision of the lower court in McNeely, as well as this Court in such cases as State v. Hanson, sought to utilize and establish a per se exception. Per se exceptions to a rule present the effect of swallowing it. State v. Overbey, 790 N.W.2d 35, 41 (SD 2010)(*dissenting* opinion). If an exception to the general rule applies all the time, the question then posed is how the general rule could ever be applied. Interpreting an exception such that it effectively swallows a general rule is generally disfavored. Johnson v. California, 541 U.S. 428, 430 (2004). Accordingly, all were sufficiently put on notice that any per se exception to the warrant requirement presented constitutional problems.

Law enforcement officers within in this state had been interpreting and implementing the "old" "prior" law wrong since 1966 – they were not justifiably relying on a correctly executed old law later changed. Their interpretation of the law was shown by McNeely not to have ever existed.

The State's position confuses two different issues in its evaluation of the extent the criminal justice system would be burdened. It seeks to substitute examining the

scope of the consequences for failing to adhere to the old rule from Schmerber (1966) up through McNeely's announcement (2013), with the scope of the burden on the court system to readdress old cases applying the benefits of a new rule. The initial oversight is significant – but the third Cowell factor addresses the burden on the system, *following legitimate attempts by law enforcement to comply with a prior law*. Law enforcement officials in South Dakota have not followed Schmerber's "prior" law. Significant oversights leading up to McNeely cannot be ignored, and then be assimilated into case law where law enforcement officers originally got it right relying on old laws which were then subsequently changed. The Cowell factors fail in situations dealing with the application of ignored old rules by failing to take into account for any moral or governmental obligation to fix a past error.

The South Dakota Supreme Court in Cowell criticized the Teague retroactivity rule as being too narrow. Cowell, 458 N.W.2d at 517 citing Teague v. Lane, 489 U.S. 288 (1989). The Teague rule functionally condensed the court's inquiry to whether there was a new rule. Id. If there was a new rule, the Court noted "it is highly unlikely that it will be

applied retroactively . . .” Id. Ironically, use of the Cowell principles in cases creates a similar concern.

Case law demonstrates a lack of cases where new rules of constitutional law are applied retroactively in South Dakota. Since Cowell, no reported decisions are present in South Dakota wherein a new rule of constitutional law is applied retroactively in either criminal law or habeas corpus proceedings. Despite concerns that steered this Court from adopting the Teaque rule for generating the same result in all cases, the Cowell factors produce self generating results as well.

One inquiry is whether the criminal justice system might be overburdened. One is left to wonder when any such claim would ever *not* be made from the State regarding retroactivity issues from a functional perspective. The Cowell factors dictate the same result in every case. An increase in resources will need to be brought to bear to some extent. This extent will be claimed in any retroactive application of a constitutional principle. The Appellant refers the reader to additional argument regarding effects on the criminal justice system in the next argument section.

Cowell drew its factors from State v. One 1966 Pontiac Auto, 270 N.W.2d 362 (SD 1978). Cowell, 458 N.W.2d at 517.

Pontiac was an appeal arising out of a civil forfeiture action. The Cowell opinion also cited additional civil cases in its decision. Id. Civil cases have evolved to produce the following standard: unless a court states otherwise, a decision has both retroactive and prospective effect. Hohm v. Rapid City, 753 N.W.2d 895, 906 (2008).

The Appellant urges the Court to adopt the Hohm rule in cases where old constitutional rules are restated exactly. It serves to encourage both federal and state high courts to specifically state whether a decision has retroactive effect when the decision is announced. This would also advance the interests sought to be protected by the third Cowell factor. Years of subsequent motion practice and appeals regarding retroactivity issues could then be avoided. The McNeely court declined to state the decision had no retroactive effect. The Hohm case, coupled with the conclusion that no new rule is being applied, requires "retroactive" application of the McNeely decision.

III. THE MCNEELY DECISION SHOULD BE GIVEN RETROACTIVE APPLICATION IN A HABEAS CORPUS CASE ARISING BEFORE MCNEELY OR ALTERNATIVELY SCHMERBER SHOULD BE GIVEN ITS EFFECT.

Cowell v. Leapley, 458 N.W.2d 514 (SD 1990), if applicable to this case, cites three factors in

retroactivity analysis, the third being whether application of McNeely to the petitioner's case, or those similarly situated, would have a disruptive effect on the criminal justice system. The Cowell opinion, as well as those opinions arising before it or after it regarding this issue, rarely indicate that the conclusion of judicial disruption is based on hard numbers as opposed to anecdotal feelings that the judicial system would be disrupted. For instance, the Cowell opinion cites Solem v. Stumes, 465 U.S. 638 (1984) noting that "[w]e can only guess at the number of cases". Cowell, 458 N.W.2d at 519.

This Court need not guess any longer.

The Appellant's Petition alleged Department of Corrections and Unified Judicial System statistical information regarding driving under the influence cases that are available on their respective websites. Appendix B. These statistics and demonstrates that the unified judicial system has handled significant fluctuation in driving under the influence cases since 2008. Case filings increased by 1,743 from 2011 to 2012. The Unified Judicial System was able to process the increase. State prosecutions were not disrupted by an increase of 1,743 additional cases

in 2012 as fewer cases were dismissed between 2012 and 2011 (1916 dismissals in 2012 versus 2239 dismissals in 2011).

The Appellant's petition alleged that in a worst case scenario that all 398 felonious inmates currently wished to seek habeas corpus relief based on McNeely grounds alone, and such grounds prejudiced the outcome of each original proceeding, the statistics show that the UJS can absorb, or is otherwise capable of handling, an additional 398 DWI cases. The UJS was able to handle 11,029 DWI case in 2008. This figure is 542 cases higher than the 10,487 DWI cases addressed in 2012.

The State argued before the habeas court that *a* number of individuals on parole or probation *may* come back into the system on violations. M7-9. These individuals *may* then pursue habeas claims. The State did not present hard numbers before the habeas court. It conceded it had none. The Appellant alleged hard numbers in his petition and his approach calls for less speculation than the State's position.

Application of McNeely would not have a disruptive effect on the Unified Judicial System. Few claims potentially and practically exist compared to what the Unified Judicial System is capable of processing, or

otherwise has been historically shown to be capable of processing in past years. Convictions for 1st and 2nd offenses can only result in sentences of less than 1 year. As such, as time marches on, fewer and fewer cases involve individuals who might seek relief. Pre-McNeely sentences are now beyond typical magistrate court appeal deadlines. SDCL 15-38-22 (ten days from filing of judgment). Fewer and fewer individuals remain in custody to potentially seek relief that could be realistically obtained in sufficient time from fewer judicial remedies before any individuals would be released from custody. Habeas corpus relief is available to individuals in custody. SDCL 21-27-1; See Two Eagle v. Leapley, 522 N.W.2d 765 (SD 1994). Anyone who has since been released from custody cannot pursue habeas corpus actions.

Driving under the influence cases present less risk of evidence loss than other criminal cases in that primary state witnesses are overwhelmingly police officers whose whereabouts are known or can otherwise be easily ascertained. Police investigation reports and audio-video evidence are, or could have been, easily preserved electronically.

Blood sample evidence since disposed would not constitute a loss of evidence prejudicing the State. A habeas action would seek a retrial because blood alcohol evidence was improperly attained. Assuming McNeely grounds to suppress blood evidence had been established in a habeas proceeding, the same legal grounds to exclude such evidence would be present at trial. Any loss of evidence would accordingly be balanced out by an order excluding such evidence anyway.

The habeas court posed the conclusion that driving under the influence cases would necessarily be dismissed because of McNeely issues. The conclusion first assumes that preclusion of convictions necessarily obtained following a violation of a defendant's Fourth Amendment rights is somehow regrettable. It secondly mischaracterizes dismissing cases as heightening the burden as opposed to a lightening it via case dismissals. Regardless, the trial court's conclusion is error due to its over-inclusive nature.

The State would still be able to proceed on driving under the influence under different theories. For instance, SDCL 32-23-1(2) proscribes "driving under the influence of an alcoholic beverage". Evidence of actual bad driving

following consumption of alcohol (at any numeric blood alcohol level) can be used to secure driving under the influence convictions. A primary evil hoped to be prevented by driving under the influence statutes are accidents and injuries resulting from impaired driving. Prosecutions where actual bad driving is visually apparent without the need for scientific test results could still proceed unhindered. Blood alcohol evidence is not necessary per se in such cases. See also SDCL 32-23-1(3)-(5).

The habeas court stressed concerns about finite resources. M19. South Dakota's Judiciary possesses inherent abilities to garner resources that are not necessarily shared by the Judiciaries of the United States or the Several States. These powers can mitigate against the effects of finite resources to some extent. S.D.Const.Art V, Sec. 10 provides that "the Chief Justice shall submit a budget an annual consolidated budget for the entire unified judicial system, and the total cost of the system *shall* be paid by the State." Use of the term "shall", suggests appropriation of the amount submitted is mandatory.

During lean budgetary times in 2011, this Court advanced such a position in its efforts to obtain adequate

funding for necessary judicial services: "A state constitutional provision suggests that the [G]overnor and Legislature must accept a court budget submitted by the Chief Justice". See "SD Chief Justice Will Resist Daugaad's Proposed Budget Cut", Associated Press January 20, 2011, www.KDLT.com South Dakota News. If deemed necessary, resources could be obtained to potentially address 398 additional cases if any additional funding would be required to address any lingering effects of State v. Hanson, supra et cetera.

Fortunately, the Unified Judicial System has been able to handle DUI case increases adequately in the past. The need for increased funding or reallocation of finite resources is undoubtedly unnecessary. Actual statistics pled in the Appellant's petition refute the habeas court's conclusion. Accordingly, the alleged disruption feared by the State to accompany so called retroactive application of McNeely is only based on that – fear.

CONCLUSION

The trial court erred dismissing the Appellant's petition. Conceivable facts did exist to grant relief. The

Petition sought application of the law of land since Schmerber. McNeely served to remind us all of that law. The Appellant requests that this Court reverse and the remand the matter with appropriate instructions to the habeas court directing it allow the case to proceed to determine whether the requested relief should be granted at a full evidentiary hearing.a

REQUEST FOR ORAL ARGUMENT

Appellant's attorney requests twenty (20) minutes for oral argument. This brief complies with this Court's length requirements and limitations.

Dated this ____ day of November, 2013.

MARK KADI
MINNEHAHA COUNTY PUBLIC ADVOCATE
Attorney for Appellant

a If anyone advances the argument that this case may or has become moot, the Appellant would call intention to the habeas court's conclusion that a definitive decision from this Court is required to provide guidance to all judges within the Unified Judicial System, and would request that this Court utilize this opportunity to do so. See Rodine v. Zoning Bd., 343 N.W.2d 124 (Ia.App. 1988) ("matters of public importance are presented and the problem is likely to recur"); City of Plankinton v. Kiefer, 13 N.W.2d 298, 301 (SD 1944); See also Rapid City Journal v. Delaney, 804 N.W.2d 388 (SD 2011)(controversy capable of repetition yet evading review).

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26823

DONOVAN CRAIG SIERS,

Petitioner and Appellant,

v.

DOUGLAS WEBER, Warden of the
South Dakota State Penitentiary,

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE PETER H. LIEBERMAN
Circuit Court Judge

APPELLEE'S BRIEF

MARTY J. JACKLEY
ATTORNEY GENERAL

Kelly Marnette
Jeffrey P. Hallem
Assistant Attorneys General
1302 E. Highway 14, Suite 1
Pierre, SD 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

ATTORNEYS FOR RESPONDENT
AND APPELLEE

Mark Kadi
Public Advocate's Office
415 North Dakota Avenue
Sioux Falls, SD 57104
Telephone: (605) 367-7392
E-mail: mkadi@minnehahacounty.org

ATTORNEY FOR PETITIONER
AND APPELLANT

Notice of Appeal filed September 30, 2013

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26823

DONOVAN CRAIG SIERS,

Petitioner and Appellant,

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DOUGLAS WEBER, Warden of the
South Dakota State Penitentiary,

Respondent and Appellee.

PRELIMINARY STATEMENT

Throughout this brief, Petitioner and Appellant, Donovan Craig Siers, will be referred to either by name or as "Petitioner." Respondent and Appellee, Douglas Weber, Warden of the South Dakota State Penitentiary, will be referred to as "Respondent" or "State." All other individuals will be referred to by name.

The settled record in the underlying criminal action, *State v. Siers*, Minnehaha County Criminal File No. 08-2735, will be referred to as "SR/DUI." The settled record in the underlying criminal action, *State v. Siers*, Minnehaha County Criminal File No. 08-5292, will be referred to as "SR/FTA." The settled record in the habeas corpus proceedings conducted in this matter will be referred to as "SR/HC." Any reference to the brief filed by Petitioner in this matter will be as

"PB." All references will be followed by the appropriate page designations.

The various transcripts will be cited as follows:

Initial Appearance – May 16, 2008.....IA1

Initial Appearance – June 12, 2008 .....IA2

Arraignment – August 27, 2008.....AR1

Pretrial Conference – October 16, 2008.....PTC

Warrant Hearing – September 2, 2009.....WH1

Change of Plea Hearing – November 6, 2009 ..... CPH

Warrant Hearing – May 5, 2011.....WH2

Revocation Motion Hearing – May 16, 2011 ..... RMH

Revocation Sentencing Hearing – June 14, 2011..... RSH

Habeas Hearing – August 30, 2013.....HCH

JURISDICTIONAL STATEMENT

This is an appeal from an Order entered by the Honorable Peter H. Lieberman, Circuit Court Judge, Second Judicial Circuit, Minnehaha County, South Dakota, on September 12, 2013, dismissing Siers' Second Amended Application for Writ of Habeas Corpus. SR/HC 75. Siers filed a Motion for Certificate of Probable Cause on September 27, 2013. SR/HC 79-83. The habeas trial court granted that motion and issued a Certificate of Probable Cause on September 27, 2013. SR/HC 84.

Siers filed a Notice of Appeal on September 30, 2013. SR/HC 85. This Court has jurisdiction pursuant to SDCL 21-27-18.1.

STATEMENT OF LEGAL ISSUE AND AUTHORITIES

DOES THE HOLDING OF *MISSOURI V. MCNEELY* CONSTITUTE A NEW RULE THAT SHOULD BE APPLIED PROSPECTIVELY ONLY IN STATE HABEAS CORPUS PROCEEDINGS?

The trial court ruled that for purposes of habeas corpus review, *McNeely* announced a new rule that should be applied prospectively only.

Cowell v. Leapley, 458 N.W.2d 514 (S.D. 1990)

State v. Garcia, 2013 S.D. 46, 834 N.W.2d 821

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

State v. Hartman, 256 N.W.2d 131 (S.D. 1977)

STATEMENT OF THE CASE AND FACTS

On May 16, 2008, Siers was operating a motor vehicle in Minnehaha County. CPH 8. He failed to stop at a red light and then made a wide turn partially into the lane of oncoming traffic. CPH 8. Law enforcement initiated a traffic stop of Siers. CPH 8. Siers smelled of alcohol, had slurred speech, and was unsteady when walking. CPH 8. Siers was arrested for driving under the influence (SDCL 32-23-1). CPH 8. A sample of his blood was obtained. CPH 8-9. The results showed Siers had .22 percent by weight of alcohol in his blood. CPH 9.

On May 16, 2008, Siers appeared before a magistrate judge, was advised of his rights and the charge, was appointed an attorney, and released on bond. IA1 2-11. A Minnehaha County Grand Jury issued an Indictment charging Siers with driving under the influence (SDCL 32-23-1) on May 29, 2008. SR/DUI. A Part II Information alleging it to be a third offense (SDCL 32-23-4) within ten years was filed on May 29, 2008. SR/DUI.

Siers was scheduled for an initial appearance on the Indictment on June 12, 2008. IA2 2. Siers failed to appear for that hearing. IA2 2; CPH 13-14. A bench warrant was issued. IA2 2, SR/DUI. Siers was ultimately arrested in North Dakota and extradited back to South Dakota. AR1 8.

Siers appeared for an arraignment on August 27, 2008. AR1 2-9. A not guilty plea to the Indictment and denial of the Part II Information were entered for Siers. AR1 6. Siers was again released on bond on September 5, 2008. SR/DUI. One of the conditions of bond was that Siers participate in the 24/7 sobriety program. SR/DUI. Siers failed to appear for his required breath test on September 6, 2008. SR/DUI. Siers failed to appear for the pretrial conference on October 16, 2008. PTC 2. A bench warrant was again issued. SR/DUI.

On September 18, 2008, a Minnehaha County Grand Jury issued an Indictment charging Siers with Felony Failure to Appear

(SDCL 23A-43-31(1)) because Siers did not appear for his June 12, 2008, initial appearance. SR/FTA. A warrant was issued. SR/FTA. On or about August 31, 2009, Siers was arrested on the outstanding warrants. WH1 5. He appeared before the trial court on September 2, 2009, where he was advised of his rights and the Failure to Appear charge. WH1 1-4.

Siers appeared before the trial court on November 6, 2009, for a change of plea hearing. CPH 1-21. After being advised of his constitutional and statutory rights, Siers pleaded guilty to driving under the influence – third offense, in file CR08-2735 and felony failure to appear in file CR08-5292. CPH 1-15. The court granted Siers a suspended execution of sentence in both files and placed him on supervised probation under certain terms and conditions. CPH 16-21; SR/DUI; SR/FTA. A Judgment and Sentence was entered in each file on November 19, 2009. SR/DUI; SR/HC 61-62; SR/FTA; SR/HC 58-59. Siers did not appeal.

In June, 2010, a Motion to Revoke Suspended Sentence was filed in both the DUI and Failure to Appear files. SR/DUI; SR/FTA. Each motion alleged Siers had violated the terms of his suspended sentence in several ways. SR/DUI; SR/FTA. A warrant was issued in each file. SR/DUI; SR/FTA.

A hearing on the Motion to Revoke Suspended Sentences was held on May 16, 2011. RMH 1-18. After hearing the evidence and

arguments of counsel, the circuit court found Siers had violated the conditions of his suspended sentences. RMH 16. Siers appeared before the court on June 14, 2011, for sentencing. RSH 2-12. The circuit court sentenced Siers to two years in the state penitentiary, with credit for 180 days, on the charge of driving under the influence – third offense. RSH 10; SR/DUI; SR/HC 9. On the felony failure to appear, the court re-suspended the original two-year penitentiary sentence. RSH 11; SR/FTA; SR/HC 8. Siers did not appeal.

Siers filed a Petition for Writ of Habeas Corpus on January 4, 2013. SR/HC 8-14. He filed an Amended Application for Writ of Habeas Corpus on May 31, 2013. SR/HC 15-24. A Provisional Writ of Habeas Corpus was entered by the habeas court on May 31, 2013. SR/HC 27-28. The State filed a Return of Writ of Habeas Corpus and Motion to Dismiss on June 13, 2013. SR/HC 31-36. Siers filed a Second Amended Application for Writ of Habeas Corpus on August 12, 2013. SR/HC 53-70.

The Honorable Peter H. Lieberman, Circuit Judge, held a hearing on the State's Motion to Dismiss on August 30, 2013. HCH 2-21. At the conclusion of the hearing, the habeas court granted the State's Motion to Dismiss. HCH 17-21. On September 12, 2013, the habeas court entered a Judgment, granting the State's Motion to Dismiss and denying Petitioner's Second Amended Application for Writ

of Habeas Corpus. SR/HC 75. Notice of Entry of the Judgment was entered on September 18, 2013.

Siers filed a Motion for Certificate of Probable Cause on four issues on September 27, 2013. SR/HC 80-83. The habeas court granted the motion on three of those issues and issued a Certificate of Probable Cause on September 5, 2013. SR/HC 84. Siers has not requested a Certificate of Probable Cause on the fourth issue from this Court.

Siers filed a Notice of Appeal of the Judgment on September 30, 2013. SR/HC 85.

ARGUMENT

THE HABEAS COURT DID NOT ERR IN FINDING THAT *MISSOURI V. MCNEELY* ANNOUNCED A NEW RULE THAT DOES NOT APPLY RETROACTIVELY.

A. *Standard of Review*

The habeas court granted the State's Motion to Dismiss filed pursuant to SDCL 15-6-12(b)(5). A Motion to Dismiss tests the legal sufficiency of pleadings. *Gruhlke v. Sioux Empire Federal Credit Union, Inc.*, 2008 S.D. 89, ¶ 17, 756 N.W.2d 399, 408. Motions to dismiss are an appropriate means to dispose of non-meritorious petitions. *Jenner v. Dooley*, 1999 S.D. 20, ¶ 13, 590 N.W.2d 463, 469. This Court has recognized that habeas corpus petitions, being a collateral attack on a final judgment, are more susceptible to dismissal than other types of

civil actions. *Id.*; *Steiner v. Weber*, 2012 S.D. 40, ¶ 5, 815 N.W.2d 549, 551.

Petitioner's proffered standards of review are, in part, based upon old law. *See Sisney v. Best, Inc.*, 2008 S.D. 70, ¶¶ 7-8, 754 N.W.2d 804, 808-09 (Court adopted the United States Supreme Court's plausible facts standard for reviewing pleadings for purposes of a motion to dismiss).

This Court set forth the current standard of review in habeas corpus cases involving a dismissal of the writ in *Steiner*:

> "A habeas corpus applicant has the initial burden of proof to establish a colorable claim for relief." *Jenner v. Dooley*, 1999 S.D. 20, ¶ 11, 590 N.W.2d 463, 468 (citing *Johnson v. Zerbst*, 304 U.S. 458, 468–69, 58 S.Ct. 1019, 1025, 82 L.Ed. 1461 (1938)). "Habeas corpus can only be used to review (1) whether the court had jurisdiction of the crime and the person of the defendant; (2) whether the sentence was authorized by law; and (3) in certain cases whether an incarcerated defendant has been deprived of basic constitutional rights." *Id.* (quoting *Lodermeier v. Class*, 1996 S.D. 134, ¶ 3, 555 N.W.2d 618, 622). Although we ordinarily review a habeas court's fact findings under the clearly erroneous standard, when, as here, the circuit court receives no evidence but grants the State's motion to dismiss as a matter of law, our review is de novo and we give no deference to the circuit court's legal conclusions. *Id.*

2012 S.D. 40, ¶ 4, 815 N.W.2d at 551. Under *Steiner*, in order for Petitioner's habeas application to survive a motion to dismiss under § 12(b)(5), it must pass a minimum "threshold of plausibility." *Id.* at ¶ 5, 815 N.W.2d at 551. If Petitioner's allegations are unspecific, conclusory, or speculative, the court may rightfully entertain a motion

to dismiss. *Id.* Also, if Petitioner fails to allege a requisite element necessary to obtain relief, dismissal is in order. *Id.*

B. *Summary of Argument*

The habeas court dismissed Petitioner's habeas corpus action for failure to state a claim. Petitioner's claims for habeas corpus relief are all based upon an essential element: that retroactive application be given to the United States Supreme Court decision in *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013). Petitioner asserted that the decision in *McNeely* is merely a restatement of an old rule and should be applied retroactively to his petition for writ of habeas corpus. PB 17. The habeas court rejected Petitioner's assertion, finding *McNeely* was a new rule that should not be applied retroactively. Given this ruling, the habeas court dismissed the petition because Petitioner could not as a matter of law establish a threshold of plausibility for any of his claims.

For purposes of reviewing the habeas court's order dismissing Petitioner's habeas claims, it is assumed, without conceding, that the decision in *McNeely* supports Petition's claims for relief[1]. As a matter

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[1] The State disputes that the decision in *Missouri v. McNeely* applies to the facts of this case. Petitioner's blood was withdrawn pursuant to South Dakota's implied consent statute. The State further disputes Petitioner's trial counsel was ineffective in interpreting this Court's long line of precedent regarding the constitutionality of warrantless searches of bodily substances following an arrest for DUI. Finally, the State disputes Petitioner could ultimately obtain relief because no prejudice can be established. Law enforcement's good faith reliance on

(continued. . .)

of law, Petitioner cannot establish that *McNeely* should be given retroactive effect. This Court's line of precedent regarding the constitutionality of warrantless searches of bodily substances arising from DUI and drug arrests compel the conclusion that *McNeely* is a new rule of law in South Dakota. Further, application of the standards pronounced by this Court in *Cowell v. Leapley*, 458 N.W.2d 514 (S.D. 1990) leads to the conclusion that *McNeely* should not be applied retroactively to judgments of conviction that were final before the date of the decision, April 17, 2013.[2]

C. *McNeely* is a "new rule."

Petitioner asserts that the decision in *McNeely* constitutes the restatement of an old rule. PB 17. He bases his argument on the language in *McNeely* noting that the totality of the circumstances approach announced in *Schmerber v. California*, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966) was, and is, the standard to review the reasonableness of a warrantless, nonconsensual search. PB 17 The United States Supreme Court granted certiorari in *McNeely* to "resolve a split of authority on the question whether the natural

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(. . .continued) existing South Dakota law under *Davis v. United States*, 564 U.S. _____, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011) and *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), would preclude exclusion of the blood evidence had a timely motion to suppress been filed.

[2] Petitioner's judgments of conviction were final in 2011.

dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations." *McNeely*, 133 S.Ct. at 1558. South Dakota was one of the jurisdictions that repeatedly held that the elimination of alcohol by natural bodily functions alone presented exigent circumstances which obviated the necessity of obtaining a search warrant. *See, e.g., State v. Hanson*, 1999 S.D. 9, ¶ 28, 588 N.W.2d 885, 891 (citations omitted). The United States Supreme Court in *McNeely* sided with those jurisdictions which found the natural dissipation of alcohol does not constitute an exigency in every case. *McNeely,* 133 S.Ct. at 1568.

The decision on what criteria to use to determine prospective or retroactive application of a decision in a state habeas corpus proceeding is a non-constitutional state decision. *Cowell,* 458 N.W.2d at 517. The federal constitution neither prohibits nor requires retroactive effect of United States Supreme Court decisions. *Id.*

> We think the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions.

Id. (quoting *Great Northern Railway v. Sunburst Oil and Refining Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360, 366 (1932)). In *State v. Garcia*, 2013 S.D. 46, 834 N.W.2d 821, this Court held that

United States Supreme Court determinations regarding retroactivity of its decisions are not binding upon a state habeas court.

The question of whether *McNeely* is a "new rule" is a question to be decided by this Court. In *Cowell*, 458 N.W.2d at 518, this Court gave "deference" to the United States Supreme Court's determination that the "rules enunciated in *Edwards* [3] and *Roberson*"[4] were indeed "new rules." This Court was not bound to accept those determinations. Deference is not warranted in this case because the resolving of the "split of authority" noted in *McNeely* resulted in the overturning of this Court's contrary precedent.

This Court has not specifically ruled on what constitutes a "new rule" for purposes of retroactivity analysis in state habeas corpus proceedings. In *Cowell*, this Court referred to the analysis in *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989). Absent an articulated state standard, the State relies on this analysis for its argument.

In *Teague,* the Supreme Court described a "new rule" as one that "breaks new ground," "imposes a new obligation on the States or the Federal Government," or is "not dictated by precedent existing at

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[3] *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

[4] *Arizona v. Roberson,* 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988).

the time the defendant's conviction became final." 489 U.S. at 301, 109 S.Ct. 1070. In determining if the decision was dictated by then-existing precedent, the United States Supreme Court looks at whether the decision was "apparent to all reasonable jurists." *Lambrix v. Singletary*, 520 U.S. 518, 527-28, 117 S.Ct. 1517, 1525, 137 L.Ed.2d 771 (1997). A "new rule" is one which invalidates reasonable, good faith interpretations of existing precedents made by state courts, even though they are shown to be contrary to later decisions. *Butler v. McKellar*, 494 U.S. 407, 414, 110 S.Ct. 1212, 1217, 108 L.Ed.2d 347 (1990).

A review of prior decisions of this Court confirms *McNeely* is a new rule in South Dakota. This Court has consistently interpreted the *Schmerber* opinion to hold that the elimination of alcohol by natural bodily functions presents an exigent circumstance which alone obviates the necessity of obtaining a search warrant. *State v. Hartman*, 256 N.W.2d 131, 134 (S.D. 1977); *State v. Parker*, 444 N.W.2d 42, 43-44 (S.D. 1989); *State v. Lanier*, 452 N.W.2d 144, 145 (S.D. 1990); *State v. Tucker*, 533 N.W.2d 152, 154 (S.D. 1995). This Court has further held that bodily substance samples were not subject to the exclusionary rule under the Fourth Amendment if they are taken (1) incident to a lawful arrest, (2) by a reliable and accepted method of obtaining such sample, (3) in a reasonable, medically approved manner, and (4) where there is probable cause to believe

that the evidence sought exists. *Hartman*, 256 N.W.2d at 134; *Parker*, 444 N.W.2d at 43-44; *State v. Heinrich*, 449 N.W.2d 25, 26-27 (S.D. 1990); *Lanier*, 452 N.W.2d at 145; *State v. Sickler*, 488 N.W.2d 70, 73 (S.D. 1992); *Tucker*, 533 N.W.2d at 154; *State v. Nguyen*, 1997 S.D. 47, ¶ 10, 563 N.W.2d 120, 122-23; *State v. Herrmann*, 2002 S.D. 119, ¶ 17, 652 N.W.2d 725, 730; *State v. Engesser*, 2003 S.D. 47, ¶ 16, 661 N.W.2d 739, 746.

The above recitation undisputedly establishes that since *Schmerber*, this Court has found existence of exigent circumstances due to the natural dissipation of alcohol alone. *McNeely* now holds just the opposite, and all courts must now look at the totality of the circumstances in every case to determine the presence of exigent circumstances. *McNeely,* 133 S.Ct. at 1563. *McNeely* therefore breaks new ground and imposes new obligations on the State that were not dictated by existing South Dakota precedent when Petitioner's conviction became final. *Cowell*, 458 N.W.2d at 518 n.5. As described by the habeas court, the *McNeely* decision "upset the apple cart basically of how we've done business, basically since I have been a judge" (HCH 6); was "quite a jolt for the State of South Dakota" (HCH 17); was a "dramatic new rule here" (HCH 17); was a "bolt out of the sky" (HCH 19); and "was a surprise to all the judges of this State" (HCH 19).

As a matter of law, *McNeely* is a new rule in South Dakota.

D. *Application of the Cowell standards precludes retroactivity*

Once this Court finds *McNeely* to be a new rule, the question of whether the decision is retroactive to cases where the conviction is final must be addressed. The criteria used to determine whether a new rule should have retroactive application is a non-constitutional state law decision. *Garcia,* 2013 S.D. 46, ¶ 17, 834 N.W.2d at 824; *Cowell*, 458 N.W.2d at 517. This Court has adopted the following criteria: (1) The purpose of the decision, (2) reliance on the prior rule of law, and (3) the effect upon the administration of justice. *Garcia,* 2013 S.D. 46, ¶ 17, 834 N.W.2d at 824; *Cowell,* 458 N.W.2d at 517. It is clear from an examination of these criteria that *McNeely* should be applied prospectively only.

Petitioner has not addressed the first two criteria in his brief. Application of these criteria supports prospective application. "The reason to apply a new decision retroactively is when the new constitutional decision is designed to improve the accuracy of criminal trials." *Cowell,* 458 N.W.2d at 518. Nothing in *McNeely* suggests the purpose of the rule is designed to improve the accuracy of criminal trials or enhance the reliability of the fact-finding process. It does "little to show the actual guilt or innocence of the individual." *Garcia*, 2013 S.D. 46, ¶ 20, 834 N.W.2d at 824. The blood test is objective and an accurate means of determining intoxication. *Engesser,* 2003 S.D. 47, ¶ 26 n.3, 661 N.W.2d at 748. If blood test evidence is

suppressed, the jury loses what is usually the most valuable piece of objective evidence in determining the guilt or innocence of a defendant. Thus, the *McNeely* decision was not designed to improve the accuracy of criminal trials or to enhance the fact-finding process.

Second, law enforcement, and our magistrate and circuit courts, have relied upon this Court's interpretation of what constitutes exigent circumstances under *Schmerber* since at least 1977. *See Hartman*, 256 N.W.2d at 134. As stated by the habeas court, "certainly over the last roughly 35 years, law enforcement in South Dakota has justifiably relied on numerous South Dakota Supreme Court decisions and the statutes passed in the State Legislature giving officers authority to take blood samples in the case of a DUI arrest." HCH 18.

At the time of Siers' plea in 2009, there were a substantial number of cases in South Dakota holding the elimination of alcohol by natural bodily functions presents exigent circumstances which obviates the necessity of obtaining a search warrant to extract a sample of a person's blood, breath, or urine. Consequently, defense counsel would have justifiably relied upon those cases when advising Siers. Given this Court's precedent, as a matter of law, failure to foresee the 2013 *McNeely* decision can not constitute ineffective assistance of counsel. Further, no magistrate or circuit court would have ruled contrary to this Court's binding precedent.

Finally, the Court examines whether the application of *McNeely* would have a disruptive effect on the criminal justice system. This is the only factor addressed by Petitioner in his brief. Petitioner claims only 398 inmates in South Dakota could seek habeas corpus relief based upon *McNeely*. DB 26. He then tries to minimize the effect those cases would have on the Unified Judicial System. DB 26-30. Contrary to Petitioner's argument, potentially 398 challenges to the validity of prior DUI convictions stands to have a significant effect on the state's courts. Further, he fails to even acknowledge the effect it would have on prosecutors and defense attorneys. Finally, he fails to acknowledge the number of potential cases filed for coram nobis relief or by a motion to strike a prior DUI conviction in future cases given the Legislature's enactment of enhanced penalties for subsequent DUI convictions. The impact of the *McNeely* decision has already had a disruptive effect on the criminal justice system. If *McNeely* is found to be retroactive, it will undermine the finality of any guilty plea entered in South Dakota before *McNeely* where a bodily substance was obtained without actual consent or without obtaining a search warrant. The retroactive application of *McNeely* will not further the goal of promoting justice in South Dakota.

When weighing the three *Cowell* factors together, *McNeely* is not due retroactive effect in South Dakota. As such, Petitioner as a

matter of law is unable to allege a plausible claim, and dismissal for failure to state a claim was warranted.

CONCLUSION

The State respectfully requests that this Court affirm, in all respects, the Judgment which granted Respondent's Motion to Dismiss and denied Petitioner's Second Amended Application for Writ of Habeas Corpus.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

Kelly Marnette
Jeffrey P. Hallem
Assistant Attorneys General
1302 East Highway 14, Suite 1
Pierre, South Dakota 57501-8501
Telephone: (605) 773-3215
E-mail: atgservice@state.sd.us

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 3,830 words.

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

Dated this _____ day of January, 2014.

_____
Kelly Marnette
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of January, 2014, a true and correct copy of Appellee's Brief in the matter of *Donovan Craig Siers v. Douglas Weber* was served by electronic mail on Mark Kadi at mkadi@minnehahacounty.org.

_____
Kelly Marnette
Assistant Attorney General

APPELLANT'S REPLY BRIEF

IN THE SUPREME COURT

OF THE

STATE OF SOUTH DAKOTA

NO. 26823

DONOVAN CRAIG SIERS,

Petitioner and Appellant,

v.

DOUGLAS WEBER,

Respondent and Appellee.

APPEAL FROM THE CIRCUIT COURT
OF THE
SECOND JUDICIAL CIRCUIT
MINNEHAHA COUNTY, SOUTH DAKOTA

THE HONORABLE PETER LIEBERMAN

Circuit Court Judge

MARK KADI
Public Advocate's Office
415 North Dakota Avenue
Sioux Falls, SD 57104
Attorney for Appellant.
mkadi@minnehahacounty.org

MARTY JACKLEY
Attorney General
1302 E. Highway 14, #1
Pierre, SD 57501-5070
Attorney for Appellee.
Marty.Jackley@state.sd.us

AARON MCGOWAN
Minnehaha Co. State's Attorney
415 North Dakota Avenue
Sioux Falls, SD 57104
Attorney for Appellee.
amcgowan@minnehahacounty.org

Notice of Appeal Filed September 30, 2013.

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v.		
DOUGLAS WEBER, WARDEN, SOUTH DAKOTA STATE PENITENTIARY and the SOUTH DAKOTA BOARD OF PARDONS AND PAROLES,	*	APPELLANT'S REPLY BRIEF
Respondents and Appellees.	*	

PRELIMINARY STATEMENT

The Appellant incorporates and reiterates all facts, arguments, and citation abbreviations previously set forth in its Appellant's brief.

ARGUMENT

The Appellee presents numerous factual and legal allegations in its Brief that need not be considered by this Court. The allegations are legally irrelevant. In addition, they are not supported by the record.

The State cites transcripts from the Appellant's underlying DUI 3rd and Felony Failure to Appear files in its brief. Appellee Brief at 3, et sequence. The State asserts such allegations as the Appellant failed to stop at a red

light and made a wide turn in his vehicle. The State also asserts that the Appellant had slurred speech and other characteristics.

The Appellee further makes additional allegations in a footnote. Appellee Brief at 9 n. 1. It alleges that the "Petitioner's blood was withdrawn pursuant to the implied consent statute". In addition, the Appellee alleges that the Appellant's trial counsel correctly interpreted South Dakota's precedence in such a manner to conclude any motion to suppress the blood alcohol evidence would fail. Also, law enforcement officers could rely on prior South Dakota precedence.

Similarly, the State presents additional conclusions of law framed as factual conclusions. Appellee Brief at 17. The Appellee asserts that 398 additional DUI cases would have a "significant effect on the state's courts." Id. It is stated that Missouri v McNeely, 133 S.Ct. 1552 (2013) already has "had a disruptive effect on the criminal justice system." Id. All assertions are made without a supporting citation or even a specific number to support the conclusion.

None of these "facts" appear in the Appellant's petition.

It is important to note what this appeal is not. This

is not an appeal of a case were a hearing on the merits occurred. This is not a case were both parties submitted evidence and testimony. Factual issues such as whether or not the Appellant's speech was slurred at all, or was slurred to a matter of some degree were not submitted to the habeas court for consideration. The habeas court did not make findings of fact on such issues, or on any factual issues. It resolved the case as a matter of law - McNeely could not be applied retroactively to the Appellant's case.

The State cites Steiner v Weber, 815 N.W.2d 549 (SD 2012) regarding the standard to use when reviewing the propriety of a motion to dismiss a claim for which relief can be granted. Appellee Brief at 8. Steiner addressed an appeal following dismissal of a Habeas petitioner's application for relief for failure to state a claim. Id. at 552. In Steiner, the petitioner alleged in his petition that he was charged with sexual contact. Id. He further alleged that the only evidence of sexual contact came in the form of his statements. He alleged that his counsel was ineffective for failure to advise him on the corroboration evidence rule. Id.

On appeal, the State defended its initial success at the habeas court level. This court noted that the State had devoted "a substantial portion of its brief to

presenting evidence that it claims could have been used against Steiner at trial." Id. at 553. Nevertheless, this Court noted that it needed to assume the allegations of the Petitioner were true. Id. If true, the allegations as plead could support a claim for relief even though doubt as to the petitions' success on the merits might exist. Id. This court found the allegations met the plausibility test. Id.

The allegations of the Appellant's petition demonstrate similar levels of specificity as in Steiner. The Appellant describes the nature of the charge. He alleged that the primary evidence against him was blood alcohol evidence obtained by force without a warrant. He indicated a failure to advise on a specific rule of law led to his eventual conviction.

The State conceded before the habeas court in the present case that the Appellant's allegations were to be taken as true for the purposes of its motion to dismiss. M2. Assuming arguendo, that McNeely applies retroactively, or Schmerber v. California, 384 U.S. 757 (1966) applies prospectively, a claim is stated for which relief can be granted. The State's tendency at the appellate level to include factual allegations in their brief not pertinent to the issue at hand is a distraction.

In addition, the record claimed to support the State's position does not appear to be in the record before this Court. The State refers to the settled record in the underlying criminal action. Appellee Brief at 1. However, while introducing underlying criminal court files through stipulation is common before a habeas court hearing commences, it was not accomplished in this case. See Lee v. Delano, 466 N.W.2d 842 (SD 1991); Alexander v. Solem, 383 N.W.2d 486 (SD 1986). The settled record in this case reveals that these files were not introduced during the motion hearing before the habeas court. M1. The case was decided solely on the face of the Appellant's petition. M2.

Judicial notice would not be the appropriate means to use by this Court to consider factual allegations from the underlying criminal cases at this stage in a proceeding addressing the propriety of a motion to dismiss (if this court would be tempted to do so sua sponte). Habeas courts will often receive court records of underlying proceedings prior to hearings on the petition's merits. See Logan v. Solem, 406 N.W.2d 714 (SD 1987). This often occurs after both parties stipulate to admission of such records. See Lee v. Delano, 466 N.W.2d 842, 843 (SD 1991). Evidence not submitted is excluded. See Richards v. Lenz, 539 N.W.2d 80 (SD 1995).

The State, however, refrained from introducing such records in such a way in this case, choosing instead to proverbially swing for the fences at their first pitch at their first at bat. Accordingly, the choice of proceeding on a motion to dismiss would dictate the standard of review to be applied on appeal. This case does not involve uncontested facts, such as whether parties to a case are legally married, or whether this Court had disbarred an attorney, or whether an appeal is still pending before this Court. See Nauman v. Nauman, 336 N.W.2d. 662 (SD 1983); Danforth v. Egan, 119 N.W. 1021 (SD 1909); McClain v. Williams, 75 N.W. 391 (SD 1909). Whether the Appellant made a wide turn, etc., represents a contested fact. It encompasses contested issues concerning whether the fact actually exists at all, and if so, to what degree or extent did it exist to justify a conclusion of impaired driving. A reasonable dispute as to the facts and their meanings remain present. Judicial notice is not appropriate in this context. SDCL 19-10-2 ("fact must be one not subject to reasonable dispute").

The State appears to argue that this Court's retroactivity considerations are devoid of federal constitutional considerations. It quotes passages from Great Northern Railway v. Sunburst Oil and Refining Co.,

287 U.S. 358 (1932). Appellee Brief at 11. One of the Several States "may say that decisions of its highest court, though later overruled, are law none the less for intermediate transactions." Great Northern, 287 U.S. at 364.

The facts of the Great Northern are distinguishable from the present case. Great Northern involved federal review regarding a Montana state high court ruling concerning a Montana state statute regulating railway carriage rates and whether the federal constitution required retroactive application of the new state law ruling. Id. at 359. It did not address federal review regarding a Montana state high court ruling which limited 4th Amendment protections accorded by a prior United States Supreme Court decision. Nor did it address whether restated federal precedence should be applied retroactively per McNeely, or prospectively per Schmerber in a jurisdiction that declined to follow such federal precedence.

The State's confederated interpretation inverses Great Northern's language to state: The State Supreme Court, may say that decisions regarding constitutional rights from the United States Supreme Court, though later limited by the State Supreme Court, are law none the less for intermediate transactions until subsequently restated by the United

States Supreme Court following accounts of noncompliance. Great Northern does indicate a State High Court may interpret and examine its own precedence regarding its state's law. The case before this Court, however, does not involve the South Dakota Supreme Court examining a state law. It involves a federal constitutional issue involving the 4th amendment applied to the Several States through the 14th Amendment of the United States Constitution.

The State presents a parade of horribles that will supposedly occur if McNeely is applied retroactively. Appellee Brief at 17. Motions to Strike will purportedly be made on future felony DUI cases regarding prior convictions listed on Part II Informations. The assertion is entirely speculative. No specific figure is stated as to how many prior convictions any individual may present a McNeely ground to provide relief. None can be stated due to the inherent uncertainty that any specific individual might reoffend. Regardless of the speculative impact on a Part II information following a future offense, nothing would be done to inhibit prosecution of the new DUI offense, leaving the possibility of incarceration of up to one full year, without any considerations of early release on parole for frequent offenders.

Similarly, the spectre of coram nobis writs presents a

hollow threat. The State omits to mention that coram nobis may not be "employed as an alternative for direct appeal or habeas corpus". Gregory v. Class, 584 N.W.2d 873, 877 (SD 1998). It deals with previously unknown issues of fact rather than issues of law. Id. at 878. The fact of whether an individual produced a blood sample which was used by police would be known to the prospective petitioner at the time of the underlying proceeding where direct and collateral legal remedies would have been available. Coram nobis would not be applicable.

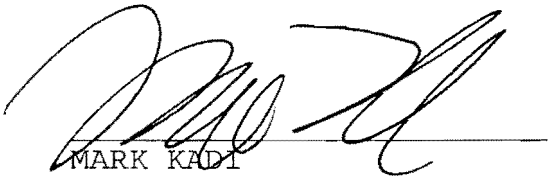
CONCLUSION

The Appellant's petition stated a claim for which relief could conceivably be granted. The allegations in the petition are required to be considered as true regarding this Court's review. Allegations not contained in the petition, urged by the State on appeal (following their choice to proceed with a motion to dismiss), should be ignored.

Law enforcement officials were not entitled to rely on state legal precedent which limited individual 4th Amendment rights more than federal precedent via Schmerber would protect. The effect to the judicial system of prospective application of Schmerber or retroactive application of McNeely could be adequately absorbed. This brief complies

with this Court's length requirements and limitations.

Dated this 24th day of Jamuary, 2014.



MARK KADI
MINNEHAHA COUNTY PUBLIC ADVOCATE
Attorney for Appellant