IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26890

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

SHAUNA FIERRO,

Defendant and Appellee.

APPEAL FROM THE MAGISTRATE COURT
FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE K. PERCY
Magistrate Court Judge

APPELLANT'S BRIEF

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PRELIMINARY STATEMENT

Throughout this brief, Defendant and Appellee, Shauna Fierro, will be referred to as "Defendant." Plaintiff and Appellant, State of South Dakota, will be referred to as "State." The settled record in the underlying criminal case, *State of South Dakota v. Shauna Fierro,* Butte County Criminal File No. 13-204, will be referred to as "SR." Material contained within the Appendix to this brief will be referenced as "APP." All such references will be followed by the appropriate page designations.

The various transcripts will be cited as follows:

Suppression Hearing – October 25, 2013.....SH

Reconsideration Hearing – November 22, 2013.....RH

JURISDICTIONAL STATEMENT

The trial court entered an Order Granting Defendant's Motion to Suppress Blood Test on November 27, 2013. SR 117; App. 1. Defendant noticed entry of the Order on December 2, 2013. SR 130-31. The State filed its petition for intermediate appeal on December 6, 2013. This Court granted the petition on January 10, 2014. SR 150-51. This Court has jurisdiction pursuant to SDCL §§ 15-26A-17 and 23A-32-5 (1).

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

DID THE TRIAL COURT ERR BY HOLDING THAT *MISSOURI V. McNEELY* IS CONTROLLING AND THAT THE WARRANTLESS SEARCH CONDUCTED UNDER THE STATE'S IMPLIED CONSENT LAW (SDCL 32-23-10) WAS UNCONSTITUTIONAL?

The trial court suppressed Defendant's blood, holding that *Missouri v. McNeely* was controlling and that the warrantless search conducted under the State's implied consent law was unconstitutional.

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

McGann v. Northeast Illinois Regional Commuter Railroad Corporation, 8 F.3d 1174 (7th Cir. 1993)

State v. Deneui, 2009 S.D. 99, 775 N.W.2d 221

Peterson v. State, 261 N.W.2d 405 (S.D. 1977)

II

DID THE TRIAL COURT ERR BY HOLDING THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE, BASED UPON THE OFFICER'S RELIANCE ON SDCL 32-23-10 TO OBTAIN A SAMPLE OF DEFENDANT'S BLOOD, WAS INAPPLICABLE?

The trial court held that the officer's reliance on SDCL 32-23-10 to require Defendant's blood sample did not constitute good faith because the blood was withdrawn subsequent to the *McNeely* decision.

Illinois v. Krull, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987)

State v. Sorensen, 2004 S.D. 108, 688 N.W.2d 193

STATEMENT OF THE CASE

The State charged Defendant by Information dated August 7, 2013, with Count 1: Driving under the Influence (SDCL 32-23-1(2)); or in the alternative, Count 2: Driving with 0.08 Percent or More by Weight of Alcohol in Blood (SDCL 32-23-1(1)). SR 4-5.

On October 11, 2013, Defendant filed a Motion to Suppress Blood Test Administration and Results in magistrate court. SR 33. An evidentiary hearing was held on October 25, 2013, before Magistrate Judge Michelle Percy. SH 1-75. The trial court granted Defendant's Motion to Suppress. SH 68-69.

The State filed a Motion to Reconsider. SR 46-47. A hearing on that motion was held November 22, 2013. RH 1-25. The trial court reaffirmed its decision to suppress Defendant's blood test administration and results. RH 19-20. The trial court subsequently

entered its findings of fact, conclusions of law and order upholding the suppression of Defendant's blood test administration and results. SR 117, 120-27; App. 2-9.

STATEMENT OF THE FACTS

On August 4, 2013, Defendant Shauna Fierro was riding a motorcycle in Butte County. SH 4-5. Defendant was a licensed South Dakota driver. SH 6; SR 1. Defendant failed to make a complete stop at a stop sign. SH 5. South Dakota Highway Patrol troopers Jerry Kastein and Richard Olauson initiated a traffic stop of Defendant. SH 5, 14.

Trooper Kastein made contact with Defendant. SH 6. He noticed the odor of alcohol and that Defendant's voice was raspy. SH 6. He requested that Defendant come to his patrol vehicle. SH 6. Defendant complied. SH 6. Trooper Kastein continued to smell the odor of alcohol when Defendant was in his vehicle. SH 6-7. He confirmed with Defendant that she had been consuming alcohol. SH 7.

Trooper Kastein requested that Defendant perform field sobriety tests and exercises and a preliminary breath test. SH 7, 13. Upon completion of the field sobriety tests and exercises and the preliminary breath test, Defendant was placed under arrest for driving under the influence. SH 13.

Trooper Kastein then read to Defendant from the standard DUI advisement card utilized by the Highway Patrol. SH 43. Defendant was advised that she was required to give a blood sample. SH 43. Defendant was transported to the Meade County Jail. SH 13-14. Trooper Olauson witnessed the blood draw. SH 14, 55. The blood sample was secured by Trooper Olauson. SH 56.

ARGUMENTS

STANDARD OF REVIEW AND SUMMARY OF ARGUMENTS

The State has appealed the trial court's Order granting Defendant's motion to suppress blood test administration and results. The issues on appeal are subject to de novo review. "A motion to suppress for an alleged violation of a constitutionally protected right raises a question of law requiring de novo review." *State v. Heney*, 2013 S.D. 77, ¶ 8, 839 N.W.2d 558, 561-62 (citation omitted). Though factual 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 reviewed de novo. *Id.* Further, challenges to the constitutionality of a statute are reviewed de novo. *State v. Stark*, 2011 S.D. 46, ¶ 10, 802 N.W.2d 165, 169.

The trial court erred as a matter of law by concluding *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013) controlled, and as such, the search conducted by the troopers under State's "implied consent" statute, SDCL 32-23-10 was

unconstitutional. App. 11-12. The trial court further erred by holding that the good faith exception to the exclusionary rule was inapplicable since the search took place subsequent to the decision in *McNeely* (April 17, 2013). *McNeely* does not control the resolution of the constitutionality of mandatory searches under the implied consent law; or the determination of whether the good faith exception to the exclusionary rule is applicable in this case.

Application of traditional Fourth Amendment analysis compels the conclusion that the South Dakota Legislature may constitutionally condition the privilege to drive within the state on a driver providing irrevocable consent to the withdrawal of blood or other bodily substance following a lawful DUI arrest. However, even if the Court rejects the State's arguments and finds the search and SDCL 32-23-10 unconstitutional, the blood sample and blood test results are admissible, and the use of the *per se* and presumption provisions (SDCL 32-23-1(1) and 32-23-7) are proper under the good faith exception to the exclusionary rule as articulated by this Court and the United States Supreme Court in *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987).

I

THE TRIAL COURT ERRED BY HOLDING THAT *MISSOURI V. McNEELY* IS CONTROLLING AND THAT THE WARRANTLESS SEARCH CONDUCTED UNDER THE STATE'S IMPLIED CONSENT LAWS WAS UNCONSTITUTIONAL.

There is a "strong presumption" of the implied consent law's constitutionality." *Stark*, 2011 S.D. 46, ¶ 10, 802 N.W.2d at 169. Parties challenging the constitutionality of a statute bear a heavy burden. "Any challenge must rebut the presumption and prove beyond a reasonable doubt the law is unconstitutional." *Buchholz v. Storsve*, 2007 S.D. 101, ¶ 7, 740 N.W.2d 107, 110 (citations omitted). A statute "should not be held unconstitutional by the judiciary unless its infringement of constitutional restrictions is so plain and palpable as to admit of no reasonable doubt." *Meierhenry v. City of Huron*, 354 N.W.2d 171, 176 (S.D. 1984). In conducting this review, the Court's function is to decide only whether the statute is unconstitutional, not whether the statute is unwise, unsound, or unnecessary. *Stark*, 2011 S.D. 46, ¶ 10, 802 N.W.2d at 169.

A. *McNeely does not address the constitutionality of the implied consent law.*

McNeely did not require that the trial court suppress the blood test administration, sample and test results in this case. The Court in *McNeely* did not address the constitutionality of an implied consent law. The sole constitutional issue decided in *McNeely*, as set forth

below, does not control the outcome of the legal issues raised in Defendant's motion to suppress.

> The question presented here is whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for non-consensual blood testing in all drunk-driving cases. We conclude that it does not and we hold, consistent with general Fourth Amendment principles, that exigency in this context must be determined case by case based upon the totality of the circumstances.

McNeely, 569 U.S. at ___, 133 S.Ct. at 1556.

Unlike *McNeely,* the Defendant's blood was obtained under the authority of the State's implied consent statute, as set forth in SDCL 32-23-10. The State did not rely on the presence of exigent circumstances to obtain Defendant's blood. *McNeely* only removed one legal underpinning to uphold the constitutionality of a search under the implied consent law (that the search is constitutional notwithstanding the implied consent law since natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement). No possible reading of *McNeely* can support the trial court's legal conclusions that the Supreme Court's ruling rendered a search under the implied consent provisions of SDCL 32-23-10 unconstitutional. Other courts have concluded *McNeely* does not control the constitutionality determination of a search conducted under an implied consent law. *See, e.g., Reeder v. State*, ___ S.W.3d ___, 2014

WL 60162, at ** 2-3 (Tex.App.-Texarkana); *Polito v. State*, 2014 WL 348533, at * 3 n.1 (Tex.App.-Dallas).

Additionally, the Court in *McNeely* acknowledged that all fifty states employ implied consent laws that are legal tools to enforce their drunk-driving law and to secure BAC evidence. *McNeely*, 569 U.S. at ___, 133 S.Ct. at 1566. The Court further recognized the validity of "implied consent laws that require motorists, as a condition of operating a motor vehicle within the state to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id.*

B. *Since 2006, there has been no statutory ability to refuse a blood withdrawal under the implied consent statute.*

In 2006, the Legislature amended SDCL 32-23-10 and removed any remaining statutory ability of a driver to refuse a blood withdrawal following a DUI arrest.[1] This amendment followed a 2005 legislative interim study conducted by the Department of Public Safety Agency Review Committee that included review of the state DUI and implied consent statues. *See* State's Motion for Judicial Notice, Ex. 5, October

[1] Contrary to the trial court's ruling, there can be no determination that "the statute is unconstitutional as applied" regarding a search conducted under SDCL 32-23-10. If Defendant's implied consent is insufficient to validate the search, this search and any other search conducted solely under the implied consent law is compelled in violation of *Bumper v. North Carolina*, 391 U.S. 543, 548-49, 88 S.Ct. 1788, 1791-92, 20 L.Ed.2d 797 (1968), and the statute as a whole must be declared unconstitutional. It will then be up to the Legislature to determine how to amend SDCL 32-23-10 to comport with the ruling.

24, 2005 Minutes, Department of Public Safety Agency Review Committee and Documents Nos. 6-9. SR 64-102. It is undisputable that the intent of the Legislature in 2006 was to remove any remaining statutory ability to refuse a blood draw under SDCL 32-23-10. *See* 2006 Senate Bill 1. App. 10. Senate Bill 1's title expressed its intended purpose: "An Act to provide for the mandatory withdrawal of blood or other bodily substances subsequent to arrest for driving while under influence." Given the mandatory nature of SDCL 32-23-10 as amended, there is no statutory ability to refuse a blood test following a valid arrest for DUI.[2]

State statistics support the rationale behind the 2006 legislative amendments to the implied consent statute. In 2005 there were 10,174 people charged with a DUI violation. *See* Motion for Judicial Notice Ex. 3, 2011 South Dakota Motor Vehicle Traffic Crash Summary. SR 56-58. In 2005, the South Dakota Department of Public Safety received 2,558 notice of refusal forms from law enforcement. As a consequence, 670 South Dakota driver licenses were revoked by the Department of Public Safety because persons refused to give a blood sample after an arrest for a DUI. *See* Affidavit of Cynthia Gerber, Department of Public Safety. SR 103-04. The

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[2] The State respectfully requests, pursuant to SDCL ch. 19-10, that the Court take judicial notice of the legislative history of the 2006 amendment to SDCL 32-23-10 found on the Legislative Research Council website regarding SL 2006, ch. 169 and Senate Bill 1.

number of revocations for refusals and DUI arrests in 2005 demonstrate that increased DUI penalties and the loss of driving privileges did not alone deter people from driving while under the influence.

C. *Searches authorized by the implied consent statue are reasonable.*

The Fourth Amendment is applicable to the states through the Fourteenth Amendment. *Vernonia School District 47J v. Acton*, 515 U.S. 646, 652, 115 S.Ct. 2386, 2390, 132 L.Ed.2d 564 (1995). When construing South Dakota Constitution Art. VI, § 11, the South Dakota Supreme Court generally looks to federal law for guidance. *State v. Deneui*, 2009 S.D. 99, ¶ 12, 775 N.W.2d 221, 229.

The Fourth Amendment does not protect against all searches and seizures, but only against unreasonable searches and seizures. *Deneui*, 2009 S.D. 99 at ¶ 13, 775 N.W.2d at 229.

> In deciding whether a search or seizure was reasonable, "[t]he touchstone of our analysis under the Fourth Amendment is always 'the reasonableness in all the circumstances of the particular governmental invasion of a citizens personal security.'" Reasonableness "depends on a balance between the public interest and the individual's right to personal security from arbitrary interference by law officers."

Id. (internal citations omitted).

If the touchstone of Fourth Amendment analysis is always the reasonableness of the particular invasion, then an individualized inquiry must be undertaken to determine if the particular invasion or

condition imposed is, in fact, "reasonable." When the totality of the circumstances is reviewed, the conditions imposed on drivers by the implied consent statute are reasonable.

In other cases involving public safety, the United States Supreme Court has balanced the compelling needs of the state against the reasonable privacy expectations of the citizen. *Michigan Department of State Police v. Sitz,* 496 U.S. 444, 455, 110 S.Ct. 2481, 2488, 110 L.Ed.2d 412 (1990) (DWI checkpoints were reasonable searches under a Fourth Amendment balancing test without a showing of "special needs" because the primary purpose was roadway safety).

Recently, the United States Supreme Court applied this balancing test when it upheld a Maryland law requiring the collection of a biological sample of DNA from an arrestee not yet convicted of a crime. *Maryland v. King,* 569 U.S. ___, 133 S.Ct. 1958, 1970, 186 L.Ed.2d 1 (2013). The Court observed that, "In some circumstances, such as '[w]hen faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions or the like, the Court has found that certain general, or individual circumstances, may render a warrantless search reasonable.'" *King,* 569 U.S. ___, 133 S.Ct. at 1969 (citation omitted). The Court recognized that circumstances that might diminish the need for a warrant could include occasions when "an individual is already on notice, for instance because of his

employment, or the conditions of his release from government custody, that some reasonable police intrusion on his privacy is to be expected." *Id.* (internal citations omitted). Additionally, "the need for a warrant is perhaps least when the search involves no discretion that could properly be limited by the 'interpo[lation of] a neutral magistrate between the citizen and the law enforcement officer.'" *Id.* at 1569-70 (internal citation omitted).

The balancing test has also been applied when a search or seizure is conducted pursuant to a statute, regulation, or government practice. *Skinner v. Railway Labor Executives' Association*, 489 U.S. 602, 618-20, 109 S.Ct. 1402, 1414-15, 103 L.Ed.2d 639 (1989). Where a statutorily-mandated search is reasonable, no warrant is required, and the results of the search are admissible in a criminal prosecution. *King,* 569 U.S. ___, 133 S.Ct. at 1970. For the reasons set forth below, a search conducted under the implied consent law is reasonable.

1. The South Dakota Legislature had a compelling public safety interest to condition the privilege to drive on consent to a test after a DUI arrest.

The United States Supreme Court has long recognized the validity and efficacy of implied consent laws. In 1957, the Court in *Breithaupt v. Abram,* 352 U.S. 432, 435 n.2, 77 S.Ct. 408, 410 n.2, 1 L.Ed.2d 448 (1957), cited with approval the implied consent laws of the State of Kansas. The Kansas implied consent law declared that

any person who operates a motor vehicle on the public highways "would consent to have a blood test made as part of a sensible and civilized system protecting himself as well as other citizens . . . from the hazards of the road due to drunken driving." *Id.*

The right to operate a motor vehicle upon a public street or highway is not a natural or unrestricted right. It a privilege which is subject to reasonable regulation under the police power of the state in the interest of public safety and welfare. *Beare v. Smith*, 82 S.D. 20, 24-25, 140 N.W.2d 603, 606 (1966). In *Peterson v. State*, 261 N.W.2d 405, 408 (S.D. 1977), this Court concluded the purpose of the implied consent statute is to achieve the objective of a "fair, efficient and accurate system of detection and prevention of drunken driving." *See also Boggs v. State Department of Public Safety*, 261 N.W.2d 412, 414 (S.D. 1977).

The *Peterson* Court set forth the compelling state public safety interest furthered by the implied consent law.

> Implied consent statutes, such as we have, are designed to combat the increasing menace and danger caused by drunken drivers using the public highways and their elimination or control presents a most perplexing problem to law enforcement officers and to the courts. The legislative purpose behind such statutes is clear. The right to drive being a privilege granted by the state it has, for the protection of the public, imposed conditions on that privilege; one being that a person consent to a chemical analysis under the conditions specified in the statutes.

261 N.W.2d at 408 (citation omitted).

The immediate purpose of the implied consent statute is to obtain the best evidence of blood alcohol content at the time a person reasonably believed to be driving while intoxicated is arrested. *Id.*

> The "best evidence of blood alcohol content" is furnished by a chemical test of the type provided for in our law. However, it is a "well-established rule that the probative value of a chemical test for intoxication diminishes with the passage of time.... "Such being true, the longer the test (is) delayed the more favorable the situation would become for the subject." Therefore, "(c)learly implied in the statute is the requirement that one of its described tests be submitted to and completed expeditiously; otherwise the purpose of the law would be frustrated." "There is no sound reason to give the driver the opportunity to delay the test to his benefit contrary to the purpose of the test and the statute to obtain as accurate an indication of his condition as possible."

Peterson, 261 N.W.2d at 408-09 (internal citations omitted).

The State's compelling public safety interest in deterring alcohol-impaired driving is furthered through the swift and immediate withdrawal of blood authorized under the current version of SDCL 32-23-10. In 2003, there were seventy-eight fatal alcohol-related crashes on South Dakota roadways. *See* State's Motion for Judicial Notice, Ex. 4, 2004 South Dakota Motor Vehicle Traffic Crash Summary at p. 8. SR 62. These crashes resulted in ninety-four deaths. *Id.* at p. 6. SR 61. In 2011, this number dropped to thirty alcohol related fatal crashes, resulting in thirty-seven deaths. *See* Motion for Judicial Notice, Ex. 3, 2011 South Dakota Motor Vehicle Traffic Crash Summary at pp. 6, 8. SR 57-58.

2. An impaired driver in South Dakota does not have a reasonable expectation of privacy to a search of their blood or other bodily substances for the presence of alcohol or other impairing substances.

"An individual must have a reasonable expectation of privacy in the place searched or the article seized before the Fourth Amendment will apply." *State v. Thunder*, 2010 S.D. 3, ¶ 16, 777 N.W.2d 373, 378; *See also*, *State v. Zahn*, 2012 S.D. 19, ¶ 20, 812 N.W.2d 490, 496. An expectation of privacy "is determined by a two-prong test: (1) whether the defendant has exhibited an actual subjective expectation of privacy and (2) whether society is willing to honor this expectation as being reasonable." *State v. Lowther*, 434 N.W.2d 747, 754 (S.D. 1989).

A person's legal relationship with the State can reduce the individual's privacy interests. *Vernonia School District 47J,* 515 U.S. at 654, 115 S.Ct. at 2391 (recognizing a reduced privacy interest because the searches involved students committed to the temporary custody of the state); *Griffin v. Wisconsin,* 483 U.S. 868, 873, 875, 107 S.Ct. 3164, 3168, 3169, 97 L.Ed.2d 709 (1987) (recognizing a reduced privacy interest when persons are under state supervision on probation). Privacy interests are also diminished when an individual voluntarily participates in a highly regulated activity. *Skinner*, 489 U.S. at 627, 109 S.Ct.at 1418.

Under South Dakota's statutory scheme, all drivers in South Dakota do not have a reasonable expectation of privacy that prohibits

the withdrawal of their blood or other bodily substance after a DUI arrest for several reasons. First, driving is a highly regulated activity. *See*, SDCL Title 32.

Second, because the implied consent law only applies after a driver is arrested based on probable cause for DUI, a driver's privacy in this context is significantly lower than an otherwise law-abiding citizen in their home or walking down the street. A driver's privacy interests are diminished after he or she is arrested and taken into police custody. *King,* 569 U.S. ___, 133 S. Ct. at 1978. Under the Fourth and Fourteenth Amendments, an arresting officer may, without a warrant, search a person lawfully arrested. *Michigan v. DeFillippo,* 443 U.S. 31, 35, 99 S.Ct. 2627, 2631, 61 L.Ed.2d 343 (1979). "A search of the detainee's person when he is booked into custody may involve a relatively extensive exploration …" *King,* 569 U.S. at ___, 133 S.Ct. at 1978; s*ee also Florence v. Board of Chosen Freeholders of the County of Burlington,* 566 U.S. ___, 132 S.Ct. 1510, 1520, 182 L.Ed.2d 566 (2012).

Finally there can be no subjective expectation of privacy because under SDCL 32-23-10, all drivers, including Defendant, consent to blood withdrawals when they choose to operate a motor vehicle in this state. "[U]nder our system of criminal law every person is presumed to know the law." *State v. Asmussen*, 2006 S.D. 37, ¶ 17, 713 N.W.2d 580, 587. Further, since Defendant was a South Dakota licensed

driver, she had additional notification. The South Dakota Driver's License Application informs the applicant that a motor vehicle operator in South Dakota consents to "the withdrawal of [their] blood or other bodily substance in accordance with SDCL 32-23-10." *See* Motion for Judicial Notice, Ex. 2, South Dakota Driver's License/I.D. Card Application. SR 53. The South Dakota Driver Manual also informs drivers that a person consents to a chemical test when driving on a public highway. *See* Motion for Judicial Notice, Ex.1, South Dakota Driver Manual, p. 63. SR 51.

Consent to the withdrawal of bodily substances under SDCL 32-23-10 is intelligently and unequivocally granted by every person driving on South Dakota highways. Other courts have held, that absent an authorizing statute (which has not existed in South Dakota since July of 2006), there is no statutory ability or constitutional right to refuse to submit to a withdrawal of blood for chemical analysis requested pursuant to the implied consent statute. *See, e.g., State v. Cabanilla*, 273 P.3d 125, 131-32 (Or. 2012); *McCracken v. State*, 685 P.2d 1275, 1277-78 (Alaska 1984); and *State v. Kanikaynar*, 939 P.2d 1091, 1096 (N.M. 1997).

To the extent Defendant may assert any subjective expectation of privacy, she simply cannot establish that "society is willing to honor this expectation as reasonable." *Lowther*, 434 N.W.2d at 754. As presented above, there is a compelling state public safety interest

being furthered by the implied consent law. Given this interest and the modification of the implied consent law over the years, it is incomprehensible that society is willing to honor a driver's ability to refuse based on a subjective expectation of privacy claim.

3. Application of the *McGann* and other factors support the reasonableness of an implied consent search under the totality of the circumstances.

The Seventh Circuit Court of Appeals, in *McGann v. Northeast Illinois Regional Commuter Railroad Corporation*, 8 F.3d 1174, 1181 (7th Cir. 1993), reviewed the reasonableness of an implied consent search by evaluating the totality of the circumstances surrounding this type of search. The *McGann* Court set forth the following factors in addressing the constitutionality of the search:

> Generally, in deciding whether to uphold a warrantless search on the basis of implied consent, courts consider whether (1) the person searched was on notice that undertaking certain conduct, like attempting to enter a building or board an airplane, would subject him to a search, (2) the person voluntarily engaged in the specified conduct, (3) the search was justified by a "vital interest", (4) the search was reasonably effective in securing the interests at stake, (5) the search was only as intrusive as necessary to further the interests justifying the search and (6) the search curtailed, to some extent, unbridled discretion in the searching officers.

Id. The implied consent search authorized under SDCL 32-23-10 satisfies all of these factors.

Factor 1. The Defendant was on notice that her privilege to drive was conditioned on consent to a search. Every person is

presumed to know the law. *Asmussen*, 2006 S.D. 37 ¶ 17, 713 N.W.2d at 587. Further, Defendant is licensed to drive in South Dakota. SH 6; SR 1. As such, notice was also provided in the South Dakota Driver's License Application and South Dakota Driver Manual. *See*, Motion for Judicial Notice, Ex. 2, South Dakota Driver's License/I.D. Card Application, and Ex. 1, South Dakota Driver Manual, p. 63. SR 51, 53.

Factor 2. The Defendant voluntarily drove her motorcycle on a South Dakota public highway while under the influence. Defendant cannot argue that she was coerced. As the Court stated in *State v. Wintlend*, 655 N.W.2d 745, 749 (Wis. Ct. App. 2002), no one forces a person to get a driver's license, and individuals have total freedom to choose whether and when to drive on public highways.

Factor 3. The implied consent search is in furtherance of the compelling public safety interest in combating the menace and danger caused by impaired drivers operating on the public highways. In addition, it is for the purpose of obtaining the best possible evidence of impairment, namely the blood alcohol content at the time of the DUI arrest.

Factor 4. The implied consent requirements are directly related to the privilege to drive. These requirements further the State's compelling public safety interest in combating the menace and danger caused by drivers operating on the public highways while under the

influence. They also provide the best evidence of impairment possible from those arrested for violating the DUI laws. "[T]here is a compelling need to get intoxicated drivers off the highways and keep them off until they have, hopefully, learned their lesson. The implied consent law is for a compelling purpose and is not overly intrusive. It is not unreasonable." *Wintlend*, 655 N.W.2d at 751. Additionally, the consent obtained under SDCL 32-23-10 only applies when the state granted privilege to drive is abused. The privilege to drive does not include placing the public in peril by driving while under the influence.

Factor 5. The authorized search is limited to the withdrawal of blood and other bodily substances for the purpose of testing for alcohol and other impairing substances. The method in which the blood sample is obtained is only as intrusive as required to further the interests and purposes justifying the search. The searches authorized by the implied consent statute are sufficiently minimally intrusive to support reasonableness under the Fourth Amendment. *See Schmerber v. California*, 384 U.S. 757, 771-72, 86 S.Ct. 1826, 1836, 16 L.Ed.2d 908 (1966); *Skinner*, 489 U.S. at 625-27, 109 S.Ct. at 1417-18. Specifically, blood withdrawals authorized by SDCL 32-23-10 are subject to standard medical procedures and safeguards set forth in SDCL 32-23-14. *See State v. Lanier*, 452 N.W.2d 144, 146 n.4 (S.D. 1990).

Factor 6. Law enforcement discretion is limited to the type of bodily substance being requested for withdrawal and whether the circumstances establish probable cause to arrest. All other criteria is proscribed by statute. The authorized implied consent search under SDCL 32-23-10 is premised on a lawful arrest based upon the existence of probable cause to arrest for a violation of SDCL 32-23-1, and probable cause to believe a person has bodily possession of evidence relevant to the offense. Here, the Defendant's seizure and the search for her blood or other bodily substances arose from a DUI arrest. Where there is probable cause to arrest for a DUI violation, there is probable cause to search for bodily substances to obtain objective scientific evidence of the driver's impairment. *Schmerber,* 384 U.S. at 768-70, 86 S.Ct. at 1834-35. Generally, Fourth Amendment reasonableness means that a search or seizure must be supported by probable cause. *See, e.g., United States v. Knights,* 534 U.S. 112, 121, 122 S.Ct. 587, 592, 151 L.Ed.2d 497 (2001). SDCL 32-23-10 satisfies this standard.

Consistent with satisfying the *McGann* factors, there is no legal support for the conclusion that the implied consent law imposes an unconstitutional condition on the privilege to drive. No court has ever suggested that Fourth Amendment rights cannot be waived or temporarily limited by agreement. *See Knights,* 534 U.S. 112 at 122, 122 S.Ct. 587 at 593, (upheld warrantless search based upon

reasonable suspicion that was agreed to as a condition for probation); *Wyman v. James*, 400 U.S. 309, 91 S.Ct. 381, 27 L.Ed.2d 408 (1971) (approved the imposition of conditions for family-welfare payments on the recipient's submission to a warrantless searches of home).

The implied consent law under review by the Court is significantly different than the circumstances addressed in *Dolan v. City of Tigard*, 512 U.S. 374, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), and other cases applying the "unconstitutional conditions doctrine." The State is unaware of a United States Supreme Court decision applying this doctrine in the Fourth Amendment context. However, it has been noted that the doctrine does not prohibit a state from conditioning a privilege upon the recipient agreeing to surrender a Fourth Amendment right. *See Burgess v. Lowery*, 201 F.3d 942, 947 (7th Cir. 2000). The inapplicability of the doctrine is especially true here; where there is a direct and close nexus between the privilege to drive and the compelling public safety interest behind the enactment of the implied consent statute.

Further, the conclusion that the Legislature may constitutionally condition a motorist's privilege to drive on consent to a search of bodily substances is supported by *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983). In *Neville*, the Supreme Court upheld the constitutionality of SDCL 32-23-10.1, when it determined that discouraging a refusal by allowing it to be used at trial

was not a compelled compulsion in violation of the Fifth or Fourteenth Amendments. *Id.* at 564, 103 S.Ct. at 923.

The *Neville* Court addressed South Dakota's implied consent law and the interests furthered by its enactment. First, the Court took judicial notice of the carnage caused by impaired drivers and a state's compelling interest in highway safety. *Neville* at 558-59, 103 S.Ct. at 920. The Court then found that as part of the South Dakota Legislature's program to deter drinkers from driving, it enacted an "implied consent" law that declares that any person operating a vehicle in South Dakota is deemed to have consented to a chemical test of the alcoholic content of his blood if arrested for driving while intoxicated. *Neville* at 559, 103 S.Ct. at 920. The Court then recognized that its decision in *Schmerber v. California* "clearly allows a State to force a person suspected of driving while intoxicated to submit to a blood alcohol test." *Neville* at 559, 103 S.Ct. at 920*; see also State v. Mattson*, 2005 S.D. 71, ¶¶ 42-46, 698 N.W.2d 538, 552-53.

For all the reasons set forth above, conditioning the privilege to drive on the submission to a search does not violate the Fourth Amendment. The Fourth Amendment balancing test must end on the side of reasonableness. The intended deterrent effect of the implied consent law tips the scales in this case. As former Justice Wollman noted in his concurrence in *Walz v. City of Hudson*, 327 N.W.2d 120, 123, n.* (S.D. 1982) (quoting Chief Justice Dunn's dissent in *Griffen v.*

Sebek, 90 S.D. 692, 245 N.W.2d 481 (1976)):

> We watched with deep emotion-sadness and pride intermixed-the television coverage during recent days of the dedication of the Vietnam Veteran's Memorial in Washington, D.C. See "Honoring Vietnam Veterans-At Last," *Newsweek*, November 22, 1982, at 80. Suppose that instead of a memorial engraved with the names of 57,939 war dead, we erected each year in our nation's capitol a memorial bearing the names of the 25,000 or so Americans who each year are killed in alcohol-related motor vehicle accidents. Would not they loom as puzzling two millennia hence as Stonehenge does to us today-megaliths in memory of the victims of our unconcern.

The Legislature's decision to address this "unconcern" through SDCL 32-23-10 is not unconstitutional.

II

> THE TRIAL COURT ERRED BY HOLDING THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE, BASED UPON THE TROOPERS' RELIANCE ON SDCL 32-23-10 TO OBTAIN A SAMPLE OF DEFENDANT'S BLOOD, WAS INAPPLICABLE.

Even if the Court should find SDCL 32-23-10 unconstitutional, the trial court's order suppressing the blood test evidence must be reversed. As a matter of law, the trial court erred in determining that the fact the implied consent search took place subsequent to *McNeely* precluded the finding of good faith. As presented above, *McNeely* does not control the determination on the constitutionality of the search.

Further, there is no decision of this Court, or the United States Supreme Court, that can reasonably be construed to compel the conclusion that the obtaining of Defendant's blood under the implied

consent law was done in violation of the Fourth Amendment or the state constitution. Rather, prior decisions rendered by this Court have upheld the constitutionality of SDCL 32-23-10. *See State v. Heinrich*, 449 N.W.2d 25, 26-27 (S.D. 1989); *State v. Jacobson*, 491 N.W.2d 455, 458 (S.D. 1992).

The good faith exception announced in *Illinois v. Krull* is applicable under the facts of this case. The troopers' objective good faith reliance upon SDCL 32-23-10 precludes suppression of the evidence. Law enforcement officers must be able to rely upon statutes enacted by our Legislature, especially when the statute was previously upheld under constitutional attack. The trial court's order suppressing the blood test evidence must be reversed.

A. *Good faith exception in general.*

It is well established that "Suppression of evidence is not a personal constitutional right, but a judicially created remedy to deter constitutional violations by government officials." *State v. Sorensen*, 2004 S.D. 108, ¶ 8, 688 N.W.2d 193, 196. The Court, quoting *United States v. Leon*, 468 U.S. 897, 906, 104 S.Ct. 3405, 3412, 82 L.Ed.2d 677 (1984) stated:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their

> future counterparts, a greater degree of care towards the rights of an accused.

Sorensen, 2004 S.D. 108, ¶ 8, 688 N.W.2d at 196-97. Because the goal of deterrence will not always be advanced by excluding relevant, though illegally seized, evidence, the Supreme Court has identified several exceptions to the exclusionary rule." *Sorensen*, 2004 S.D. 108, ¶ 8, 688 N.W.2d at 197.

One of these exceptions is "good faith." The exclusionary rule does not apply "when the police act with an objectively 'reasonable good-faith belief' that their conduct is lawful." *Davis v. United States,* 564 U.S. ___, 131 S.Ct. 2419, 2427, 180 L.Ed.2d 285 (2011). In order to qualify for the good faith exception, the officer "must have 'acted in the objectively reasonable belief that [his] conduct did not violate the Fourth Amendment.'" *State v. Boll*, 2002 S.D. 114, ¶ 38, 651 N.W.2d 710, 720.

B. *Under Illinois v. Krull, the officer's reliance upon SDCL 32-23-10 mandates application of the good-faith exception.*

This Court has applied the good faith exception to the exclusionary rule consistent with United States Supreme Court precedent. *See, e.g., Sorensen,* 2004 S.D. 108, ¶¶ 8-9, 688 N.W.2d at 196-97*; State v. Saiz*, 427 N.W.2d 825 (S.D. 1988). In *Illinois v. Krull,* the United States Supreme Court extended the good faith exception to searches conducted in reasonable reliance on subsequently

invalidated statutes. In adopting this extension, the *Krull* Court stated:

> The application of the exclusionary rule to suppress evidence obtained by an officer acting in objectively reasonable reliance on a statute would have as little deterrent effect on the officer's actions as would the exclusion of evidence when an officer acts in objectively reasonable reliance on a warrant. Unless a statute is clearly unconstitutional, an officer cannot be expected to question the judgment of the legislature that passed the law. If the statute is subsequently declared unconstitutional, excluding evidence obtained pursuant to it prior to such a judicial declaration will not deter future Fourth Amendment violations by an officer who has simply fulfilled his responsibility to enforce the statute as written. To paraphrase the Court's comment in *Leon:* "Penalizing the officer for the [legislature's] error, rather than his own, cannot logically contribute to the deterrence of Fourth Amendment violations." [468 U.S. at 921].

Krull, 480 U.S. at 349-50, 107 S.Ct. at 1167.

The *Krull* good faith exception applies unless it is established that the Legislature wholly abandoned its responsibility to enact a constitutional law when it enacted SDCL 32-23-10, or the officer should have reasonably known that the statute was unconstitutional. *Krull,* 480 U.S. at 355, 107 S.Ct. at 1170. Neither exception can be established under the undisputed facts of this case.

First, there is no factual or legal support for the conclusion that the Legislature abandoned its responsibilities. In *Boggs*, 261 N.W.2d at 414-15, the Court concluded it was up to the Legislature to determine the implied consent penalty provisions. When the current

version of SDCL 32-23-10 was enacted in 2006, there was no controlling court decision that could support the conclusion that SDCL 32-23-10 was in any way unconstitutional. The controlling case law in South Dakota at that time was that a compelled search following a DUI or drug arrest was constitutional even absent the implied consent statute. *See, e.g.*, *State v. Hartman*, 256 N.W.2d 131, 134 (S.D. 1977); and *State v. Herrmann*, 2002 S.D. 119, ¶ 17, 652 N.W.2d 725, 730. Additionally, as the United States Supreme Court recognized in *Neville*, 459 U.S. at 559, 103 S.Ct. at 920, *Schmerber* allows a state to force a person suspected of driving while intoxicated to submit to a blood alcohol test.

Likewise, there are no facts or legal authority that can refute the trooper's good faith reliance upon SDCL 32-23-10 for the blood withdrawal. Neither the holding, nor the constitutional issue addressed in *McNeely*, support the conclusion that any law enforcement officer reasonably should have known that SDCL 32-23-10 was unconstitutional.

Again, there is no decision from this Court or the United States Supreme Court regarding the constitutionality of a search under the implied consent law that could reasonably or objectively effect the trooper's good faith reliance on the statute. Additionally the Court in *Heinrich*, 449 N.W.2d at 26-27, upheld the constitutionality of the then-existing version of SDCL 32-23-10 and its compulsory blood

alcohol test for a third offense DUI. *See also State v. Jacobson*, 491 N.W.2d 455, 458 (S.D. 1992). ("Under SDCL 32-23-10, the predicates for admission of the results of a forced blood test are simple. 'Once an individual has been convicted twice for a violation of SDCL 32-23-1 [DUI], a trooper is only required to inform an arrested person of the warnings outlined in SDCL 32-23-10, and the result of a compulsory blood alcohol test is admissible.' *State v. Heinrich,* 449 N.W.2d 25, 27 (S.D. 1989)"). Though the Court upheld the constitutionality of the implied consent law under a legal underpinning *McNeely* removed, the statute does not rely upon the presence of exigent circumstances to conduct the warrantless search.

Absent any controlling precedent to the contrary, it is reasonable to conclude that the officer could not know SDCL 32-23-10 was unconstitutional at the time the blood sample was withdrawn in this case. The good faith exception in *Krull* applies and the blood sample and test are admissible.

Finally, the Court has only precluded an action under SDCL 32-23-1(1) and the application of SDCL 32-23-7 where there is violation of the State's implied consent laws. *See, e.g., Herrmann*, 2002 S.D. 119, ¶¶ 17-20, 652 N.W.2d at 730-31. Since there is no assertion that the provisions of SDCL 32-23-10 were not fully complied with, the State should be allowed to proceed utilizing SDCL 32-23-1(1) and SDCL 32-23-7.

CONCLUSION

For all the reasons set forth above, the trial court's Order Granting Defendant's Motion to Suppress Blood Test must be reversed.

Dated this 13th day of February, 2014.

Respectfully submitted,

MARTY J. JACKLEY
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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellant's Brief contains 6,635 words.

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

Dated this 13th day of February, 2014.

/s/*Jeffrey P. Hallem*
Jeffrey P. Hallem
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 13th day of February, 2014, a true and correct copy of Appellant's Brief in the matter of *State of South Dakota v. Shauna Fierro* was served by electronic mail on Joseph M. Kosel at jkosel@johnkosellaw.com; Ronald A. Parson, Jr. at ron@jhalawfirm.com; and Delia M. Druley at delia@jhalawfirm.com.

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Assistant Attorney General

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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 26890

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

vs.

SHAUNA FIERRO,

Defendant and Appellee.

APPEAL FROM THE CIRCUIT COURT
FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE K. PALMER-PERCY
MAGISTRATE COURT JUDGE

BRIEF OF APPELLEE SHAUNA FIERRO

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PETITION FOR INTERMEDIATE APPEAL GRANTED: JANUARY 10, 2014

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PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index will be to the designation (R.) and the applicable page. References to Appellant State of South Dakota's Appendix will be to the designation (App.) and the applicable page.

There are two transcripts contained in the record. References to the transcript of the original October 25, 2013 hearing on Fierro's motion to suppress will be to the designation (T1) and the applicable page. References to the transcript of the November 22, 2013 hearing on the State's motion for reconsideration will be to the designation (T2) and the applicable page. References to hearing exhibits will be to the designation (Ex.) and the applicable exhibit number.

REQUEST FOR ORAL ARGUMENT

Shauna Fierro respectfully requests the privilege of oral argument.

STATEMENT OF THE ISSUES

I. Did the lower court commit legal error in holding that the State's warrantless search and seizure of the Defendant's blood violated the Fourth Amendment because it failed to meet its burden to establish an exception to the warrant requirement?

The trial court held that the warrantless blood draw was not done pursuant to any valid exception to the warrant requirement and violated the Defendant's Fourth Amendment rights.

- *Missouri v. McNeely*, 133 S. Ct. 1552 (2013)
- *Schmerber v. California*, 384 U.S. 757 (1966)
- *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973)
- *State v. Akuba*, 2004 S.D. 94, 686 N.W.2d 406

II. Did the lower court commit legal error in rejecting the State's resort to the "good faith" exception to the exclusionary rule and suppressing the fruits of an unconstitutional search and seizure?

The trial court rejected the State's request to apply the "good faith" exception to the exclusionary rule and granted the Defendants' motion to suppress the blood evidence.

- *United States v. Davis*, 131 S.Ct. 2419 (2011)
- *Illinois v. Krull*, 480 U.S. 340 (1987)
- *State v. Boll*, 2002 S.D. 114, 651 N.W.2d 710

STATEMENT OF THE CASE

This is an intermediate appeal from an order suppressing blood evidence seized by the State without a warrant pursuant to South Dakota's implied consent statutes. On August 7, 2013, the State charged the defendant, Shauna Fierro, by Information in Butte County of the Fourth Judicial Circuit with alternative counts of Driving Under the Influence in violation of SDCL 32-23-1(1) & (2). (R. 4-5).

The case was assigned to the Honorable Michelle Palmer-Percy, Magistrate Judge. On October 11, 2013, the Defendant filed a Motion to Suppress Blood Test Administration and Results. (R. 33). An evidentiary hearing was held on October 25, 2013. At this hearing, the State did not offer any exhibits, but did call two witnesses: Trooper Jerry Kastein and Trooper Richard Olauson of the South Dakota Highway Patrol. (T1 3, 52). The Defendant then played a video excerpt of the arrest, which was received into evidence as Exhibit A. (T1 59-60). In addition, Shauna Fierro testified on her own behalf. (T1 61). Following the arguments of counsel, the magistrate court granted the Defendant's motion to suppress the blood evidence seized from her without a warrant. (T1 68-69).

On November 4, 2013, the State filed a motion to reconsider the suppression of the blood evidence. (R. 46). The State also attempted to place new evidence into the record by filing a motion for judicial notice with various documents attached. (R. 48). In the meantime, the parties drafted and provided proposed findings of fact and conclusions of law. (T2 20; R. 105). A hearing on the State's motion to reconsider was held on November 22, 2013, at which no additional evidence was presented.

Following the arguments of counsel, the magistrate court denied the motion for reconsideration and reaffirmed its earlier ruling granting the motion to suppress the blood evidence. (T2 19-21).

On November 25, 2013, the magistrate court signed and entered its Order Granting Defendant's Motion to Suppress Blood Test. (R. 117). On December 2, 2013, the court entered its Findings of Fact and Conclusions of Law Re: Defendants' Motion to Suppress Blood Test. (R. 134). Specifically, the court made express factual findings that the Defendant was never asked to consent to the seizure of her blood, that she did *not* voluntarily consent to the seizure of her blood and, in fact, that she specifically *refused* to voluntarily submit to the seizure of her blood before the procedure was done at the Meade County jail. (R. 135-36).

The conclusions of law entered by the lower court make clear that it did not hold that any of South Dakota's implied consent statutes are inherently unconstitutional. Rather, the court held that the State's warrantless seizure of the Defendant's blood violated the Fourth Amendment because the State had not demonstrated under the totality of the circumstances that an exception to the warrant requirement applied. (R. 141).

First, the State did not demonstrate – and never even claimed – that exigent circumstances justified the warrantless seizure of the Defendant's blood. (R. 139). And second, the State failed to demonstrate that the Defendant had voluntarily consented to the warrantless seizure of her blood and, even if she had done so, any such consent was revoked by her refusal to submit to the procedure. (R. 139-41). As

a result, the court held that "the State's interpretation of SDCL 32-23-10 in this particular case requiring a mandatory blood withdrawal without a warrant and without proving a valid exception to the warrant requirement is unconstitutional." (R. 141). Finally, the court held that suppression of the evidence under the exclusionary rule was the appropriate remedy under the circumstances. (R. 141-42).

In a separate order, the court granted the Defendant's motion in limine to exclude the results of the preliminary breath test, a ruling from which the State did not seek to appeal. (R. 118; T1 70; T2 4-5).

Finally, the State's belated "motion for judicial notice" was never ruled upon by the magistrate court and therefore may not be reviewed on appeal under this Court's settled precedent.[1] Even if the motion were to be deemed denied, the State has not appealed from the failure to grant it. As a result, the numerous documents stapled to the State's motion for judicial notice were never received into evidence and are not part of the factual record. It is surprising that the State would rely upon unadmitted evidence as a basis for reversal.

On January 13, 2014, this Court entered its order granting the State's petition to allow this appeal from the magistrate court's intermediate order. (R. 150).

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[1] *See, e.g., Primeaux v. Dooley*, 2008 S.D. 22, ¶ 17, 747 N.W.2d 137, 142; *State v. Svihl*, 490 N.W.2d 269, 273 (S.D. 1992); *State v. Sickler*, 334 N.W.2d 677, 679 (S.D. 1983).

STATEMENT OF THE FACTS

The Defendant respectfully suggests that the statement of facts set forth in the State's opening brief omits several material facts. In addition, the State has not argued in its appellate brief that any of the findings of fact entered by the magistrate court, after evaluating the testimony of the witnesses at the evidentiary hearing, are clearly erroneous, thus waiving any such argument.

On the evening of August 4, 2013, Shauna Fierro was riding on her motorcycle in Butte County, returning home from dinner with friends. (T1 56-57). A little after eleven p.m., Shauna was pulled over by the South Dakota Highway Patrol. (T1 5, 7). Troopers Jerry Kastein and Richard Olauson were in the patrol car that initiated the stop.

As the sole justification for pulling her over, Trooper Kastein stated that Shauna's motorcycle had not come to a complete a stop at a stop sign. (T1 5). After inspecting her South Dakota driver's license, Trooper Kastein administered standard sobriety tests and exercises, some of which he concluded she did not pass. (T1 7-13, 23). In addition, Trooper Kastein administered a preliminary breath test, which resulted in a reading of .097 percent. (T1 13). He then placed Shauna under arrest for driving under the influence of alcohol. (T1 13).

Trooper Kastein does not work regularly in Butte County. Rather, he is typically stationed in Watertown and was specially assigned to work in the Black Hills during the Sturgis Motorcycle Rally. (T1 19). He did not have any contact with the Butte County State's Attorney prior to this assignment. (T1 19). He had, however,

recently received new training from his superiors regarding the Supreme Court's decision in *Missouri v. McNeely*. (T1 49).

After arresting her, Trooper Kastein informed Shauna that she was required by law to give the State her blood. (T1 42-43). He did so by reading from a DUI advisement card. (T1 43). The advisement card used by Trooper Kastein, however, was not the most recent version of such a card issued to South Dakota law enforcement following *McNeely*, which directed officers to "request" drivers to "consent to the withdrawal" of blood. (T1 50). Instead, he read Shauna the advisement from the pre-*McNeely* version of the card, which informed motorists that they were required to give blood and had no choice at all in the matter. (T1 50).

When Shauna specifically asked if she had to submit to the withdrawal of blood, Trooper Kastein responded: "Yep … Because state law says you have to." (T1 62). The conversation was captured by a camera in the patrol car and admitted at the hearing as Exhibit A:

TROOPER:	I've got to read you this card, okay?
DEFENDANT:	Okay.
TROOPER:	It's a DUI Advisement Card. It says: I've arrested you for violation of South Dakota Codified Law 32-23-1 – that's the DUI Code. Any person in this state who operates a vehicle has consented to withdrawal of blood or other bodily substance. I require you to submit to withdrawal of your blood. You have a right … You have a right to additional chemical analysis by a technician of your own choosing at your own expense.
DEFENDANT:	I have to give you blood?

TROOPER: Yep.

DEFENDANT: Why?

TROOPER: Because the state law says you have to. Any time you get arrested for DUI, state law says you have to… you have to give blood.

(Ex. A; T1 59-60). As Trooper Kastein later admitted:

Q: Okay. So just so we're clear, at no time did you give her any choice on whether or not she was going to have blood taken; right?

A: That's correct.

(T1 50). After the advisement was read, the officers drove to the Meade County jail, where Trooper Olauson was dropped off with Shauna in his custody. (T1 53).

Trooper Olauson escorted Shauna inside the facility, where she was required to submit to a blood draw performed by a county employee without Shauna's consent. While being processed, Shauna informed the officers that she wanted to refuse the blood test and consult with an attorney. (T1 62). When the technician first attempted to stick the needle into Shauna's arm, she pulled away to avoid it. (T1 63). Just before the needle pierced her skin and vein, Shauna again asked if she was required to undergo the procedure against, stating that she did not want to have her blood seized and would not consent unless required by law. (T1 63).

It is not disputed that the arresting officers had access to cell phones, a dispatch radio, and a computer in their patrol car and could have easily requested a warrant for the forced withdrawal of blood from Shauna Fierro, but simply chose not to do so. (T1 44, 45).

STANDARD OF REVIEW

The written findings of fact and conclusions of law entered by the lower court supersede any prior oral remarks and reflect its final and determinative thoughts for purposes of appellate review. *See State v. Labine*, 2007 S.D. 48, ¶ 16, 733 N.W.2d 265, 270. On review of a motion to suppress evidence, this Court is not restricted to the legal rationale of the lower court and may affirm for any reason. *See State v. Wright*, 2010 S.D. 91, ¶ 8, 791 N.W.2d 791, 794.

A motion to suppress for an alleged violation of a constitutional right raises a question of law reviewed *de novo*. *See State v. Heney*, 2013 S.D. 77, ¶ 8, 839 N.W.2d 558, 561. In making that determination, this Court reviews all findings of fact under the clearly erroneous standard. *See id.* Once the facts are determined, application of the legal standard to those facts is a question of law reviewed de novo. *See id.*

INTRODUCTION AND CONSTITUTIONAL BACKGROUND

The Fourth Amendment to the United States Constitution guarantees citizens the right to be free from unreasonable searches and seizures:

> 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.

Even greater protection is guaranteed by Article VI, Section Eleven of the South Dakota Constitution. *See State v. Opperman*, 247 N.W.2d 673, 674-75 (S.D. 1976). These complementary prohibitions generally require a warrant to be issued before an individual may be subject to a search or seizure by the State. *See Terry v. Ohio*, 392 U.S. 1, 20 (1968); *State v. Ballard*, 2000 S.D. 134, ¶ 10, 617 N.W.2d 837, 840. Pursuant to each provision, a warrantless search or seizure is "per se unreasonable" unless it falls within one of a few, well-delineated exceptions. *State v. Zahn*, 2012 S.D. 19, ¶ 29, 812 N.W.2d 491, 499. Free and voluntary "consent" and "exigent circumstances" are two such exceptions to the warrant requirement.

Schmerber and exigent circumstances

For many years, the leading decision on blood draws in cases involving DUI investigations was *Schmerber v. California*, 384 U.S. 757 (1966), in which the Supreme Court approved a warrantless blood draw where the defendant driver was involved in an accident and then taken to the hospital to treat his injuries. Although later read much more broadly by numerous courts, the Fourth Amendment holding in *Schmerber*

was quite narrow, approving the blood draw under the particular facts of that case based on the "exigent circumstances" exception to the warrant requirement:

> The officer in the present case, however, might reasonably have believed 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 a 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 (citation omitted). And the Supreme Court issued a further caveat:

> It bears repeating **…** that we reach this judgment only on the facts of the present record. The integrity of an individual's person is a cherished value of our society. That we today hold that the Constitution does not forbid the State's minor intrusions into an individual's body under stringently limited conditions in no way indicates that it permits more substantial intrusions or intrusions under other conditions.

Id. at 772. The *Schmerber* decision thus made clear that the question of whether a warrantless blood draw could be justified by an exception to the warrant requirement was an individual, particularized inquiry based upon all of the circumstances. Certainly, *Schmerber* does not contemplate that law enforcement may seize a person's blood without a warrant, valid consent, or exigent circumstances. And in fact, *Schmerber* did not even address the "consent" exception to the warrant requirement.

Unfortunately, this Court (like many courts) construed *Schmerber*, not as dependent upon its fact-specific finding of exigent circumstances, but to mean that because "the elimination of alcohol by natural bodily functions presents exigent

circumstances which obviate the necessity of obtaining a search warrant," the State could always compel blood draws in DUI investigations incident to an arrest with probable cause and done in a reliable, medically approved manner. *State v. Vandergrift*, 535 N.W.2d 428, 429 (S.D. 1995); *State v. Hanson*, 1999 S.D. 9, ¶ 28, 588 N.W.2d 885, 891; *State v. Herrmann*, 2002 S.D. 119, ¶ 17, 652 N.W.2d 725, 730.

Indeed, in *State v. Spry*, 207 N.W.2d 504 (S.D. 1973), this Court cited *Schmerber* for the dubious proposition "that a defendant's consent or refusal is *irrelevant* to the admission of the blood test if the test is taken pursuant to a valid arrest." *Id.* at 508 (emphasis supplied). A few years later, in *State v. Buckingham*, 240 N.W.2d 84 (S.D. 1976), this Court elaborated that although the Fourth Amendment did not, in light of its assessment of *Schmerber*, grant an arrested individual any right to refuse a blood draw, South Dakota's implied consent statutes in force at the time *did* impose such a requirement "beyond those mandated by the *Schmerber* case." *Id.* at 89.

With little variation, that is the stasis in which this Court's assessment of warrantless blood draws has been essentially frozen since that time. *See, e.g., State v. Hartman*, 256 N.W.2d 131, 135 (S.D. 1977); *State v. Heinrich*, 449 N.W.2d 25, 26-27 (S.D. 1989); *State v. Lanier*, 452 N.W.2d 144, 146 (S.D. 1990). As this Court has summarized, "[i]t is well settled that a state may, within constitutional limits, force an individual to submit to a test of bodily fluids." *State v. Nguyen*, 1997 S.D. 47, ¶ 10, 563 N.W.2d 120, 122-23. This Court's basis for that assertion was that "elimination of alcohol by natural bodily functions presents exigent circumstances which obviate the necessity of obtaining a search warrant." *Vandergrift*, 535 N.W.2d at 429.

And though it had always recognized a statutory right to refuse under its implied consent law, the South Dakota Legislature passed certain amendments to those statutes in 2006 that the State now claims remove any right, statutory or otherwise, to refuse a warrantless blood draw.

Bustamonte **and consent**

Although not cited in the State's brief, the leading case addressing the "consent" exception to the Fourth Amendment's warrant requirement is *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). As the Supreme Court explained, "[t]he precise question" in that seminal decision was "what must the prosecution prove to demonstrate that a consent was 'voluntarily' given." *Id.* at 223. Building upon *Bumper v. North Carolina*, 391 U.S. 543 (1968), the Supreme Court held that in order satisfy the "consent" exception, a State must demonstrate that "[w]hen a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given" and "the product of an essentially free and unconstrained choice by its maker." *Bustamonte*, 412 U.S. at 222, 226. The Fourth Amendment thus requires that "consent not be coerced, by explicit or implicit means, by implied threat or covert force." *Id.* at 228.

Significantly, "whether a consent to a search was in fact 'voluntary' or was the product of coercion, express or implied, is a question of fact to be determined from the totality of all the circumstances." *Id.* at 227. This is so because "no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is

directed." *Id.* at 228. And though the Court made clear that individuals obviously have a Fourth Amendment "right to refuse consent," the State must not always show a person's *knowledge* of her right to refuse in order to establish valid consent. *Id.* at 227. "In sum," the Court concluded, "there is no reason for us to depart in the area of consent searches, from the traditional definition of 'voluntariness.'" *Id.* at 229.

When directly presented with an issue concerning the consent exception to the warrant requirement, this Court has always faithfully applied the requirements of *Bustamonte*. *See, e.g., State v. Nemeti*, 472 N.W.2d 477, 478 (S.D. 1991); *State v. Almond*, 511 N.W.2d 572, 573 (S.D. 1994); *State v. Hanson*, 1999 S.D. 9, ¶ 25, 588 N.W.2d 885, 891; *State v. Akuba*, 2004 S.D. 94, ¶ 12, 686 N.W.2d 406, 412.

The *McNeely* decision

On April 17, 2013, the United States Supreme Court addressed the process for obtaining constitutionally valid blood samples in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013). In that case, the defendant was arrested for DUI and refused a blood test. The officer read the implied consent warning in which he asked the defendant to submit to the withdrawal of a blood sample, and instructed that if he refused, his license would be revoked for one year and the refusal could also be used against him by the prosecution. The defendant refused and the officer directed the lab technician to withdraw blood. The trial court held that the warrantless blood draw violated the Fourth Amendment and granted the defendant's motion to suppress.

Just like the South Dakota Legislature has now purported to do, the Missouri Legislature had recently amended its "implied consent" statute to remove prior

language stating that if a DUI suspect refused to consent to a warrantless blood draw, "then none shall be given." *State v. McNeely*, 2011 WL 2455571 at *6. Based upon that amendment, the Missouri Court of Appeals reversed the trial court's suppression of the blood draw and held that removal of the statutory right to refuse had eliminated the need for a warrant and that "law enforcement officers are now permitted to order a warrantless blood draws [sic] when they have a reasonable suspicion that a person is driving while intoxicated." *Id.* at *6.

The Missouri Supreme Court reversed that erroneous holding, affirming the trial court's suppression of the blood draw and holding that no special facts establishing exigent circumstances existed to constitutionally permit a warrantless blood draw as required by *Schmerber*. *See State v. McNeely*, 358 S.W.2d 65, 74-75 (Mo. 2012) (en banc). Significantly, the Missouri Supreme Court held that Missouri's "implied consent" statute, which recently had been amended to eliminate a statutory right to refuse a blood draw, was irrelevant because it could not trump the defendant's constitutional rights. *See id.* at 75 n. 9 ("Because the warrantless blood draw in this case was a violation of defendant's Fourth Amendment right to be free from unreasonable searches, there is no need to address the State's arguments based on Missouri's implied consent law").

Granting certiorari, the United States Supreme Court affirmed the Missouri Supreme Court and held that the warrantless blood draw had violated the Fourth Amendment. Rejecting the argument that motorists have only a minimal privacy interest in their blood, the Court emphasized that it had "never retreated … from our

recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests" and that "a compelled physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation," like "any invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely*, 133 S. Ct. at 1558, 1565 (citation omitted).

The Court further rejected Missouri's argument that dissipation of alcohol from the blood creates a *per se* exigency. *See id.* at 1560. Nor does the "general importance of the government's interest" in deterring DUIs "justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case." *Id.* Rather, "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search," the Court held that "the Fourth Amendment mandates that they do." *Id.* at 1561. Reiterating its holding in *Schmerber*, the Court served notice that "[w]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case on the totality of the circumstances." *Id.* at 1563. The *McNeely* decision thus reaffirmed that there is no "DUI exception" to the Fourth Amendment. And although no implied consent statute issues were explicitly raised in *McNeely*, it is clear that was so precisely because neither the Supreme Court nor the Missouri Supreme Court would have analyzed the need for a warrant if consent implied by statute was tantamount to Fourth Amendment consent.

As discussed, this Court's cases involving South Dakota's implied consent statutes appear to be predicated upon an overly broad reading of *Schmerber's* original holding. Under *Schmerber*, in order for a warrantless search and seizure of blood to be valid, the State must demonstrate that exigent circumstances made it impracticable to obtain a warrant. The *Schmerber* standard mandates that "a warrantless search will be upheld only if (i) reasonable methods were used, (ii) there was probable cause that evidence would be found, and (iii) there were *exigent circumstances* making it impracticable to obtain a search warrant first." Wayne R. LaFave, 3 *Search and Seizure: A Treatise on the Fourth Amendment*, § 5.3(c); *see also United States v. Eagle*, 498 F.3d 885, 892 (8th Cir. 2007) (explaining that pursuant to *Schmerber*, "[p]olice may conduct a warrantless search by requiring an individual to submit to a blood test where they have probable cause to do so and exigent circumstances exist").[2]

Rather than determining the applicability of an exception to the warrant requirement as required by *Schmerber*, South Dakota's implied consent laws, in their various forms, have been justified on the ground that dissipation of alcohol in the blood is a *per se* exigency and thus no further constitutional inquiry was required. *McNeely* reiterated that S*chmerber* requires an individualized factual inquiry when considering an exception to the warrant requirement and abrogated the notion that

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[2] This Court has recognized that *Schmerber*'s holding depended on its finding of exigent circumstances. *See State v. Engesser*, 2003 S.D. 47, ¶ 22, 661 N.W.2d 739, 747 (quoting *Winston v. Lee*, 470 U.S. 753, 759 (1985)) (noting that blood test in *Schmerber* "fell within the exigent circumstances exception to the warrant requirement").

natural metabolization of alcohol in the blood is a *per se* exigency justifying warrantless blood testing in all drunk-driving cases. And so the constitutional underpinning for this Court's prior approval of warrantless blood draws in the absence of exigent circumstances has disappeared.

The present appeal

More so than in many cases, the past embodied by this Court's relevant precedent is prologue. This Court has yet to issue any decision confirming the impact of *McNeely*. Consistent with *Schmerber*, *Bumper*, *Bustamonte*, and now *McNeely*, the Defendant respectfully suggests that the State's warrantless search and seizure of her blood violated the Fourth and Fourteenth Amendments, as well as Article VI, Section Eleven of the South Dakota Constitution.

ARGUMENT

I. THE LOWER COURT CORRECTLY HELD THAT THE STATE'S SEARCH AND SEIZURE OF THE DEFENDANT'S BLOOD WITHOUT A WARRANT VIOLATED THE FOURTH AMENDMENT.

"In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do." *McNeely*, 133 S.Ct. at 1561. Under settled precedent, unless falling within a recognized exception to the warrant requirement, the State's warrantless seizure of the Defendant's blood was *per se* unreasonable and therefore unconstitutional. *See Zahn*, 2012 S.D. 19, ¶ 29, 812 N.W.2d at 499. It is the State's burden to prove that a search meets an exception to the warrant requirement. *See Labine*, 2007 S.D. 48, ¶ 14,

733 N.W.2d at 269. "Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case on the totality of the circumstances." *McNeely*, 133 S.Ct. 1563 (citing *Schmerber*). In the lower court, the only exception relied upon by the State was that the Defendant "consented" to the withdrawal of her blood – against her will – pursuant to South Dakota's implied consent statutes. The lower court properly rejected that asserted justification and held that no recognized exception to the warrant requirement applied.

A. The Defendant did not freely and voluntarily consent to the search and seizure of her blood.

In order to sustain a warrantless search and seizure on the basis of consent, the State bears the burden of proving by a preponderance of the evidence that valid consent was freely and voluntarily given. *See Akuba*, 2004 S.D. 94, ¶¶ 12-13, 686 N.W.2d at 412-13; *Bustamonte*, 412 U.S. at 233 (explaining that only by "careful sifting of the unique facts and circumstances of each case" can it "be ascertained whether in fact [consent] was voluntary or coerced"). Whether valid consent existed is generally a question of fact and the trial court's resolution of that question will be upheld unless the evidence, construed in the light most favorable to the trial court's findings, demonstrates that it was clearly erroneous. *See Akuba*, 2004 S.D. 94, ¶ 25, 686 N.W.2d at 417 (quoting *Almond*, 511 N.W.2d at 573).

1. The Defendant did not actually consent.

It is clear that the State did not meet its burden to prove that Shauna Fierro freely and voluntarily consented to the withdrawal of her blood under the totality of the circumstances. In fact, as the lower court found, Fierro affirmatively refused to

grant such consent, stating that she did not agree to the blood draw and would not submit unless required by law, requesting an attorney, and even initially physically resisting the procedure to the point of pulling her arm away in an attempt to avoid the needle. (R. 121-22; T1 50, 61-63). Indeed, it was admitted that Fierro's consent to the blood draw was never even sought. (T1 50). Because they are fully supported by the record, the State has not challenged any of these findings on appeal.

2. The "implied consent" statutes cannot be utilized to establish consent for Fourth Amendment purposes.

SDCL 32-23-10 provides that any person who operates a vehicle in South Dakota "is considered to have given consent to the withdrawal of blood[.]" In 1959, South Dakota's implied consent law was enacted to impose conditions on the privilege of operating a motor vehicle in the State for the protection of the public, "one being that a person consent to a chemical analysis under the conditions specified in the statutes." *Beare v. Smith*, 140 N.W.2d 603, 606 (S.D. 1966). But the effect of this "consent" implied by statute was not that a person waived her Fourth Amendment right to refuse a warrantless search and seizure of her blood. Rather, it simply meant that "[o]nce the conditions of the statute are met, refusal to submit to the test results in a mandatory loss of license." *Id.*

Before 2006, the implied consent warnings contained in SDCL 32-23-10 were like the vast majority of similar statutes in other jurisdictions, couched in terms of an officer requesting a blood draw and advising the suspect of the legal and evidentiary consequences that would result from her refusal. *See Webb v. South Dakota Dep't of Commerce and Regulation*, 2004 S.D. 63, ¶ 13, 680 N.W.2d 661, 662 n. 2; *McNeely*, 133

S.Ct. at 1566-67 & n. 9 (noting that implied consent laws typically require suspected drunk drivers to take a test for the presence of alcohol and mandate that a driver's license will be revoked if they refuse a test).

In 2006, however, the Legislature rewrote SDCL 32-23-10 to include language stating that:

> The arresting law enforcement officer may, subsequent to the arrest of any operator for a violation of § 32-23-1, require the operator to submit to the withdrawal of blood or other bodily substances as evidence.

SL 2006, Ch. 169, § 1. This Court has not yet construed that amendment.

The State contends that "the Defendant's blood was obtained under the authority of the State's implied consent statute, as set forth in SDCL 32-23-10" and argues that "the South Dakota Legislature may constitutionally condition the privilege to drive within the state on a driver providing irrevocable consent to the withdrawal of blood or other bodily substance following a lawful DUI arrest." (Brief at 6, 8). It further suggests that SDCL 32-23-10 operates to establish that the Defendant – and all other drivers – have freely and voluntarily consented to a warrantless blood draw. (Brief at 18) ("Consent to the withdrawal of bodily substances is intelligently and unequivocally granted by every person driving on South Dakota highways").

That argument does not hold water. Under the Fourth Amendment and Article VI, Section Eleven, voluntariness is a question of fact that must be determined on a case-by-case basis. *See Akuba*, 2004 S.D. 94, ¶ 25, 686 N.W.2d at 417. In order to be voluntary, consent must be "the product of an essentially free and unconstrained choice," and not "coerced, by explicit or implicit means, by

implied threat or covert force." *Bustamonte*, 412 U.S. at 226, 28; *State v. Cody*, 293 N.W.2d 440, 450 (S.D. 1980) (same); *Bumper*, 391 U.S. at 548-50 (explaining that "mere acquiescence to a show of lawful authority is insufficient to establish voluntary consent" because "[w]here there is coercion there cannot be consent"). Where consent is compelled by statute, it cannot be said to be "freely and voluntarily given" as required to be an exception to the warrant requirement. *See, e.g., State v. Brooks*, 838 N.W.2d 563, 572-73 (Minn. 2013) (rejecting State's argument that defendant consented to warrantless blood draw pursuant to Minnesota's implied consent statute, but rather holding that defendant consented to the blood draw as a factual matter under an individualized, totality of the circumstances analysis).

Nor can the State simply alter or bypass constitutional requirements by enacting a statute. *See Poppen v. Walker*, 520 N.W.2d 238, 242 (S.D. 1994) ("The legislature cannot define the scope of a constitutional provision by subsequent legislation"). Although the Legislature may be able to constitutionally condition the privilege of driving upon submitting to a blood test following an arrest for DUI with probable cause, and thereby suspend that privilege if the driver does not submit, it cannot abrogate a person's right to be free from unreasonable searches and seizures as defined by the United States Supreme Court.

This Court has always deemed statutes purporting to trump Fourth Amendment protections to be unconstitutional. *See State v. McCreary*, 142 N.W.2d 240, 247 (S.D. 1966) (holding that statute rendering all relevant evidence seized under search warrant admissible notwithstanding any defect, insufficiency or irregularity in

issuance of warrant violated due process and search and seizure provisions of Constitution); *State v. Lane*, 82 N.W.2d 286, 289 (S.D. 1957) (explaining that "[t]he above law attempts to require something less than the constitution guarantees. … The Legislature cannot make an illegal search legal by the fruits of the search).

The same argument, of course, was rejected by the Missouri Supreme Court in *McNeely*, 358 S.W.3d at 75 n. 9. As one court has explained, "[t]o hold that the legislature could nonetheless pass laws stating that a person 'impliedly' consents to searches under certain circumstances where a search would otherwise be unlawful would be to condone an unconstitutional bypassing of the Fourth Amendment." *Hannoy v. State*, 789 N.E.2d 977, 987 (Ind. Ct. App. 2003) (rejecting suspect's submission to invocation of implied consent statute as meeting exception as "[a]ny 'consent' given in response to such a statement can only fairly be characterized as a mere submission to the supremacy of the law and not freely and voluntarily given").

In *State v. Butler*, 302 P.3d 609 (Ariz. 2013) (en banc), the Arizona Supreme Court similarly rejected the argument that "consent" given under Arizona's implied consent statute "either constitutes an exception to the warrant requirement or satisfies the Fourth Amendment's requirement that consent be voluntary." *Id.* at 613. The court based its ruling, in part, on the fact that the implied consent admonition read to the defendant, concluded with the statement "You are, therefore, required to submit to the specified tests." *Id.* The court held that "independent of [the implied consent law], the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw." *Id.* at 613.

The Supreme Court, as well, has rejected statutory schemes in which a "privilege" is conditioned upon one giving up rights guaranteed by the Constitution. Although States may place conditions on privileges, such power "is not unlimited, and one of those limitations is that it may not impose conditions which require the relinquishment of constitutional rights." *Frost v. Railroad Comm'n of State of California*, 271 U.S. 583, 593-94 (1926). This is so because "[i]f the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Id.*

Finally, the three pre-*McNeely* decisions from other jurisdictions cited by the State for the proposition that "there is no statutory ability *or constitutional right* to refuse to submit to a withdrawal of blood for chemical analysis requested pursuant to the implied consent statute" either do not stand for that proposition at all or are distinguishable. (Brief at 18). In *State v. Cabanilla*, 273 P.3d 125, 129 (Or. 2012), the court simply held that under an implied consent statute that permitted physical refusal to submit to a breath test, but imposed legal consequences for doing so, a defendant's refusal was admissible regardless of whether he understood his rights or the consequences of refusal. In *McCracken v. State*, 685 P.2d 1275, 1277-78 (Alaska Ct. App. 1984), the court also held that imposing legal consequences for refusing to consent to a breath test does not violate the Fourth Amendment. And in *State v. Kanikaynar*, 939 P.2d 1091, 1093-96 (N.M. Ct. App. 1997), the court held that aggravation of the defendant's DUI conviction for refusing a breath test was

permissible under the Fourth Amendment. Each of these cases involved legal consequences imposed for *refusing* non-invasive breath tests. They did not involve the constitutionality of forced blood draws under a statutory scheme that denies the Fourth Amendment right to refuse consent to a search without a warrant or a valid warrant exception altogether. None supports the State's position.

In sum, the State's suggestion that SDCL 32-23-10 establishes valid consent under the Fourth Amendment or somehow constitutes a waiver or negation of the constitutional right to be free from unreasonable searches and seizures does not withstand the scrutiny of precedent and should be rejected.

3. The Defendant withdrew or revoked any "consent" implied by operation of statute.

Even if one adopts the legal fiction that she "consented" to the State's search and seizure of her blood pursuant SDCL 32-23-10, the Defendant withdrew or revoked any such implied consent. Consent to be searched may be withdrawn any time prior to its completion. *See State v. Zachodni*, 466 N.W.2d 624, 629 (S.D. 1991) (holding that consent to search truck, even if it covered suitcase, was withdrawn by defendant's "verbalized reluctance to allow the suitcase to be searched").[3]

As the Eighth Circuit has explained, "Once given, consent to search may be withdrawn: 'Withdrawal of consent need not be effectuated through particular magic words, but an intent to withdraw consent must be made by unequivocal act or

[3]Abrogated on other grounds by *Akuba*, 2004 S.D. 94, ¶ 13, 686 N.W.2d at 412.

statement.'" *United States v. Sanders*, 424 F.3d 768, 774 (8th Cir. 2005); *see also United States v. Dyer*, 784 F.2d 812, 817 (7th Cir. 1986); *McNeely*, 133 S.Ct. at 1566 (recognizing that "[implied consent] laws impose significant consequences when a motorist *withdraws* consent"). The standard for measuring the scope of Fourth Amendment consent is objective reasonableness – what would the typical reasonable person have understood by the exchange between the officer and the suspect? *See Sanders*, 424 F.3d at 774 (quoting *Florida v. Jimeno*, 500 U.S. 248, 251 (1991)). "Conduct withdrawing consent must be an act clearly inconsistent with the apparent consent to search, an unambiguous statement challenging the officer's authority to conduct the search, or some combination of both." *Sanders*, 424 F.3d at 774.

The lower court correctly found that the Defendant withdrew any prior consent to the warrantless blood draw that could be implied by operation of statute or otherwise. (R. 135-36, 140). In stating that she did not agree to the blood draw and would not submit unless required by law, requesting an attorney, and initially resisting the procedure by pulling away her arm, Shauna acted clearly inconsistent with any implied consent to the search and unambiguously challenged its authority. (R. 121-22; T1 50, 61-63).

Tellingly, the State has not challenged these findings or legal conclusions on appeal, nor has it argued that Shauna did not withdraw or revoke any implied consent. Rather, it simply asserts, without citation to any authority, that the consent it implies from SDCL 32-23-10 should be deemed "irrevocable." As discussed above, this suggestion conflicts with settled law. "A consent to search is not

irrevocable, and thus if a person effectively revokes his prior consent prior to the time the search is completed, then the police may not thereafter search in reliance upon the earlier consent." LaFave, 4 *Search and Seizure*, § 8.2 at 133.

B. The "implied consent" statutes do not establish any other recognized exception to the Fourth Amendment's warrant requirement.

The State has made no attempt to justify its warrantless search and seizure of blood upon the basis of *Schmerber*. And it dodges this Court's binding precedent holding that a warrantless search is *per se* unreasonable, and therefore unconstitutional, unless falling within a valid exception to the warrant requirement.

Instead, the State has flipped the constitutional standard and argues that the warrantless search and seizure of blood pursuant to the implied consent statutes should be deemed per se *reasonable* under the Fourth Amendment and therefore constitutional under any circumstances. That is precisely the sort of "bright line" approach rejected in *McNeely*, 133 S.Ct. at 1560-63, because the "invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" It should be rejected here as well.

1. The State's new argument based on the "special needs" exception is unpersuasive and incorrect.

Although it never made the argument to the lower court, the State appears to suggest on appeal that warrantless blood draws conducted pursuant to the implied consent statutes should be categorically approved under what has been termed the "special needs" exception to the warrant requirement. (Brief at 12) (citing *Skinner v.*

Railway Labor Executives' Ass'n, 489 U.S. 602 (1989); *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990)). That exception has no applicability here.

In recognizing a limited "special needs" exception in certain circumstances, the Supreme Court has explained that it applies only "when 'special needs, *beyond the normal need for law enforcement*, make the warrant and probable-cause requirement impracticable.'" *Skinner*, 489 U.S. at 619 (quoting *Griffin v. Wisconsin*, 483 U.S. 868, 873 (1987)) (emphasis supplied). In other words, if the very purpose of the search is to gather evidence to assist law enforcement, the exception does not apply.

In *Skinner*, 489 U.S. at 620-21, the Court thus approved FRA regulations requiring railroad employees involved in train accidents to submit to chemical testing because the tests were *not* intended "to assist in the prosecution of employees, but rather 'to prevent accidents and casualties in railroad operations that result from impairment of employees by alcohol or drugs.'" Since that time, the Court has consistently held that this "closely-guarded" exception does not apply to law-enforcement related searches. *See, e.g., Ferguson v. City of Charleston*, 532 U.S. 67, 83-84 (2001) (invalidating nonconsensual testing of pregnant women for illegal drug consumption "because the immediate objective of the searches was to generate evidence for law enforcement purposes").

Without question, the primary purpose of SDCL 32-23-10 is evidentiary and prosecutorial. *See Peterson v. State*, 261 N.W.2d 405, 408 (S.D. 1977). As even the State concedes, "[t]he immediate purpose of the implied consent statute is to obtain the best evidence of blood alcohol content at the time a person reasonably believed

to be driving while intoxicated is arrested." (Brief at 15). SDCL 32-23-10 thus does not fit into the "special needs" exception to the warrant requirement.

2. The State's argument that warrantless, nonconsensual blood draws done pursuant to SDCL 32-23-10 should be authorized as inherently "reasonable" conflicts with settled precedent.

Nor can the State's generalized arguments asking this Court to balance a compelling interest in road safety (reflected primarily by documents not in the evidentiary record) against reasonable expectations of privacy be said to defeat Fourth Amendment protections. (Brief at 13-19). The same public policy arguments were raised in *McNeely* and rejected by the Supreme Court. Missouri had argued that "the privacy interest implicated by blood draws of drunk-driving suspects is relatively minimal," because motorists have a diminished expectation of privacy and blood testing is relatively commonplace in society and does not involve substantial risk, trauma, or pain. *McNeely*, 133 S.Ct. at 1564-65. The Court was not persuaded, holding that the fact that people are accorded less privacy in automobiles because of a compelling governmental need for regulation "does not diminish a motorist's privacy interest in preventing an agent of the government from piercing his skin" and explaining that it has "never retreated" from its "recognition that any compelled intrusion into the human body implicates significant, constitutionally protected privacy interests." *Id.* at 2565. As the Court recognized, the piercing of skin and withdrawal of blood is much more intrusive and contrary to reasonable privacy expectations, for example, than an officer's brief questioning of motorists at sobriety checkpoints approved in *Sitz*, 496 U.S. at 450-51.

And while acknowledging that "[n]o one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it," *id.* (quoting *Sitz*, 496 U.S. at 451), *McNeely* also rejected any suggestion that this important public safety interest could trump the Fourth Amendment, holding that "the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case." 133 S.Ct at 1555. Specifically, such interests do not eliminate the requirement to apply "traditional Fourth Amendment totality-of-the-circumstances analysis" when determining if the State demonstrated an exception to the warrant requirement. *Id.* at 1565-66. The Court noted that it was "aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts" and to the contrary, "although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence." *Id.* at 1567.

Finally, the State's passing reference to *Maryland v. King*, 133 S.Ct. 1958 (2013), involving a statute authorizing DNA testing of arrestees for identification purposes, similarly does not provide any support for its argument. Holding that no search warrant was required for a DNA cheek swab of a person lawfully arrested for a serious offense, the Supreme Court emphasized that a "buccal swab is a far more gentle process than a venipuncture to draw blood" that "requires no surgical intrusion beneath the skin" and focused on the "brief," "minimal," and "negligible" character of the procedure, finding it comparable to "fingerprinting" as a "natural

part of the administrative steps incident to arrest" and stressing that DNA points "like a fingerprint … are not themselves evidence of any particular crime, in the way that a drug test can by itself be evidence of illegal narcotics use." *Id.* at 1968-72. *King* thus is inapplicable where an invasive procedure is used to pierce the skin and draw blood under a statute having, not identification, but the collection of specific, incriminating evidence of a particular crime as its primary purpose.

3. The State's argument based on the supposed "*McGann* factors" should be rejected.

In its final attempt to reframe the reasonableness inquiry in a way that avoids unfavorable Supreme Court precedent, the State invokes what it calls the "*McGann* factors," derived from *McGann v. Northeast Illinois Regional Railroad Corp.*, 8 F.3d 1174 (7th Cir. 1993). Although it is a non-binding case that predates *McNeely* by two decades and has been cited by courts outside the Seventh Circuit only eleven times, the State attempts to elevate *McGann*'s status to that of a seminal and controlling decision. It does not, however, assist the State in this appeal.

McGann involved a claim by a municipal railroad station that by posting a sign at a parking lot entrance advising that all cars were subject to search, it obtained the implied consent of all drivers who entered to waive their Fourth Amendment rights. That dubious proposition was rejected. In concluding that the search was unreasonable under the totality of the circumstances, the court noted six possible factors that it "decline[d] to regard … as dispositive criteria," including notice, a "vital interest" such as airplane security, and minimal intrusiveness. *See id.* at 1181.

The assessment in *McGann* was made in the context of whether the "implied consent" derived from the posted sign could constitute an exception to the warrant requirement "comparable to the exception for regulatory searches undertaken for an administrative purpose" such as a "compelling security concern" like "the need to search persons boarding an airplane." *Id.* at 1181-82. These regulatory or administrative searches bear no relevance to those done for the express purpose of collecting incriminating evidence for prosecution. As made clear in *McNeely,* 133 S.Ct. at 1555, and *King*, at 1968-72, an interest in collecting evidence without a warrant to investigate DUI suspects in the name of public highway safety does not justify the highly intrusive nature of the State cutting into a person's skin and veins in order to take blood against her will to assist in her prosecution. Any relevant "balancing" of these non-dispositive factors applicable to regulatory or administrative searches gleaned from *McGann* weighs decidedly in favor of respecting the Fourth Amendment's warrant requirement within the context of a prosecutorial search for evidence using an invasive procedure such as a forced blood draw.

The State also argues that Fourth Amendment rights can be waived or limited by agreement. (Brief at 22) (citing *United States v. Knights*, 534 U.S. 112 (2001) and *Wyman v. James*, 400 U.S. 309 (1971)). Once again, the cases are inapposite. *Knights* upheld a warrantless search condition of a probation order strictly on the basis that those serving a criminal sentence may have their freedom curtailed as part of their punishment. And *Wyman*, 400 U.S. at 318-19, held that a non-compulsory policy that case workers visit a home as part of an eligibility determination for Aid to Families

with Dependent Children was not a search under the Fourth Amendment because the visit was not done to collect evidence or investigate crimes, but to ascertain the needs of the covered children, and because the consequence of refusal was not prosecution but rather termination of benefits. The scope of any waiver of Fourth Amendment rights in these cases was exceedingly narrow and not applicable here.

Finally, the State has isolated a sentence from *South Dakota v. Neville*, 459 U.S. 553 (1983), to assert that "*Schmerber v. California* 'clearly allows a State to force a person suspected of drunk driving while intoxicated to submit to a blood test.'" (Brief at 24). But that sentence is not presented in proper context. It is settled that approval of the forced blood draw in *Schmerber* depended upon the Court's fact-specific determination that law enforcement had satisfied the exigent circumstances exception to the warrant requirement. *See Eagle*, 498 F.3d at 892; *Engesser*, 2003 S.D. 47, ¶ 22, 661 N.W.2d at 747.

McNeely has abrogated the State's outdated reading of *Schmerber*. And *Neville* is not even a Fourth Amendment case, but was addressed to the Fifth Amendment privilege against self-incrimination. In other words, the sentence from *Neville* on which the State rests its argument is no longer operative, if indeed it ever was.

C. To comport with the Fourth Amendment, this Court should construe the "implied consent" statutory scheme as permitting refusal or withdrawal of consent.

The State suggests that if this Court affirms the lower court's ruling that the warrantless search and seizure of the Defendant's blood violated the Fourth Amendment, then "this search and any other search conducted solely under the

implied consent law is compelled in violation of *Bumper v. North Carolina*, … and the statute as a whole must be declared unconstitutional." (Brief at 9 n. 1).

But this Court could avoid that result. Statutes regulating searches and seizures must be strictly construed against the State and liberally in favor of the individual. *See Lane*, 82 N.W.2d at 289. Moreover, that the words of a statute must "be read in their context and with a view to their place in the overall statutory scheme. *Expungement of Oliver*, 2012 S.D. 9, ¶ 9, 810 N.W.2d 350, 352. Similarly, "[i]t is inappropriate to select one statute on a topic and disregard another statute which may modify or limit the effective scope of the former statute." *Id.* Rather, this Court must construe statutes together and harmonize them, giving effect to all of their provisions. *See State v. Young*, 2001 S.D. 76, ¶ 10, 630 N.W.2d 85, 89.

Most significantly, this Court has held that "[i]f an alternative construction of a statute would involve serious constitutional difficulties, then that interpretation should be rejected in favor of one which avoids such constitutional infirmities." *Oliver*, 2012 S.D. 9, ¶ 18, 810 N.W.2d at 354.

The language in SDCL 32-23-10 is permissive rather than mandatory. It states that an arresting officer "may" require a motorist to submit to a blood draw, not that an officer is *required* to do so without any valid exception to the warrant requirement. Even standing alone, then, SDCL 32-23-10 can be applied constitutionally where an officer determines that no exigent circumstances or other exception exists and thus exercises her complete discretion not to require a warrantless blood draw from a suspect who refuses consent.

When read together and harmonized, the prior implied consent scheme also demonstrates a suspect's right to refuse a warrantless blood draw. SDCL 32-23-10.1 and SDCL 32-23-18 acknowledge that persons may refuse to submit to a blood draw and impose penalties and consequences for doing so. SDCL 32-23-11 even provides a procedure for challenging administrative penalties imposed for exercising the right of refusal. SDCL 32-23-13 actually describes SDCL 32-23-11 as a statute that "permits [a motorist] to refuse to submit to a test[.]" Citing to statutes other than SDCL 32-23-10, this Court has also recognized that the implied consent scheme contemplates refusal. *See State v. Mattson*, 2005 S.D. 71, ¶ 42, 698 N.W.2d 538, 552 (citing SDCL 32-23-10.1 and 19-13-28.1). Why would the Legislature leave in place detailed statutory procedures recognizing and addressing the consequences of doing something that the State now claims cannot be done?

Just as in *Lane*, 82 N.W.2d at 289, "the above law" – construed in the manner advocated by the State – "attempts to require something less than the constitution guarantees." Because it offends the Fourth Amendment, "that interpretation should be rejected in favor of one which avoids such constitutional infirmities." *Oliver*, 2012 S.D. 9, ¶ 18, 810 N.W.2d at 354. This Court should construe South Dakota's "implied consent" statutory scheme as permitting a motorist to refuse or withdraw consent to comport with the Fourth Amendment. In the absence of such a construction, as the State has acknowledged, SDCL 32-23-10 must give way to constitutional imperatives.

II. THE LOWER COURT'S SUPPRESSION OF THE RESULTS OF THE STATE'S UNCONSTITUTIONAL SEIZURE OF THE DEFENDANT'S BLOOD WAS THE APPROPRIATE REMEDY.

The State has also appealed from the lower court's suppression of the fruits of the unconstitutional search, contending that the "good faith" exception to the exclusionary rule should apply. That argument should be rejected as well.

Under the good faith exception, the exclusionary rule does not apply when law enforcement conducts a search in objectively reasonable reliance on binding judicial precedent or statute. *See United States v. Davis*, 131 S.Ct. 2419, 2429-34 (2011); *Illinois v. Krull*, 480 U.S. 340 (1987); *State v. Boll*, 2002 S.D. 114, ¶ 38, 651 N.W.2d 710, 720-21. Because the arresting officers in this case were not in any objective position to reasonably rely on either, the exception does not apply.

The warrantless blood draw here took place on August 4, 2014. At that time, *Schmerber* had governed such activities for almost fifty years. It held that a warrantless search would be upheld only if, after examining all of the facts of an individual case, the State proved that (i) reasonable methods were used, (ii) there was probable cause that evidence would be found, *and* (iii) there were exigent circumstances making it impracticable to obtain a search warrant first. *Eagle*, 498 F.3d at 892; *Engesser*, 2003 S.D. 47, ¶ 22, 661 N.W.2d at 747. The officers here knew there were no exigent circumstances authorizing seizure of the Defendant's blood without a warrant and the State has never claimed otherwise.

On top of that, at the time of the arrest, the Supreme Court's decision in *McNeely*, a highly publicized case in the law enforcement community, had been the

law of the land for almost four months. *McNeely* held that "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do." 133 U.S. at 1561. It reiterated S*chmerber*'s requirement of an individualized factual inquiry when considering an exception to the warrant requirement and expressly abrogated the old notion that natural metabolization of alcohol in the blood is a *per se* exigency justifying warrantless blood testing in all drunk-driving cases, invalidating this Court's prior decisions suggesting otherwise. As the State frankly acknowledges, this Court previously "upheld the constitutionality of the implied consent law under a legal underpinning *McNeely* removed[.]" (Brief at 30).[4]

As the Supreme Court has explained, "[r]esponsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to those rules." *Davis*, 131 S.Ct. at 2429. It is clear that the officers here should have objectively known in light of *McNeely* that they could not categorically rely on exigency to search blood but must obtain a warrant where possible if another exception did not apply. Trooper Kastein was aware of

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[4] Notably, in the State's brief in *Siers v. Weber*, App. 26823, it argued a "new rule" is "one which invalidates reasonable, existing precedents made by state courts" and that "[a] review of prior decisions of this Court confirms *McNeely* is a new rule." (Brief at 13). And in the State's Brief in *State v. Lloyd Edwards*, App. 26847, it argued that the officer's objective and reasonable reliance on SDCL 32-23-10 precluded application of the exclusionary rule *precisely because* that particular arrest and search took place *prior* to *McNeely*. (Brief at 26).

McNeely and had received new training regarding the decision from his chain of command. (T1 49). The Attorney General's Office had studied *McNeely* too, and had issued a revised version of the DUI advisement card that directed officers to "request" drivers to "consent to the withdrawal" in light of that decision. (T1 50). But Trooper Kastein never changed cards. Instead, he read Shauna the advisement from the pre-*McNeely* version. (T1 50).

SDCL 32-23-10, moreover, did not *require* the officers to perform a forced blood draw, it gave them complete discretion regarding whether to do so, discretion that would only be objectively reasonable to exercise in a manner consistent with the binding requirements of *Schmerber* and *McNeely*. Certainly, they could not reasonably rely solely on permissive language in the implied consent statute after *McNeely*, but were required to determine whether the facts presented exigent circumstances justifying a warrantless search, whether another exception applied, or else obtain a warrant as the Fourth Amendment mandates. *See, e.g., United States v. Cedric Brown*, 2013 WL 5604589 (D.Md. Oct. 11, 2013) (finding Fourth Amendment violation in case involve federal implied consent law in similar circumstances and suppressing evidence in light of *McNeely*).

In the *McNeely* cases, it should be remembered, neither the United States nor Missouri Supreme Court applied the good faith exception to save the blood test from exclusion. And although the State argues that good faith arises from *Krull*, 480 U.S. at 340, the standard of reasonableness adopted there "is an objective one; the standard does not turn on the subjective good faith of individual officers." *Id.* at 356. The

State was put on clear and present notice that the "legal underpinning" of the implied consent statutory scheme was "removed by *McNeely*." (Brief at 30). The State proclaimed its intent to defend the implied consent laws but, in the interim, was well aware that the legal status of the statutes was dubious, issuing revised implied consent cards directing officers to "request" consent to blood draws. (T1 49-50). The officers here received *McNeely* training but then did not bother to alter their conduct in abeyance of its clear mandate. That is not good faith justifying an exception to the exclusionary rule within the meaning of this Court's precedent.

Finally, the State's half-hearted request to allow the case to proceed under SDCL 32-23-7 is misplaced and should be rejected where the blood test was secured as the result of a constitutional violation.

CONCLUSION

WHEREFORE, Appellee Shauna Fierro respectfully requests that this Honorable Court *affirm* the lower court's suppression order in all respects.

Dated this 17th day of April, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing **Brief of Appellee Shauna Fierro** was served via email upon the following:

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 9,935 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

Appeal No. 26890

STATE OF SOUTH DAKOTA,
Plaintiff and Appellant,
v.
SHAUNA FIERRO,
Defendant and Appellee.

Appeal from the Magistrate Court, Fourth Judicial Circuit
Butte County, South Dakota

The Honorable Michelle K. Percy
Magistrate Court Judge

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Order Granting Petition for Allowance of Appeal from
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Statement of Interest in Appeal No. 26890

In the wake of the United States Supreme Court decision, *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), members of both the South Dakota Trial Lawyers Association ("SDTLA") and the South Dakota Association of Criminal Defense Lawyers ("SDACDL") have contended with a myriad of *McNeely* interpretations and applications by South Dakota Judges ruling on suppression motions related to blood test administration and blood test results in DUI investigations. The divergent practices being employed by South Dakota law enforcement agencies has also generated additional constitutional concerns for SDTLA and SDACDL members' clients. A desire for judicial recognition of the U.S. Supreme Court's *McNeely* decision and an explanation of what it means for South Dakota's Implied Consent law serves as the catalyst behind SDTLA and SDACDL's request to jointly submit an amicus curiae brief on Respondent Shauna Fierro's behalf. The National Association of Criminal Defense Lawyers ("NACDL") has also asked to join this Amicus Brief in recognition of its South Dakota chapter and in support of South Dakota citizen's constitutional rights.

Argument

I. U.S. Supreme Court Decisions: The Supreme Law of the Land

> Article VI of the Constitution makes the Constitution the "supreme Law of the Land." In 1803, Chief Justice Marshall, speaking for a unanimous Court, referring to the Constitution as "the fundamental and paramount law of the nation," declared in the notable case of *Marbury v. Madison,* 1 Cranch 137, 177, 2 L.Ed. 60, that "It is emphatically the province and duty of the judicial department to say what the law is."
>
> This decision declared the basic principle that the federal judiciary is supreme in the exposition of the law of the constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It

> follows that the interpretation of the Fourteenth Amendment enunciated by this Court ... is the supreme law of the land, and Art. VI of the Constitution makes it of binding effect on the States "any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."
>
> Every state legislator and executive and judicial officer is solemnly committed by oath taken pursuant to Art. VI, cl. 3, "to support this Constitution." [...]
>
> No state legislator or executive or judicial officer can war against the Constitution without violating his undertaking to support it. Chief Justice Marshall spoke for a unanimous Court in saying that: "If the legislatures of the several states may, at will, annul the judgments of the courts of the United States, and destroy the rights acquired under those judgments, the constitution becomes a solemn mockery...." *United States v. Peters,* 5 Cranch 115, 136, 3 L.Ed. 53 (1809).

Cooper v. Aaron, 358 U.S. 1, 18 (1958).

The South Dakota Supreme Court has acknowledged that this mandate applies with equal force to all state courts, including this Honorable Court. *Watkins v. Class*, 566 N.W.2d 431, 438 n. 7 (S.D. 1997).

II. Missouri v. McNeely: Exigency Exception to the Warrant Requirement Revisited by the United States Supreme Court

In *Missouri v. McNeely*, the United States Supreme Court reaffirmed that blood draws are protected under the Fourth Amendment as they are a search of one's person. 133 S.Ct. 1552, 1558 (2013). "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Id.* (citing *Winston v. Lee*, 470 U.S. 753, 760 (1985); *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 616 (1989)). Although a warrant or consent would allow for a person's blood to be drawn, *McNeely* addressed the exigent circumstances exception to the warrant requirement, specifically "whether the natural 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." *McNeely*, 133 S.Ct. at 1558 (emphasis added).

The *McNeely* Court emphasized that the totality of the circumstances must be considered by the court to determine whether a law enforcement officer faced an emergency that justified acting without a warrant. *Id.* at 1559 (citations omitted). Absent the established justification that a warrant provides, "the fact-specific nature of the reasonableness inquiry," demands that each case of alleged exigency be evaluated "on its own facts and circumstances." *Id.* (internal citations omitted).

The U.S. Supreme Court stated that although "[i]t is true that as a result of the human body's natural metabolic processes, the alcohol level in a person's blood begins to dissipate once the alcohol is fully absorbed and continues to decline until the alcohol is eliminated," it does not mean that a court should depart from a "careful case-by-case assessment of exigency" *Id.* (citing *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. 602, 623 (1989); *Schmerber v. California*, 384 U.S. 757, 770-71 (1966)). "In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* (citing *McDonald v. United States*, 335 U.S. 451, 456 (1948)). "In such a circumstance, there would be no plausible justification for an exception to the warrant requirement." *Id.* at 1561.

The *McNeely* Court did note that there may be circumstances, such as those present in *Schmerber*, in which the natural dissipation of alcohol in the blood may support an exigency finding. *Id.* at 1563. The metabolization of alcohol from the blood, however, does not constitute *per se* exigent circumstances. *Id.* Rather, "[w]hether 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.* at 1563. The U.S. Supreme Court held that "the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant." *Id.* at 1568.

McNeely also discussed implied consent laws "that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." *Id.* at 1566. "Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.* (internal citations omitted).

> It is also notable that a majority of States either place significant restrictions on when police officers may obtain a blood sample despite a suspect's refusal (often limited testing to cases involving an accident resulting in death or serious bodily injury) or prohibit nonconsensual blood tests altogether. Among these States, several lift restrictions on nonconsensual blood testing if law enforcement officers first obtain a search warrant or similar court order.

Id. (internal citations omitted).

In closing its implied consent discussion, the United States Supreme Court confirmed that "States [may] choos[e] to protect privacy beyond the level that the Fourth Amendment requires. But wide-spread state restrictions on nonconsensual blood testing provide further support for our recognition that compelled blood draws implicate a significant privacy interest." *Id.* at 1567 (internal citations omitted).

III. Survey of Post-*McNeely* Decisions

The *Missouri v. McNeely* decision was rendered by the U.S. Supreme Court in April 2013. Since then, courts across the country have been tasked to interpret and apply the new precedent. South Dakota is no exception. The time it takes for Fourth Amendment suppression issues to work through a state's judicial system, from the trial court to the sometimes multi-tiered appellate courts, can range from months to years. As a result, there are a limited number of cases that specifically address *McNeely*. For the appellate courts that have had such an opportunity, States' implied consent statutory schemes have not played a predominant role in the analysis or in the decision announced by those courts.

A. North Carolina

On May 7, 2010, Daniel Harrison Brennick's truck drifted over the center line and collided with another vehicle. *State v. Brennick*, 2013 WL 6234650, *1. The driver of the other vehicle died as a result of the collision. *Id.* Brennick was thrown from his vehicle and was unconscious when the paramedics arrived. *Id.* North Carolina Highway Patrol Trooper Inman was the first and only officer initially at the scene. As he investigated the collision area, Trooper Inman found beer cans in and around Brennick's vehicle. *Id.* After additional law enforcement arrived, Trooper Inman headed to the hospital where Brennick was being treated. *Id.*

"When he arrived [at the hospital], Trooper Inman learned that [Brennick] had possibly sustained life-threatening injuries, and hospital staff were attempting to [stabilize Brennick] so they could perform surgery." *Id.* Trooper Inman grew concerned that he may lose access to Brennick once he went into surgery. *Id.* Trooper Inman

decided to order Brennick's blood to be drawn while he was unconscious. *Id.* Neither Brennick's consent nor a warrant was obtained for the blood draw. *Id.* Brennick survived and was indicted on charges of second degree murder, driving while impaired, and felony death by motor vehicle. *Id.*

In November 2012, Brennick moved to suppress the blood draw sample. *Id.* at *2. The trial court denied Brennick's motion and entered the following findings of fact:

> 10. Trooper Inman reasonably concluded upon his return to the hospital, he might be denied access to defendant because defendant by that time might be in surgery.
>
> 11. Based on his training and experience, Trooper Inman knew that any ...alcohol in a person's blood stream is eliminated with the passage of time and that such a person's blood alcohol concentration dissipates over time.
>
> 12. Trooper Inman reasonably believed that any further delay in obtaining a blood sample from defendant would result in the dissipation of the percentage of alcohol in defendant's blood.
>
> 13. N.C.G.S. 20-139.1(d1) provides that if a suspected impaired driver refuses to submit to a chemical analysis: "... any law enforcement officer with probable cause may, without a court order, compel the person to provide blood or urine samples for analysis if the officer reasonably believes that the delay necessary to obtain a court order, under the circumstances, would result in the dissipation of the percentage of alcohol in the person's blood or urine."
>
> 14. N.C.G.S. 20–16.2(b) provides in relevant part: "If a law enforcement officer has reasonable grounds to believe that a person has committed an implied-consent offense, and the person is unconscious or otherwise in a condition that makes the person incapable of refusal, the law enforcement officer may direct the taking of a blood sample or may direct the administration of any other chemical analysis that may be effectively performed."
>
> 15. Based on the totality of the circumstances, Trooper Inman made the decision to obtain a sample of defendant's blood without a search warrant, and he asked medical personnel in the emergency room to draw a sample of defendant's blood for later blood alcohol analysis.

> Medical personnel drew such a blood sample pursuant to the trooper's request.

Id. at *2-3

On appeal, Brennick contended that "*Missouri v. McNeely* overrules the trial court's conclusion that North Carolina's implied consent statute permitted Trooper Inman's 'total' reliance on the statute to order a warrantless blood draw from" him." *Id.* at *3

The Court of Appeals of North Carolina had previously held that the *McNeely* decision did not change the operation of North Carolina law. *Id.* at *4 (citing *State v. Dahlquist*, ---N.C.App.---- (2013)(COS13-276)). "[A]fter the Supreme Court's decision in *McNeely*, the question for this Court is still whether, considering the totality of the circumstances, the facts of this case gave rise to an exigency sufficient to justify a warrantless search." *Id.* Under both the *McNeely* standard and North Carolina law, the Court of Appeals of North Carolina affirmed the trial court's denial of Brennick's motion to suppress. *Id.*

> In this case, the trial court's findings of fact are supported by competent evidence, and the findings, in turn, support the trial court's conclusion that, considering the totality of the circumstances in this case, exigent circumstances existed such that the warrantless, compelled blood draw in this case was proper. We conclude the trial court did not err in entering an order denying Defendant's motion to suppress.

Id. at *5.

B. Delaware

On March 27, 2012, Othelo Predeoux was one of the drivers involved in a two-vehicle accident. *State v. Predeoux*, 2013 WL 5913393, *1. Predeoux was placed in an ambulance and joined by Delaware State Police officer, Corporal Shannon King. *Id.* As they talked Cpl. King detected an odor of alcohol and asked Predoux if he had been

drinking. *Id.* Predeoux answered no. *Id.* Cpl. King had another officer administer a PBT which registered a breath alcohol level of .051. *Id.* Predeoux was subsequently transported to the hospital while Cpl. King continued his accident investigation. *Id.*

After interviewing the other driver Cpl. King went to meet with Predeoux for a second time. *Id.* Upon learning it may be Predeoux's birthday, Cpl. King again asked him if he had been drinking. *Id.* Predeoux changed his story and admitted to taking "one shot" the night before. *Id.* Cpl. King ordered a blood draw from Predeoux. *Id.* No warrant was obtained. *Id.* Predeoux was charged with Driving Under the Influence, Driving with a Suspended License and Failure to Yield at an Intersection. *Id.*

In Predeoux's motion to suppress he contended that "the warrantless blood draw in this case was an impermissible search in violation of the Fourth Amendment of the U.S. Constitution, and Article 1, Sections 6 and 7 of the Delaware Constitution." *Id.* The Superior Court of Delaware explicitly stated that it is the State's burden to prove by a preponderance of the evidence that a warrantless search fell within an established exception to the warrant requirement. *Id.* at * 2 (citing *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013)). "This principle applies to the type of search at issue in this case, which involved a compelled physical intrusion beneath [the] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation." *Id.* (citing *McNeely*, 133 S.Ct. at 1558).

The Superior Court of Delaware explained that "[a]s required by *McNeely*, this Court looks at the totality of the circumstances to determine if there existed exigent factors beyond 'the natural metabolization of alcohol in the bloodstream sufficient to justify the warrantless blood draw." *Id.* The State asked the Court to distinguish

Predoux's case from *McNeely* and instead follow *Schmerber*, which involved the warrantless blood draw of a suspect injured in an automobile accident. *Id.* (citing *Schmerber v. State of California*, 384 U.S. 757, 770 (1966)). The Superior Court of Delaware chose to follow *McNeely*. *Id.*

"Unlike the evidence presented in *Schmerber*, Cpl. King's testimony clearly established that there were no exigent circumstances which prevented him from obtaining a warrant." *Id.* "At no time did Cpl. King testify that he was faced with an emergency that objectively justified a warrantless search." *Id.* As a result, the Superior Court of Delaware declared that Predeoux's "Motion to Suppress is **GRANTED** and any and all evidence from said search is excluded under *McNeely*." *Id.* at *3 (emphasis in original).

C. Texas

State v. Baker

On June 13, 2009, Texas Parks and Wildlife Game Wardens were called to the scene of a jet ski accident. *State v. Baker*, 2013 WL 5657649, *1. Warden Smith was advised by the paramedics that the "injured party 'was not in good shape.'" *Id.* Terry Shannon Baker was identified as the jet ski operator involved in the accident. *Id.* When Baker was approached, the "game wardens detected the strong odor of alcohol on [Baker's] breath, and noted that his eyes were bloodshot and watery." *Id.* Baker also admitted to consuming four or five beers that day. *Id.*

At the conclusion of the wardens' investigation at the scene, Baker was asked to accompany them to East Texas Medical Center to provide a mandatory blood specimen for testing. *Id.* When Baker asked to give a breath sample he was told that a blood sample was required. *Id.* Baker acquiesced and got in the patrol vehicle. Baker was not read his constitutional rights or Texas' implied consent statutory warning. *Id.* Baker did, however,

sign a form supplied by a nurse. *Id.* His blood sample registered a .09 alcohol concentration. *Id.* Following a series of field sobriety tests, Baker was placed under arrest and read his rights. *Id.*

The trial court granted Baker's motion to suppress the blood test results. The trial court also made express findings of fact and conclusions of law.

> (1) The game wardens lacked probable cause to effect the arrest when the blood sample was taken, (2) [Baker] was not placed under arrest until after he performed the [field sobriety tests], (3) the game wardens failed to follow the statutory procedures in obtaining mandatory blood draws without warrants and misstated the law to [Baker] concerning involuntary blood samples, (4) the State failed to present evidence of exigent circumstances justifying the warrantless acquisition of the blood sample, and (5) the State failed to prove that [Baker] voluntarily consented to the procedure.

Id. at *2. The State appealed. *Id.*

The Court of Appeals Texas, Tyler, stated that the taking of a blood sample is analyzed as a search and seizure under the federal and Texas constitutions but that there are also statutory requirements that may apply when a person is arrested for an intoxication related offense. *Id.* "Texas's implied statute governs the state's ability to obtain a breath or blood sample from a person arrested for an intoxication related offense and provides that an arrested suspect has implied consented to the taking of a sample in

certain circumstances."[1] *Id.* at *3 (citing *State v. Johnston*, 336 S.W.3d 649, 661 (Tex.Crim.App.2011)).

The Texas Court of Appeals explained that its implied consent statutes are not implicated unless an arrest occurs and, even when the implied consent statutes are in play, it only serves to "expand on the state's search capabilities by providing another framework for obtaining a specimen of a DWI suspect's blood. The arrest must still meet minimum constitutional standards" *Id.* at *4 (internal citations omitted). "Thus, in the absence of a valid search warrant or actual consent, full compliance with Chapter 724 is required, even though the sample is taken from the arrested suspect with probable cause under exigent circumstances." *Id.*

On this issue, the Court of Appeals of Texas, Tyler, found that Baker was under arrest at the time of the warrantless blood draw and the wardens had probable cause to arrest Baker. *Id.* at *6-7. The State did not challenge the trial court's finding on the issue of Compliance with Chapter 724, Texas's explicit framework for mandatory warrantless blood draws. *Id.* at *8. "Consequently, even though the trial court's conclusions

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[1]A person who has refused to submit to the voluntary taking of a blood or breath sample after being arrested for operating a watercraft or motor vehicle while intoxicated, may be required to submit to the specimen taking if a law enforcement officer has reasonable grounds to believe the person was intoxicated while operating a motor vehicle or watercraft and that the person was involved in accident that the officer reasonably believes occurred as a result of the offense, and the officer reasonably believes that as a direct result of the accident any individual has died or will die, an individual other than the arrested person has suffered serious bodily, or an individual other than the person arrested has suffered bodily injury and been transported to a hospital or medical facility for medical treatment. *Id.* at *3-4 (quoting TEX. TRANSP. CODE ANN. § 724.012(a), (b)(1)); *see* TEX TRANSP. CODE ANN. § 724.011 and § 724.012(b).

regarding arrest and probable cause were incorrect, the State has not shown that the trial court abused its discretion in granting [Baker's] motion to suppress on this ground." *Id.*

Next, the Court of Appeals of Texas, Tyler, addressed the State's contention that exigent circumstances existed to justify taking an involuntary blood sample from Baker. *Id.* The Court found that the only evidence the State relied upon to support its exigency claim was the natural dissipation of alcohol from the blood stream. *Id.* at *9. This is insufficient under both *Schmerber* and *McNeely*. *Id.* at *8-9. "Without any evidence of exigent circumstances, such as evidence that it would take too long to procure a warrant under these circumstances, the trial court could have reasonably concluded that the State failed to show that the warrantless blood draw was supported by exigent circumstances." *Id.* at *9 (citing *McNeely*, 133 S.Ct. at 1562).

The trial court's order granting [Baker's] motion to suppress evidence was affirmed.[2] *Id.* at *10.

Pearson v. State

In *Pearson v. State*, James Edward Pearson challenged his intoxication manslaughter convictions. 2014 WL 895509, *1. Pearson argued, *inter alia*, that the trial court erred in denying his motion to suppress the blood draw evidence because the police lacked exigent circumstances for the warrantless search. *Id.*

Pearson was involved in multi-vehicle accident with multiple casualties. *Id.* at *3 At 4:50am Texas Department of Public Safety Trooper Ramiro Aguilar arrived at the

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[2] On the consent issue the Court of Appeals of Texas, Tyler, stated that "the State failed to prove by clear and convincing evidence that [Baker] voluntarily gave his consent to provide a blood specimen" and therefore the Court could not conclude that the trial court had abused its discretion on this issue. 2013 WL 5657649, *10.

scene. *Id.* Both Pearson and the remaining survivors had already been transported to the hospital. *Id.* Trooper Aguilar was told by various law enforcement and emergency services personnel that had interacted with Pearson that he "smelled strongly of alcohol," was "wasted," and that he had admitted drinking that night. *Id.* "Trooper Aguilar completed his investigation at the scene before going to the hospital at approximately 10 a.m. to speak with [Pearson]." *Id.* Pearson "denied that he had been drinking and refused to consent to a blood draw." *Id.* Although Pearson was not under arrest, Trooper Aguilar directed a nurse to take a blood sample from Pearson. *Id.* Trooper Aguilar did not have a warrant. *Id.*

At trial, Pearson moved to suppress the blood alcohol evidence and the supporting expert testimony on the basis "that the blood draw as warrantless and unjustified by exigent circumstances." *Id.* at *1. Trooper Aguilar testified that he was the only officer on duty that morning, that he was solely responsible for securing the accident scene, including preserving and collecting evidence, and that when he arrived at the hospital approximately 6 hours after the accident occurred Pearson "had blood shot eyes, was speaking slowly, and still smelled strongly of alcohol." *Id.* at *3. Pearson argued that "the six-hour delay in taking the blood vitiates any exigent circumstances Trooper Aguilar might have had in not obtaining a warrant." *Id.*

The Texas Court of Appeals acknowledged the *McNeely* decision's applicability to Pearson's appeal. *Id.* at *2.

> The natural metabolization of alcohol in the bloodstream does not present a per se exigency that justifies an exception to the Fourth Amendment's warrant requirement for all nonconsensual blood testing when intoxication is suspected. Instead, exigency in this context must be determined on a case-by-case basis considering the totality of the circumstances, including

> the well-settled fact that alcohol in the bloodstreams begins to dissipate quickly as soon as a person stops drinking.

Id. (citing *Missouri v. McNeely*, 133 S.Ct. 1552, 1556 (2013)).

In affirming the trial court's denial of Pearson's motion to suppress the blood test results, the Texas Court of Appeals held that after "[h]aving considered the totality of the circumstances and viewing the evidence in the light most favorable to the ruling, we conclude that the trial court did not abuse its discretion in determining that Trooper Aguilar acted under exigent circumstances in having appellant's blood drawn without a warrant." *Id.* at *4.

D. Arizona

In *State v. Butler*, 302 P.3d 609 (Ariz. 2013) (en banc), the Arizona Supreme Court rejected the State's argument that the "consent" given under Arizona's implied consent statue "either constitutes an exception to the warrant requirement or satisfies the Fourth Amendment's requirement that consent be voluntary." *Id.* at ¶ 17. The court based its ruling, in part, on the fact that the implied consent admonition read to the defendant, concluded with the statement "You are, therefore, required to submit to the specified tests." *Id.* at ¶ 20. The officer did not tell the defendant that he was permitted to refuse. *Id.* at ¶¶ 17, 20. Thus, the court held that "independent of [Arizona's implied consent law], the Fourth Amendment requires an arrestee's consent to be voluntary to justify a warrantless blood draw." *Id.* at ¶ 18. *See also State v. Brooks*, 2013 WL 5731811 at *6-8 (Minn. Oct. 23, 2013) (analyzing whether arrestee's consent to a warrantless blood draw under Minnesota's implied consent law was "free and voluntary" under traditional Fourth Amendment factors for analyzing consent, not under the "implied consent" test).

IV. *McNeely* Recognition by the South Dakota Supreme Court

In *Missouri v. McNeely* the United States Supreme Court did not examine the legality of the warrantless blood draw under Missouri's implied consent statute; rather the warrantless blood draw was examined in accordance with the requirements set forth in the Fourth Amendment. Delaware, North Carolina, Texas, and Arizona analyzed the warrantless blood draws at issue in the same manner. Since the days of *Marbury v. Madison*, constitutional concerns have always been addressed first, prior to any examination of statutory schemes enacted by the States. To posit that the *McNeely* decision should play second fiddle to South Dakota's implied consent statutory framework is contrary to federal and South Dakota jurisprudence.

Empirically, this Court has shown deference to and respected the decisions of the U.S. Supreme Court. As the supreme law of the land, this Honorable Court should recognize the *McNeely* decision as Fourth Amendment progeny that demands analysis and application prior to any consideration or discussion of South Dakota's implied consent statutes. Although the two are not mutually exclusive, the separation between constitutional decisions of the federal judiciary and statutory creations by state legislatures must never be ignored.

The Fourth Amendment exists to protect the innocent as well as the guilty. South Dakotan citizens are entitled to, deserve, and should be able to rely upon the same Fourth Amendment protections afforded to the rest of Americans. To allow South Dakota's implied consent statutes to usurp the United States Supreme Court's power and authority exercised in *McNeely* would be to the detriment of the Republic and to the devastation of South Dakota citizens' constitutional rights.

Conclusion

On behalf of SDTLA, SDACDL, and NACDL, this Court is asked to AFFIRM the order granting Defendant/Appellee Shauna Fierro's Motion to Suppress Blood Test.

Respectfully submitted this 21st day of April, 2014.

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Certificate of Service

The undersigned hereby certifies that two true and correct copies of the foregoing **AMICUS BRIEF ON BEHALF OF SDTLA, SDACDL and NACDL** and all appendices were mailed by first class mail, postage prepaid to:

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SDTLA, SDACDL, NACDL

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Certificate of Compliance

In accordance with SDCL §15-26A-66(b)(4) I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 4,485 words from the Statement of Interest through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

On this 21st day of April, 2014.

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26890

STATE OF SOUTH DAKOTA,

Plaintiff and Appellant,

v.

SHAUNA FIERRO,

Defendant and Appellee.

APPEAL FROM THE MAGISTRATE COURT
FOURTH JUDICIAL CIRCUIT
BUTTE COUNTY, SOUTH DAKOTA

THE HONORABLE MICHELLE K. PERCY
Magistrate Court Judge

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 26890

STATE OF SOUTH DAKOTA,

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PRELIMINARY STATEMENT

For this Court's convenience, citations in this Reply Brief will follow the same format used in the State's Appellant's Brief. In addition, citations to the State's Appellant's Brief will be designated as "SB," Shauna Fierro's Appellee's Brief will be designated as "DB," and the Amicus Brief filed by the South Dakota Trial Lawyers, the South Dakota Association of Criminal Defense Lawyers, and the National Association of Criminal Defense Lawyers will be designated as "AB." All such references will be followed by the appropriate page designations.

The State relies on the Statement of the Case and Facts, as well as the Arguments and authorities presented in its initial brief. The present brief will be limited to new matters raised by Defendant and the Amici Curiae in their briefs.

ARGUMENTS

I

THE TRIAL COURT ERRED BY HOLDING THAT *MISSOURI V. McNEELY* IS CONTROLLING AND THAT THE WARRANTLESS SEARCH CONDUCTED UNDER THE STATE'S IMPLIED CONSENT LAWS WAS UNCONSTITUTIONAL.

The trial court below erroneously relied upon *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013) (hereinafter *McNeely*) and traditional Fourth Amendment actual consent analysis to suppress the blood and test results. As discussed below, *McNeely* did not directly or indirectly adjudicate the constitutionality of a compelled warrantless search under an implied consent statute. Beyond her *"McNeely* controls" argument, Defendant has not provided an alternative legal basis to affirm the suppression of the blood and test results.

A. *McNeely* Does Not Support the Trial Courts Suppression of the Blood and Test Results.

McNeely does not control here. Defendant's argument that *McNeely* invalidated state implied consent laws rests on the flawed premise that *McNeely* "would [not] have analyzed the need for a warrant if consent implied by statute was tantamount to Fourth Amendment consent." DB 16. The *McNeely* decision did not reach the question of the validity or invalidity of an implied consent law because Missouri, unlike South Dakota, allows a suspect to revoke consent. *State v. McNeely*, 358 S.W.3d 65, 68 n.2 (Mo. 2012). McNeely revoked his consent pursuant to the authority granted to him by Missouri's

implied consent statute. *Id.* The only remaining justification for the search in *McNeely* was exigent circumstances. See *United States v. Lechliter*, 2014 WL 722286 at *5 (D.Md.) (not designated for publication) (the district court in addressing the reason why Missouri's implied consent law was not an issue in *McNeely* noted the arresting officer's failure to comply with the statute under an erroneous belief that Missouri law allowed a mandatory warrantless blood withdrawal.)

The sole justification proffered by Missouri and the only issue before the Supreme Court in *McNeely* concerned the presence of exigent circumstance to support a warrantless nonconsensual blood draw. The Supreme Court held that the natural dissipation of alcohol from the blood does not, standing alone, support a finding of exigent circumstances in all cases. *McNeely*, 133 S.Ct. at 1556 and 1563.

Defendant's "*McNeely* controls" argument is not supported by other parts of the *McNeely* decision. In Part III of the decision, the plurality stated that "states have a broad range of legal tools to enforce their drunk-driving laws." *McNeely,* 133 S.Ct. at 1566. As noted in the Amicus Brief (AB 4), the plurality then references state implied consent and mandatory blood laws. *Id.* Further, Justice Kennedy in his concurrence to Part III noted:

> States and other governmental entities which enforce the driving laws can adopt rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment and give helpful guidance to law enforcement officials. And this Court, in due course, may find it

> appropriate and necessary to consider a case permitting it to provide more guidance than it undertakes to give today.

Id. at 1569. There would be no need for the above statements if *McNeely* resolved all issues regarding Fourth Amendment constitutionality of warrantless compelled blood withdrawals under state implied consent laws.

Other courts addressing the constitutionality of their state implied consent laws have not read *McNeely* as broadly as Defendant and the trial court. The Hawaii Court of Appeals recently rejected Defendant's "*McNeely* controls" argument in *State v. Yong Shik Won*, ___ P.3d ___, 2014 WL 1270615 at *18 (Haw. Ct. App.). The court stated: "*McNeely* did not address other potential exceptions to the warrant requirement … the validity of implied consent statutes or the validity of … tests conducted pursuant to such statutes." After the Supreme Court's vacation and remand following *McNeely*, the Minnesota Supreme Court in *State v. Brooks*, 838 N.W.2d 563, 567 (Minn. 2013) noted the narrowness of the *McNeely* holding and its inapplicability to the determination of whether Minnesota's implied consent law is constitutional.

Defendant's cites to *State v. Butler*, 302 P.3d 609, 612 (Ariz. 2013) to support her "*McNeely* controls" argument. *Butler* has not been endorsed by any other state or federal court. In fact, the only non-Arizona reported decision citing *Butler* disagrees with the decision.

In *State v. Flonnory*, 2013 WL 4567874, at *3 (Del. Super. Ct. 2013) (not designated for publication), the court stated that it did "not view *McNeely* as prohibiting courts from finding that statutory implied consent satisfies … the consent exception …."

Unlike *McNeely*, Defendant had no statutory right to revoke her consent. Her ostensible acts of revocation – verbal protestations, recoiling her arm – had no legal effect in South Dakota. Drawing Defendant's blood and searching it was, unlike *McNeely,* justified from start to finish by South Dakota's implied consent statute, not exigent circumstances. Thus, *McNeely* does not control this case or warrant suppressing the results of the blood test.

B. Defendant Has Presented No Persuasive Argument To Hold A Search Under SDCL 32-13-10 Is Unconstitutional.

The troopers did not rely upon exigent circumstances or actual consent following Defendant's arrest to conduct the search that obtained a sample of her blood. Reliance was upon SDCL 32-23-10. As such, the ultimate issue before Court is whether a compelled warrantless blood withdrawal taken pursuant to SDCL 32-23-10 is a constitutionally reasonable search.

Rather than address the merits of this issue, Defendant's brief attacks the principle of implied consent with conclusory contentions that warrantless blood draws are *per se* unreasonable, and that implied consent cannot replace actual consent at the time of the

search. Defendant's contentions fail to engage, let alone refute, the operative principles behind implied consent: that a compelling state interest stands behind the enforcement of South Dakota's implied consent law;[1] that drivers have a reduced expectation of privacy in the highly regulated realm of driving; that a driver's consent to a search is lawfully implied by driving upon public roadways; that irrevocable consent under the statute is essential to the efficacious enforcement of laws prohibiting driving under the influence of alcohol; and that searches pursuant to SDCL 32-23-10 are constitutionally reasonable. SB 13-15, 16-18, 18-19, 23-24.

Defendant's response is in conflict with the recent decision in *State v. Yong Shik Won,* where the court upheld Hawaii's implied consent law. The Hawaii Court of Appeals addressed in detail *McNeely* and the Fourth Amendment. *Won,* 2014 WL 1270615, at **17-22.

The analysis applied by the *Won* court mirrors the State's arguments for upholding a search under SDCL 32-13-10, an analysis that is lacking in Defendant's Brief, the Amicus Brief and the cases

[1] Documents that the State presented below through its Motion for Judicial Notice are part of the settled record on appeal. *State v. Berget,* 2013 S.D. 1, ¶ 42, 826 N.W.2d 1, 16. The documents contain information to which judicial notice may properly be taken under SDCL ch. 19-10. As such, to the extent the lower court's failure to rule on the motion may impede the court's consideration of this information, the State respectfully requests that the court take judicial notice.

cited therein. In addressing the reduced expectation of privacy the court stated:

> Only a driver arrested on probable cause of [DUI], who already has a diminished expectation of privacy because he or she is in custody . . . is subject to a breath test. Such a driver's objective expectation of privacy is further diminished by the implied consent to breath testing imposed by statute, which gives a driver statutory notice that if arrested for [DUI], "some reasonable police intrusion on his [or her] privacy is to be expected.

Won, 2014 WL 1270615 at *21.

In addressing the Hawai'i Legislature's ability to condition the privilege to drive upon consent to a search the court stated:

> [U]nder Hawai'i's implied consent statute, by driving on a public road, the driver has consented to testing.
>
> The Legislature presumably could have sought to make the implied consent to breath testing completely irrevocable. See *Rowley [v. Commonwealth,* 629 S.E.2d [188] at 191 ("The act of driving constitutes an irrevocable, albeit implied, consent to the officer's demand for a breath sample."); *State v. Diaz,* [144 Idaho 300,] 160 P.3d 739, 741–42 (2007) (applying statutory implied consent despite driver's attempt to withdraw consent). However, to avoid physical violence, Hawai'i's implied consent statute gives a driver the limited right, subject to the imposition of significant sanctions, to refuse to submit to testing. But this limited statutory right to refuse testing only modifies, but does not vitiate, the driver's implied consent to testing. The limited statutory right to refuse testing also does not mean that the driver's implied consent is not valid for purposes of the Fourth Amendment and Article I, Section 7. *See Rowley,* 629 S.E.2d at 191 (holding that a driver's implied consent to submit to breath samples by exercising the privilege of driving was a valid consent to search under the Fourth Amendment); *Burnett v. Municipality of Anchorage,* 634 F.Supp. 1029, 1038 (D. Alaska 1986) (noting that a driver, who has given his or her implied consent to a

> breath test by driving on a public highway, is not entitled to recant or withdraw such consent for Fourth Amendment purposes after being lawfully arrested for [DUI]).

Won, 2014 WL 1270615 at *20.

In contrast, Defendant's reliance on dicta in *Brooks*, 838 N.W.2d at 572-73, provides no support for her contentions. The Minnesota Supreme Court was not addressing an implied consent statute like South Dakota's. Further, the State is not requesting the Court to uphold the implied consent search based solely upon statutory consent, or a legislatively authorized search conducted without reasonable suspicion because the vehicle has "whiskey plates." Rather, under the totality of the circumstances, the search conducted under SDCL 32-23-10 was reasonable and not violative of the Fourth Amendment.

Further, despite Defendant's baseless assertion to the contrary (DB 31-32), the implied consent analysis in *McGann v. Northeast Illinois Regional Commuter Railroad Corporatio*n, 8 F.3d 1174 (7th Cir. 1993), should be applied. Argument as to why the factors set forth in *McGann* are inappropriate, or why South Dakota's implied consent law does not satisfy those factors, is nonexistent. *McGann* addressed the relevant factors in determining whether, under the totality of the circumstances, an implied consent search satisfies the Fourth

Amendment. SB 19-22. The State has demonstrated how a search under SDCL 32-23-10 satisfied each of the factors listed in *McGann*.

Even though *Won* explains why the ability to refuse is not integral to the reasonableness or constitutionality of statutory implied consent, Defendant requests that this Court read a right to refuse into South Dakota's current implied consent law *after* the Legislature expressly repealed any remaining ability to refuse in 2006. Defendant's position does not square with standard rules of statutory construction. "'In interpreting legislation, this court cannot add language that simply is not there.'" *See In re Estate of Gossman,* 1996 S.D. 124, ¶ 11, 555 N.W.2d 102, 106 (additional citations omitted).

When the Legislature amends a statute, it is presumed that it intended to change existing law, and that it intended the statutory scheme as a whole to conform to the amendment's purpose. *Lewis and Clark Rural Water System, Inc. v. Seeba*, 2006 S.D. 7, ¶ 19, 709 N.W.2d 824, 832. To the extent that Defendant sees disharmony between the 2006 amendment and holdover provisions from the pre-amended scheme as a whole, this discord is resolved by two other rules of statutory construction: (1) that when provisions regarding the same subject matter conflict the more specific apply (*Tracfone Wireless, Inc. v. South Dakota Department of Revenue and Regulation*, 2010 S.D. 6, ¶ 14, 778 N.W.2d 130, 134); and (2) that the newer statute supersedes the older. *Peterson v. Burns*, 2001 S.D. 126, ¶ 29,

635 N.W.2d 556, 567. As the most recent and specific pronouncement of legislative intent, the 2006 amendment must control over any older provisions of SDCL 32-13 *et seq.* that appear in conflict with it. *See e.g., Matter of Bode's Estate*, 273 N.W.2d 180, 183 (S.D. 1979) ("Although repeals by implication are not favored, it is well settled that without a repealing clause two irreconcilably repugnant acts, passed at different times, cannot stand, and that the later operates to repeal the former.")

If the Court finds the statute is unconstitutional because it provides no ability to refuse, it is up to the Legislature, not this Court, to determine how to respond to such a ruling. For the Court to add the ability to refuse by judicial decree requires the Court to assume a role the state constitution forbids.

Defendant cites no rationale or authority for the proposition that implied consent laws are constitutionally unreasonable *per se*, or that a right of revocation is indispensable to their constitutionality. The trial court's suppression of the test results on Defendant's blood accordingly must be reversed.

II

THE TRIAL COURT ERRED BY HOLDING THE GOOD FAITH EXCEPTION TO THE EXCLUSIONARY RULE, BASED UPON THE TROOPERS' RELIANCE ON SDCL 32-23-10 TO OBTAIN A SAMPLE OF DEFENDANT'S BLOOD, WAS INAPPLICABLE.

Even assuming that this Court finds the search unconstitutional, the trial court erred in suppressing Defendant's blood testing. The evidence conclusively shows that the troopers relied in good faith on SDCL 32-23-10 to obtain Defendant's blood sample without a warrant. SB 25-30; *Illinois v. Krull*, 480 U.S. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987).

Defendant claims *McNeely* gave a "clear mandate," and as such, there can be no good faith. DB 39. As already discussed, *McNeely* did not invalidate implied consent statutes. The only "mandate" in *McNeely* was that the natural dissipation of alcohol in the blood could no longer be the sole exigent circumstance when blood was obtained under the exigent circumstances exception to the warrant requirement.

Further, Defendant acknowledges that this Court has yet to issue any decision interpreting the impact *McNeely* may have, if any, on South Dakota's implied consent law. DB 18. Absent any controlling precedent to the contrary, the troopers were justified in relying on SDCL 32-23-10 in obtaining a sample of Defendant's blood.

Defendant refers the Court to decisions on appeal that raise issues regarding the legality of searches under the implied consent laws. DB 37. If all the opinions entered by the various circuit and magistrate court judges that are currently before this Court on appeal are considered,[2] *McNeely* is anything but clear. This lack of lower court consensus and law enforcement uniformity is precisely why the Amici filed their brief. AB 1 ("myriad of *McNeely* interpretations and applications by South Dakota Judges" … "divergent practices being employed by South Dakota law enforcement agencies").

In an effort to turn the troopers' good faith reliance on SDCL 32-23-10 into bad faith, Defendant asserts the Attorney General "directed" law enforcement to use a revised implied consent card and request consent instead of relying on the implied consent law. DB 38-39. The questioning relied upon to support this proposition is ambiguous at best and shows no bad faith. SH 49-50; DB 38. Defendant's bad faith premise also has no factual basis, as the Attorney General's memo and the implied consent card supposedly directed to be used were not introduced into evidence or part of the settled record of this case.

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[2] *See State v. Allen* (Appeal # 26999)(blood suppressed - implied consent may be revoked); *But cf. State v. Edwards* (Appeal # 26847) (implied consent search invalid but suppression denied under good faith); *State v. Priebe* (Appeal # 26998)(suppression denied – implied consent constitutional); *State v. Houghtaling* (Appeal # 26992) (suppression denied – implied consent constitutional).

To the extent the Court may wish to consider the merits of this argument, it must be rejected. Defendant does not accurately represent the contents of the Attorney General's April memo. Because Defendant invokes the memo in her argument, the State respectfully request the Court take judicial notice under SDCL ch. 19-10 of the April 26, 2013, memorandum, which is located on the Attorney Generals of website (http//atg.sd.gov/News/Publication.aspx "*Missouri v. McNeely* Blood Test Guideline") (APP. 1), and review the current proposed alternative implied consent card prepared by the Attorney General's Office which removed language regarding drivers' license revocation to be consistent with arguments the State was making to lower courts and now this Court on appeal. APP 2. The referenced Attorney General's memo discusses alternatives law enforcement could employ until this Court issued a dispositive interpretation of *McNeely*. Nowhere did the Attorney General concede SDCL 32-23-10 is unconstitutional or direct law enforcement to use the alternative implied consent warning.

Thus, even if the Court finds the search was constitutionally deficient, the Court must reverse the trial court's suppression of the blood and test results. As a matter of law, the application of the good faith exception to the exclusionary rule announced in *Illinois v. Krull*, to the settled record facts of this case compels reversal of the trial court's ruling to suppress the blood and test results.

CONCLUSION

For all the reasons set forth above and in Appellant's Brief dated February 13, 2014, the trial court's Order Granting Defendant's Motion to Suppress Blood Test must be reversed.

Dated this 1st day of May, 2014.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellant's Brief contains 3,012 words.

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

Dated this 1st day of May, 2014.

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Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 1st day of May, 2014, a true and correct copy of Appellant's Reply Brief in the matter of *State of South Dakota v. Shauna Fierro* was served by electronic mail on Joseph M. Kosel at jkosel@johnkosellaw.com; Ronald A. Parson, Jr. at ron@jhalawfirm.com; Delia M. Druley at delia@jhalawfirm.com; Clint Sargent at clint@meierhenrylaw.com; and Raleigh Hansman at raleigh@meierhenrylaw.com.

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