CASE NO. A-13-0931

STATE OF MINNESOTA

IN SUPREME COURT

State of Minnesota,

Appellant,

vs.

Todd Eugene Trahan,

Respondent.

BRIEF OF AMICUS CURIAE NATIONAL COLLEGE OF DUI DEFENSE, INC.

LORI SWANSON
Minnesota Attorney General
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

JOHN J. CHOI
Ramsey County Attorney

THOMAS RAGATZ
(#0236822)
Assistant Ramsey County Attorney
345 Wabasha Street, North
St. Paul, MN 55102

ATTORNEYS FOR APPELLANT

OFFICE OF THE MINNESOTA APPELLATE PUBLIC DEFENDER

CATHRYN MIDDLEBROOK
Chief Appellate Public Defender
License No. 162425

540 Fairview Avenue North
Suite 300
St. Paul, MN 55104
(651) 201-6700

ATTORNEYS FOR RESPONDENT

WILLIAM A. LEMONS
Minnesota County Attorney's Association
100 Empire Drive, Suite 200
St. Paul, MN 55103
(651) 641-1066

ATTORNEY FOR AMICUS CURIAE MINNESOTA COUNTY ATTORNEY'S ASSOCIATION, LEAGUE OF MINNESOTA CITIES

DANIEL L. GERDTS
Attorney at Law
247 Third Avenue South
Minneapolis, MN 55415
(763) 432-5822

ATTORNEY FOR AMICUS CURIAE MINNESOTA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, MINNESOTA SOCIETY FOR CRIMINAL JUSTICE

BELL ISLAND
Island & Huff
Attorneys at Law, PC, LLO
1428 10th Street
Gering, Nebraska 69341
(308) 635-4900
Admitted Pro Hac Vice

BARRY S. EDWARDS, Minn. Lic. No. 0315047
Barry S. Edwards Law Office, LLC
125 Main Street, SE | Suite 339
Minneapolis, Minnesota 55414
(612) 310-7398
bse@barrysedwardslaw.com

ATTORNEY FOR AMICUS CURIAE NATIONAL COLLEGE OF DUI DEFENSE, INC.

TABLE OF CONTENTS

CASES CITED

STATUTES AND OTHER SOURCES CITED

STATEMENT OF INTEREST OF AMICUS CURIAE

Amicus Curiae, the National College for DUI Defense, Inc. ("NCDD"), is a nonprofit professional organization of lawyers, with over two thousand members, focusing on issues related to the defense of a person charged with driving under the influence. Through its extensive educational programs, its website, and its e-mail list, the NCDD trains lawyers to more effectively represent persons accused of driving under the influence.[1]

The NCDD supports affirmance of the decision of the Court of Appeals determining the application of the criminal refusal statute as applied to Trahan was unconstitutional.

ISSUE

Whether a statute's *per se* criminalization of the refusal to consent to a warrantless search of a person's blood is unconstitutional under the Fourth Amendment to the United States Constitution as applied.

ARGUMENT

THE *PER SE* CRIMINALIZATION OF A REFUSAL

TO SUBMIT TO A WARRANTLESS SEARCH

PURSUANT TO AN IMPLIED CONSENT LAW IS UNCONSTITUTIONAL

---

[1] Counsel for Amicus Curiae states that he has authored the brief in whole and that no person other than amicus curiae, its members, or its counsel made a monetary contribution to the preparation or submission of the brief.

"The Fourth Amendment provides in relevant part that "[t]he 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 Warrant shall issue, but upon probable cause." *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013). Warrantless searches are presumptively unreasonable unless they meet one of the well recognized exceptions to the warrant requirement. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) When the state claims an exception to the warrant requirement, it is their burden to prove one of the exceptions applies. *Id.* The invasion of the body for a blood sample based solely on the implied consent law would create an impermissible *per se* exception to the warrant requirement.

The purpose of the Fourth Amendment protects citizens from the arbitrary invasion by the government or its agents. *Camara v. Municipal Court of City and County fo San Francisco*, 387 U.S. 523 (1967). "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Constitution Amendment IV. "The Fourth Amendment thus gives concrete expression to a right of the people which 'is basic to a free society'" *Camara* at 528 citing *Wolf v. People of State of Colorado*, 338 U.S. 25, 27 (1949). The Fourth Amendment gives voice to the right to be free and unmolested by government officials in

the absence of a warrant.

In order to prevent the government from harassing its citizens, the Fourth Amendment requires a judical officer to act as a gatekeeper between those who enforce the law and those they seek to arrest. "We explained that the importance of requiring authorization by a neutral and detached magistrate before allowing a law enforcement officer to invade another's body in search of evidence of guilt is indisputable and great." *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013). As stated in *McDonald v. United States*, 335 U.S. 451, 455-56 (1948), "[t]he right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals." In order to protect an individuals liberty and privacy, the Fourth Amendment prevents law enforcement from conducting searches or seizures in the absence of a warrant issued by a neutral and detached magistrate.

While there are exceptions to the warrant requirement, they are few and well delineated. *Katz v. U.S.*, 399 U.S. 347 (19167). "Our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception. See, *e.g., United States v. Robinson,* 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)" *McNeely*, 133 S.Ct. At 1558. "For the constitution requires 'that the deliberate, impartial judgment of a judical officer . . . be interposed between the citizen and the police . . ." *Katz* at 358 citing *Wong Sun v. United States*, 371 U.S. 471, 481 (1963). In order to invade a citizen's privacy and circumvent the need to obtain a warrant from a neutral and

detached magistrate, the state must establish they have met one of the few delineated exceptions to the warrant requirement.

The governments intrusion into the body for a blood sample is a search entitled to constitutional protections. *Schmerber v. California*, 384 U.S. 757 (1966). Since the invasion of the body is a search, then the state is required to prove either an exception to the warrant requirement, or that they obtained a warrant. "The overriding function of the Fourth Amendment is to protect privacy and dignity against unwarranted intrusion by the state. In Wolfe, we recognized '(t)he security of one's privacy against arbitrary intrusion by the police' as being at 'at the core of the Fourth Amendment'" *Schmerber* at 767 (1966). In *Missouri v. McNeely*, 133 S.Ct. 1552, 1554 (2013), ". . . where the search involved compelled physical intrusion beneath McNeely's skin and into his veins to obtain a blood sample to use as evidence in a criminal investigation," is a search and seizure under the Fourth amendment.

> In light of our society's concern for the security of one's person, see, *e.g., Terry v. Ohio,* 392 U.S. 1, 9, 88 S.Ct. 1868, 1873, 20 L.Ed.2d 889 (1968), it is obvious that this physical intrusion, penetrating beneath the skin, infringes an expectation of privacy that society is prepared to recognize as reasonable. The ensuing chemical analysis of the sample to obtain physiological data is a further invasion of the tested employee's privacy interests. Cf. *Arizona v. Hicks,* 480 U.S. 321, 324–325, 107 S.Ct. 1149,

> 1152–1153, 94 L.Ed.2d 347 (1987). Much the same is true of the breath-testing procedures required under Subpart D of the regulations. Subjecting a person to a breathalyzer test, which generally requires the production of alveolar or "deep lung" breath for chemical analysis, see, *e.g., California v. Trombetta,* 467 U.S. 479, 481, 104 S.Ct. 2528, 2530, 81 L.Ed.2d 413 (1984), implicates similar concerns about bodily integrity and, like the blood-alcohol test we considered in *Schmerber,* should also be deemed a search, see 1 W. LaFave, Search and Seizure § 2.6(a), p. 463 (1987). See also *Burnett v. Anchorage,* 806 F.2d 1447, 1449 (CA9 1986); *Shoemaker v. Handel,* 795 F.2d 1136, 1141 (CA3), cert. denied, 479 U.S. 986, 107 S.Ct. 577, 93 L.Ed.2d 580 (1986).

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1413, 103 L. Ed. 2d 639 (1989). There is no *per se* exception to the warrant requirement when the government invades the body to seize blood from a citizen. *McNeely*.

McNeely made clear that Fourth Amendment consent is not the same as Implied Consent. Under the Fourth Amendment, there is no *per se* waiver of a citizen's rights. While consent may given to authorize a police search, it also may be revoked. Once given, consent to search may be withdrawn and the withdrawal does not require any particular words. *U.S. v. Sanders,* 424 F.3d 768 (8th cir. 2005). The decision not to submit to a chemical test is the revocation of consent requiring the state to obtain a

warrant.

In *McNeely*, Implied Consent was different than Fourth Amendment consent. McNeely was read an Implied Consent advisement and he refused to submit to a test. The officer then obtained a sample of McNeely's blood. The court failed to justify the seizure of McNeely's blood under the Implied Consent statute and instead conducted a Fourth Amendment analysis. The presence of the Implied Consent did not act as a waiver of McNeely's rights under the Fourth Amendment, rather it required the state to obtain a warrant. In fact, the court stated that there are no *per se* exigencies justifying an exception to all non-consensual blood draws. *McNeely*. This is because the collection of blood is, "Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Id.* at 1558. The court could not fathom why, absent an exigency, the Fourth Amendment would not protect against an intrusion into the body. *Id.* The right, and expectation, that the state must obtain a warrant in the absence of consent is required.

If Implied Consent was Fourth Amendment consent, the court in *McNeely* would have addressed the matter rather than addressing the warrant requirement. Instead, the Supreme Court did not. The Idaho Supreme Court in *Sate v. Wulff*, 157 Idaho 416. 418, 337 P.3d 575, 577, (2014), stated. "Allowing a warrantless blood draw based on Idaho's implied consent statute would act as a *per se* exception to the warrant requirement, which contradicted *McNeely's* language that warrantless blood draws should be examined case

by case." Implied consent statutes cannot act as a *per se* waiver, and in the absence of that waiver, the citizen retains the right to revoke his consent to a search.

The idea that once consent is given, it cannot be withdrawn fails to meet constitutional muster. As the Idaho Court noted in *State v. Eversole*, __ P.3d ___, 2015 WL 1542545, p4 (2015), "A holding that the consent implied by a statue is irrevocable would be utterly inconsistent with the language in *McNeely* denouncing categorical rules that allow warrantless forced blood draws." Citing *Wulff*, 157 Idaho at 422, 337 P.3d at 581. The court went on, "[A]n implied consent statute such as . . . Idaho's does not justify a warrantless blood draw from a driver who refuses to consent . . .or objects to the blood draw. . . . Inherent in the requirement that consent be voluntary is the right to the person to withdraw that consent." citing *State v. Halseth*, 157 Idaho at 646, 339 P.3d at 371. See also, *State v. Won*, 136 Hawaii 292, 361 P.3d. 1195 (Haw. 2015). Allowing an Implied Consent statute to act as a *per se* waiver of Fourth Amendment would be the exception that swallows the rule.

Preventing drunk driving is a public interest. However, this public interest does not trump the constitution. An exception may be recognized, "when special needs, beyond normal law enforcement, make the warrant and probable-cause requirements impracticable." *Skinner* at 619. "The question is not, at this stage at least, whether these inspections may be made, but whether they may be made without a warrant. For example, to say that gambling raids may not be made at the discretion of the police without a

warrant is not necessarily to say that gambling raids may never be made. In assessing whether the public interest demands creation of a general exception to the Fourth Amendment's warrant requirement, the question is not whether the public interest justifies the type of search in question, but whether the authority to search should be evidenced by a warrant, which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search. See *Schmerber v. State of California*, 384 U.S. 757, 770—771, 86 S.Ct. 1826, 1835—1836, 16 L.Ed.2d 908. *It has nowhere been urged that fire, health, and housing code inspection programs could not achieve their goals within the confines of a reasonable search warrant requirement.*" (Emphasis added) *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 533 (1967). The court must look to other reasonable alternatives to criminalizing the requirement that the government obtain a warrant. A *per se* crime for a citizen's requirement that the government obtain a warrant prior to invading his body fails to consider reasonable alternatives. "The Bill of Rights which we guard so jealously and the procedures it guarantees are not to be abrogated merely because a guilty man may escape prosecution or for any other expedient reason". *Kennedy v. Mendoza-Martinez*, 372 U.S. 184 (1963).

McNeely recognized the governments requirement to make reasonable attempts to obtain a warrant prior to invading the body of a citizen. The court noted, "States have also innovated. Well over a majority of states allow police officer or prosecutors to apply

for search warrants remotely through various means, including telephonic or radio communications, electronic communication such as e-mail and video conference." *Id.* at 1562. With these means of communication, it is not difficult, or unreasonable for the court to require an officer to attempt to obtain a warrant. The government's failure to attempt to comply with the constitution cannot justify charging a citizen with a crime because the officer thinks the citizen may be guilty.

Officers also have time to obtain a warrant. "Moreover, because a police officer must typically transport a drunk-driving suspect to a medical facility and obtain the assistance of someone with appropriate medical training before conducting a blood test, some delay between the time of the arrest or accident and the time of the test is inevitable regardless of whether police officers are required to obtain a warrant." *Id.* at 156, citing to *State v. Shriner*, 751 N.W.2d 538, 554 (Minn. 2008). Before making the *per se* crime of refusing to a test, the court should consider the available options and the attempt of the government's agents to obtain a warrant.

Not only is the seizure of blood invasive, it carries a risk to the citizen. While a blood draw may have become common place, that does not mean the blood draw does not present a hazard. According to the World Health Organization guidelines on drawing blood: best practices in phlebotomy, 1.1.1, p. 3 (2010), "By its nature, phlebotomy has the potential to expose health workers and patients to blood from other people, putting them at risk from blood borne pathogens. These pathogens include human immunodeficiency

virus (HIV), hepatitis B virus (HBV), hepatitis C virus (HCV) . . . For example, outbreaks of hepatitis B have been reported with the use of glucometers (devices used to determine blood glucose concentration) . . . Diseases such as . . .syphilis may also be transmitted via contaminated blood . . . and poor infection control practices may lead to bacterial infection where the needle is inserted." and "Serious adverse events linked with phlebotomy are rare, but may include loss of consciousness with tonic clonic seizures. Less severe events include pain at the site of venepuncture, anxiety and fainting." *Id.* While these occurrences may be unusual for a blood draw, when the government seizes a citizen and punctures the skin, there is still a potential for harm. Because there is the potential for harm, the government cannot create a *per se* exception to the warrant requirement when it desires to pierce the skin.

Finally, there is no more fundamental right in a criminal case than the government's requirement that the offense be proved beyond a reasonable doubt. *In re Winship*, 397 U.S. 358 (1970). "The requirement that guilt of a criminal charge be established by proof beyond a reasonable doubt dates at least from our early years as a Nation. The 'demand for a higher degree of persuasion in criminal cases was recurrently expressed from ancient times, (though) its crystallization into the formula 'beyond a reasonable doubt' seems to have occurred as late as 1798. It is now accepted in common law jurisdictions as the measure of persuasion by which the prosecution must convince the trier of all the essential elements of guilt.' C. McCormick, Evidence s 321, pp.

681—682 (1954); see also 9 J. Wigmore, Evidence, s 2497 (3d ed. 1940)." *In re Winship*, 397 U.S. 358, 361 (1970). Before a citizen may be convicted of a crime, the state must prove each element beyond a reasonable doubt.

However, in order to obtain a blood sample, the officer must have probable cause. *McNeely*. Probable cause is one of the lowest standards of proof, significantly lower than proof beyond a reasonable doubt. As Black's Law Dictionary, Abridged 6th addition, p. 834 (1991) defines Probable Cause, "Reasonable grounds for belief that a person should be arrested." While on the other hand, Beyond a Reasonable Doubt is defined as, "In evidence means fully satisfied, entirely convinced, satisfied to a moral certainty." *id.* at 111. The proof in order to convict a citizen of a crime is of the highest standard, while that to arrest is not.

The crime of refusal of a chemical test is based on the officer's request the citizen submit to a blood test. However, the officer's request is based on the probable cause standard of evidence. Yet if that request for a blood sample is declined, then the state may charge the citizen with a crime. A crime of the officer thought you may have committed an offense.

The crime of refusal cannot be reconciled with the standard of proof in a criminal case. A crime must be proven beyond a reasonable doubt. But the crime of refusal is established by probable cause. It seems contrary to the notions of criminal law that a person can be convicted because of an officer's probable cause to arrest, but is not guilty

of the underlying offense for which the officer made the request. The conflict by creating a crime based on an officer's belief an offense has been committed flies in the face of the constitutional protections.

CONCLUSION

Amicus Curiae National College for DUI Defense, Inc., urge this court to affirm the lower courts determination that Minnesota's Criminal Refusal Statute is unconstitutional as applied and that the Implied Consent cannot act as a *per se* exception to the warrant requirement.

Respectfully Submitted,

Amicus Curiae
National College for DUI Defense, Inc.

By: _____
Bell Island, NSBA#20408
Pro Hac Vice
Island & Huff, PC, LLO
Attorneys at Law
1428 10th Street
Gering, Nebraska 69341
Telephone: 308-635-4900
efile@islandhuff.com and

By_____
BARRY S. EDWARDS, Minn. Lic. No. 0315047
Barry S. Edwards Law Office, LLC
125 Main Street, SE | Suite 339
Minneapolis, Minnesota 55414
(612) 310-7398
bse@barrysedwardslaw.com

CERTIFICATE

Comes now counsel for amicus curiae and states that the brief submitted consists of 3,004 words, using Times New Roman and 13 point font. Counsel has relied upon Wordperfect X3 in preparing the brief.

Bell Island

STATE OF MINNESOTA)
) ss.
COUNTY OF _____)

CERTIFICATE OF SERVICE

Barry Edwards of the City of Minneapolis, County of _____ State of Minnesota, certifies that on day of the week, month, day, year, he served the following document

Brief of Amicus Curiae, National College of DUI Defense, Inc.

Upon the following persons by mailing a copy thereof, enclosed in an envelope and by depositing same in the designated pick up point for U.S. Mail directed at the last known address:

Lori Swanson
Minnesota Attorney General
1800 Bremer Tower
445 Minnesota Street
St. Paul, MN 55101

Daniel L. Gerdts
Attorney at law
247 Third Avenue South
Minneapolis, MN 55415
(763) 432-5822

John J. Choi
Ramsey County Attorney
345 Wabasha Street, North
St. Paul. MN 55102

Cathryn Middlebrook (#162425)
Chief Appellate Public Defender
540 Fairview Avenue, Suite 300
St. Paul, MN 55104

Thomas Ragatz (#0236822)
Assistant Ramsey County Attorney
345 Wabasha Street, North
St. Paul. MN 55102

William A. Lemons (30295425)
Minnesota County Attorney's Association
100 Empire Drive, Suite 200
St. Paul, MN 55103
(651) 641-1066

_____
(Signature)

_____
(County where certificate was signed)

_____
(Date of Signature)

_____
(State where certificate was signed)