A13-1245

STATE OF MINNESOTA
IN SUPREME COURT

STATE OF MINNESOTA,

Respondent,

v.

WILLIAM ROBERT BERNARD, JR.,

Appellant.

AMICUS BRIEF OF AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS

Amicus American Civil Liberties Union of Minnesota ("ACLU-MN") respectfully submits this brief to urge that this Court reverse the Court of Appeal's decision.[1] The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with approximately 300,000 members dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The ACLU-MN is one of its statewide affiliates with more than 8,500 members. Since its founding in 1952, the ACLU-MN has engaged in constitutional litigation, both directly and as *amicus curiae*, in a wide variety of cases. Among the rights that the ACLU-MN has litigated to protect is the right to privacy and the protection from unreasonable and warrantless searches guaranteed by the Fourth Amendment to the United States Constitution and Article I, Section 10, of the Minnesota Constitution.

The ACLU-MN believes that the Court of Appeals erred when it concluded that a driver's due process rights are not violated by prosecuting him for refusing to submit to a warrantless breath test under circumstances where the police could have obtained a search warrant but chose not to do so. Criminalizing an individual's refusal to submit to a warrantless search under such circumstances violates the individual's right to be free from unreasonable searches and the right to due process of law. Moreover, the Court of

[1] Counsel certifies that this brief was authored in whole by listed counsel for amicus curiae ACLU-MN. No person or entity other than amicus curiae made any monetary contribution to the preparation or submission of the brief. This brief is filed on behalf of the ACLU-MN, which was granted leave to participate as amicus by this Court's Order dated May 20, 2014.

Appeals' decision essentially repeals the Warrant Clause, replacing it with a harmless error test for determining whether a warrant was required.

SUMMARY OF THE ARGUMENT

The principles underlying the Fourth Amendment – that the people have the right be free from unchecked governmental intrusion – have been affirmed throughout our nation's history and, indeed, precede it. The origins of the Fourth Amendment can be traced back through the centuries to the Magna Carta itself. The Fourth Amendment's Warrant Clause protects individual liberty and the right to be free from excessive government intrusion by insisting that, whenever possible, a neutral and detached magistrate – rather than a police officer –determine whether probable cause to search exists, even when it appears indisputable.

The Court of Appeals' decision disregards the Warrant Clause and is contrary to over two centuries of Fourth Amendment jurisprudence. By criminalizing the refusal to submit to a warrantless search, Minnesota's test-refusal statute violates due process of law. This Court should reverse the Court of Appeals.

ARGUMENT

I. THE COURT OF APPEALS' DECISION IS CONTRARY TO THE PRINCIPLES UNDERLYING THE FOURTH AMENDMENT, WHICH HAVE BEEN RECOGNIZED SINCE THE MAGNA CARTA AND AFFIRMED THROUGHOUT OUR NATION'S HISTORY.

A. The Origins of the Fourth Amendment.

"[T]he Fourth Amendment provides us with a rich historical background rooted in American, as well as English, experience; it is the one procedural safeguard in the Constitution that grew directly out of the events which immediately preceded the revolutionary struggle with England." Jacob W. Landynski, *Search and Seizure and the Supreme Court* 19 (1966). The Fourth Amendment was intended to guard against unconstrained governmental intrusion into a citizen's privacy. At its core, the Fourth Amendment is a necessary check on the executive power; it provides a clear function for the judiciary in the broader separation-of-powers scheme envisioned by the Framers. *See infra The Federalist Nos. 47, 51* (James Madison), *No. 78* (Alexander Hamilton), and related discussion.

The Fourth Amendment's conceptual premise predates the United States Constitution and is embedded deep within English history, dating back to the Magna Carta itself, in 1215. *See* Leonard W. Levy, *Original Intent and the Framers' Constitution* 222 (1988) (noting that Robert Beale, clerk to the Privy Council in 1589, was the first to link the right to privacy to article 39 of the Magna Carta); Osmond K. Fraenkel, *Concerning Searches and Seizures*, 34 Harv. L. Rev. 361, 365 (1920); Jeanne N. Lobelson, *The Warrant Clause*, 26 Am. Crim. L. Rev. 1433 (1989). As early as the

13th century, English law recognized the principle of liberty that "every man's house is his castle," and as such, protected the people from unchecked governmental intrusion into their homes, persons, and effects. *See* Sir Edward Coke, 3 *The Institutes of the Laws of England* 161 (1797) ("For a man's house is his castle, *et domus sua cuique est tutissimum refugium* [and each man's home is his safest refuge]."); Fraenkel, *supra*, at 365 (citing same).

The English courts affirmed the right of the people to be secure in their homes through the middle ages. Indeed, this maxim – every man's house is his castle – appeared in a judicial decision as early as 1603, in *Semayne's Case*, 5 Coke's Rep. 91a, 77 Eng. Rep. 194 (K.B. 1604). *Semayne's Case* noted that the King's officers had no right to enter an individual's home in civil cases, and that even in felony cases, where the officers would have the right to enter, they were still required to knock and announce their presence before entering. *See* Michael R. Sonnenreich et al., *No-Knock and Nonsense, An Alleged Constitutional Problem*, 44 St. John's L. Rev. 626, 627 (1970).

By the time of the Enlightenment, English members of Parliament expressed this same principle – that the people were to be protected from unchecked governmental intrusion into their homes – in ever more forceful language. In 1763, William Pitt described this principle in a speech to Parliament:

> The poorest man may in his cottage bid defiance to all the forces of the crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter; all his force dares not cross the threshold of the ruined tenement!

William Pitt, Speech on the Excise Bill (1763) (quoted in *Miller v. United States*, 357 U.S. 301, 307 (1958)); *see also* Nelson B. Lasson, *The History and Development of the Fourth Amendment to the United States Constitution* 49-50 (1937) (citing same).

Around the same time as William Pitt's speech to Parliament, the English courts decided a series of five cases, upholding the people's right to be free from unchecked government intrusion into their homes and businesses. *See Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763); *Leach v. Money*, 19 Howell's St. Tr. 1001 (1765); *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763); *Wilkes v. Halifax*, 95 Eng. Rep. 797 (K.B. 1765); *Entick v. Carrington*, 95 Eng. Rep. 807 (1765). Those five cases involved the Crown's issuance of "general warrants." General warrants authorized sweeping searches and seizures related to the seditious libel law, essentially as a means of silencing criticism of the government and restricting the freedom of the press. *See* Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment*, § 1.1(a) (5th ed. 2012). Various types of general warrants existed; some warrants instilled authority in executive officers to search and seize publications critical of the state, while others, equally broad, gave them authority to arrest those suspected of producing them. *See* Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257, 283-84 (1984). Perhaps most importantly, general warrants would typically authorize the apprehension of "all persons suspected" of being involved in a crime, without naming (or even describing) any person in particular. *See* 4 William Blackstone, *Commentaries* *291. In that series of "general warrant" cases, the English courts held that general warrants were invalid, and they awarded recoveries to plaintiffs for claims of false imprisonment and trespass against

officials acting under general warrants. *See Huckle v. Money*, 95 Eng. Rep. 768 (K.B. 1763); *Leach v. Money*, 19 Howell's St. Tr. 1001 (1765); *Wilkes v. Wood*, 98 Eng. Rep. 489 (K.B. 1763); *Wilkes v. Halifax*, 95 Eng. Rep. 797 (K.B. 1765); *Entick v. Carrington*, 95 Eng. Rep. 807 (1765); *see also* Silas J. Wasserstrom, *The Incredible Shrinking Fourth Amendment*, 21 Am. Crim. L. Rev. 257, 283-84 (1984).

The disapproval of general warrants was not limited to judicial decisions. Indeed, William Blackstone also noted the distaste for general warrants in his Commentaries, which became popular in the American colonies on the eve of the revolution:

> A *general* warrant to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; **for it is the duty of the magistrate, and ought not be left to the officer, to judge of the ground of suspicion.**

4 William Blackstone, *Commentaries* *291 (emphasis added).

Meanwhile, in colonial America, "general, promiscuous intrusion by government officials provided the standard method of search and seizure" in the 1760's. Tracey Maclin, *The Complexity of the Fourth Amendment: A Historical Review*, 77 B.U. L. Rev. 925, 939 (1997). Various statutory provisions in the colonies – and those of a particularly egregious character in Massachusetts – provided for various forms of general searches and seizures that affected ordinary people, ranging in topics from taxation, debt collection, food safety, and alcohol consumption, to those that were religious and political in nature. *Id.*

In addition, colonial customs officers utilized "writs of assistance" to allow for perpetual searches of buildings for contraband and smuggled goods, a practice

uncommon in England. *See* LaFave, *supra*, at § 1.1(a). James Otis, a lawyer arguing against the use of such writs in 1761, famously described the writ of assistance as "the worst instrument of arbitrary power, the most destructive of English liberty" and said they conferred "a power that places the liberty of every man in the hands of every petty officer." 2 John Adams, *The Works of John Adams* 523-27 (Charles Francis Adams ed. 1865) (recording his recollection of James Otis's arguments during the *Writs of Assistance* cases); Wasserstrom, *supra*, at 285 n.149 (citing same). The issuance and use of writs of assistance, as Otis argued in the January 4, 1762 issue of the *Boston Gazette*, meant that "every man . . . [would] be liable to be insulted, by a *petty officer*, and threat[e]ned to have his house *ransack'd*, unless he will comply with his unreasonable and *imprudent* demands." Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979, 993-94 (2011) (citing Josiah Quincy, Jr., *Reports of Cases Argued and Adjudged in the Superior Court of Judicature of the Province of Massachusetts Bay, Between 1761 and 1772*, 488-89 (1865) (quoting James Otis's January 4, 1762 article in the *Boston Gazette*)).

John Adams, who witnessed Otis's speech later remarked, "[e]very man of a crowded audience appeared to me to go away, as I did, ready to take up arms against writs of assistance. . . . Then and there the child Independence was born." 10 John Adams, *The Works of John Adams*, 247-48 (Charles Francis Adams ed. 1856); *see generally* Thomas K. Clancy, *The Framers' Intent: John Adams, His Era, and the Fourth Amendment*, 86 Ind. L.J. 979, 980-81 (2011) (discussing the impact and influence of Otis's argument on John Adams).

Like John Adams, other Revolutionary political minds envisioned the Bill of Rights as an opportunity to create a series of checks and balances on the executive, legislative, and judicial branches of government. This vision was the product of the Framers' belief that the accumulation of too much power in any single branch of government was the "very definition of tyranny." *The Federalist No. 47* (James Madison). In order to protect against tyranny and, ultimately, ensure the "preservation of liberty," the Framers championed a separation of powers. *Id.* (arguing that "the preservation of liberty requires that the three great departments of power should be separate and distinct").

Both the Federalists and the Anti-Federalists agreed that any national government should be subject to a system of checks and balances through the separation of powers. Wasserstrom, *supra*, at 287 (citing Gordon Wood, *The Creation of the American Republic 1776-1787*, at 549 (1969)). Writing in parallel to the Federalist papers, the Anti-Federalists explained that "[w]hen great and extraordinary powers are vested in any man, or body of men, which in their exercise, may operate to the oppression of the people, it is of high importance that powerful checks should be formed to prevent the abuse of it." *The Anti-Federalist No. 16* (Brutus). Indeed, as James Madison argued, ensuring a separation of powers was an "essential precaution in favor of liberty." *The Federalist No. 47* (James Madison). While the Framers feared the over-accumulation of power in any single branch of government, they also recognized that "the judiciary, from the nature of its functions, will always be the least dangerous [branch of government] to

the political rights of the Constitution; because it will be least in a capacity to annoy or injure them." *The Federalist No. 78* (Alexander Hamilton).

The Framers' reaction to the overly intrusive executive and legislative searches and seizures authorized by the general warrants and writs of assistance became "the moving force" behind the Fourth Amendment. *See Illinois v. Krull*, 480 U.S. 340, 362 (1987) (O'Connor, J., dissenting) (stating that the Court "has repeatedly noted that reaction against the ancient Act of Parliament authorizing indiscriminate general searches by writ of assistance, 7 & 8 Wm. III, c. 22, § 6 (1696), was the moving force behind the Fourth Amendment") (citing *Payton v. New York*, 445 U.S. 573, 583-84, and n.21 (1980); *Stanford v. Texas*, 379 U.S. 476, 481-82 (1965); *Boyd v. United States*, 116 U.S. 616, 624-30 (1886)).

By placing the power to authorize searches and seizures in the hands of the judiciary, the Framers, through the Fourth Amendment, ensured that any attempt of executive or legislative overreach would be checked by the neutrality of the judiciary, a branch "said to have neither *force* nor *will*, but merely judgment." *The Federalist No. 78* (Alexander Hamilton); *see also Illinois v. Krull*, 480 U.S. 340, 364 (1987) (O'Connor, J., dissenting) (arguing that "[l]egislatures have, upon occasion, failed to adhere to the requirements of the Fourth Amendment . . . . Indeed, as noted, the history of the Amendment suggests that legislative abuse was precisely the evil the Fourth Amendment was intended to eliminate").

B. The Purpose and Importance of the Warrant Clause.

A century ago, the Supreme Court declared: "The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established [by] years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land." *Weeks v. United States*, 232 U.S. 383, 393 (1914), *overruled by Mapp v. Ohio*, 367 U.S. 643 (1961). The historical record of the origins of the Fourth Amendment, as set forth above, helps illuminate the purpose and importance of the Warrant Clause, from ratification of the Bill of Rights through today.

As this Court noted in *State v. Jackson*, 742 N.W.2d 163, 169 (Minn. 2007), the Fourth Amendment was ratified partly in "reaction to the general warrants in England and the writs of assistance in the colonies." *Id.* (citing *Steagald v. United States*, 451 U.S. 204, 220 (1981)); *see also Steagald*, 451 U.S. at 220 ("The central objectionable feature of both warrants was that they provided no judicial check on the determination of the executing officials that the evidence available justified an intrusion into any particular home.") (citing *Stanford*, 379 U.S. at 481-85). In addition, the United States Supreme Court recognized the efforts of James Otis as early as 1886, when it described the practice of the issuance of writs of assistance in the colonies and noted Otis's pronouncement that such writs were "the worst instrument of arbitrary power . . . since they placed the liberty of every man in the hands of every petty officer." *Boyd*, 116 U.S. at 625 (internal quotations and footnote omitted); *see also Stanford*, 379 U.S. at 481-82 (suggesting that writs of assistance were the catalyst for the Revolutionary War).

The historical origin of the principles underlying the Fourth Amendment, and the ensuing two centuries of jurisprudence, have led courts to continue to affirm that the Fourth Amendment places a check on governmental intrusion and establishes the right to privacy. Just last year, in *State v. Brooks*, 838 N.W.2d 563 (Minn. 2013), *cert. denied*, 134 S.Ct. 1799 (2014), this Court observed that the Fourth Amendment "establishes the right to privacy 'as one of the unique values of our civilization,' and 'with few exceptions, stays the hands of the police unless they have a search warrant.'" *Id.* at 568 (quoting *McDonald v. United States*, 335 U.S. 451, 453 (1948)). Likewise, in *State v. Krenz*, 634 N.W.2d 231 (Minn. Ct. App. 2001), the Court of Appeals noted: "The basic purpose of the Fourth Amendment 'is to safeguard the privacy and security of individuals against arbitrary invasions by government officials.'" *Id.* at 234 (quoting *Camara v. Municipal Court*, 387 U.S. 523, 528 (1967)). "'[E]xcept in certain carefully defined classes of cases, a search . . . is 'unreasonable' unless it has been authorized by a valid search warrant.'" *Id.* (quoting *Camara*, 387 U.S. at 528-29).

Addressing the critical role of the Warrant Clause in *United States v. Chadwick*, 433 U.S. 1 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991), the Court remarked: "The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral magistrate, which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'" *Id.* at 9 (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)); *see also United States v. Leon*, 468 U.S. 897, 913-14 (1984) (quoting *Chadwick*, 433 U.S. at 9). Furthermore, "a warrant assures the

individual" who is searched "of the lawful authority of the executing officer, his need to search, and the limits of his power to search." *Chadwick*, 433 U.S. at 9 (citing *Camara*, 387 U.S. at 532).

Chadwick also recognized that "[j]ust as the Fourth Amendment 'protects people, not places,' the protections a judicial warrant offers against erroneous governmental intrusions are effective whether applied in or out of the home." *Id.* at 9-10. The taking of a blood, breath, or urine sample is a physical intrusion that constitutes a search. *Skinner v. Ry. Labor Execs.' Ass'n*, 489 U.S. 602, 616–17 (1989). Such searches are generally unreasonable unless conducted pursuant to a warrant. *Id.* at 619.

C. The Fourth Amendment Requires a Warrant Even When Probable Cause Is Indisputable.

It has long been the fundamental law of the land that warrantless searches are "unlawful notwithstanding facts unquestionably showing probable cause." *Agnello v. United States*, 269 U.S. 20, 33 (1925); *see also Thompson v. Louisiana*, 469 U.S. 17, 20-21 (1984). The Supreme Court explained this guiding legal principle in *Katz v. United States*, 398 U.S. 347 (1967):

> Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," for the Constitution requires "that the deliberate, impartial judgment of a judicial officer * * * be interposed between the citizen and the police * * *." "Over and again this Court has emphasized that the mandate of the (Fourth) Amendment requires adherence to judicial processes," and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.

Id. at 357 (internal citations & footnotes omitted).

Holding that the police required a warrant to search a footlocker seized from an automobile despite having probable cause to believe that it contained narcotics, the Court later commented:

> Even though on this record the issuance of a warrant by a judicial officer was reasonably predictable, a line must be drawn. In our view, when no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority. Respondents were therefore entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in the contents of the footlocker were invaded.

Chadwick, 433 U.S. at 15-16. Minnesota drivers are likewise entitled to the protection of the Warrant Clause with the evaluation of a neutral magistrate, before their privacy interests in their blood, breath, or urine are invaded—even if the existence of probable cause is indisputable.

D. The Critical Fourth Amendment Role of the Neutral and Detached Magistrate.

In *State v. Paulick*, 151 N.W.2d 591, 597 (Minn. 1967), this Court noted: "With respect to the Fourth Amendment, the United States Supreme Court has consistently stressed the necessity for establishing probable cause by a judicial officer." As the Supreme Court explained in *Johnson v. United States*, 333 U.S. 10 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. **Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a**

> **nullity and leave the people's [privacy] secure only in the discretion of police officers**. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

Id. at 13-14 (footnotes omitted & emphasis added); *see also Camara*, 387 U.S. at 529 (quoting *Johnson*, 333 U.S. at 13-14).

In *United States v. Jeffers*, 342 U.S. 48 (1951), the Court reiterated: "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes. . . . In so doing the Amendment does not place an unduly oppressive weight on law enforcement officers but merely interposes an orderly procedure under the aegis of judicial impartiality that is necessary to attain the beneficent purposes intended." *Id.* at 51 (internal citations omitted). Thus, the search "warrant procedure serves to insure that the deliberate, impartial judgment of a judicial officer will be interposed between the citizen and the police, to assess the weight and credibility of the information which the complaining officer adduces as probable cause." *Wong Sun v. United States*, 371 U.S. 471, 481-82 (1963).

A search "without a warrant bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure on an after-the-event justification for the arrest or search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck v. Ohio*, 379 U.S. 89, 96 (1964). As the Court acknowledged in *Katz*, "bypassing a neutral predetermination of the scope of a search leaves individuals secure from Fourth

Amendment violations 'only in the discretion of the police.'" 389 U.S. at 358-59 (quoting *Beck*, 379 U.S. at 97).

Accordingly, in *Thompson v. Louisiana*, the Court observed: "we have consistently reaffirmed our understanding that in all cases outside the exceptions to the warrant requirement the Fourth Amendment requires the interposition of a neutral and detached magistrate between the police and the 'persons, houses, papers, and effects' of citizens." 469 U.S. at 20. Similarly, in *Mincey v. Arizona*, 437 U.S. 385 (1978), the Court recognized: "The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'" *Id.* at 390 (quoting *Katz*, 389 U.S. at 357).

E. The Court of Appeals' Decision Disregards the Warrant Clause and Two Centuries of Fourth Amendment Jurisprudence.

In the case at bar, the officers requested the Appellant to take a breath test. Taking a breath sample is a physical intrusion that constitutes a search and requires a warrant, absent an exception to the warrant requirement. *See Missouri v. McNeely*, ___ U.S. ___, 133 S.Ct. 1552, 1561 (2013); *Skinner*, 489 U.S. at 616–19; *Brooks*, 838 N.W.2d at 568.[2] Although the officers could have secured a search warrant in the case at bar, they chose

[2] An officer's **request** that an individual take a breath test might also constitute a search requiring a warrant, absent an exception to the warrant requirement. *See State v. Hardy*, 577 N.W.2d 212, 215-16 (Minn. 1998) (holding that officer's request for person to open his mouth was a search requiring a warrant or an exception to the warrant requirement).

not to do so. None of the specifically established and well-delineated exceptions to the warrant requirement applies to the case at bar. Hence, the officers' request that the Appellant take a warrantless breath test violated his Fourth Amendment rights. This Court must, therefore, reverse his conviction for refusing to submit to an unreasonable warrantless search.

The Court of Appeals' "hypothetical warrant" analysis ignores a century of binding Supreme Court precedent consistently holding that the Fourth Amendment requires a warrant—even when probable cause is indisputable. *See, e.g.*, *Thompson*, 469 U.S. at 20-21; *Chadwick*, 433 U.S. at 15-16; *Katz*, 398 U.S. at 357; *Agnello*, 269 U.S. at 33. Furthermore, the Court of Appeals' "hypothetical warrant" analysis essentially repeals the Warrant Clause by judicial fiat, allowing probable cause determinations to be made by police officers—rather than by neutral and detached magistrates. This severely flawed analysis is contrary to the principles underlying the Fourth Amendment, which have been recognized since the Magna Carta and affirmed throughout our nation's history.

Beyond disregarding the purpose and importance of the Warrant Clause, the Court of Appeals' "hypothetical warrant" analysis eliminates this critical judicial check the Framers placed on executive power in the Fourth Amendment. By ignoring the Supreme Court's warning in *Johnson v. United States*, the Court of Appeals' "hypothetical warrant" analysis "reduce[s] the [Fourth] Amendment to a nullity and leave[s] the people's [privacy] secure only in the discretion of police officers. . . ." 342 U.S. at 14.

In his dissenting opinion in *State v. Mawolo*, No. A13-0770, 2014 WL 2013350, 2014 Minn. App. Unpub. LEXIS 481 (Minn. Ct. App. May 19, 2014) (unpublished),[3] Judge Klaphake characterizes the Court of Appeals' "hypothetical warrant" analysis "to be flawed because it fails to identify a legitimate exception to the warrant requirement and creates an exception that renders the Fourth Amendment meaningless when a person is merely suspected of driving while intoxicated." *Id.* at *6. Echoing the *Johnson* Court's warning, Judge Klaphake further writes:

> I find this logic to be inherently flawed and circular, suggesting that because police had probable cause and *could* have obtained a warrant, an exception to the warrant requirement exists. Such reasoning goes against all common sense and essentially eviscerates the warrant requirement with an exception so broad that it becomes meaningless.

Id. at *8 (emphasis in original).

The potential impact of the Court of Appeals' "hypothetical warrant" analysis cannot be overstated. It neither is—nor can be—limited to drunk driving cases. Its flawed logic applies equally to searches of "persons, houses, papers, and effects" in contexts that have nothing to do with drunk driving. U.S. Const. amend. IV; Minn. Const. art. I, § 10. So long as it can be established after the fact that probable cause existed for a search, an officer's failure to obtain a warrant will be excused. The Court of Appeals' "hypothetical warrant" analysis reduces the Fourth Amendment to a nullity leaving our privacy secure only in the discretion of police officers. This Court must, therefore, reverse the Court of Appeals in the case at bar and declare Minnesota's test-

[3] Pursuant to Minn. Stat. § 480A.08(3), a copy of this unpublished opinion is attached hereto.

refusal statute unconstitutional under the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Minnesota Constitution.

II. BY CRIMINALIZING THE REFUSAL TO SUBMIT TO A WARRANTLESS SEARCH, MINNESOTA'S TEST-REFUSAL STATUTE VIOLATES DUE PROCESS OF LAW.

Laws criminalizing an individual's refusal to consent to a warrantless search are unconstitutional. The Supreme Court has repeatedly recognized that the Fourth Amendment protects a person's right to refuse to consent to a warrantless search under various circumstances. For example, in *District of Columbia v. Little*, 339 U.S. 1 (1950), the Court held that refusing to unlock the door to one's home does not constitute misdemeanor interference with a health inspection. Emphasizing that the defendant "neither used nor threatened force of any kind," the Court observed that a prohibition against "interfering with or preventing any inspection" to determine a home's sanitary condition "cannot fairly be interpreted to encompass" a person's mere failure to unlock a door and permit a warrantless entry. *Id.* at 5, 7. The Court reasoned that "[t]he right to privacy in the home holds too high a place in our system of laws to justify a statutory interpretation that would impose a criminal punishment on one who does nothing more than" refuse to unlock a door. *Id.* at 7.

Similarly, in *Camara v. Municipal Court*, 387 U.S. 523, 540 (1967), the Court recognized an individual's constitutional right to resist a warrantless housing inspection, noting that the "appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection." Likewise, in *See v. City of Seattle*, 387 U.S. 541, 546 (1967),

the Court recognized a person's constitutional right to resist a warrantless fire inspection, observing that the "appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse." This Court has also recognized that people have a constitutional right to refuse to consent to warrantless searches. *See, e.g., State v. George*, 557 N.W.2d 575, 579 (Minn. 1997); *State v. Dezso*, 512 N.W.2d 877, 880 (Minn. 1994).

Reversing a conviction for harboring a fugitive in *United States v. Prescott*, 581 F.2d 1343, 1351 (9th Cir. 1978), the Ninth Circuit held that "passive refusal to consent to a warrantless search is privileged conduct which cannot be considered evidence of criminal wrongdoing." The *Prescott* court supported its holding with this reasoning:

> "When a law enforcement officer claims authority to search a home under a warrant, he announces in effect that the occupant has no right to resist the search." When, on the other hand, the officer demands entry but presents no warrant, there is a presumption that the officer has no right to enter, because it is only in certain carefully defined circumstances that lack of a warrant is excused. An occupant can act on that presumption and refuse admission. He need not try to ascertain whether, in a particular case, the absence of a warrant is excused. He is not required to surrender his Fourth Amendment protection on the say so of the officer. **The Amendment gives him a constitutional right to refuse to consent to entry and search. His asserting it cannot be a crime.**

Id. at 1350-51 (citations omitted & emphasis supplied).

In his dissenting opinion in *State v. Mawolo*, 2014 WL 2013350 at *8 (Minn. App. May 19, 2014) (unpublished), Judge Klaphake concludes that "[b]ecause appellant had a constitutional right to refuse to submit to a warrantless search under the facts of this case, the test-refusal statute has criminalized appellant's constitutionally protected activity." By penalizing the exercise of the constitutional right to refuse to consent to a warrantless

search, Minnesota's test-refusal statute violates due process of law, as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Minnesota Constitution. Accordingly, this Court must reverse the Court of Appeals in the case at bar and declare Minnesota's test-refusal statute unconstitutional under the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Minnesota Constitution.

CONCLUSION

Criminalizing the refusal to submit to a warrantless search for chemical testing violates the prohibition against unreasonable warrantless searches contained in the Fourth Amendment to the United States Constitution and Article I, Section 10 of the Minnesota Constitution. Criminalizing the exercise of the constitutional right to refuse to consent to a warrantless search violates due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 7 of the Minnesota Constitution. Accordingly, *amicus curiae* ACLU-MN respectfully urges this Court to reverse the decision of the Court of Appeals in the case at bar and declare Minnesota's test-refusal statute unconstitutional.

Respectfully submitted

Dated: June 11, 2014

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subdiv. 3(c). This brief was prepared using Microsoft Word Version 12.0 in 13-pt. font, which reports that the brief contains 5,484 words.

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CITED UNPUBLISHED CASE

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Court of Appeals of Minnesota.

STATE of Minnesota, Respondent,
v.
Roland Olando MAWOLO, Appellant.

No. A13–0770. | May 19, 2014.

Hennepin County District Court, File No. 27CR1230804.

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Considered and decided by SCHELLHAS, Presiding Judge; STAUBER, Judge; and KLAPHAKE, Judge.

Opinion

UNPUBLISHED OPINION

STAUBER, Judge.

***1** On appeal from his conviction of second-degree test refusal, appellant argues (1) his conviction must be reversed because he was arrested without probable cause when his car was stopped by two police squads and he was ordered out at gunpoint and handcuffed and (2) his test-refusal conviction must be reversed because the test-refusal statute is unconstitutional after the United States Supreme Court's decision in *Missouri v. McNeely*, 133 S.Ct. 1552 (2013). We affirm.

FACTS

On September 16, 2012 the Brooklyn Park Police Department received an eyewitness report that a burglary was in progress at a residence. The reporting witness identified himself and stated that he observed a black male "walk up to the door of the residence, pound on it and try to pry it open." The witness also stated that he saw the suspect with a "crowbar or some sort of a tool that he was using as leverage to get into the house." Officer Jamie Angerhofer received the call at 4:26 am, and arrived at the scene shortly thereafter along with Officer Michael Wrobel who arrived in a separate squad car. While the police were en route, dispatch updated them with additional information that the witness saw the suspect get into a vehicle and that the lights inside the vehicle were on. When the police arrived at the scene they observed a vehicle backing out of the driveway. The police activated their emergency lights, at which time the driver pulled forward toward the garage. There were no other people or cars in the area.

Because the police were informed that the driver was armed with a crowbar, they conducted a "high-risk stop." The officers drew their service weapons, asked the driver to exit the vehicle with his hands up and to walk backwards towards them. The driver complied and was handcuffed and pat-searched for weapons. The police identified the driver as appellant Roland Mawolo.

Officer Angerhofer walked appellant to the back of his squad car while Officer Wrobel investigated the alleged burglary. Officer Wrobel looked inside appellant's vehicle to check to see if anyone else was in the car. He saw a tire iron in the back of the car, which somewhat resembled a crowbar. He also tried to contact any occupants of the residence. Officer Wrobel observed that there were pry marks on the door, but he could not tell whether they were new or old. He received additional information that the police department had contacted a woman at the address but that she was uncooperative, and that appellant listed the address as his residence.

Meanwhile, Officer Angerhofer was speaking with appellant and detected "an odor of an alcohol beverage" and observed that appellant had "bloodshot, watery eyes and also slurred speech." Officer Angerhofer asked appellant to take a preliminary breath test (PBT). Appellant would not blow into the straw on the PBT device. After Officer Angerhofer learned that there had not been a burglary, he removed appellant's handcuffs and had him exit the squad car. Officer Angerhofer then asked appellant to perform a series of

field sobriety tests, including a horizontal gaze nystagmus test, the walk and turn test, and the one-legged stand test, all resulting in "clues" that suggested intoxication. Officer Angerhofer again asked appellant to take a PBT. Appellant again refused to blow into the straw. Appellant was placed under arrest for driving while intoxicated (DWI). Appellant was transported to the police department and read the implied consent advisory around 5:14am. Appellant again refused to take a breath test.

***2** Appellant was charged with one count of third-degree driving while impaired, and one count of second-degree test refusal. Appellant moved to suppress the evidence of intoxication and test refusal on the grounds that the police lacked probable cause to arrest him for DWI. The district court denied appellant's motion. Appellant was subsequently convicted at trial of second-degree test refusal, and was acquitted of DWI. This appeal followed.

DECISION

I.

"When reviewing a district court's pretrial order on a motion to suppress evidence, we review the district court's factual findings under a clearly erroneous standard and the district court's legal determinations de novo." *State v. Gauster,* 752 N.W.2d 496, 502 (Minn.2008) (quotations omitted). The standard for reviewing reasonable suspicion and probable cause determinations is de novo. *In re Welfare of G.M.,* 560 N.W.2d 687, 690 (Minn.1997).

Appellant argues that the evidence of his test refusal should have been suppressed because it was the product of an unlawful arrest. "The United States and Minnesota Constitutions protect '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' " *State v. Diede,* 795 N.W.2d 836, 842 (Minn.2011) (quoting U.S. Const. amend. IV, citing Minn. Const. art. I, § 10). The exclusionary rule provides that evidence seized in violation of the constitution generally must be suppressed. *State v. Jackson,* 742 N.W.2d 163, 177–78 (Minn.2007). An arrest is lawful where the police first obtain a warrant, or where the police have adequate probable cause for the arrest and an exception to the warrant requirement applies, such as the exception for felony arrests in a public place. *See State v. Dickey,* 827 N.W.2d 792, 798 (Minn.App.2013). "The test of probable cause to arrest is whether the objective facts are such that under the circumstances a person of ordinary care and prudence would entertain an honest and strong suspicion that a crime has been committed." *State v. Johnson,* 314 N.W.2d 229, 230 (Minn.1982) (quotation omitted).

Appellant argues that the police lacked probable cause to arrest him for burglary, and that he was arrested when the police stopped his car, held him at gunpoint, and handcuffed him. But the state contends that appellant was not arrested on suspicion of burglary but was lawfully detained pursuant to a *Terry* investigatory stop. *See Terry v. Ohio,* 392 U.S. 1, 21, 88 S.Ct. 1868, 1880 (1968). We agree. When a crime has been recently committed, the police may detain a person found at the scene in order to "freeze" the situation for the purpose of investigating the alleged crime. *Wold v. State,* 430 N.W.2d 171, 174–75 (Minn.1988). Moreover, when an officer has reasonable, articulable suspicion that a suspect is armed, the officer may "lawfully make a forcible investigative stop" to check the suspect for weapons in the interest of officer safety. *State v. Gilchrist,* 299 N.W.2d 913, 916 (Minn.1980). An investigatory stop does not require probable cause; rather, the police must have a "particularized and objective basis for suspecting the particular person [ ] stopped of criminal activity." *Berge v. Comm'r of Pub. Safety,* 374 N.W.2d 730, 732 (Minn.1985) (quoting *United States v. Cortez,* 449 U.S. 411, 417–18, 101 S.Ct. 690, 694–95 (1981)). An officer must consider "all of the circumstances" and may rely on her special training as a police officer. *Id.* (quotations omitted).

***3** On these facts, the police had sufficient reasonable suspicion to conduct the *Terry* stop. The police received a report that someone was attempting to break into a residence using something that looked like a crowbar, and that the suspect got into a vehicle. When the police arrived at the scene, appellant was the only person around, and his vehicle was the only vehicle in the area. Appellant also matched the physical description provided to the police. Because the suspect reportedly had a crowbar and was allegedly in the process of committing a burglary, the police had reason to believe that he was armed and dangerous. *See State v. Moffatt,* 450 N.W.2d 116, 120 (Minn.1990) (concluding that investigatory stop of suspects for alleged burglary was reasonable where "the men might have had one or more weapons in the car"). Based on the totality of the circumstances, and given the legitimate concerns for officer safety, the stop was justified and supported by reasonable suspicion.

But appellant argues that, because he was handcuffed and seized at gunpoint, he was de facto arrested. Even though a *Terry* stop is justified by reasonable suspicion, the scope of the detention must not exceed constitutional limits. *State v. Blacksten,* 507 N.W.2d 842, 846 (Minn.1993). But the mere fact that appellant was handcuffed and held at gunpoint does not convert the *Terry* stop into a full arrest. "[I]f an officer making a reasonable investigatory stop has cause to believe that the individual is armed, he is justified in proceeding cautiously with weapons ready." *State v. Munson,* 594 N.W.2d 128, 137 (Minn.1999) (quotation omitted). "[B]riefly handcuffing a suspect while the police sort out the scene of an investigation does not per se transform an investigatory detention into an arrest, nor does placing the suspect in the back of a squad car while the investigation proceeds." *Id.*

Appellant argues that even if the police had reasonable suspicion to stop him for the burglary, they lacked probable cause to arrest him for DWI because the only indicium of intoxication was the smell of alcohol emanating from his person when he was handcuffed by the police. We disagree. When the police initially smelled alcohol on appellant, they had reasonable, articulable suspicion to believe that he was driving while intoxicated. On this basis, the police were justified in expanding the scope of the stop to include an investigation of whether appellant was driving drunk. *See State v.. Askerooth,* 681 N.W.2d 353, 364 (Minn.2004) ("An intrusion not closely related to the initial justification for the search or seizure is invalid ... unless there is independent probable cause or reasonableness to justify that particular intrusion."). Appellant was arrested for DWI after he exhibited numerous indicia of intoxication including bloodshot and watery eyes, slurred speech, and difficulty walking, and after he failed several field-sobriety tests. Upon these facts, the police had ample probable cause to arrest appellant for DWI. Because evidence of appellant's test refusal was not the result of an unlawful seizure, the evidence was properly admitted at trial.

II.

***4** Appellant also argues that his conviction should be reversed because the criminal test-refusal statute is unconstitutional following the U.S. Supreme Court's recent decision in *McNeely,* and the Minnesota Supreme Court's follow up decision in *Brooks*. *See McNeely,* 133 S.Ct. 1552; *State v. Brooks,* 838 N.W.2d 563 (Minn.2013). The constitutionality of a statute is a question of law that we review de novo. *State v. Melde,* 725 N.W.2d 99, 102 (Minn.2006). This court presumes that Minnesota statutes are constitutional. *Id.* The party questioning the constitutionality of a statute must demonstrate beyond a reasonable doubt that it violates a constitutional provision. *State v. Wolf,* 605 N.W.2d 381, 386 (Minn.2000).

Appellant was convicted of second-degree test refusal, which consists of "refus[ing] to submit to a chemical test of the person's blood, breath, or urine." Minn.Stat. § 169A.20, subd. 2 (2012). The statute criminalizes refusal to submit to testing authorized under the implied-consent law, which provides that anyone who drives a vehicle has consented to a chemical blood, breath, or urine test for alcohol. Minn.Stat. § 169A.51, subd. l(a) (2012). Consent to testing is implied when officers have probable cause to believe a person was driving while intoxicated. Minn.Stat. § 169A.51, subd. l(b) (2012). Taking a breath sample implicates a suspect's Fourth Amendment rights. *Skinner v. Ry. Labor Execs.' Ass'n,* 489 U.S. 602, 616–17, 109 S.Ct. 1402, 1413 (1989). We have interpreted Minnesota's implied consent statute as criminalizing only refusal to cooperate with searches that are constitutionally reasonable, so that the state must establish a lawful basis for the warrantless breath test that appellant refused. *See State v. Wiseman,* 816 N.W.2d 689, 694–95 (Minn.App.2012), *cert. denied,* 133 S.Ct. 1585 (2013).

The state argues that this court should not reach the merits of this question because appellant did not raise this argument before the district court. Appellate courts "generally will not decide issues which were not raised before the district court, including constitutional questions." *Roby v. State,* 547 N.W.2d 354, 357 (Minn.1996). But this court may consider "any other matter, as the interests of justice may require." Minn. R.Crim. P. 28.02, subd. 11. In this case, the Supreme Court's decision in *McNeely* was pronounced after appellant's trial, but while his case was still pending. Moreover, the parties have adequately briefed the issue. *See Tischendorf v. Tischendorf,* 321 N.W.2d 405, 410 (Minn.1982) (stating that a constitutional question may be decided on appeal where "the parties have had adequate time to brief such issues"). Therefore, we will consider the merits of appellant's constitutional argument.

The state also argues that the rule in *McNeely* should not be applied to appellant's case because the rule does not apply retroactively. *See Danforth v. State,* 761 N.W.2d 493, 496 (Minn .2009) (allowing for the retroactive effect of a new

rule only in limited circumstances). But the retroactivity rule affirmed in *Danforth* only applies to convictions that have become final. *Id*. at 498. A conviction becomes final after the time for appeal is exhausted. *O'Meara v. State*, 679 N.W.2d 334, 340 (Minn.2004), *overruled on other grounds by Danforth v. Minnesota*, 552 U.S. 264, 128 S.Ct. 1029 (2008). Because the time for appeal has not yet expired in this case, we conclude that *McNeely* applies to this case without needing to decide whether *McNeely* has retroactive effect.

***5** Appellant argues that after *McNeely* the test-refusal statute is unconstitutional because it violates the doctrine of unconstitutional conditions. Specifically, appellant argues that the state may not compel a driver to submit to a blood-alcohol test using the threat of criminal punishment. The doctrine of unconstitutional conditions "reflects a limit on the state's ability to coerce waiver of a constitutional right where the state may not impose on that right directly." *State v. Netland*, 762 N.W.2d 202, 211 (Minn.2009), *abrogated in part by McNeely*, 133 S.Ct. 1552. "The doctrine is properly raised only when a party has successfully pleaded the merits of the underlying unconstitutional government infringement." *Id*.

In *Netland*, the supreme court addressed a similar challenge and upheld the constitutionality of the statute on the grounds that the defendant could not show that a warrantless search for her blood-alcohol content would have been unconstitutional. *Id*. at 213–14. The supreme court relied upon *State v. Shriner*, 751 N.W .2d 538, 545 (Minn.2008), *abrogated by McNeely*, 133 S.Ct. 1552, which held that the dissipation of alcohol in the blood created a per se exigent circumstance justifying a warrantless blood-alcohol test so long as the police had probable cause. Following the reasoning in *Shriner*, the supreme court stated in *Netland* that

> the criminal test-refusal statute does not violate the prohibition against unreasonable searches and seizures found in the federal and state constitutions because under the exigency exception, no warrant is necessary to secure a blood-alcohol test where there is probable cause to suspect a crime in which chemical impairment is an element of the offense.

Netland, 762 N.W.2d at 214.

But *McNeely* held that the evanescent nature of alcohol in the blood does not create a per se exception to the warrant requirement, abrogating *Shriner*. *McNeely*, 133 S.Ct. at 1556. "[E]xigency ... must be determined case by case based on the totality of the circumstances." *Id*. Accordingly, appellant argues that, absent exigent circumstances the state may not lawfully compel a suspect to submit to a blood-alcohol test by imposing criminal penalties for test refusal. And the state has not established the existence of any special circumstances in this case.

But *McNeely* did not invalidate state test-refusal statutes. In fact, a plurality of the Supreme Court cited with favor state implied-consent laws, stating that they represent a "broad range of *legal tools* to enforce [state] drunk-driving laws and to secure [blood-alcohol concentration] evidence without undertaking warrantless nonconsensual blood draws." *Id*. at 1566 (emphasis added). In *Brooks*, our supreme court stated that the conclusion that our implied-consent laws are unconstitutional is "inconsistent" with the description of implied-consent laws as "*legal tools* " in *McNeely*. 838 N.W.2d at 572 (quotation omitted).

***6** In *State v. Bernard*, 844 N.W.2d 41, 42 (Minn.App.2014), *pet. for review filed* (Minn. Apr. 17, 2014), this court recently addressed a similar challenge to the test-refusal statute and concluded that "[t]he Fourth Amendment does not prohibit the state from criminalizing a suspected drunk driver's refusal to submit to a breath test for alcohol content" because as long as the police have probable cause the test is constitutionally reasonable. *See also Brooks*, 838 N.W.2d at 571 ("Although refusing the test comes with criminal penalties in Minnesota, the Supreme Court has made clear that while the choice to submit or refuse to take a chemical test will not be an easy or pleasant one for a suspect to make, the criminal process often requires suspects and defendants to make difficult choices" (quotations omitted)); *Wiseman*, 816 N.W.2d at 691 ("[T]he imposition of criminal penalties for refusing to submit to a properly requested chemical test is a reasonable means to a permissible state objective.").

Because we conclude that a breath test is a constitutionally reasonable search so long as the police have probable cause to believe the suspect was driving while intoxicated, we need not address appellant's argument that the test-refusal statute imposes an unconstitutional condition on motorists. *See Netland*, 762 N.W .2d at 212 (concluding that it was unnecessary to determine whether the test-refusal statute

imposed an unconstitutional condition where the defendant could not show that a warrantless blood-alcohol test would have been unconstitutional).

Affirmed.

KLAPHAKE, Judge [*] (dissenting).

***6** Because I believe that Minnesota's test-refusal statute is unconstitutional, following the Supreme Court's decision in *Missouri v. McNeely,* 133 S.Ct. 1552 (2013), I respectfully dissent from that part of the majority's opinion in this case.

In rejecting appellant's claim that the test-refusal statute is unconstitutional, the majority follows this court's decision in *State v. Bernard,* 844 N.W.2d 41 (Minn.App.2014), *pet. for review filed* (Minn. Apr. 17, 2014). I find the analysis in *Bernard* to be flawed because it fails to identify a legitimate exception to the warrant requirement and creates an exception that renders the Fourth Amendment meaningless when a person is merely suspected of driving while intoxicated.

"The Fourth Amendment proscribes all unreasonable searches and seizures, and it is a cardinal principle that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment-subject only to a few specifically established and well-delineated exceptions." *Katz v. United States,* 389 U.S. 347, 357, 88 S.Ct. 507, 514 (1967). Chemical tests for blood, breath, or urine are searches under both the Fourth Amendment and the Minnesota Constitution. *See Skinner v. Ry. Labor Execs. Ass'n.,* 489 U.S. 602, 616, 109 S.Ct. 1402, 1412–13 (1989); *Ellingson v. Comm'r of Pub. Safety,* 800 N.W.2d 805, 807 (Minn.App.2011), *review denied* (Minn. Aug. 24, 2011).

***7** Minnesota's test-refusal statute makes it a "crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine." Minn.Stat. § 169A.20, subd. 2 (2012). The majority acknowledges that this court has "interpreted Minnesota's implied consent statute as criminalizing only refusal to cooperate with searches that are constitutionally reasonable, so that the state must establish a lawful basis for the warrantless ... test that appellant refused," citing *State v. Wiseman,* 816 N.W.2d 689, 694–95 (Minn.App.2012), *review denied* (Minn. Sept. 24, 2012), *cert. denied,* 133 S.Ct. 1585 (2013). Following *McNeely,* however, *Wiseman* is no longer good law.

In *Wiseman,* the defendant raised a substantive-due-process challenge to the test-refusal statute, claiming that it criminalized constitutionally protected activity involving "the passive or nonviolent refusal to submit to a warrantless police search." *Id* . The *Wiseman* court rejected that challenge, concluding that if an officer has probable cause to believe that a person is under the influence of alcohol, there is no "fundamental right" to refuse a chemical test because the police can obtain a sample for chemical testing under the single-factor exigent circumstances exception based on "[t]he rapid, natural dissipation of alcohol in the blood." *Id.* (quoting *State v. Shriner,* 751 N.W.2d 538, 549–50 (Minn.2008)).

An integral part of this court's decision in *Wiseman* is its reliance on the single-factor or per se exigency of dissipation of blood alcohol evidence. In *McNeely,* however, the Supreme Court clarified that police cannot rely solely on the natural and rapid dissipation of alcohol as the per se exigency to support a warrantless chemical test and that exigent circumstances must be based on an analysis of the totality of the circumstances. 133 S.Ct. at 1558–60. In a given case, special circumstances may exist that would justify a warrantless seizure of a defendant's blood, breath, or urine under a totality-of-the-circumstances exigency analysis, despite a refusal to submit to chemical testing. *Id.* at 1561, 1563. Under *McNeely,* police cannot justify the request for a chemical test solely on the single-factor exigent circumstances exception involving the natural and rapid dissipation of alcohol in the blood. Thus, any reliance on *Wiseman* is questionable after *McNeely*.

Nevertheless, this court has fully followed *Wiseman* in *Bernard,* holding that "Bernard's prosecution did not implicate any fundamental due process rights" because there was a "*constitutionally* viable alternative." 844 N.W.2d at 46 (emphasis in original). But *Bernard* fails to identify such an alternative. Instead, *Bernard* relies on an *un* constitutional alternative: because the officer had probable cause to believe Bernard was under the influence of alcohol, the officer could have obtained a "hypothetical" search warrant to test his blood. *See id*. Following the reasoning set out in *Wiseman,* the *Bernard* court held that because the officer could have obtained a search warrant, Bernard had no right to refuse to submit to a lawful test and committed a crime when he refused that test. *Id*.

***8** I find this logic to be inherently flawed and circular, suggesting that because police had probable cause and *could* have obtained a warrant, an exception to the warrant requirement exists. Such reasoning goes against all common

sense and essentially eviscerates the warrant requirement with an exception so broad that it becomes meaningless. *See Katz,* 389 U.S. at 357, 88 S.Ct. at 515 ("Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause.' ") The fact that police have probable cause to believe a defendant is under the influence of alcohol does not permit a warrantless search for chemical testing. *McNeely,* 133 S.Ct. at 1561 ("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.")

Because appellant had a constitutional right to refuse to submit to a warrantless search under the facts of this case, the test-refusal statute has criminalized appellant's constitutionally protected activity. There is no recognized exception that would permit police to obtain a warrantless search for chemical testing merely because they had probable cause to request such a test and could have obtained a warrant. The Fourth Amendment and *McNeely* require that police either obtain a warrant under these circumstances or establish, by a totality of the circumstances, the existence of exigent circumstances. Because I conclude that the test-refusal statute is unconstitutional, I would reverse appellant's test-refusal conviction.

Footnotes

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

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