9-24-2009

State v. Wheeler Appellant's Reply Brief Dckt. 35194

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	
Plaintiff-Respondent,	)	NO. 35194
	)	
v.	)	
	)	
SHAWN THOMAS WHEELER,	)	REPLY BRIEF
	)	
Defendant-Appellant.	)	
	)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF BONNER

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STATEMENT OF THE CASE

Nature of the Case

The State presented false testimony during the preliminary hearing, motion to suppress hearing, and during trial. The State, thereafter, vouched for the credibility of a law enforcement officer who presented false testimony during these hearings. Mr. Wheeler asserts he was denied a fair trial and, therefore, the matter should be remanded for a new trial. Additionally, the district court erred denying his motion to suppress the evidence obtained through the forcible blood draw. This reply brief is necessary to further elaborate on Mr. Wheeler's claims.

Statement of the Facts and Course of Proceedings

The Statement of the Facts and Course of Proceedings were previously articulated in Mr. Wheeler's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Did the prosecutor commit prosecutorial misconduct by continuing to allow the police officer to submit false testimony and then vouching for the trooper's credibility in closing arguments?

2. Did the district court err in denying Mr. Wheeler's motion to suppress the results of the forcible blood draw because it was unreasonable under the circumstances and Mr. Wheeler revoked his implied consent?

ARGUMENT

I.

The Prosecutor Committed Prosecutorial Misconduct By Continuing To Allow The Police Officer To Submit False Testimony And Then Vouching For The Trooper's Credibility In Closing Arguments

A. Introduction

This Reply brief will respond to general areas in response to the State's argument. First, that Mr. Wheeler's claim may be raised for the first time on appeal because his claim is that the prosecutor's actions prevented obtaining a conviction by criminal process that was fair. Second, the vouching that occurred in this case constituted misconduct and is prohibited under both federal and state law.

B. Prosecutorial Misconduct Claims May Be Raised For The First Time On Appeal

The State argues that a prosecutor's presentation of knowing false testimony in an attempt to seek a conviction may not be raised for the first time on appeal. (Respondent's Brief, pp.6-7, 10-11.) The State bases its argument upon the premise that a *Napue* claim may not be raised for the first time on appeal (Respondent's Brief, pp.6-7) and vouching for the credibility of an officer during closing arguments is not fundamental error (Respondent's Brief, pp.10-11). Mr. Wheeler disagrees.

Mr. Wheeler asserts that he was deprived of a fair trial; he contends that the prosecutor's actions of allowing Trooper Jayne to testify falsely deprived him of a fair trial . He asserts that the prosecutor's actions of having him bound over with the use of false testimony, using the false testimony to avoid suppression of evidence, continuing with different false testimony at trial, and then vouching for the credibility of the officer

when the only material issue in dispute was the credibility over the testimony of whether Mr. Wheeler drove his motorcycle on a public highway, all deprived him of process that was fundamentally fair.

Prosecutorial misconduct as occurred in this case need not first be presented to the district court. A prosecutorial misconduct claim is not a basis for a motion for a new trial. *See State v. Page*, 135 Idaho 214, 223, 16 P.3d 890, 899 (2000). In *State v. Irwin,* the Idaho Supreme Court vacated a judgment based upon the prosecutor's inappropriate line of questioning. *See Irwin,* 9 Idaho 35, 71 P. 608 (1903). The concept that the prosecutor may act inappropriately outside of the disputed evidence was more recently recognized in *State v. Phillips,* 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). In *Phillips,* the Court of Appeals noted that the prosecutor may not use inappropriate comments about defense counsel and such use constitutes prosecutorial misconduct. *Id.* Nor may a prosecutor use inflammatory words about a witness or the defendant is inappropriate. *Id.* A prosecutor may not mischaracterize the evidence in closing arguments. *Id.* Nor may the prosecutor misrepresent the law. *Id.* Moreover, the prosecutor may not present the case to appeal to the emotion, passion or prejudice of the jury through use of inflammatory tactics. *Id.* The prohibited conduct outlined in *Phillips* does not necessary go to certain evidence that is at issue in the case, but instead recognizes the limited boundaries by the manner by which the prosecutor may gain a conviction. *Id.*

Thus, the only time that direct review of whether the actions of the prosecutor deprived a person of a fundamentally fair trial is by raising the issue on direct appeal. If this Court never reviews the manner by which convictions are obtained, prosecutor's

actions will go unchecked and defendants will be convicted by Idaho proceedings that were unjust and fundamentally unfair. For policy reasons this Court should review the process for fundamental fairness.

Mr. Wheeler argues that the manner by which this prosecutor obtained the conviction - by use of the known false testimony and vouching for the credibility of the officer - deprived him of a fair trial. Mr. Wheeler asserts his case is akin to a case where the prosecutor has been ordered to not present certain pieces of evidence and does so in spite of the court's order, or asks inappropriate questions. The prosecutor's actions are as egregious as a defense attorney encouraging the defendant to present perjured testimony. The process by which this conviction was obtained was fundamentally unfair.

C. The Closing Arguments In This Case Constituted Misconduct

The State asserts that Mr. Wheeler failed to explain how the closing arguments constituted inappropriate vouching (Respondent's Brief, p.12) and failed to discuss vouching under Idaho case law (Respondent's Brief, p.12, n.4). Mr. Wheeler asserts that a Ninth Circuit case best explained why the comments made by the prosecutor in this case were inappropriate vouching and that Idaho case law also supports finding vouching to be fundamental error.

Whether Mr. Wheeler drove on the public highway was the critical issue of the case. The jurors would either believe Trooper Jayne who claimed that he saw Mr. Wheeler drive on the highway, although his video would not depict his version of the events, or the jurors would believe Mr. Wheeler who claimed to have pushed his bike across the public highway and then drove the bike on the private property. The

prosecutor used the cloak of the government seal to vouch for the credibility of the officer by explaining to the jurors that the officer would not jeopardize his job over this case and, therefore, would not lie about he observed.

The Ninth Circuit case, *United States v. Edwards*, 154 F.3d 915, 921 (9th Cir. 1998), recognized that different types of vouching exists. The type that occurred in this case is more akin to the first type described in *Edwards*; the prosecutor places the prestige of the government behind the witness. *Id.* The *Edwards* Court recognized that not all vouching would render a criminal trial fundamentally unfair, but would more likely do so in those cases when the credibility of a key witness is crucial. *Id.* Moreover, the Court recognized that the rule against vouching was designed to prevent prosecutors from taking advantage of the natural tendency of jury members to believe in the honesty of the government lawyers. *Id.* The Ninth Circuit noted that enforcement of the rule against vouching implicates the basic foundation of our system of justice. *Id.*, (quoting, *United States v. Prantil,* 764 F.2d 548, 553 (9th Cir. 1985).) The *Edwards* Court went on to evaluate whether the improper vouching amounted to harmless error, concluding that although the prosecutor acted in good faith and acted in an ethical manner at all times, nevertheless, the prosecutor's personal involvement in discovery of the crucial piece of evidence, his vouching for the credibility of a particular witness, and acting as a silent witness throughout the trial, did not constitute harmless error.

The obligation of the state to see that defendants receive a fair trial is primary and fundamental. *Pulver v. State*, 93 Idaho 687, 471 P.2d 74 (1970) (quoting *McIntosh v. Commonwealth, Ky.*, 368 S.W.2d 331 (Ky.Ct.App.1963)). The State may only obtain a valid conviction in a fundamentally fair manner. *Schwartzmiller v. Winters,*

99 Idaho 18, 19, 576 P.2d 1052, 1053 (1978). In *State v. Perry,* the Idaho Supreme Court recognized that "the jury's vital and exclusive function [is] to make credibility determinations . . . ." *Perry,* 139 Idaho 520, 81 P.3d 1230 (2003) (prohibiting the use of polygraph results at the jury trial stage because it usurps the jury's function). Idaho recognizes a prosecutor's personal opinion or belief about a witness' credibility is inappropriate during closing arguments. *State v. Timmons,* 145 Idaho 279, 288, 178 P.3d 644, 653 (Ct. App. 2007).

> [However, a] prosecuting attorney may express an opinion in argument as to the truth or falsity of testimony or the guilt of the defendant when such opinion is based upon the evidence, but the prosecutor should exercise caution to avoid interjecting his or her personal belief and should explicitly state that the opinion is based solely on inferences from evidence presented at trial.

State v. Gross, 146 Idaho 15, 19, 189 P.2d 477, 481 (Ct. App. 2008). When the prosecutor expresses personal opinion or implies that he may be privy to additional information, unknown to the jury, tending to corroborate the witnesses testimony, misconduct occurs. *See State v. Priest,* 128 Idaho 6, 14, 909 P.2d 624, 632 (Ct. App. 1995).

The prosecutor in this case either knew or should have known from the prior hearings, that he was dealing with an officer who lied under oath. By asking the jury if they heard anything about the officer lying only attempted to vouch for the officer's testimony; this prosecutor must have known that Trooper Jayne had not testified honestly in this case. After trying to convince the jury that this officer would not lie, the prosecutor argued that this officer would not risk his career over obtaining a conviction in this case. The career comment implies privy to information unbeknownst to the jury and indicates that this officer would never testify inappropriately. While this case does

involve an officer who has lied about certain evidence, the prosecutor was not simply commenting on the evidence presented or asking the jurors to weigh the credibility for themselves, but instead wraps the cloak of honesty of the government around this officer. The prosecutor's closing arguments were merely the climax of prosecutorial misconduct committed throughout Mr. Wheeler's criminal proceedings.

II.

The District Court Erred In Denying Mr. Wheeler's Motion To Suppress The Results Of The Forcible Blood Draw Because It Was Unreasonable Under The Circumstances And Mr. Wheeler Revoked His Implied Consent

A. Introduction

Mr. Wheeler asserts that the district court erred denying his suppression motion because he revoked his implied consent. Mr. Wheeler requests that *State v. Diaz,* 144 Idaho 300, 160 P.3d 739 (2007), be modified to comport with this Court's own precedent and that of the United States Supreme Court.

B. The Fourth Amendment Protects Individuals From Unreasonable Forcible Blood Draws

Neither this Court, through broad interpretation, nor the State through legislative enactments, can reduce or rescind the minimal, basic, and fundamental protections against unreasonable searches and seizures granted to all citizens, irrespective of their domicile, by the Fourth Amendment to the United States Constitution. *See Ybarra v. Illinois,* 444 U.S. 85, 96 n.11 (1979) (state statute which purports to authorize police in some circumstances to make searches and seizures without probable cause and without search warrants falls within the category of statutes "purporting to authorize

searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches.").

The Fourth Amendment to the United States Constitution protects ***people***, not places, from unwarranted governmental intrusions. *Minnesota v. Olson,* 495 U.S. 91, 96 n.5 (1990); *State v. Pruss,* 145 Idaho 623, 626, 181 P.3d 1231, 1234 (2008) (emphasis added). Fourth Amendment protections are secured by the constitutional requirement that all searches and seizures be reasonable. Warrantless searches and seizures are *per se* unreasonable unless they fall within a specifically established and well-delineated exception to the warrant requirement. *California v. Acevedo,* 500 U.S. 565, 580 (1991); *State v. Murphy,* 129 Idaho 861, 863, 934 P.2d 34, 36 (Ct. App. 1997). When a warrantless search or seizure has occurred, the State bears a heavy burden to justify dispensing with the warrant requirement. *Welsh v. Wisconsin,* 466 U.S. 740, 749-750 (1984); *State v. Curl,* 125 Idaho 224, 225, 869 P.2d 224, 225 (1993).

It is without question that "[t]he taking of a blood alcohol content test is a seizure within the context of the fourth amendment to the United States Constitution." *State v. Woolery,* 116 Idaho 368, 370, 775 P.2d 1210, 1212 (1989) (citations omitted) As the United States Supreme Court recognized in *Schmerber v. California,* 384 U.S. 757, 767 (1966):

> It could not reasonably be argued, and indeed respondent does not argue, that the administration of the blood test in this case was free of the constraints of the Fourth Amendment. Such testing procedures plainly constitute searches of 'persons,' and depend antecedently upon seizures of 'persons,' within the meaning of that Amendment.

384 U.S. at 767.

C. The United States Supreme Court Historical Development Of The Limited Forcible Blood Draw

Schmerber was only the second case to be considered by the United States Supreme Court on the question of whether forcible blood draws violate an individual's Fourth Amendment right to be free of unreasonable searches and seizures, but it was also the last. In the first case, *Breithaupt v. Abram,* 352 U.S. 432, 439-440 (1957), the petitioner was driving a truck that collided with a passenger car, killing all three occupants of the car and seriously injuring the petitioner. *Id.* at 433. Officers found a nearly empty whiskey bottle in the glove compartment of the petitioner's truck, and the smell of alcohol was detected on the petitioner's breath at the hospital. *Id.* The petitioner's blood was drawn by a physician, at the request of a police officer, while the petitioner was unconscious and results revealed the petitioner's blood alcohol content to be .17. *Id.* The petitioner challenged the admission of the blood test results at his trial, arguing the blood draw was involuntary and violated his Due Process rights. *Id.* The United States Supreme Court held that blood test results were admissible in the petitioner's involuntary manslaughter prosecution because New Mexico had validly declined to adopt the exclusionary Rule for Fourth Amendment violations. *Id.* at 439-440. In determining that the blood draw was not offensive to due process, the Court emphasized the fact that the blood was drawn under the protective eye of the physician, and not done in a manner that would shock the conscience or be considered a method of obtaining evidence that would offend a sense of justice. *Id.* at 438.

Subsequently, the Court directly addressed the blood draw as a Fourth Amendment issue. In *Schmerber,* the petitioner and a companion had been drinking at a bar at a bowling alley. 384 U.S. at 758 n.2. After the pair left the bowling alley, the car

which the petitioner was driving skidded, crossed the road, and struck a tree. *Id.* Both the petitioner and his companion were injured and taken to the hospital for treatment.[1] *Id.* At the hospital, a police officer directed a physician to draw a blood sample from the petitioner. *Id.* at 758. The results revealed a percent by weight of alcohol in the petitioner's blood, which indicated intoxication, and such results were admitted at petitioner's trial. *Id.* at 759. The petitioner objected to the admission of the results, arguing that his blood was drawn despite his refusal to consent to the test. *Id.*

The *Schmerber* Court found no violation stemming from the warrantless taking of the petitioner's blood under the unique facts of the case. Specifically, the Court relied on the destruction of blood evidence as a relevant factor in the exigency determination under the following circumstances: the officer investigating the accident encountered the defendant at the accident scene; the defendant smelled of alcohol; the passenger in defendant's car was injured and taken to the hospital; the investigating officer arrived at the hospital where defendant was being treated almost two hours after the accident; and finally, the defendant was placed under arrest. The *Schmerber* Court, without citing to any authority, stated:

> ***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.

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[1] While this incident was charged as misdemeanor driving under the influence of alcohol, it should be noted that the offense occurred in 1964 and there is no indication that state law, at the time, included a more serious offense of causing an accident or injury while DUI. Of course, the underlying facts of the offense in *Schmerber* are more serious than a simple misdemeanor DUI.

Id. at 771 (emphasis added).[2]

Before broadly applying the analysis of *Schmerber* to any other case or facts, however, it is important to remember the Court's final admonition:

> It bears repeating, however, 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 States 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. (emphasis added).

D. Idaho's Struggle To Limit The Scope Of The Forcible Blood Draw

Since *Schmerber* was issued in 1966, Idaho courts have struggled to identify limits on the scope of forcible evidentiary testing in D.U.I. prosecutions and driver license suspension hearings. The Idaho Supreme appears to have first addressed the ability of an individual to refuse to submit to an evidentiary test for alcohol concentration in the context of driver's license revocation matter. *See State v. Ankney,* 109 Idaho 1, 704 P.2d 333 (1985). In *Ankney,* the defendant argued that he had shown cause for refusing to take the evidentiary test when he testified that he did not know whether he had a constitutional right to refuse the test and he did not understand the refusal form

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[2] It is important to remember that *Schmerber* was decided in 1966. More than 35 years have passed since the decision, and technology in the scientific and medical fields has advanced exponentially. While the court in 1966 may have been justified in relying upon the destruction of blood evidence as a factor in the exigent circumstance analysis excusing the warrant requirement, the state of technology, advancements in medical and scientific technology over the past 35 years vitiate the propriety of such a strenuous reliance.

that was read to him. *Id.* at 3, 704 P.2d at 335. As a result, the defendant argued that his driver's license should not have been suspended because of his refusal to submit to an evidentiary test. The Idaho Supreme Court disagreed, concluding that "[u]nder Ankney's reading of the statute, any justification for not taking the test would be sufficient to excuse a person from the test. This interpretation is contrary to both good sense and the rules of statutory construction." *Id.* at 6, 704 P.2d at 338.

A few months later, in *State v. Tierney,* 109 Idaho 474, 708 P.2d 879 (1985), the Idaho Supreme Court again considered the right to refuse evidentiary testing for alcohol in the context of a driver's license suspension. In *Tierney,* the defendant refused to submit to evidentiary testing for alcohol concentration and a result, his driver's license was seized and suspended. *Id.* at 476, 708 P.2d at 881. The defendant challenged his license suspension, and the court held a hearing at which the defendant testified that he declined the test because (1) he was intoxicated, and (2) he was on medications he believed might affect the outcome of the test. *Id.* The defendant's testimony was corroborated by the testimony of his girlfriend and an acquaintance. *Id.* at 447, 708 P.2d at 882. The Court rejected this argument, concluding that the defendant's "justifications for refusing to submit to the test do not constitute 'cause' for refusal to submit to the test." *Id.* (citing *Ankney,* 109 Idaho at 1, 704 P.2d at 333).

The Idaho Supreme Court next considered the ability of an individual to refuse to submit to a blood-alcohol test, again in the civil context, in *In re Griffiths,* 113 Idaho 364, 744 P.2d 92 (1987). In *Griffiths,* the defendant's driver's license was suspended based on his refusal to take a test to determine his blood alcohol content. *Id.* at 365, 744 P.2d at 93. The defendant appealed the suspension to the magistrate court, which held a

hearing and considered testimony from police officers, including the arresting officer, the defendant, and the defendant's mother. *Id.* at 366-367, 744 P.2d at 94-95. The defendant and his mother both testified that he had a fear of needles, and the defendant testified that was the reason he refused to submit to the blood draw. *Id.* The magistrate found that fear of needles was not, as a matter of law, reason to refuse a blood-alcohol test. *Id.* at 367, 744 P.2d at 95. The Supreme Court reversed, holding that " a fear of needles may establish sufficient cause for refusing to submit to a blood test requested pursuant to I.C. §18-8002 if the fear is of such a magnitude that as a practical matter the defendant is psychologically unable to submit to the test, *and* if the fear is sufficiently articulated to the police officer at the time of the refusal so that the officer is given an opportunity to request a different test." *Id.* at 372, 744 P.2d at 100. Notably, the *Griffiths* Court acknowledged that the language of I.C. § 18-8002(3), formerly codified as I.C. §49-352, which allowed a defendant to show cause why he or she refused an evidentiary test, "had meaning in and of itself, and by itself established grounds for refusal." *Id.* The Court further noted that "[i]t seems self-evident that the legislature has authorized the seizure of a license only where the defendant has refused a requested test after being properly informed." *Id.* In sum, the *Griffiths* Court recognized the ability of a driver to refuse to submit to an evidentiary test for blood alcohol content.

It was not until 1989 that the Court addressed a defendant's ability to refuse to submit to evidentiary testing for blood alcohol content in the criminal context. *See State v. Woolery,* 116 Idaho 368, 775 P.2d 1210 (1989). In *Woolery,* the defendant was driving a truck at a high rate of speed through an intersection and failed to stop at the stop sign. *Id.* The defendant's vehicle crashed into the victim's car, killing the victim's

passenger and seriously injuring the victim. *Id.* The defendant suffered head and chest injuries and was transported to Mercy Medical Center for treatment. *Id.* at 369, 775 P.2d at 1211. An officer at the scene followed the ambulance to Mercy Medical Center and told the defendant's treating physician that he needed a blood test sample from the defendant. *Id.* The sample was drawn and revealed that the defendant's blood alcohol content was over the legal limit. *Id.* The defendant challenged the admissibility of the test results, arguing that he did not consent to the blood test. *Id.* at 370, 775 P.2d at 1212.

At a hearing, the State stipulated that the defendant was not provided with the advisory rights contained in I.C. §18-8002 when his blood was drawn, and the testimony of the officer established the defendant was not under arrest at the time of the blood draw. *Id.* The lower court denied the defendant's motion to suppress. On appeal, the Idaho Supreme Court affirmed, holding that: "[i]n the instant situation, the destruction of the evidence by metabolism of alcohol in the blood provides an inherent exigency which justifies the warrantless search." *Id.* As a result, the Court concluded that the relevant questions were whether there was sufficient justification for ordering the testing, and whether the test was conducted in a reasonable manner. *Id.* at 371, 775 P.2d at 1213.

> The legislature acknowledged [in I.C. § 18-8002] that some individuals refuse to comply with their previously granted [implied] consent to submit to an evidentiary test. ***Rather than condone a physical conflict, the legislature provided for the administrative revocation of the license of an individual who refuses to comply with his previously given consent.*** Such legislative acknowledgement was not meant to hamstring the ability of law enforcement to properly investigate and obtain evidence of ***serious crimes committed by those individuals who have chosen to drink and drive.***
>
> . . . .

> For the driver who has been involved in an accident which causes either serious injury or death, the state must have the usual authority to investigate and collect evidence which exists in any other felony investigation. ***Thus, a driver's refusal to peacefully submit to an evidentiary test should not preclude law enforcement from making a probable cause seizure of his blood.***

Id. at 373-374, 775 P.2d at 1215-1216 (emphasis added).

In *State v. McCormack,* 117 Idaho 1009, 793 P.2d 682 (1990), the Idaho Supreme Court considered a challenge to applicability of I.C. §18-8002 on Indian reservations. In considering the jurisdictional issue, the Court also considered whether the breath alcohol tests were admissible against the defendants. The defendants had voluntarily submitted to the tests after being advised that the failure to do so would result in a 180 day driver's license suspension. *Id.* at 1010, 793. P.2d at 683. In addressing the implied consent provision, the Court *noted* that "[a]lthough under I.C. §18-8002(3) a driver has the physical ability to refuse to submit to an evidentiary test, that section did not create statutory right in a driver to withdraw his implied consent or refuse to submit to an evidentiary test to determine his blood alcohol level." *Id.* at 1013-1014, 793 P.2d at 686-687 (citing *Woolery,* 116 Idaho at 368, 775 P.2d at 1210).

Subsequent cases addressing refusals to submit to evidentiary testing for blood alcohol content arose in the context of simple driving under the influence of alcohol charges not involving accidents, or in license revocation proceedings. *See, e.g., State v. Nickerson,* 132 Idaho 406, 973 P.2d 758 (Ct. App. 1999) (defendant charged with DUI first refused and then consented to breath test only after being ordered to do so by his parole officer; consent was not involuntary and results were admissible because the defendant had impliedly consented to such testing by driving a car on Idaho highways, and "although an individual has the physical ability to prevent a test,

there is no legal right to withdraw the statutorily implied consent."); *State v. Halen,* 136 Idaho 829, 41 P.3d 257 (2002) (affirming driver's license suspension based on driver's refusal to submit to blood draw based on dislike for needles, where driver's dislike of needles did not constitute a "psychological inability to submit to the [blood] test" and did demonstrate cause for refusing test); *State v. Worthington,* 138 Idaho 470, 65 P.3d 211 (Ct. App. 2002) (warrantless forcible blood draw of defendant charged with felony DUI, where three officers and two nurses held defendant down, and physical restraints were used to accomplish forcible blood draw, not violative of Fourth Amendment due to exigent circumstances or implied consent, and draw not unreasonable).

E. Idaho's Abandonment Of Its Own Standards And Those Identified By The United States Constitution And United States Supreme Court And Rendering Portions Of The Implied Consent Statute Superfluous

Despite the clear constitutional standards adopted by the Idaho Supreme Court in *Griffiths* and *Woolery,* which were based on *Schmerber* and grounded in the Fourth Amendment, the Idaho Supreme Court recently abandoned those standards in *State v. Diaz*, 144 Idaho 300, 160 P.3d 739 (2007). In *Diaz,* the defendant was suspected of driving under the influence of alcohol and was transported by the officer to a local hospital where his blood was drawn. *Id.* at 302, 160 P.3d at 741. The defendant did not physically resist either being transported to the hospital, or the taking of his blood, but protested the blood draw. *Id.* The Defendant was ultimately charged with felony DUI based on prior convictions, and he sought to suppress his blood test results, arguing that the test was involuntary and not justified by exigent circumstances. *Id.*

The Court rejected this argument, concluding that the blood draw could be justified either by exigent circumstances or consent. *Id. Diaz,* 144 Idaho at 302, 160

P.3d at 471. Because the defendant had "given his implied consent to evidentiary testing by driving on an Idaho road, he also gave his consent to a blood draw." *Id.* at 303, 160 P.3d at 742. Given the Court's finding that the forcible blood draw was consensual, the Court went on to consider the reasonableness of the blood draw under the Fourth Amendment, in light of the totality of the circumstances including: (1) whether the procedure was done in a medically acceptable manner; and (2) whether the procedure was done without unreasonable force. *Id.* Finding the blood draw to be reasonable, the Court then considered whether I.C. §18-8002(6)(b) permits officers to order involuntary blood draws absent offenses such as aggravated DUI or vehicular manslaughter. The Court found that the statute provides NO protection to drivers, but only to hospital professionals, and does nothing more than limit when an officer may request, rather than order, hospital personnel to draw a driver's blood against the driver's will. *Id.* at 303-304, 160 P.3d at 742-743.

The Court's decision in *Diaz* is contrary to *Schmerber,* its own precedent (*see Grifftihs; Woolery*), and it renders portions of Idaho Code irrelevant and superfluous. It is not disputed that in Idaho, as is true in every other state, by driving a motor vehicle on the roadways (or in some jurisdictions, by obtaining a driver's license), a driver consents to evidentiary testing of his or her blood, breath and urine for the presence of alcohol or intoxicating substances, when an officer has *reasonable grounds*, or probable cause, to believe the driver is DUI. *See* Idaho Code §§ 18-8002(1), -8002A(e); M. Elizabeth Fuller, Comment, *Implied Consent Statutes: What is Refusal?,* 9 AM. J. OF TRIAL ADVOC. 423, 424 FN.12 (1986) (identifying and citing to implied consent statutes in every state).

In exchange for the privilege of driving on the roadways of a given state, or in exchange for the privilege of a driver's license, a driver impliedly consents to submit to evidentiary testing so long as that testing is legally justified. *Id.* Despite the existence of implied consent laws, the vast majority of states have nevertheless found that an individual may refuse to submit to evidentiary testing, so long as they are advised that the failure to submit to testing will result in a civil penalty and driver's license suspension. *See, e.g., Pena, v. State,* 684 P.2d 864 (Alaska 1984) (chemical sobriety test results inadmissible in manslaughter prosecution of defendant who refused to take test); *State v. Estrada,* 100 P.3d 452 (Ariz. Ct. Ap. Div. 2 2004) (blood test results in DUI prosecution inadmissible when blood drawn without warrant while defendant received medical treatment against his will); *State v. Slaney,* 653 So.2d 422 (Fla. Dist. Ct. Appl. 3d Dist. 1995) (blood test results inadmissible in DUI prosecution where driver consented to blood draw only after being misinformed by officer that statute required him to submit to test, rather than telling driver that driver could submit to test); *Pilkenton v. State,* 561 S.E.2d 462 (Ga. Ct. App. 2002) (in DUI prosecution, evidence insufficient to invoke implied consent statute allowing officers to require driver to submit to blood test where there is an accident involving serious injury, where driver complained of pain in wrist and other driver was bleeding but not seriously injured); *Hannoy v. State,* 789 N.E.2d 977 (Ind. Ct. App. 2003) (implied consent laws could not be applied in DUI causing death where officer requesting medical personnel to draw defendant's blood did not advise defendant of implied consent law and did not seek defendant's actual consent); *People v. Wade,* 460 N.Y.S.2d 870 (N.Y. 1983) (under implied consent law if officer has reasonable grounds to believe driver is DUI, officer

may have a blood sample withdrawn by appropriate professional within two hours of arrest for results to be admissible but officer MUST honor conscious suspect's wish to refuse test); *State v. Shantie,* 92 P.3d 746 (Ore. 2004) (defendant's refusal to consent to blood draw did not render blood draw results inadmissible in DUI trial under implied consent law where the evidence was obtained pursuant to a warrant); *State v. Mullins,* 489 S.E. 2d 923 (S.C. 1997) (under implied consent statute, once driver refused blood tests, no chemical tests could be performed and results were inadmissible in DUI trial); *Beeman v. State,* 86 S.W.3d 613 (Tex. Crim. App. 2002) (implied consent statute did not preclude taking of blood sample pursuant to search warrant and thus results were admissible in DUI prosecution even where driver did not consent; implied consent statute did not provide greater protection than fourth amendment).

Indeed, both Idaho Code and case law recognize that individuals will refuse to submit to evidentiary testing. *See* Idaho Code §18-8002(3) ("At the time evidentiary testing . . . is requested, the person shall be informed that if he refuses to submit to or if he fails to complete, evidentiary testing . . . .") I.C. §18-8002(4) ("If the motorist refuses to submit to or complete evidentiary testing. . . . "); I.C. §18-8002A(2) ("At the time of evidentiary testing . . . is requested, the person shall be informed that if the person refuses to submit to or fails to complete evidentiary testing . . . ."); I.C. §18-8004(2) ("Any person who does not take a test to determine alcohol concentration or whose test result is determined by the court to be unreliable or inadmissible against him . . . ."); *Griffiths,* 113 Idaho at 370, 744 P.2d at 98.; *but see State v. Diaz,* 144 Idaho 300, 302-303, 160 P.3d 739, 741-742 (2007) (holding that pursuant to I.C. §18-8002(1), by driving a vehicle, the defendant impliedly consented to evidentiary testing for alcohol

and could not withdraw that consent); *Halen v. State,* 136 Idaho 829, 833, 41 P.3d 257, 261 (2002) (same in the context of a driver's license suspension challenge where defendant refused and *did not* submit to an alcohol concentration test); *State v. Worthington,* 138 Idaho 470, 475, 65 P.3d 211, 216 (Ct. App 2002) ("[The defendant], by virtue of the exigent circumstance exception to the warrant requirement and Idaho's implied consent statute, had no legal entitlement to refuse or prevent the blood draw.").

The only circumstances under which an officer is permitted to *require* a driver, against his or her will, to submit to evidentiary testing is when the officer has probable cause to believe the driver has committed one of the following offenses: (1) aggravated DUI; (2) vehicular manslaughter where the driver is under the influence; (3) aggravated operation of a vessel on the waters of Idaho while the operator is under the influence; and (4) criminal homicide involving a vessel on the waters of Idaho while the operator is under the influence. *See* Idaho Code § 18-8002(6)(b); *but see Diaz,* 144 Idaho at 303-304, 160 P.3d at 742-743 (holding that I.C. §18-8002(6)(b) applies and protects medical personnel only, and limits when an officer may *order* medical personnel to administer a blood withdrawal, not when an officer can *request* a blood draw). An officer is permitted to compel evidentiary testing under these enumerated circumstances just as he or she would be able to do in any other serious felony case. Where an officer has probable cause to believe that one of these "***serious crimes [has been] committed by those individuals who have chosen to drink and drive[,]***" and the driver has "been involved in an accident which causes either serious injury or death, the state must have the usual authority to investigate and collect evidence which exists in any other felony investigation." *Woolery,* 116 Idaho at *Id.* at 373-374, 775 P.2d at 1215-1216 (emphasis

added). Thus, the ability of an officer to obtain a blood sample without the express consent of a driver, and indeed in the face of the withdrawal of any implied consent, is not contingent on the implied consent statute, but rather, hinges on traditional notions of probable cause and warrant exceptions.

F. The Distinction Between Consent and Exigent Circumstances

The *Diaz* Court was simply incorrect in concluding that forcing a defendant to submit to a blood draw over his objection could be justified by reliance on the implied consent law. *Diaz,* 144 Idaho at 302, 160 P.3d at 471. It is not true that because the defendant had "given his implied consent to evidentiary testing by driving on an Idaho road, he also gave his consent to a blood draw." *Id.* at 303, 160 P.3d at 742. In reaching its conclusions, the *Diaz* Court makes the fundamental mistake of conflating the concepts of exigent circumstances and consent.

When a warrantless search is justified on the basis of exigent circumstances, the search must also be justified by probable cause. *State v. Holton,* 132 Idaho 501, 504, 975 P.2d 789, 792 (1999) ("The exigent circumstances exception refers broadly to fact patterns sufficient to excuse an officer form the requirement of obtaining a warrant to conduct a search for which he has probable cause." (citations omitted) (internal quotations omitted)). An exigent circumstance is one in which "the facts known at the time of the [warrantless] entry indicate a 'compelling need for official action and no time to secure a warrant.'"[3] *State v. Smith,* 144 Idaho 482, 485-486, 163 P.3d 1194, 1197-

[3] The availability of the telephonic warrant is certainly a factor that must be considered in determining whether the circumstances are exigent, i.e., whether officers have time to secure a warrant. *See, e.g., State v. Rodriguez,* 156 P.3d 771, 778-780 (Utah 2007). *See United States v. Baker,* 520 F.Supp. 1080, 1083 (D.Iowa 1981) (finding that one

1198 (2007) (quoting *Michigan v. Tyler,* 436 U.S. 499, 509 (1978)). The scope of a warrantless entry or search premised on probable cause and exigent circumstances is limited by the exigency that justified the warrantless entry or search at the outset. *Id.* at 487, 163 P.3d at 1199 (citations omitted). The dissipation of blood alcohol is not sufficient in and of itself to constitute exigent circumstances.[4] *See, e.g., State v. Rodriguez,* 156 P.3d 771 (Utah 2007).

In contrast, consent is an exception to the probable cause requirement, and thus an exception to the warrant requirement. *Schneckloth v. Bustamonte,* 412 U.S. 218 (1973). An officer need not possess probable cause, reasonable suspension, or anything more than a hunch before asking a citizen whether he or she will consent to

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hour and fifteen minutes was "abundant time" to obtain warrant by telephone, a process that often takes no more than thirty minutes); *State v. Flannigan,* 978 P.2d 127, 131 (Ariz. Ct. App. 1998) ("[T]he Mesa Police Department is able to obtain a warrant within as little as fifteen minutes and that delays of only fifteen to forty-five minutes are commonplace."). "The mere possibility of delay does not give rise to an exigency." *Flannigan,* 978 P.2d at 131.

[4] The dissipation of alcohol from the human body is accomplished at somewhere between the rate of .015% and.018% per hour; although in some individuals the rate may be as high as .022%. *See* RICHARD SAFERSTEIN, CRIMINALISTICS: AN INTRODUCTION TO FORENSIC SCIENCE 280 (5th ed. 1995). Following the drawing of a blood sample, any subsequent testing will reflect the blood alcohol content level at the time of the blood draw, but not the level at the time of operation of a motor vehicle. *See* DAVID R. HARPER & JANET E.L. CORRY, COLLECTION AND STORAGE OF SPECIMENS FOR ALCOHOL ANALYSIS, IN MEDICOLEGAL ASPECTS OF ALCOHOL DETERMINATION IN BIOLOGICAL SPECIMENS 145, 149 (James C. Garriott ed. 1993). Fairly simple scientific formulae, known as retrograde extrapolation, are employed to convert blood alcohol content results from the time of the blood draw to the time of actual physical control over a motor vehicle. LAWRENCE TAYLOR, DRUNK DRIVING DEFENSE § 8.01 (4th ed. 1996). According even to conservative estimates, given our knowledge of alcohol dissipation, there exists at least a 3.6 hour window of opportunity during which a search warrant can be obtained to obtain a blood sample for forensic testing without affecting the integrity of blood alcohol content results. *Id.* § 6.02; *see also* 49 C.F.R. § 382.209 (1995) (Federal Motor Carrier Safety Regulations prohibit drivers who may be required to take a post-accident alcohol test from consuming any alcohol for eight hours after an accident, or until the test is conducted, whichever is sooner.).

search of their person or property. Of course, an individual always has the right to say no. To be valid, consent must be given voluntarily. *Smith,* 144 Idaho at 488, 163 P.3d at 1200. Voluntariness is "a question of fact to be determined in light of all the surrounding circumstances." *Id.* In addition, if a person consents to a search, the scope of the consensual "search is generally defined by its expressed object[,]" or by limits placed upon the scope of the search by the consenting party. *Florida v. Jimeno,* 500 U.S. 248, 251 (1991) ("A suspect may of course delimit as he chooses the scope of the search to which he consents.").

In addition to being limited, consent may also be withdrawn. *United States v. McWeeney*, 454 F.3d 1030 (9th Cir. 2006) (holding that, "a suspect is free . . . after initially giving consent, to delimit or withdraw his or her consent *at anytime*," in the context of a stop and risk); *United States v. Sanders*, 424 F.3d 768 (8th Cir. 2005) ("Once given, consent to search may be withdrawn."); *United States v. Lockett*, 406 F.3d 907 (3rd Cir. 2005) (recognizing that a suspect retains the right to revoke his consent, in the context of a luggage search); *United States v. Marshall*, 348 F.3d 281 (1st Cir. 2003) (same, in the context of a home search); *United States v. Bustillos-Munoz*, 235 F.3d 505 (10th Cir. 2000) (same, in the context of a vehicle search); *United States v. McFarley*, 991 F.2d 1188 (4th Cir. 1993) (same, in the context of a luggage search). Thus, the scope of a consensual search under the Fourth Amendment is determined by standards of objective reasonableness: "what would the typical reasonable person have understood by the exchange between the officer and the suspect?" *Id.*

Where the State seeks to rely upon voluntary implied consent to support forced blood draws under the Fourth Amendment, the State bears the burden not only that the consent was voluntary, but that the search conducted falls within the parameters or limits of the consent given. Thereafter, assuming the implied consent was voluntary and the search was limited to the scope of the consent given, and not otherwise withdrawn, the State must further demonstrate the search was reasonable. *Jimeno,* 500 U.S. at 250 ("The touchstone of the Fourth Amendment is reasonableness."); *Diaz,* 144 Idaho at 303, 160 P.3d at 742.

G. The State May Not Grant A Privilege On A Renunciation Of A Constitutional Right To Due Process

Moreover, it is without question that a State cannot condition the granting of a privilege upon the renunciation of a constitutional right to due process. *See Slochower v. Bd. Of Higher Educ.,* 350 U.S. 551, 555 (1956) (striking down statute which made the assertion of the privilege against self-incrimination by a city employee or agent relating to his or official duties the functional equivalent of a resignation, where statute resulted in conclusive presumption of guilt of one who claimed his or her constitutional privilege, such discharge violated due process even though employee had no constitutional right to be a City employee).

> It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require the

> relinquishment of constitutional rights. If 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.

Frost v. R.R. Comm'n of California, 271 U.S. 583, 593-594 (1926).

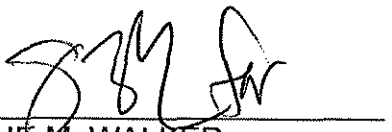
Here, the statute purporting to authorize warrantless, forcible blood draws based on implied consent granted by the driver in exchange for the privilege of driving on Idaho's roadways, and this Court's interpretation to the same effect, are precisely the type of compulsion rejected by the United States Supreme Court. "If 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 be manipulated out of existence." *Id.* Compelled consent to warrantless searches of one's body as a condition of driving a car is a violation of due process and cannot be countenanced.

Moreover a forcible blood draw like the one conducted here violates due process because it involves the State obtaining evidence from an individual by violating an individual's most cherished right to autonomy and privacy in his or her own skin. It does so in a nonconsensual, forcible manner that offends not only a sense of justice, but which "shocks the conscience." *Rochin v. California,* 342 U.S. 165, 172-173 (1952). "So here, to sanction the brutal conduct which naturally enough was condemned by the court whose judgment is before us, would be to afford brutality the cloak of law. Nothing would be more calculated to discredit law and thereby to brutalize the temper of a society." *Id.* at 174.

CONCLUSION

Mr. Wheeler respectfully requests that this Court vacate the Judgment of Conviction and reverse this case for a new trial.

DATED this 24th day of September, 2009.



DIANE M. WALKER
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 24th day of September, 2009, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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INMATE # 45432
1825 OTTS BASIN
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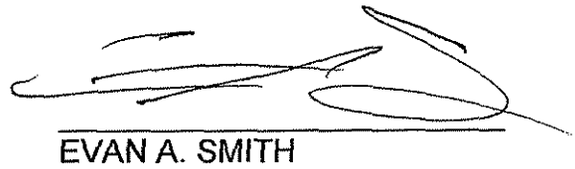

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