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State v. Wulff Respondent's Brief Dckt. 41179

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff/Appellant, Supreme Court No. 41179
Kootenai Co. Case No. CR-12-19332

v.

MICHAH A. WULFF

Defendant/Respondent

RESPONDENT'S BRIEF

Appeal from the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai

Honorable Benjamin R. Simpson, District Judge

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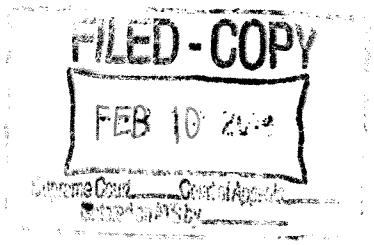

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I. STATEMENT OF THE CASE

A. NATURE OF THE CASE

The state appeals from the District Court's order suppressing evidence obtained as a result of a warrantless blood draw after a refusal of a breath and blood test.

B. STATEMENT OF FACTS AND COURSE OF PROCEEDINGS

A sheriff's deputy observed a car driven at speeds in excess of 60 miles per hour in a marked 25 mile per hour zone. (R. p. 7) The car stopped in response to the deputy's lights, and the deputy made contact with the cars' driver, Micah Wulff. (Id.) Wulff admitted he "shouldn't be driving" and his car smelled strongly of an alcoholic beverage. (Id.) Wulff admitted drinking and failed field sobriety tests. (Id.) Wulff stated he would not participate in a breath test so the deputy took him to a hospital. (Id.) Wulff initially refused giving a blood sample and told the nurse "you're not touching me." (R. pp 7) When two security officers approached he allowed for the blood draw without further resistance. (R. p. 7-8)

The state charged Wulff with felony DUI. (R. pp 44-45) Wulff moved to suppress the results of the blood draw because the state failed to obtain a search warrant. (R. 53-56) (R. 73-75) (R. 82-85) The District Court granted the motion, concluding that: "the recent United States Supreme Court case *Missouri v. McNeely*, 569 U.S. ____ (2013) places new limits on the ability of law enforcement to conduct a blood test without a warrant." Finding the U.S. Supreme Court held: "in these 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." 569 U.S. ____ (2013) (R. p. 100-101) The state filed a notice of appeal. (R. p. 111-113)

II. ISSUES ON APPEAL

Did the District Court correctly hold that *Missouri v. McNeely*, 569 U.S. ____ (2013) places new limits on the ability of law enforcement to conduct a blood test without a warrant (R. p. 100-101 & p. 111-113) and suppression of the warrantless blood draw was required? (R. p. 106-108)

III. ARGUMENT

The District Court correctly held that *Missouri v. McNeely*, 569 U.S. ____ (2013) places new limits on the ability of law enforcement to conduct a blood test without a warrant and suppression of the warrantless blood draw is required. (R. pp 106-108)

A. INTRODUCTION

The District Court concluded that *Missouri v. McNeely*, ____ U.S. ____, 133 S. Ct. 1552 (2013) "places new limits on the ability of law enforcement to conduct a blood test without a warrant." (R. p. 100-101) (R. p. 11-113) The court held that "In *McNeely*, the U.S. Supreme Court stated that "[W]hether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances." *McNeely*, 569 U.S. ____ (2013) (R. p. 103) That to adopt the states argument would "in essence, act as a per se exception to the warrant requirement. In turn, implied consent statutes would have the effect of making the *McNeely* decision of little or

no consequence..... Therefore, despite the fact that the U.S. Supreme Court did not directly discuss implied consent statutes, interpreting the *McNeely* opinion as permitting forced blood draw's simply because a state has legislation that allows such action would render the *McNeely* decision a dead letter." (R. p. 103)

B. STANDARD OF REVIEW

The standard of review of a District Court order granting or denying a suppression motion is bifurcated factual findings are accepted unless clearly erroneous, but the Court freely reviews the application of constitutional principles to the facts found. *State v. Purdum*, 147 Idaho 206, 207 P.3d 183, 183 (2009)

C. THE DISTRICT COURT CORRECTLY HELD THAT *MISSOURI V. MCNEELY*, 569 U.S. ___ (2013) PLACES NEW LIMITS ON THE ABILITY OF LAW ENFORCEMENT TO CONDUCT A BLOOD TEST WITHOUT A WARRANT AND SUPPRESSION OF THE WARRANTLESS BLOOD DRAW IS REQUIRED.

"Administration of a blood alcohol testing constitutes a seizure of the person, and a search within the purview of the Fourth Amendment." *State v. LeClercq*, 149 Idaho 905, 243 P.3d 1093, 1095 (Ct. App. 2010) citing *Schumber v. California*, 384 U.S. 757, 767, 86 S. Ct. 1826, 1833-34, 16 L.Ed.2d 908, 917-918 (1966); *State v. Diaz*, 144 Idaho 300, 302, 160 P.3d 739, 741 (2007) (other citation omitted). Searches and seizures performed without a warrant are presumptively unreasonable. *Id.* (citation omitted) (R. p. 98-99)

The District Court went on to hold: "Under Idaho's implied consent statute, anyone who drives or is in actual physical control of a vehicle is deemed to have impliedly

consented to evidentiary testing for alcohol when an officer who has reasonable grounds to believe in an individual is driving under the influence requests this testing. *LeClercq*, 149 Idaho at ___, 243 P.3d at 1095-96, *quoting Diaz*, 144 Idaho at 302, 160 P.3d at 741 (other citation omitted); I.C. § 18-8002(1). Such implied consent is an exception to the warrant requirement. *Id.* at 1095, citing *Schneckloth v. Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L.Ed.2d 854 (1973) (other citation omitted) This implied consent to evidentiary testing includes testing of a suspect's blood or urine under I.C. § 18-8002, in addition to Breathalyzer testing – the test requested is of the officer's choosing. *Diaz*, 144 Idaho at 302, 160 P.3d at 741 citing *Halen v. State*, 136 Idaho 829, 833, 41 P.3d 257, 261 (2002).

According to Idaho case law, the right of an officer to order a blood draw is not limited by I.C. § 18-8002(6)(b). *Diaz*, 144 Idaho at 303, 160 P.3d at 742. Under I.C. § 18-8002(6)(b), an order for a blood draw must be supported by probable cause that one of the enumerated crimes, such as aggravated DUI or vehicular manslaughter, have occurred. I.C. § 18-8002(6)(b). However, in *Halen v. State*, 136 Idaho 829, 833-34, 41 P.3d 257, 261-62 (2002), the Supreme Court of Idaho "held that Idaho Code § 18-8002(6)(b) limits only when an officer can *order* medical personnel to administer a blood withdrawal but does not otherwise limit when an officer 'may *request* that a defendant peacefully submit to a blood withdrawal.'" *Diaz*, 144 Idaho at 303, 160 P.3d at 742 (quoting *Halen*, 136 Idaho at 834, 41 P.3d at 262 (emphasis supplied)).

Despite the fact that "[n]othing in Idaho Code § 18-8002 limits the officer's authority to require a defendant to submit to a blood draw[,]" the recent United States Supreme Court Case *Missouri v. McNeely*, 569 U.S. ___(2013), places new limits on the ability of law enforcement to conduct a blood test without a warrant. *Diaz*, 144 Idaho at 303, 160 P.3d at 742. In *McNeely*, the U.S. Supreme Court stated that "[i]n those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." 569 U.S. ___ (R. p. 99-101)

Ultimately, the District Court found that "After Defendant refused the breath test....Deputy Larson did not obtain a warrant prior to the blood draw." (R. p. 102) The court further held: "there is no evidence or allegation that Defendant gave his consent to blood draw, only that with the implied threat of force he succumbed to the test." (R. p. 102)

The court noted that the state argued that "once implied consent had been given by an individual who has taken advantage of the privilege of driving on Idaho's roads that individual cannot withdraw the implied consent." (R. p. 102)

The District Court correctly articulated the unconditional conditions doctrine which prohibits the government from conditioning the grant of a privilege upon the waiver of a constitutional right. The U.S. Supreme Court set forth the unconstitutional conditions doctrine in *Frost v. R.R. Comm'n of State of Cal.*:

> [i]t 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 State of Cal., 271 U.S. 583, 593-94, 46 S. Ct. 605, 607, 70 L. Ed. 1101 (1926)(emphasis ours) The doctrine has been applied in a number of jurisdictions, including Arizona and Georgia, to the granting of the privilege to drive. Those courts dealing with the issue have all held that the doctrine prevents the conditioning of the privilege to drive upon the waiver of one's Fourth amendment rights. As it is now clear, following *McNeely*, that motorists have a Fourth Amendment right to be free from warrantless blood draws, absent a true showing of exigent circumstances, the state is not free to condition the granting of the privilege to drive upon a citizen's waiver of that right. In other words, consent may not be "implied" with respect to warrantless blood draws.

Idaho's implied consent law purports to condition the privilege to drive upon one giving their implied consent to a warrantless blood draw upon law enforcement's suspicion of DUI. Idaho's Implied consent Statute, I.C. § 18-8002 provides in part:

> (1) Any person who drives or is in actual physical control of a motor vehicle in this state shall be deemed to have given his consent to evidentiary testing for

> concentration of alcohol as defined in section 18-8004, Idaho Code, and to have given his consent to evidentiary testing for the presence of drugs or other intoxicating substances, provided that such testing is administered at the request of a peace officer having reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of the provisions of section 18-8004, Idaho Code, or section 18-8006, Idaho Code.

I.C. § 18-8002(1) Defendant recognizes that several Idaho courts, prior to *McNeely*, have held that a driver was deemed to have given his "implied" consent to a warrantless blood draw merely by driving upon the roadways of the state:

> [u]nder Idaho's implied consent statute, I.C. § 18–8002(1), anyone driving on Idaho roads is deemed to have impliedly consented to evidentiary testing for the presence of alcohol or drugs when a police officer has reasonable cause to believe the person was driving under the influence. In other words, "[b]y virtue of this statute, 'anyone who accepts the privilege of operating a motor vehicle upon Idaho's highways has consented in advance to submit to a BAC test.' " *Rodriguez,* 128 Idaho at 523, 915 P.2d at 1381 (quoting *Matter of McNeely,* 119 Idaho 182, 187, 804 P.2d 911, 916 (Ct.App.1990)). *See also Diaz,* 144 Idaho 300, 160 P.3d 739. Implied consent to evidentiary testing is not limited to a breathalyzer test, but may also include testing the suspect's blood or urine. I.C. § 18–8002(9)

State v. DeWitt, 145 Idaho 709, 712-13, 184 P.3d 215, 218-19 (Ct. App. 2008). However, Defendant would argue that such a conditional grant of the privilege to drive was not considered to afoul of the unconstitutional conditions doctrine due to the fact that under pre-McNeely jurisprudence it was believed that an individual held no constitutional right to be free from warrantless blood draws. *See, State v. Bock*, 80 Idaho 296, 306, 328 P.2d 1065, 1071 (1958); see also, *State v. Curtis*, 106 Idaho 483, 489, 680 P.2d 1383, 1389 (Ct. App. 1984) As the *McNeely* decision has changed the constitutional landscape in this regard, and it is settled that motorists do in fact have a protected Fourth

Amendment right to be free from warrantless blood draws, the State is prohibited from conditioning the granting of the privilege to drive upon a waiver of that right.

Due to the recency of the *McNeely* decision, only this recent District Court decision has ruled on the constitutionality of states implied consent statutes with respect to compelled blood draws. However, as stated infra, a number of courts have dealt with the issue of statutorily implying consent to warrantless blood draws where the Fourth Amendment would otherwise prohibit such a search, e.g. where probable cause was lacking to suspect the motorist of DUI. In each such case those Courts held that the unconstitutional conditions doctrine prohibited the legislature from conditioning the grant of the privilege to drive upon the waiver of the protections of the Fourth Amendment. In other words, those courts held that the legislature could not circumvent the Fourth Amendment by "implying" consent to an otherwise unlawful search. *State v. Quinn*, 218 Ariz. 66, 72-73, 178 P.3d 1190, 1196-97 (Ct. App. 2008), *Cooper v. State*, 277 Ga. 282, 289-91, 587 S.E.2d 605, 611-12 (2003), *Hannoy v. State*, 789 N.E.2d 977, 986-87 *on reh'g*, 793 N.E.2d 1109 (Ind. Ct. App. 2003)

In *State v. Quinn*, the Arizona Court of Appeals ruled on the constitutionality of a section of the Arizona implied consent law which purported to "imply" a motorists' consent to warrantless blood draws *absent* probable cause to believe the motorist to have been DUI. Specifically, the statute at issue sought to imply consent in every instance where a motorist was involved in an accident which resulted in death or serious injury to another. *State v. Quinn*, 218 Ariz. 66, 69, 178 P.3d 1190, 1193 (Ct. App. 2008) The

defendant, Quinn, was involved in such an accident. It was undisputed that law enforcement did not possess probable cause to believe Quinn to be DUI. Nevertheless, acting under authority of Arizona's implied consent statute, law enforcement extracted blood without a warrant and absent actual consent. The State of Arizona argued that consent was implied by the operation of statute:

> [t]he State further asserts that, even assuming the statute does not fit within the special needs exception, Quinn consented to the search because § 28–673 specifies that all those who drive a vehicle on Arizona roads consent to such a search. In support it relies on *Tornabene v. Bonine ex rel. Ariz. Highway Dep't,* 203 Ariz. 326, 334, ¶ 19, 54 P.3d 355, 363 (App.2002), which held, "driving in Arizona is not a right, but a privilege, subject to legislative mandate."

State v. Quinn, 218 Ariz. 66, 72, 178 P.3d 1190, 1196 (Ct. App. 2008) In rejecting the state's argument, the Court noted that the Fourth Amendment required probable cause for DUI prior to the extraction of blood:

> [n]ormally, because any forced extraction of blood by the State invades one's expectation of privacy in bodily integrity, the intrusion is subject to the requirements of the Fourth Amendment. *State v. Jones,* 203 Ariz. 1, 9, ¶ 27, 49 P.3d 273, 281 (2002); *see also Schmerber v. California,* 384 U.S. 757, 767, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966). As *Schmerber* explains, the State's unconsented-to search of a person's blood requires probable cause to believe that the search will reveal the presence of controlled or intoxicating substances. 384 U.S. at 768–71, 86 S.Ct. 1826. The *Schmerber* Court stated that:
>
> > [t]he interests in human dignity and privacy which the Fourth Amendment protects forbid any [ ] intrusions [into a person's blood] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear....

Id. at 769–70, 86 S.Ct. 1826.

State v. Quinn, 218 Ariz. 66, 68-69, 178 P.3d 1190, 1192-93 (Ct. App. 2008) Applying the unconstitutional conditions doctrine to the statute, the Court ruled the statute an unconstitutional exercise of legislative authority:

> ...states may not condition the grant of a privilege on the forfeiture of a constitutional right..."a statute cannot circumvent a firmly established constitutional right."
> ...
> As *Schmerber* makes clear, Quinn's constitutional right is to be free of any searches of her blood "[i] n the absence of a clear indication" that her blood would demonstrate the presence of alcohol or other controlled substances. Thus, within the limits of the Constitution, the State cannot condition Quinn's driving privilege on the surrender of her constitutional right not to have evidence admitted against her in a criminal prosecution that was taken from her without a consent and in the absence of probable cause.

State v. Quinn, 218 Ariz. 66, 73, 178 P.3d 1190, 1197 (Ct. App. 2008).

In *Cooper v. State*, 277 Ga. 282, 587 S.E.2d 605 (2003), the Georgia Supreme Court dealt with a statute nearly identical to that in Quinn:

> [u]nder OCGA § 40-5-55(a), because Cooper was involved in an accident resulting in "serious injuries," as defined in subsection (c) of the statute, he was deemed by operation of law to have given consent to the administered blood test to determine if there was the presence of alcohol or any other drug.

Cooper v. State, 277 Ga. 282, 285, 587 S.E.2d 605, 608 (2003)(citations omitted). The Georgia Court noted:

> [t]he high courts of several other states have grappled with the constitutionality of provisions allowing the chemical testing of bodily substances without probable cause or valid consent, and based solely on a serious traffic mishap. These courts have uniformly rejected provisions which obviate the finding of probable cause. See *McDuff v. State,* 763 So.2d 850 (Miss.2000); *Blank v. State,* 3 P.3d 359 (Alaska 2000); *King v. Ryan,* 153 Ill.2d 449, 180 Ill.Dec.

> 260, 607 N.E.2d 154 (1992); *Commonwealth v. Kohl,* 532 Pa. 152, 615 A.2d 308 (Pa.1992). Compare *State v. Roche,* 681 A.2d 472 (Maine 1996).

Cooper v. State, 277 Ga. 282, 287-88, 587 S.E.2d 605, 609-10 (2003). The Court then held, as did the Court in *Quinn* that an implied consent statute could not act to imply consent where to do so would require the waiver of a motorist's Fourth Amendment right to be free from unreasonable search and seizure:

> [t]his Court's use of the term "suspect" in regard to the Implied Consent Statute brings into sharp focus the flaw in that portion of the statute compelling chemical testing of the person merely by virtue of involvement in a traffic accident resulting in serious injury or fatality. There is no requirement of individualized suspicion, much less probable cause, that would render the person "suspect" of impaired driving.
> ...
> Thus, to the extent that OCGA § 40-5-55(a) requires chemical testing of the operator of a motor vehicle involved in a traffic accident resulting in serious injuries or fatalities regardless of any determination of probable cause, it authorizes unreasonable searches and seizures in violation of the State and Federal Constitutions.

Cooper v. State, 277 Ga. 282, 290, 587 S.E.2d 605, 611-12 (2003) In so holding the Court cited the following language from the Indiana Court of Appeals in *Hannoy v. State*, 789 N.E.2d 977, 987 (Ind.App.2003):

> [t]he legislature cannot, however, abrogate a person's Fourth Amendment right to be free from unreasonable searches and seizures, as defined by the Supreme Court. *To hold that the legislature could nonetheless pass laws stating that a person "impliedly" consents to searches under certain circumstances where a search would otherwise be unlawful would be to condone an unconstitutional bypassing of the Fourth Amendment.*

Cooper v. State, 277 Ga. 282, 290, 587 S.E.2d 605, 611-12 (2003) The Court concluded by stating:

> "The requirements of the Fourth Amendment cannot be lowered based upon the heinousness of the particular crime police are investigating." *Hannoy v. State,* supra at 988. The illegally-obtained test results were not admissible against Cooper at trial, and the trial court erred in denying Cooper's motion to suppress such evidence.

Cooper v. State, 277 Ga. 282, 291, 587 S.E.2d 605, 613 (2003)

In *Hannoy v. State*, 789 N.E.2d 977, *on reh'g*, 793 N.E.2d 1109 (Ind. Ct. App. 2003), the Indiana Court of Appeals addressed the constitutionality of the Marion County Sheriff Department's policy of obtaining blood samples without probable cause from drivers involved in accidents resulting in serious bodily injury or death. *Id. Hannoy* was involved in an accident involving the death of another individual and, as in *Quinn* and *Cooper*, law enforcement lacked probable cause to believe Hannoy to be DUI. Rejecting a "special needs" argument as well as an argument that Indiana's implied consent statute authorized the blood draw, the Court found the warrantless blood draw unconstitutional :

> [t]he requirements of the Fourth Amendment cannot be lowered based upon the heinousness of the particular crime police are investigating. We are well aware of the pain and suffering inflicted by intoxicated drivers on our roads. Nevertheless, we do not perceive that our opinion today, which will apparently require alterations in the standard policy of at least one major Indiana law enforcement agency, will unduly burden law enforcement officers in collecting blood alcohol readings in cases such as this...To the extent our holding today may lead to the loss of blood alcohol or illicit drug content evidence in some cases, we heed the words of the Supreme Court in *Schmerber* that the Fourth Amendment imposes limitations on the ability of police to investigate criminal activity and sometimes requires police to "suffer the risk" that certain evidence thereby will not be obtained. 384 U.S. at 770, 86 S.Ct. at 1835.
>
> The withdrawal of Hannoy's blood was not obtained pursuant to the guidelines in the implied consent statutes and cannot be justified as being drawn in accordance with those statutes. The withdrawal was not accomplished in accordance with the Fourth Amendment and *Schmerber*

> because there was no probable cause to believe Hannoy was intoxicated at the time his blood was drawn and no actual, knowing, and voluntary consent to the withdrawal. The "special needs" exception to the probable cause requirement cannot be applied in the context of a criminal investigation by law enforcement. Therefore, the blood alcohol content evidence obtained from the blood draw performed at the request of law enforcement was illegally obtained and should not have been admitted into evidence by the trial court.

Hannoy, at 987-89 *on reh'g*, 793 N.E.2d 1109 (Ind. Ct. App. 2003)

The *McNeely* Court gave the clear mandate that "[i]n those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment *mandates* that they do so." *Missouri v. McNeely*, 133 S. Ct. 1552, 1561, 185 L. Ed. 2d 696 (2013) Thus, after *McNeely*, a motorist arrested on suspicion of DUI now clearly has a constitutional right to be free from warrantless intrusions into their body absent the existence of either a true showing of exigent circumstances cause or actual valid consent. As such, the unconstitutional conditions doctrine now prohibits the legislature from bypassing constitutional protections of the Fourth Amendment and implying, or otherwise requiring, consent upon the act of accepting the privilege to drive. Thus, the *Diaz* decision cited by the State is inapplicable to this instant case. Consent cannot be implied when we are dealing with the prospect of "consenting away" a valid Fourth Amendment right.

A search conducted by law enforcement officers without a warrant is per se unreasonable unless the State proves it fell within one of the narrowly drawn exceptions to the warrant requirement. *Schneckloth v. Bustamonte,* 412 U.S. 218, 219, 93 S.Ct. 2041, 36

L.Ed.2d 854 (1973); *State v. Dominguez,* 137 Idaho 681, 683, 52 P.3d 325, 327 (Ct.App.2002). A search conducted with consent that was voluntarily given is one such exception. *Schneckloth,* 412 U.S. at 219, 93 S.Ct. 2041; *Dominguez,* 137 Idaho at 683, 52 P.3d at 327. The State has the burden of proving, by a preponderance of the evidence, that the consent was voluntary rather than the result of duress or coercion, direct or implied. *Schneckloth,* 412 U.S. at 221, 93 S.Ct. 2041; *State v. Hansen,* 138 Idaho 791, 796, 69 P.3d 1052, 1057 (2003); *State v. Fleenor,* 133 Idaho 552, 554, 989 P.2d 784, 786 (Ct.App.1999); *Dominguez,* 137 Idaho at 683, 52 P.3d at 327. A voluntary decision is one that is "the product of an essentially free and unconstrained choice by its maker." *Schneckloth,* 412 U.S. at 225, 93 S.Ct. 2041. *See also, Culombe v. Connecticut,* 367 U.S. 568, 602, 81 S.Ct. 1860, 6 L.Ed.2d 1037 (1961).

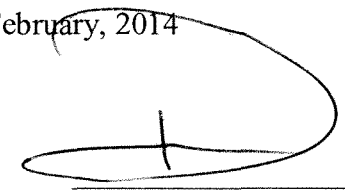
While blood was ultimately extracted from Defendant, it was not taken with his voluntary consent. It is not alleged that Defendant put up a violent struggle with the nurse or the officer when the blood was extracted. However, it is clear from the totality of the circumstances that he did not want to submit to any tests and that the blood was extracted after he had already refused the officer's repeated requests for a test to determine the concentration of alcohol in his body. Furthermore, mere acquiescence in the face of a claim of authority does not equate to voluntary consent: [t]he State's burden to show that consent was freely and voluntarily given cannot be met by "showing no more than acquiescence to a claim of lawful authority." *State v. Tietsort*, 145 Idaho 112, 118, 175 P.3d 801, 807 (Ct. App. 2007)(quoting *Bumper v. North Carolina,* 391 U.S. 543, 549, 88 S.Ct. 1788, 1791–92, 20

L.Ed.2d 797, 802 (1968)). The ALS advisory told Defendant he was "required by law" to submit to the test. Given that fact, Defendant's mere acquiescence to the blood drawing process does not equate to voluntary consent. Defendant did not consent to the blood draw and thus consent cannot be used to subvert the requirement that law enforcement seek out a warrant. The proper remedy is the suppression of the warrantless blood draw consistent with Idaho court's rejection of the Leon Good Faith exception. *State v. Koivu*, 152 Idaho 511, 519, 272 P.3d 483, 491 (2012)

IV. CONCLUSION

The defense requests that the District Court's order suppressing the evidence of the blood draw be upheld and the matter remanded for further proceedings.

Respectfully submitted this 5 day of February, 2014



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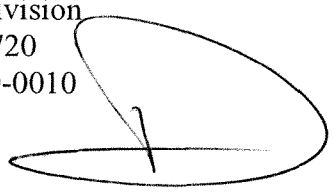
CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 5th day of February, 2014, I placed the original bound brief, six bound copies, and one unbound, unstapled copy of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

Idaho Supreme Court
P.O. Box 83720
Boise, ID 83720 0101

I HEREBY CERTIFY that on this 5th day of February, 2014, I caused two true and correct copies of the foregoing BRIEF OF RESPONDENT to be placed in the United States mail, postage prepaid, addressed to:

Kenneth R. Jorgensen
Deputy Attorney General
Criminal Law Division
P.O. Box 83720
Boise, ID 83720-0010



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