STATE OF MINNESOTA

IN SUPREME COURT

FILED

A12-0164 February 27, 2013

Office of
Appellate Courts

James Louis Peppin,

Petitioner,

vs.

Commissioner of Public Safety,

Respondent

ORDER

Based upon all the files, records, and proceedings herein,

IT IS HEREBY ORDERED that the petition of James Louis Peppin for further review be, and the same is, denied.

Dated: February 27, 2013

BY THE COURT:

/s/

Lorie S. Gildea
Chief Justice

STATE OF MINNESOTA COURT OF APPEALS

JUDGMENT

James Louis Peppin, petitioner, Appellant, vs.
Commissioner of Public Safety, Respondent

Appellate Court # A12-0164
Trial Court # 33-CV-11-313

Pursuant to a decision of the Minnesota Court of Appeals duly made and entered, it is determined and adjudged that the decision of the Kanabec County District Court herein appealed from be and the same hereby is affirmed and judgment is entered accordingly.

It is further determined and adjudged that the Commissioner of Public Safety herein, have and recover of James Louis Peppin herein the amount of $305.04 as costs and disbursements in this cause, and that execution may be issued for the enforcement thereof.

Dated and signed March 4, 2013 *FOR THE COURT*

Attest Bridget C. Gernander
Clerk of the Appellate Courts

By */s/* _____
Assistant Clerk

Statement For Judgment

Costs and Disbursements in the Amount of: $305.04

Attorney Fees in the Amount of

Other: _____

Total *$305.04*

Satisfaction of Judgment filed _____
Dated

Therefore the above judgment is duly satisfied in full and discharged of record

Attest Bridget C. Gernander By _____
Clerk of Appellate Court *Assistant Clerk*

STATE OF MINNESOTA COURT OF APPEALS

TRANSCRIPT OF JUDGMENT

I, Bridget C. Gernander, Clerk of the Appellate Courts, do hereby certify that the foregoing is a full and true copy of the Entry of Judgment in the cause therein entitled, as appears from the original record in my office, that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my signature at the Minnesota Judicial Center,

In the City of St Paul *March 4, 2013*
Dated

Attest *Bridget C. Gernander*
Clerk of the Appellate Courts

By */s/*
Assistant Clerk

STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0164

James Louis Peppin, petitioner,
Appellant,

vs.

Commissioner of Public Safety,
Respondent.

Filed December 3, 2012
Affirmed
Collins, Judge*

Kanabec County District Court
File No 33-CV-11-313

Charles A. Ramsay, Daniel J. Koewler, Ramsay Law Firm, P.L.L.C., Roseville, Minnesota (for appellant)

Lori Swanson, Attorney General, Tibor M. Gallo, Assistant Attorney General, St. Paul, Minnesota (for respondent)

Considered and decided by Larkin, Presiding Judge; Werke, Judge; and Collins, Judge.

UNPUBLISHED OPINION

COLLINS, Judge

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

Appellant challenges the revocation of his driver's license under the implied-consent law on two grounds. First, appellant argues that the warrantless collection of his urine was impermissible because no exception to the warrant requirement applied. Second, appellant contests the analysis of his urine sample, arguing that even if the collection of the sample was permissible the subsequent warrantless analysis is unconstitutional. We affirm.

FACTS

On April 18, 2011, Kanabec County Deputy Lance Herbst arrested appellant James Peppin on suspicion of driving while impaired. Deputy Herbst read Peppin the standard implied-consent advisory. Peppin acknowledged his understanding of the advisory, waived his right to consult with an attorney, and provided a urine sample.

The urine sample, analyzed only for drugs, revealed the presence of amphetamine and methamphetamine. On August 16, 2011, the Minnesota Department of Public Safety revoked Peppin's driving privileges. Peppin moved to challenge the warrantless seizure of his urine sample and the subsequent analysis of that sample. An implied-consent hearing was held, and on December 5, 2011, the district court issued its order sustaining Peppin's license revocation. This appeal followed.

DECISION

Under Minnesota's implied-consent law, any person who drives a motor vehicle within the state consents to have his or her blood, breath, or urine chemically tested for the purpose of determining the presence of a controlled substance or its metabolite. Minn. Stat. §169A.51, subd. 1(a) (2010). An officer may

require a person to submit to chemical testing following a probable-cause arrest for driving under the influence of alcohol or drugs. *Id.,* subd. 1(b)(1) (2010). Before requesting the test, an implied-consent advisory must be read to the person.[1] This advisory satisfies the requirement that, when a test is requested, a person must be informed that (1) Minnesota law requires the person to take a test and (2) refusal to take a test is a crime. *Id.,* subd. 2(1)-(2) (2010). A person who refuses to submit to the test is subject to both civil and criminal consequences. Minn. Stat. §§169A.52, subd. 3(a) (revoking driving privileges for test refusal), .20, subd. 2 (making test refusal a crime), .25-26 (penalizing criminal test refusal as gross misdemeanor) (2010).

"When the facts are not in dispute, the validity of a search is a question of law subject to de novo review." *Haase v. Comm'r of Pub. Safety,* 679 N.W.2d 743, 745 (Minn. App. 2004). "When reviewing a pretrial order on a motion to suppress evidence, we may independently review the facts and determine whether, as a matter of law, the district court erred in suppressing or not suppressing the evidence." *State v. Askerooth,* 681 N.W.2d 353, 359 (Minn. 2004).

Peppin asserts two challenges. First, he argues that the warrantless seizure of his urine sample is unsustainable under any recognized exception to the warrant requirement. Second, he argues that, even if the collection of his urine was permissible, the subsequent warrantless analysis of the sample is unconstitutional.

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[1] Peppin concedes that probable cause existed to support the reading of the implied-consent advisory following his arrest.

I.

The United States and Minnesota Constitutions prohibit "unreasonable searches and seizures." U.S. Const. amend. IV; Minn. Const. art, I, § 10. "[W]arrantless searches are generally unreasonable." *State v. Netland,* 762 N.W.2d 202, 212 (Minn. 2009). "[I]ndividuals have a legitimate privacy interest protecting searches involving intrusions beyond the body's surface." *State v. Hardy,* 577 N.W.2d 212, 215 (Minn. 1998) (quotation omitted). The taking of blood, breath, or urine implicates the Fourth Amendment. *Skinner v. Ry. Labor Executives' Ass'n,* 489 U.S. 602, 616-17, 109 S. Ct. 1402, 1412-13 (1989). However, a warrantless search to determine whether a person was driving under the influence does not necessarily violate an individual's Fourth Amendment rights. *Schmerber v. California,* 384 U.S. 757, 771-72, 86 S. Ct. 1826, 1836 (1966). "[B]ecause the ultimate touchstone of the Fourth Amendment is reasonableness, the warrant requirement is subject to certain exceptions." *State v. Shriner,* 751 N.W.2d 538, 541 (Minn. 2008) (quotation omitted). These exceptions include consent of the person searched, *State v. Diede,* 795 N.W.2d 836, 846 (Minn. 2011), and exigent circumstances, *Netland,* 762 N.W.2d at 212. Peppin argues that neither exception applies to the collection of his urine sample. We disagree.

A. Constitutional challenge

Before considering the exceptions to the warrant requirement, we address an inconsistency in Peppin's argument regarding the implied-consent law and the consent exception to the warrant requirement. Peppin states that he is in "no way" challenging the constitutionality of Minn. Stat. §169A.20, subd. 2

(statute criminalizing the refusal to submit to chemical testing). Indeed, in his brief and at oral argument to this court, Peppin conceded the constitutionality of both the implied-consent law and the test-refusal statute. Instead, Peppin asserts that consent in implied-consent circumstances is inherently coercive. This argument calls into question the validity of an exception to the Fourth Amendment. *See Diede,* 795 N.W.2d at 846 (consent is an exception to the warrant requirement for Fourth Amendment searches). Peppin's argument thus implicates a constitutional challenge.

"We are to read and construe a statute as a whole and must interpret each section in light of the surrounding sections to avoid conflicting interpretations." *Am. Family Ins. Grp. v. Schroedl,* 616 N.W.2d 273, 277 (Minn. 2000). We reject Peppin's argument that Minnesota law could constitutionally criminalize test refusal on the one hand and simultaneously stand for the proposition that submitting to chemical testing in accordance with the implied-consent law is inherently coercive and compels evidence suppression on the other.[2] In practical terms, such a holding would place the implied-consent law and test-refusal statute in direct conflict with a recognized exception to the Fourth Amendment.

The Minnesota Supreme Court has considered constitutional challenges to the implied-consent law and discussed the application of the unconstitutional-conditions doctrine. *See Netland,* 762 N.W.2d at 211-12 (doctrine limits state's ability to coerce waiver of a constitutional right but appellant must establish that statute authorized unconstitutional state action).

[2] Accepting such a proposition would run afoul of the well-established principle to avoid interpreting statutes in a way that implicates constitutional problems. *See State v. Gaiovnik,* 794 N.W.2d 643, 648 (Minn. 2011).

However, if a seizure of evidence is constitutionally valid, there is no need to reach the constitutionality question or analyze the unconstitutional-conditions doctrine. *Id.* Such is the case here, where we determine that the warrantless collection of urine is justified on both the consent and exigent-circumstances exceptions to the warrant requirement.

B. Consent exception

If Peppin's consent to the collection of his urine sample was proper, then no warrant was required under the Fourth Amendment. *State v. Hanley,* 363 N.W.2d 735, 738 (Minn. 1985) (citing *Schneckloth v Bustamonte,* 412 U.S. 218, 219, 93 S. Ct. 2041, 2043-44 (1973)). To qualify as an exception to the general rule that warrantless searches are impermissible, the state must show by a preponderance of the evidence that consent was "given freely and voluntarily." *Diede,* 795 N.W.2d, at 846. Voluntariness is a question of fact varying from case to case. *Bustamonte,* 412 U.S. at 249, 93 S. Ct. at 2059. We will not reverse the district court's finding that consent was voluntary unless it was clearly erroneous. *State v. Alayon,* 459 N.W.2d 325, 330 (Minn. 1990).[3]

In this case, the commissioner met her burden of proof by presenting the implied-consent-advisory form. This document demonstrates that Peppin

[3] While it is not clear error prejudicial to Peppin, it is nonetheless troubling that the district court expressly "adopt[ed] by reference the legal reasoning" contained in the commissioner's memorandum as the court's conclusions of law. District courts should heed the supreme court's repeated admonition that this practice is hardly commendable and calls into question the independent assessment of the evidence by the district court. *See Pederson v. State,* 649 N.W.2d 161, 163 (Minn. 2002); *Dukes v. State,* 621 N.W.2d 246, 259 (Minn. 2001).

acknowledged his rights and waived his opportunity to consult with counsel before he consented to provide a urine sample. Peppin's assertion that consent in this context is inherently coercive is not novel:

> [T]he statutory phrase "implied consent" is a misnomer….When the requirements of probable cause and exigent circumstances are met, *consent* is not constitutionally necessary to administer a warrantless chemical test, nor is *consent* the basis for the search. Indeed, the implied consent advisory required by Minnesota law…does not seek a person's consent to submit to a warrantless chemical test; rather, it advises a person that Minnesota law requires the person to take a chemical test and that refusal to submit to a chemical test is a crime.

State v. Wiseman, 816 N.W.2d 689, 693-94 (Minn. App. 2012), *review denied* (Minn. Sept. 25, 2012). *But see Prideaux v. State, Dep't of Pub Safety,* 310 Minn. 405, 408-09, 247 N.W.2d 385, 388 (1976) (concluding that for purposes of the right to counsel, the obvious and intended nature of implied-consent law is to coerce the driver to consent to chemical testing); *State v. Netland,* 742 N.W.2d 207, 214 (Minn. App. 2007), *aff'd in part, reversed on other grounds,* 762 N.W.2d. 202 (Minn. 2009) (refusing to address whether implied-consent law is coercive due to application of exigent-circumstances exception).[4] We adopt the *Wiseman* distinction that the

[4] The commissioner suggests in her primary brief that, because the record contains no evidence of coercion, Peppin lacks standing to raise this issue. This suggestion is misplaced. *See Anderson v. Cnty of Lyon,* 784 N.W.2d 77, 83 (Minn. App. 2010) (standing requires sufficient stake in outcome and injury to a cognizable

implied-consent law is not seeking a person's consent to a warrantless test but rather advising a person that refusal to submit is a crime. 816 N.W.2d at 693-94. The *Wiseman* holding clarifies dicta contradictions in earlier cases and forecloses the argument that the implied-consent law is inherently coercive. *Id.* The implied-consent advisory informs the person of all of their rights under the law, including the right to counsel, and that refusing to take the test is a crime. *See* Minn. Stat. §169A.51, subd. 2(1)-(2) (2010) (outlining implied-consent-advisory requirements). We conclude that the district court did not err in determining that Peppin knowingly and voluntarily submitted to testing. Therefore, the collection of the urine sample did not violate Peppin's Fourth Amendment rights.

C. Exigent circumstances exception

Exigent circumstances provide another exception to the warrant requirement of the Fourth Amendment. *Netland,* 762 N.W.2d at 212. When determining the existence of exigent circumstances, this court recognizes two tests: "single factor" and "totality of the circumstances." *State v. Gray,* 456 N.W.2d 251, 256 (Minn. 1990). In certain situations a single factor alone can create exigent circumstances, including the imminent destruction or removal of evidence. *Id.*

Peppin seeks to distinguish this case from those that previously applied the single-factor-exigency exception to testing for alcohol concentration. *See Shriner,* 751 N.W.2d at 549-50 (establishing that

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legal interest), *review denied* (Minn. Aug. 24, 2010). Peppin's stake in the outcome is linked to the fact that his license was revoked. The revocation, if wrongful, would constitute harm. This combination is sufficient to sustain standing. Peppin's argument regarding coercion is his theory of the case.

single-factor exigency exists in alcohol-concentration testing due to the "rapid, natural dissipation of alcohol"); *Ellingson v. Comm'r of Pub. Safety,* 800 N.W.2d 805, 807 (Minn. App. 2011) (concluding that single-factor exigency justifies warrantless collection of blood, breath, or urine samples in blood-alcohol cases to prevent destruction of evidence). Peppin argues that his case is distinguishable from alcohol-concentration situations. He points to the fact that he was tested only for drugs, not alcohol, and that the presence of drugs theoretically remains in the bloodstream much longer than alcohol. Peppin concludes that this eliminates the evanescent nature and therefore the exigency. We disagree, taking guidance from the Supreme Court:

> [A]lcohol and other drugs are eliminated from the bloodstream at a constant rate, and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible. Although the metabolites of some drugs remain in the urine for longer periods of time and may enable… estimat[ation of] whether [an individual] was impaired by those drugs at the time of a covered accident, incident, or rule violation, the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence.

Skinner, 489 U.S. at 623, 109 S. Ct. at 1416 (citations omitted). Peppin would have us distinguish *Skinner* as stemming from a Federal Railroad Administration case. But *Skinner's* reasoning is nonetheless applicable to the safety requirements of driving on Minnesota

roads. We share the concern that the delay necessary to obtain a warrant, even though metabolites of drugs may remain in a person's bloodstream for a longer period of time, is an unreasonable risk. Holding otherwise would place law enforcement officers in the untenable position of having to speculate regarding the substance influencing a person and how long it would take for the particular substance to dissipate. Therefore, on this record, we decline to distinguish the evanescent quality of drugs from that of alcohol. The evanescent quality of drug metabolites in this case justified the warrantless seizure of evidence. *See Shriner,* 751 N.W.2d at 542 (outlining the well-established principle that a single fact can create an exigent circumstance).[5] Because the collection of Peppin's urine is justified by a single-factor exigency, we need not discuss the totality-of-the-circumstances test. *See In re Welfare of D.A.G.,* 484 N.W.2d 787, 791 (Minn. 1992) (presence of single-factor exigency forecloses need to proceed to totality analysis).

II.

Peppin challenges the warrantless analysis of the urine sample, even if it was properly collected. The Supreme Court has found a privacy interest in the passing of urine and recognized that the analysis of urine constitutes a search under the Fourth

[5] Peppin also asserted that the commissioner failed to meet her burden of proof regarding the application of the exigency exception to the warrant requirement. *See id.* (burden of demonstrating the necessity of a warrantless search under exigent circumstances rests with the state). We disagree. Although the practice is discouraged, the district court's express adoption of respondent's legal reasoning as its conclusions of law includes adoption of *Skinner's* guidance regarding the evanescent quality of drug metabolites. In doing so, the district court implicitly found that the commissioner met her burden of proving single-factor exigency.

Amendment. *Skinner,* 489 U.S. at 617, 109 S. Ct. at 1402. The Fourth Amendment protects against only unreasonable searches, but even when a search "may be performed without a warrant[, it] must be based, as a general matter, on probable cause to believe that the person to be searched has violated the law." *Id.* at 624, 109 S. Ct. at 1417. Peppin concedes that probable cause existed to support the invocation of the implied-consent law following his arrest. His challenge is whether there was sufficient time to obtain a warrant before the sample was analyzed.

Peppin's assertion that there was adequate time to obtain a warrant prior to the analysis is irrelevant. The Supreme Court has held that the Fourth Amendment does not require a warrant to analyze toxicology samples. "[I]n light of the standardized nature of the [chemical] tests and the minimal discretion vested in those charged with administering the program, there are virtually no facts for a neutral magistrate to evaluate." *Id.* at 622, 109 S. Ct. at 1416.

This court has previously decided that a person who provides a sample for chemical testing under the implied-consent law has lost any legitimate interest of privacy in the sample's analysis. *See Harrison v. Comm'r of Pub. Safety,* 781 N.W.2d 918, 921 (Minn. App. 2010) (no privacy interest in knowing the alcohol concentration derived from a blood-alcohol analysis). Because we have adopted the rationale that drug metabolites are similar to alcohol in the implied-consent context, it follows that Peppin did not have a legitimate expectation of privacy in the urine analysis. We have repeatedly addressed the diminished expectation of privacy that a driver has when utilizing roadways. "The right of the public to be free from the unwarranted dangers posed by drinking drivers far outweighs any interest any individual may have in the

continued unrestricted operation of motor vehicles." *Szczech v. Comm'r of Pub. Safety,* 343 N.W.2d 305, 307 (Minn. App. 1984). We agree that the protections of the warrant process diminish when government action is minimally intrusive and lacks discretion. In circumstances, as here, where a warrantless search is minimally intrusive and supported by an important government interest, it follows that the search is reasonable for Fourth Amendment purposes. We thus decline to require a warrant for chemical testing of a lawfully collected sample.

We conclude that both the warrantless collection and subsequent analysis of Peppin's urine sample were constitutionally permissible under the implied-consent law.

Affirmed.

State of Minnesota	**District Court**
	Tenth Judicial District
County of Kanabec	**Case Type 6: Implied Consent**

James Louis Peppin,
Petitioner,

Court File No.: 33-CV-11-313

vs.

Findings of Fact, Conclusions of Law and Order

State of Minnesota, Commissioner of Public Safety,
Respondent.

The above-captioned matter came before the Honorable James T. Reuter, Judge of District Court, at the Kanabec County Courthouse, Mora, Minnesota, on the 2nd day of November, 2011. This was a hearing on a petition filed pursuant to Minn. Stat. §169A.53 for review of Petitioner's driver's license revocation.

Petitioner was present. He was represented by Attorney Charles Ramsay. Respondent was represented by Attorney Tibor Gallo of the Minnesota Attorney General's Office. The parties stipulated that issues before the Court were: (1) whether a search warrant was required to obtain a sample of Petitioner's urine; and (2) whether a search warrant was required to analyze the urine sample that was obtained. Three exhibits were introduced into the record: April 18, 2011 Motor Vehicle Implied Consent Advisory; (2) April 20, 2011 MN BCA Laboratory Analysis Request; and (3) July 18, 2011 MN BCA Report on the Examination of Physical Evidence. Counsel for Petitioner was given two weeks for the submission of his client's brief; Respondent was allowed an addition two weeks to

provide a responsive brief. The Court took the matter under advisement on November 30, 2011.

The Court, being fully advised in the premises, and upon the arguments of counsel and all of the files, records and proceedings herein, hereby makes the following:

FINDINGS OF FACT

1. On April 18, 2011 James Peppin, the Petitioner herein, was arrested for Driving While Impaired in Kanabec County.

2. At the detention facility Petitioner was read the Minnesota Implied Consent Advisory, which, in part, states that "refusal to take a test is a crime."

3. No search warrant was obtained. Petitioner provided the arresting officer with a sample of his urine.

4. Petitioner asserts he provided his urine specimen under the coercion of impending arrest.

5. Subsequent analysis of this specimen performed by the Minnesota Bureau of Criminal Apprehension determined the presence amphetamines and methamphetamines in Petitioner's urine.

Based on these Findings of Fact, the Court now makes the following:

CONCLUSIONS OF LAW

1. Petitioner now asserts that this warrantless search was coercive, especially as the urine specimen analysis was for the presence of drug metabolites, not for evanescent alcohol.

2. Petitioner further maintains that the dissipation of alcohol in urine allows implementation of the exigency circumstance to the search warrant

requirement, no such rapid dissipation is demonstrated with respect to controlled substances; even the mere presence of the metabolites of controlled substances suffices to incriminate a driver.

3. Respondent thoroughly and succinctly refutes Petitioner's assertions in its legal memorandum. The Court hereby adopts by reference the legal reasoning of Respondent.

Based on the foregoing Findings of Fact and Conclusions of Law, **it is hereby ordered:**

1. The revocation of Petitioner's driving privileges is hereby sustained.

Dated this 5th day of December, 2011.

BY THE COURT:
/s/
Honorable James T. Reuter
District Court Judge

STATE OF MINNESOTA DISTRICT COURT

COUNTY OF KANABEC TENTH JUDICIAL DISTRICT
Case Type: Implied Consent

Court File No. 33-CV-11-313

James Louis Peppin,

Petitioner,

vs.

Commissioner of Public Safety,

Respondent.

RESPONDENT'S MEMORANDUM OF LAW

INTRODUCTION

This matter came before the district court on November 2, 2011, before the Honorable James T. Reuter, presiding. Charles A. Ramsay, Esq. represented the Petitioner; Tibor M. Gallo, Assistant Attorney General, represented the Commissioner of Public Safety. Petitioner stated that the issues he would challenge were: (1) whether a search warrant was required to obtain a sample of Petitioner's urine; and (2) whether a search warrant was required to analyze the urine sample that was obtained. Petitioner waived all other issues. The parties were allowed to submit briefs on the issues, and Petitioner's Memorandum of Law was submitted on November 16, 2011. Respondent hereby submits her response.

FACTS

The parties stipulated that on April 18, 2011, Kanabee County Sheriff's Deputy Lance Herbst stopped Petitioner's pick-up truck based on Petitioner's driving conduct. In the course of the traffic stop and subsequent field sobriety tests, the deputy determined that he had probable cause to arrest Petitioner on

suspicion that he was under the influence of a controlled substance, other than alcohol. After Deputy Herbst arrested Petitioner, he read Petitioner the Minnesota Implied Consent Advisory. After the Advisory was read, Petitioner agreed to submit to a chemical test of his urine and to provide a sample to determine whether he was under the influence of a hazardous or controlled substance. The urine sample was analyzed by the Minnesota Bureau of Criminal Apprehension, which reported the presence of drugs, which in turn was the basis for Respondent revoking Petitioner's driving privileges.

No testimony was provided by the parties at the hearing.

ARGUMENT

I. BECAUSE PETITIONER CONSENTED TO A URINE TEST, AND DUE TO THE EVANESCENT NATURE OF CHEMICALS IN THE BODY, AND BECAUSE THE URINE COLLECTION WAS REASONABLE, PETITIONER'S FOURTH AMENDMENT RIGHT WAS NOT VIOLATED BY COLLECTION OF THE URINE SAMPLE WITHOUT A WARRANT.

As a general rule, warrantless searches are *per se* unreasonable. Of course, that rule is subject to several notable exceptions, including consent, *see State v. Hanley,* 363 N.W.2d 735, 738 (Minn. 1985), and exigent circumstances, *see State v. Shriner,* 751 N.W.2d 538 (Minn. 2008). Petitioner apparently argues that consent does not apply because the Implied Consent Advisory is unconstitutionally coercive because refusal has been "criminalized." Conspicuously absent from Petitioner's argument is the fact that this issue was resolved nearly one decade ago in a published

opinion directly on point. *See State v. Mellett,* 642 N.W.2d 779 (Minn. Ct. App. 2002) (holding that criminalizing refusal does not violate the Fourth Amendment), *rev. denied* (Minn. July 16, 2002).

Indeed, the consent exception applies as do numerous other exceptions to the warrant requirement; accordingly, the officer was not required to obtain a warrant prior to collecting Petitioner's urine sample.[1]

A. A Warrant Was Not Required Because Petitioner Consented To A Urine Test By Driving A Motor Vehicle In The State Of Minnesota.

The undisputed evidence before the Court is that Petitioner freely and voluntarily consented to a urine test. Petitioner never testified to feeling coerced into taking a test. This Court cannot make any determination on Petitioner's credibility because Petitioner did not even take the stand at the hearing Petitioner requested. Because coercion cannot be assumed, Petitioner's claim must fail. Even if Petitioner had testified to feeling coerced into taking a test by the reading of the Advisory, the law is well-settled that the Advisory does not violate the Fourth

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[1] Any claim by Petitioner that the urine test constitutes a warrantless search that was not justified by any exception to the *warrant* requirement also fails under the theory of *Cupp v. Murphy,* 412 U.S. 291, 93 S. Ct. 2000 (1973) adopted by this state's Supreme Court in *State v. Oevering,* 268 N.W.2d 68, 72-73 (Minn. 1978) *(quoting Chimel v. California,* 395 U.S. 752, 89 S. Ct. 2034, 23 (1969) and holding that a warrantless search in the form of a blood draw may be conducted pursuant to a search incident to a lawful arrest, even when a person is not under formal arrest if probable cause exists to support the formal arrest). Here, Petitioner conceded probable cause, and was under formal arrest. Moreover, the urine test here is much less intrusive than the blood draw that was upheld in *Oevering.*

Amendment, the Fifth Amendment, the Right to Privacy, or Due Process. *See, id.*

Petitioner's argument appears to be based on the erroneous assumption that the Implied Consent Statute impermissibly extracts consent from motorists by threatening them with criminal sanctions for refusing a test. In fact, our reviewing courts have long recognized that the Implied Consent Statute is specifically designed to compel motorists to submit to chemical testing. More importantly, Minnesota appellate courts have also found that the statutory provision at issue does not violate the constitution as Petitioner suggests.

Initially, the Implied Consent law presumes that anyone who drives, operates or is in physical control of a motor vehicle and then is arrested for DWI consents to an alcohol concentration test. Minn. Stat. §169A.51, subd. 1(a) (2010); *State, Dep't. of Public Safety v. Wiehle,* 287 N.W.2d 416, 418 (Minn. 1979). This "implied consent" has been specifically challenged and repeatedly upheld by Minnesota appellate courts.

For example, in *State v. Pernell,* A06-1128 (Minn. Ct. App. Jan. 15, 2008) (unpublished)[2], Appellant challenged her conviction for test refusal, arguing that the statute criminalizing refusal violated her Fourth Amendment rights to be free from an unlawful search. The appellate court cited Minn. Stat. §169A.51, subd. 1(a) and stated that "any person who drives a motor vehicle. . . consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol, a controlled substance or its metabolite, or a hazardous substance." *Id.* The court went on to find that Appellant's Fourth

[2] Pursuant to Minn. Stat. §480A.08, subd. 3 (2010), copies of all unpublished opinions cited herein are attached.

Amendment rights were not violated because ***she consented to a test simply by driving a motor vehicle.*** In making this determination, the court relied on *Mellett,* finding it dispositive of Appellant's Fourth Amendment challenge to that statute.

B. Petitioner Never Withdrew The Implied Consent During the Advisory and Expressly Consented To Provide A Urine Sample.

In addition, the reading of the Implied Consent provides a motorist with an opportunity to withdraw the consent that is implied by law and to refuse the testing process. In this case, Petitioner did not withdraw the implied consent and expressly agreed to a urine test during the Implied Consent Advisory. Petitioner was provided an opportunity to consult with a lawyer before making a free and voluntary decision to provide a sample of urine for testing. Petitioner explicitly agreed to a urine test. Petitioner could have refused testing and no sample of urine would have been compelled.

Accordingly, based on the uncontroverted evidence before the Court, and as a well-settled matter of law, Petitioner's consent was voluntary and on-going. Thus, there was no need for the officer to obtain a warrant.

C. Appellate Courts Have Squarely Considered And Rejected Any Claim That The Refusal Statute Impermissibly Coerces Consent Such That It Violates The Fourth Amendment.

As discussed above, a DWI suspect is also required to make a choice when arrested for DWI and read the Minnesota Implied Consent Advisory. The

suspect can agree to testing or can refuse. Either a test failure or refusal holds both criminal and civil consequences. The suspect is not coerced into a testing decision; the suspect is simply subject to consequences depending on which decision is made. Petitioner argues that this choice is unfair. But this claim has also previously been made and rejected by Minnesota appellate courts and the United States Supreme Court.

"[The United States] Supreme Court has explicitly rejected Fourth Amendment challenges to chemical testing in the driving while intoxicated context." *Mellett,* 642 N.W.2d at 783, referencing *Schmerber v. California,* 384 U.S. 757, 772, 86 S. Ct. 1826, 1836 (1966). Here, because the legislature has a compelling state interest in protecting law abiding motorists from drunk drivers, that interest favors intrusion by the state on privacy rights held by motorists for the purpose of obtaining an alcohol concentration test. *See Id.* at 784. The law is well-settled.

In the controlling case on this issue, the Minnesota Court of Appeals held that the refusal statute does not violate the United States or Minnesota Constitutions. *Id.* at 782.[3] In *Mellett,* after being arrested for driving while impaired ("DWI"), the defendant was read the Advisory and then refused to take a breath test or provide a blood or urine sample. *Id.* at 780. On appeal, the defendant argued that the refusal statute violated the Fifth Amendment, a right to privacy, and the Fourth Amendment to the Minnesota Constitution. *Id.* at 783. The Court of Appeals squarely rejected each these claims.

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[3] *Mellett's* holding was not disturbed by *State v. Netland,* 762 N.W.2d 202 (Minn. 2009).

Here, any argument Petitioner makes about being unconstitutionally "compelled" to submit to a test is based on the flawed premise that a suspected drunk driver somehow has a right to withhold consent, without greater consequence, to the warrantless search of their breath, blood or urine. Therefore, Petitioner's argument is more accurately framed as whether the *test refusal statute* violates the Constitution because it unlawfully forces a driver to involuntarily "consent" to a test of their blood, breath or urine. This same argument was rejected in *Mellett:*

> While Appellant concedes that the State has the power to take a blood sample, by force if need be, Appellant also argues that because the state has this power, all other means of coercion available to the state to require submission to chemical testing are foreclosed. But Appellant cites no direct authority for this conclusion, and the presence of one constitutional remedy to enforce the driving-while-intoxicated statutes cannot prevent legislative enactment of other procedures. [Citations omitted.] Therefore, we defer to the legislature's judgment and hold that the refusal statute does not violate Appellant's Fourth Amendment rights.

Id. at 785. The Court of Appeals upheld the defendant's conviction for DWI.[4]

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[4] The Court of Appeals affirmed its holding and rationale in *State v. Schwichtenberg,* No. A05-768, 2006 WL 463865 (Minn. Ct. App. Feb. 28, 2006), *rev. denied* (Minn. May 16, 2006), *cert. denied,* 549 U.S. 994 (2006) (unpublished) (Fourth Amendment right to be free from unwarranted search and seizure not violated by Minnesota's DWI and Refusal law).

Petitioner's argument that the implied consent statute is violated because consent is negated when a DWI suspect is also advised that refusal is a crime essentially suggests that the Implied Consent law should somehow offer a "safe harbor," *i.e.,* the ability to avoid any criminal or civil consequences at all. However, the United States Supreme Court does not agree. In *South Dakota v. Neville,* 459 U.S. 553, (1983) the court stated:

> [T]he officers specifically warned respondent that failure to take the test could lead to loss of driving privileges for one year. It is true the officers did not inform respondent of the further consequence that evidence of refusal could be used against him in court, but we think it unrealistic to say that the warnings given here implicitly assure a suspect that no consequences other than those mentioned will occur. Importantly, the warning that he could lose his driver's license made it clear that refusing the test was not a "safe harbor," free of adverse consequences.

Id. at 566.

Indeed, Petitioner's attempt to argue that the consent here was "coerced" under the Fourth Amendment has been repeatedly and consistently rejected by the Court of Appeals in the following decisions: *Ersfeld v. Commissioner of Public Safety,* No A08-1856 (Minn. Ct. App. Aug. 25, 2009) (unpublished) (specifically rejecting Fourth Amendment coercion argument); *Duncan v. Commissioner of Public Safety,* No. A08-2237 (Minn. Ct. App. Aug. 4, 2009)

(unpublished) (applying *Netland* and specifically rejecting unconstitutional coercion argument).

Petitioner attempts to avoid the well-settled law by relying on dicta in the overturned Court of Appeals' decision in *State v. Netland,* 742 N.W.2d 207 (Minn. Ct. App. 2007), *reversed,* 762 N.W.2d 202 (Minn. 2009). But the Minnesota Supreme Court rejected any Fourth Amendment claim to the Implied Consent law, finding that the exigency exception to the warrant requirement applies in DWI cases due to the evanescent nature of alcohol in the body. *See Netland,* 762 N.W.2d 202 (Minn. 2009). Given this, any reliance on the Court of Appeals' dicta in *Netland* is misplaced.

Petitioner also claims that Respondent cannot rely on both the Fourth Amendment and Implied Consent Law in obtaining a test. However, that specific argument was recently rejected in *State v. DeNucci,* No. A09-2340, 2010 WL 4181148, at *6 (Minn. Ct. App. Oct. 26, 2010) (unpublished, attached). In *DeNucci,* the appellant argued that "the state may not rely on both the implied-consent statute and the Fourth Amendment." The appellate court discussed several earlier cases before affirming the district court's decision rejecting the appellant's argument. *Id.* (discussing *State v. Netland,* 762 N.W.2d 202 (Minn. 2009); *State v. Shriner,* 751 N.W.2d 538 (Minn. 2008); *State v. Scott,* 473 N.W.2d 375 (Minn. Ct. App. 1991)). The court noted Respondent's authority to revoke licenses while relying on *Netland,* a case involving a situation where the "officer invoked the implied consent scheme, and the defendant was charged with refusal for intentionally failing to provide a breath sample." *DeNucci, at* *6 (citing *Netland,* 762 N.W.2d at 205-06). Moreover, the court stated that "the *Scott* opinion stands for the proposition that, if a law enforcement officer invokes the implied-consent statute, the state

thereafter may not *physically* force a person to submit to a chemical test." *Id.* (citing *Scott,* 473 N.W.2d at 377).[5] Significantly, the *DeNucci* opinion above was a urine sample case in which the Court of Appeals specifically held that:

> DeNucci's argument fails because the supreme court's opinion in *Shriner* and *Netland* make clear that the evanescent nature of alcohol in a person's bloodstream constitutes exigent circumstances that justify a warrantless search of a person's blood, urine, or breath in practically every DWI case.

DeNucci, at *5. Accordingly, the *DeNucci* decision rejects Petitioner's argument.

Petitioner's claim that consent was unlawfully coerced when a driver is advised that it is a crime to refuse testing is without merit and should be rejected.

D. A Warrant Was Not Required Based On Exigent Circumstances.

Petitioner argues that there were no exigent circumstances that would justify the warrantless collection and testing of the urine. Petitioner cites no

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[5] *Scott* was a case where blood was drawn *despite the driver's express refusal* to test after being read the Implied Consent Advisory. The Advisory read to Petitioner was much different from the Advisory read to the driver in *Scott.* The language of the Advisory has dramatically changed in the years since *Scott* came out, and Minnesota appellate courts have since concluded that the language meets the requirements of fundamental fairness inherent in a substantive due process analysis. *See State v. Lee,* 577 N.W.2d 730 (Minn. Ct. App. 1998). Petitioner takes liberty with the holding in *Scott* in an attempt to apply it here where it certainly does not apply.

legal authority supporting his argument. The fact that substance concentrations change in the urine due to excretion and bodily functions constitute exigent circumstances that justify the warrantless collection and testing of the urine. The Supreme Court held that "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. The rapid, natural dissipation of alcohol from the body creates a single factor exigent circumstance which justifies warrantless collection of a sample for the purpose of testing blood alcohol. *Shriner,* 751 N.W.2d at 549. The "single factor exigency" underlying the need to promptly collect evidence in DWI cases described in *Shriner* has also been extended to implied consent proceedings. *Froehle v. Commissioner of Public Safety,* No. A07-2299 (Minn. Ct. App. Nov. 18, 2008) *rev. denied* (Minn. Feb. 17, 2008) (unpublished).[6]

Accordingly, the Minnesota Court of Appeals recently recognized that the single-factor exigency exception to the warrant requirement applies with equal force to the collection of a urine sample for alcohol concentration testing. *Ellingson v. Commissioner of Public Safety,* 800 N.W.2d 805 (Minn. Ct. App. 2011), *rev. denied* (Minn. Aug. 24, 2011).

The *Ellingson* decision confirms earlier appellate opinions holding that the exigency exception to the

[6] Imminent destruction of evidence is another single factor that supports exigent circumstances. *See State v. Gray,* 456 N.W.2d 251, 256 (Minn. 1990). Accordingly, a warrantless search is permissible when the delay necessary to obtain a warrant might result in the loss or destruction of the evidence. *See State v. Richards,* 552 N.W.2d 197, 203 (Minn. 1996). Whether exigent circumstances exist is an objective determination. *See Shriner,* 751 N.W.2d at 542.

warrant requirement applies to urine tests. *Bezdicek v. Commissioner of Public Safety,* No. A10-2077 (Minn. Ct. App. July 5, 2011) (unpublished opinion); *Dupont v. Commissioner of Public Safety,* No. A10-2074 (Minn. Ct. App. June 27, 2011) (unpublished opinion); *Zieglmeier v. Commissioner of Public Safety,* No. A08-951 (Minn. Ct. App. March 9, 2010) (unpublished opinion); *Stocco* v. *Commissioner of Public Safety,* No. A09-239 (Minn. Ct. App. Feb. 2, 2010) (unpublished opinion).

Petitioner further claims that the Minnesota cases holding that exigent circumstances allow warrantless testing of urine do not apply because Petitioner was only suspected and tested for controlled or hazardous substances. His claims are not supported by the record. The record contains no evidence that compares the rate of elimination from the body of alcohol to the rate of elimination of any other drug or controlled substance.[7] There is no question that controlled substances, drugs, and hazardous substances are generally eliminated from the human body through urine or other means. There is not a need to compare the precise speeds of elimination, because in every instance, a delay in obtaining samples to test for drugs or controlled substances results in some alteration or loss of evidence. Petitioner claims that there is no evidence on the record that Deputy Herbst believed that the drugs affecting Petitioner were rapidly dissipating. Of course, there is no evidence either that Deputy Herbst believed they were not rapidly dissipating. That is the whole point of the exigent circumstances exception to the warrant requirement:

[7] The paragraph in Petitioner's Memorandum of Law on p. 9, beginning with the word "Exigency" is not supported by evidence in the record and should be stricken.

that the officer need not speculate or guess how much time he has to seek a warrant before the evidence has dissipated. The exigent circumstances exception allows chemical testing precisely for the reason that it is not known how long the evidence will remain intact.

Petitioner's argument here is virtually identical to the argument rejected by the Court of Criminal Appeals of Tennessee in the well-reasoned *State v. Gagne,* 2011 WL 2135105 (Tenn. Crim. App. May 31, 2011) (unpublished opinion, attached). After a car accident, an experienced trooper noted indicia of use of illegal drugs, and the defendant admitted that she had been taking pills, including Hydrocodone, before the wreck. *Id.* at *2. His search of defendant's car produced various baggies and pills. The trooper obtained defendant's blood sample at the hospital, which indicated the presence of cocaine and Diazepam, but showed alcohol to be below 0.01, the equivalent of a negative result. *Id.* at *3-4. An agent testified that the body metabolizes various drugs in order to get the drug out of the body, and some continue to break down once out of the body. The trial court had admitted the toxicology reports over the defendant's Fourth Amendment objections. *Id.* at *6. The Court of Appeals held that a compulsory chemical test falls within the exigent circumstances exception to the Fourth Amendment, citing *State v. Humphries,* 70 S.W.3d 752 (Tenn. Crim. App. 2001). The court correctly held that exigent circumstances apply to drugs as well as alcohol because a person's body processes begin to reduce the amount of the intoxicating substance "shortly after consumption." *Id.* at *7.

The Minnesota decisions hold that exigent circumstances apply to warrantless testing of urine as well as blood and breath. *Ellingson,* 800 N.W.2d at 807. The United States Supreme Court, in *Skinner v.*

Railway Labor Executives' Association, 489 U.S. 602, 109 S. Ct. 1402 (1989), did not distinguish between alcohol and other drugs when considering the importance of timely drug testing. *Skinner* is cited in *Ellingson* and numerous other Minnesota cases, and is one of the foundations of this State's jurisprudence on chemical testing of drivers. *Ellingson,* 800 N.W.2d at 807. The Supreme Court held:

> As the FRA recognized, alcohol and other drugs are eliminated from the bloodstream at a constant rate, see 49 Fed.Reg. 24291 (1984), and blood and breath samples taken to measure whether these substances were in the bloodstream when a triggering event occurred must be obtained as soon as possible. See *Schmerber v. California,* 384 U.S., at 770-771, 86 S. Ct., at 1835-1836. Although the metabolites of some drugs remain in the urine for longer periods of time and may enable the FRA to estimate whether the employee was impaired by those drugs at the time of a covered accident, incident, or rule violation, 49 Fed. Reg. 24291 (1984), the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence.

Skinner, 489 U.S. at 623.

Here, the Supreme Court considered public policy, science, and legal analysis to support its application of the exigent circumstances exception to the warrant requirement to drugs and controlled substances, as well as to alcohol. There is no reason to believe Minnesota courts would not, or should not, follow *Skinner.* The exigent circumstances exception applies to drug testing as well as alcohol testing.

E. A Warrant Was Not Required Based Upon The Potential For Imminent Destruction Of Evidence.

While the suspected drunk driver has no ability to speed up the metabolic burn-off of drugs in the blood stream or breath, the drunk driver does have the ability to destroy the evidence of the drugs concentration in their urine, simply by voiding their bladder. The imminent destruction of evidence is a single factor that can constitute exigent circumstances. *See State v. Gray,* 456 N.W.2d 251, 256 (Minn. 1990). Similarly, a warrantless search is permissible when the delay necessary to obtain a warrant *might* result in the loss or destruction of the evidence. *See State v. Richards,* 552 N.W.2d 197, 203 (Minn. 1996) (emphasis added) The possibility that the suspected drunk driver could render the evidence of his or her urine incapable of testing by deliberately or involuntarily voiding his or her bladder is yet another factor making the collection of urine even more time sensitive than either blood or breath.

F. Given That The Search Was Reasonable, A Warrant Was Not Required.

Rather than analyzing the exceptions to the warrant requirement, this court could simply find that, when balancing the needs of the state with the interests of the individual, a warrantless implied consent search is reasonable. According to the United States Supreme Court in *Skinner v. Railway Labor Executives' Assoc.,* 489 U.S. 602, 619 (quoting *United States v. Montoya de Hernandez,* 473 U.S. 531, 537 (1985), "what is reasonable…depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." The Court further stated that "the permissibility of a particular

practice is 'judged by balancing its intrusion on the individual's Fourth Amendment interests against it promotion of legitimate governmental interests. *Id.* (quoting *Delaware v. Prouse,* 440 U.S. 648, 654 (1979); *United States v. Martinez-Fuerte,* 428 U.S. 543 (1976)).

In *Skinner,* the Supreme Court upheld a statutory chemical testing scheme as reasonable. *Skinner* involved an administrative rule promulgated by the Federal Railroad Administration which prohibited railroad employees from using or possessing alcohol or drugs and from reporting for duty while under the influence. *See* 489 U.S. at 608. The rule authorized the taking of both blood and urine samples from certain employees following certain categories of accidents without any level of suspicion. Additionally, the rule authorized tests upon "reasonable suspicion" in other circumstances. The Supreme Court balanced the interests of the government against the intrusion on the individual's privacy interests and concluded that the regulations were reasonable under the Fourth Amendment. *Id.* at 634. As in *Skinner,* the Minnesota chemical testing statute is also reasonable.

1. The state has a compelling interest in conducting warrantless implied consent searches.

In *Mellett,* the court noted that the state has a compelling interest in "protecting state residents from drunk drivers." The court stated that an important part of protecting the public from drunk drivers is "the testing of those whom officers have probable cause to believe have been drinking and driving while impaired" and that the "balancing test favors intrusion by the state on privacy rights." 642 N.W.2d at 784. Further, in *Szczech v. Commissioner of Public Safety,* 343 N.W.2d 305, 307 (Minn. Ct. App. 1984), the Court of Appeals

stated that the "right of the public to be free from the unwarranted dangers posed by drinking drivers far outweighs any interest any individual may have in the continued unrestricted operation of motor vehicles."

Certainly, the state's ability to protect the public from intoxicated drivers rests in large part on the state's ability to carry out chemical testing without unreasonable delay. The court in *Skinner* noted that "the government's interest in dispensing with the warrant requirement is strongest when, as here 'the burden of obtaining a search warrant is likely to frustrate the governmental purpose behind the search." *Skinner,* 489 U.S. at 623. The court explained that the constant dissipation of alcohol and drugs necessitated a chemical test be conducted "as soon as possible." *Id.*

2. Warrantless implied consent searches are a minimal intrusion on the individual's expectations of privacy.

An individual normally has a high expectation of privacy in his bodily integrity. *See Skinner,* 489 U.S. at 616-17. However, these expectations diminish when an individual voluntarily participates in a highly regulated activity. *Id.* at 627 (finding significant in the fact that employees were participating in an industry regulated pervasively to ensure safety). While drivers on the roadways are not employed by the government, they are taking part in an inherently dangerous and highly regulated activity. Regulations cover all aspects of driving from the qualifications of those who may participate and the rules they must follow while driving, to the type and condition of vehicles that may be driven. Respondent does not assert that drivers relinquish their constitutional rights by getting behind the wheel, but drivers cannot also expect that they can

drink alcohol to the point of impairment, place others in danger by doing so, and be assured that officers will not be able to obtain a chemical test in a prompt manner.

Additionally, the purpose of a warrant is to "assure the citizen that the intrusion is authorized by law, and that it is narrowly limited in its objectives and scope." *Id.* at 622. However, in *Skinner,* the court stated that, "in light of the standardized nature of these tests and the minimal discretion vested in those who administer the program, there are virtually no facts for a neutral magistrate to evaluate." *Id.* The court concluded that "imposing a warrant requirement in the present context would add little to the assurances of certainty and regularity already afforded by the regulations, while significantly hindering, and in many cases frustrating, the objectives of the Government's testing program." *Id.* at 624.

The same is true here. The implied consent statute itself provides assurance that the search is authorized by law, because it only allows testing upon probable cause to believe a person is driving while impaired by alcohol or controlled substances. Under these circumstances a warrant would certainly be granted. The participation of the neutral magistrate would add no additional protection of the driver's privacy rights and would essentially be nothing more than a formality.

Further, the Implied Consent Law limits the scope of the search to the detection of drugs or alcohol in the driver's system, thus eliminating the danger that an officer's search will sweep more broadly than permitted under the circumstances, such as what could occur in a search warrant of a premises. The minimal intrusion on the diminished expectation of privacy that is occasioned by the taking of chemical tests from

individuals who officers have reason to believe were driving while impaired cannot outweigh the state's compelling interest in protecting its citizen from the dangers of drunk driving by ensuring that consequences are imposed upon those individuals who put others in harm's way. As a result, warrantless chemical tests under the Implied Consent Law are reasonable under the Fourth Amendment.

II. A WARRANT WAS NOT REQUIRED TO ANALYZE THE URINE SAMPLE AFTER IT HAD BEEN LAWFULLY COLLECTED.

Petitioner also argues that the analysis of the properly collected urine sample violated the Fourth Amendment because there was no exception to the warrant requirement that applied to the analysis of the urine. Petitioner's argument was squarely rejected in the recent case of *Harrison v. Commissioner of Public Safety,* 781 N.W.2d. 918, 921 (Minn. Ct. App. 2010), where the Court held that an individual lawfully arrested for DWI has no reasonable expectation of privacy in a lawfully obtained sample relating to analysis for alcohol or drug. Petitioner specifically argues that because the "exigency" ended once the urine was collected, a warrant becomes necessary to then analyze that urine. Because a warrant was not required to collect the sample, there is no warrant required to analyze evidence lawfully obtained.

The consent implied by a driver is not only to *provide* a sample, but "to a chemical ***test*** of that person's blood, breath, or ***urine*** for the purpose of determining the presence of alcohol, a *controlled substance* or its *metabolite,* or a *hazardous substance." See* Minn. Stat. §169A.51, subd. 1(a) (2010) (emphasis added). Because Petitioner's consent was never

withdrawn, and Petitioner consented again to taking a urine test when the officer asked, a warrant was not required to collect or analyze the sample that was lawfully obtained. Moreover, the Advisory specifically informs a driver that the test is done to determine whether he or she is under the influence of alcohol or drugs. Because the urine sample was lawfully obtained for the express purpose of testing it for drugs, a warrant was not required to analyze the sample.

Petitioner's claim that a warrant was required before the urine was analyzed has been repeatedly rejected by Minnesota appellate courts. The Supreme Court essentially considered the same argument in *State v. Wiehle,* 287 N.W.2d 416 (Minn. 1979) and squarely rejected it. In *Wiehle,* the driver had also been in an accident and unconscious when his blood was drawn for implied consent purposes. On appeal, the driver advanced a claim that although the blood sample could be taken lawfully while he was unconscious, the Implied Consent Law conferred affirmative rights upon him which he must be allowed to exercise after regaining consciousness. The Court soundly rejected this argument focusing on the fact that rights under the Implied Consent Law are limited by reasonableness, and since Wiehle's physical condition prevented him from refusing, his consent remained continuous and *"permitted use of the blood sample in the implied consent proceeding." See Wiehle,* 287 N.W.2d at 419 (emphasis added).

The Minnesota Court of Appeals also considered this "second warrant" issue in the case of *State v. Soua Thoa Yang,* 352 N.W.2d 127 (Minn. Ct. App. 1984) (J. Randall). In *Yang,* the issue was whether a second warrant had to be obtained for a letter which was lawfully seized from the defendant's residence pursuant to the initial warrant in order to translate it from

Hmong to English. The court rejected the second warrant argument stating that, *"once evidence is lawfully seized, tests such as chemical analysis, ballistics, and other interpretive tests may be run without a further warrant." See id.* at 129 (emphasis added). Further, the court reasoned that no significant Fourth Amendment policy would be served in this process since the evidence had already been properly seized by the first warrant which was lawfully obtained and executed. *See id.*

Just as in *Yang,* the evidence here was lawfully obtained under the Fourth Amendment given established statutory and case law. Petitioner conceded that the officer had probable cause. Given the officer's probable cause, and at least two exceptions to the warrant requirement for collecting the sample (consent and exigent circumstances), the established case law authorized the collection of urine and therefore, the analysis of that urine. Further, no purpose would be served by a second warrant requirement given the fact that the evidence at issue in this matter was already lawfully seized under the Fourth Amendment *for the specific purpose of analysis.* As the court noted in *Yang,* a second warrant would impose "a pro forma requirement which would serve no purpose." *Id.*

Petitioner's reliance on *Walter v. U.S.,* 447 U.S. 649 (1980) is misplaced. There, FBI agents came into possession of some videotapes from private sources and the Court held that, under those circumstances, the government may not exceed the scope of the private search. *See Walter,* 447 U.S. at 653-65. Moreover, the subject films had initially been packaged privately in the mail such that there was a legitimate expectation of privacy and the Court had serious First Amendment concerns *See id.*

This is not a case in which unsuspecting law enforcement officers received Petitioner's urine sample through a sealed package from a private party. Indeed, law enforcement directly and lawfully obtained the evidence through its own DWI investigations of Petitioner in which probable cause was developed, Petitioner was arrested, and the Implied Consent Law invoked. The sample was expressly requested by law enforcement and provided by Petitioner for chemical analysis. There are no Fourth Amendment concerns similar to those raised in *Jacobsen* or *Walter.* As such, these cases are inapposite and *Yang* is controlling.

Finally, Petitioner did not contest the officer's probable cause determination, thereby conceding the fact. Therefore, assuming *arguendo* that the urine sample was obtained or analyzed in violation of the warrant requirement, the Petitioner's drug concentration would have been ***inevitably discovered*** because the officer would have been able to get a warrant for both collection and analysis of the sample based on the probable cause he had that Petitioner was engaged in the criminal activity of driving while impaired.

Under the inevitable discovery doctrine, seized evidence is admissible even if the search violated the warrant requirement if the State can establish that the fruits of a challenged search "ultimately and inevitably would have been discovered by lawful means." *Nix v. Williams,* 467 U.S. 431, 444 (1984). The inevitable discovery doctrine "involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment." *State v. Licari,* 659 N.W.2d 243, 254 (Minn. 2003) (quoting *Nix,* 467 U.S. at 444 n.5, 104 S. Ct. at 2509). The test set out in *Nix* has been interpreted to include two elements: (1) there

must be an "ongoing line of investigation that is distinct from the impermissible or unlawful technique;" and (2) there must be a "showing of a reasonable probability that the permissible line of investigation would have led to the independent discovery of the evidence " *United States v Villalba-Alvarado,* 345 F.3d 1007, 1019-20 (8th Cir. 2003). *See also State v. Blaisdell,* No. A06-467 (Minn. Ct. App. Aug. 8, 2006) (unpublished) (even if driver improperly seized when ordered back into vehicle, the officer, who was in process of running a registration check, would have inevitably discovered tabs were expired).

In this case, the officer had probable cause to arrest Petitioner for DWI. Thus, the officer would have been successful in obtaining a warrant to collect and analyze the urine sample. As a result, the fact that Petitioner was driving under the influence of drugs in his system would have inevitably been discovered.

Given this abundance of published ease law rejecting Petitioner's argument that a warrant was required to analyze the urine, the argument necessarily fails as a matter of law.

CONCLUSION

Respondent respectfully requests that the Commissioner's order revoking Petitioner's driver's license be sustained.

Dated: November 30, 2011 Respectfully submitted,

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