QUESTION PRESENTED FOR REVIEW

When an officer informs a driver that "refusal to submit to a test is a crime," does a driver's acquiescence to the officer's demand to conduct a warrantless search and seizure of the driver's urine qualify as constitutionally valid consent, as a matter of law?

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REPLY PETITION FOR A WRIT OF CERTIORARI

The Petitioner, James L. Peppin, respectfully submits this reply Petition for a Writ of Certiorari to review the judgment of the Minnesota Supreme Court.

REASONS FOR GRANTING THE WRIT

The State of Minnesota's response to Mr. Peppin's petition for a writ of *certiorari* does not directly refute any of the compelling reasons why it is appropriate for this Court to accept review of this matter.

Respondent does not argue that the issue presented in this matter is not an important federal question that should be decided by this Court, an issue that strikes at the heart of what does and does not constitute "consent" for the purposes of the Fourth Amendment.

Likewise, Respondent does not argue that the issue presented in this matter does not conflict with numerous, relevant decisions of this Court.

Nevertheless, Respondent opposes *certiorari* in this matter, misstating the proceedings on appeal and attempting to reframe the arguments raised below.

I. The Issue Presented In This Case Is Ripe For Review By This Court.

In its opposition to this petition, Respondent argues that review of this matter is "premature" because the same issue is currently under review in other appeals currently pending in Minnesota.

Respondent does not, and can not, argue that this matter was not dealt with by a state court of last

resort, for it was. There can be little doubt that the question presented in this case – namely, does a driver's mere acquiescence to a law enforcement agent's demand to conduct a warrantless search and seizure of that driver qualify as constitutionally valid consent, when withholding consent is treated as a criminal act - is not only pending in Minnesota, but in many of the other jurisdictions that currently impose criminal penalties for withholding consent to searches in DWI cases.

As was stated in Mr. Peppin's original petition, the practice of legislatively eliminating the protections of the Fourth Amendment in all DWI cases, by coercing individuals to give up their right to withhold consent to a warrantless search, is already entrenched in ten States. In the wake of *Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552 (2013), it is logical to assume that even more States will pass these types of laws. Criminalizing test refusal is at least as effective a method of removing DWI searches from the protections of the Fourth Amendment Warrant Clause as was the discredited doctrine of "single-factor exigency."

In this context, where over a million DWI searches are performed annually by law enforcement agents around the country,[1] it is vital that this question is answered as soon as possible. Accepting review in this case would not only avoid the vast amount of judicial resources that would be spent repeatedly answering this exact question, but would

[1]In 2010, approximately 1.4 million DWI arrests were performed. U.S. Department of Justice, Federal Bureau of Investigation, *Uniform Crime Report*, *Crime in the United States, 2010*, http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/persons-arrested/arrestmain.pdf (last visited August 22, 2013)

also ensure uniformity in the application of the Fourth Amendment to DWI searches that occur with such frequency and regularity.

The issue raised in *Peppin v. Comm'r of Pub. Safety* could not be raised any more cleanly or concisely, and was presented at every stage of litigation. Whether the same issue is pending in any other court is irrelevant to the fact that Mr. Peppin's case presents the ideal opportunity to review an issue that already has a direct bearing on how the Fourth Amendment is applied to DWI cases across the United States.

II. The Precise Issue Presented Was Preserved Throughout the Appeal Process and Was Not "Passed On" Below.

Respondent cannot dispute that the issue presented in this matter was not only raised at every level of review, but was explicitly and intentionally framed so as to highlight the unconstitutional nature of Minnesota's criminalization of "test refusal." Minn. Stat. §169A.20, subd. 2 (2006).

Respondent nonetheless raises the red herring that the precise constitutional issue presented (and ruled upon) was somehow "conceded" by Mr. Peppin upon appeal. This is a misstatement of the procedural posture of this case and a misunderstanding of what question is presented for review.

The case of *Peppin v. Comm'r of Pub. Safety* fundamentally differs from the factual setting presented to this Court in *South Dakota v. Neville*, 459 U.S. 553, 564, 103 S.Ct. 916, 923 (1983). There, this Court held that the use of a driver's refusal against him or her at trial does not violate the Fifth Amendment right against self-incrimination, because

"refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer." *Id.* In this matter, unlike the driver in *Neville*, Mr. Peppin *did not* refuse to submit to a warrantless search. In fact, after being told he was required to provide his consent and that if he withheld that consent he would face up to a year in jail, he *agreed* to submit to a warrantless search.

The "concessions" made on appeal in this matter reflect the understanding that Mr. Peppin lacked standing to directly challenge Minnesota's decision to punish drivers who withhold consent with jail sentences – but only because Mr. Peppin did not actually refuse, and was not "coerced" into refusing any more than the driver in *Neville* was "coerced" into refusing. Had Mr. Peppin refused, and therefore been charged with the crime of test refusal, the procedural posture in this case would be slightly different . . . but would still present a significant constitutional question.

Instead, Mr. Peppin did what was expected of him; in the face of threats of incarceration, and after being told that he had no choice, he agreed to submit to a warrantless search and seizure of his urine. The question presented in this matter, and the primary question raised throughout these proceedings, is whether or not Mr. Peppin's mere acquiescence to claims of lawful authority can properly be deemed to be "consent" *as a matter of law*. *Bumper v. North Carolina*, 391 U.S. 543, 548, 88 S.Ct. 1788, 1792 (1968) ("When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to

a claim of lawful authority") (internal citations omitted).

It is absurd to argue that Mr. Peppin specifically challenged the warrantless search and seizure in this matter and then promptly and immediately waived that issue upon appeal. Respondent's misunderstanding as to what aspects of Minnesota's test refusal law Mr. Peppin has standing to challenge (the coercive nature of the criminalization of test refusal) versus what he lacked standing to challenge (the actual punishment of individuals who refuse to consent to warrantless searches) is not a valid basis to defer granting the petition in this matter.

As a practical matter, the procedural posture regarding any Fourth Amendment challenge to the practice of criminalizing the withholding of consent in DWI searches is likely irrelevant. To be fair, whether the driver refuses to consent to a warrantless search, or is compelled to agree, the ultimate constitutionality of the law at issue will likely be the same - either the criminalization of test refusal violates both the unconstitutional conditions doctrine (for those who refuse), and is unconstitutionally coercive (for those who agree), or the whole scheme is constitutional, whether a driver refuses or not. However, Mr. Peppin's challenge is directed towards the coercive aspects of test refusal laws like Minnesota's, not the imposition of punishment upon those who actually do refuse.

Therefore, while Petitioner would like nothing more than for this Court to invalidate the practices of the various states that imprison DWI suspects who refuse to consent to warrantless searches,[2] that

[2] *Camara v. Municipal Court of City and County of San Francisco*, 387 U.S. 523, 540 (1967) ("we therefore conclude that

punishment was not levied against Mr. Peppin, and he "conceded" as much on appeal.

Instead of arguing whether or not the criminalization of test refusal runs afoul of the Due Process Clauses of the Fifth and Fourteenth Amendments, or violates the unconstitutional conditions doctrine, Mr. Peppin respectfully requests that this Court grant the petition in this matter and address the equally unconstitutional side to this law - the method by which many States, including Minnesota, coerce drivers into waiving their Fourth Amendment right to demand a warrant by virtue of treating the withholding of consent as a criminal act in and of itself.

This was the specific question raised at every step of this case, the specific question that was fully litigated at every step of this case, and is what makes this case ideal for resolving an important question of federal law that has not been, but should be, settled by this Court.

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appellant had a constitutional right to insist that the inspectors obtain a warrant to search and that appellant may not constitutionally be convicted for refusing to consent to the inspection."); *See v. City of Seattle*, 387 U.S. 541, 546 (1967) ("Therefore, appellant may not be prosecuted for exercising his constitutional right to insist that the fire inspector obtain a warrant authorizing entry upon appellant's locked warehouse.")

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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