No.

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER GAEDE, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition for Writ of Certiorari to the
Illinois Appellate Court

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Introduction

Mr. Gaede was arrested for suspicion of drunk driving. The State requested his consent to breath analysis. He refused, believing it was his right to do so. The State punished him with significant consequences; his driver's license was suspended and his refusal was used against him in the subsequent criminal prosecution.

I.

Do motorists have the Fourth Amendment rights to refuse consent to warrantless breath-analysis, and to demand compliance with the Warrant Clause, before the State invades their bodily integrity in search of incriminating evidence?

II.

If so, can the State punish motorists for asserting these Fourth Amendment rights?

TABLE OF CONTENTS

INDEX TO APPENDIX

TABLE OF AUTHORITIES

Cases

Statutes

Westlaw Internet Search

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The petitioner, Christopher Gaede, respectfully petitions for a Writ of Certiorari to review the Illinois Appellate Court's opinion upholding the constitutionality of Illinois' implied consent statute and affirming Mr. Gaede's conviction.

OPINION BELOW

The published opinion of the Illinois Appellate Court is reported at *People v. Gaede*, 2014 IL App (4th) 130346, reh'g denied (Dec. 22, 2014), appeal denied (Ill. Mar. 25, 2015), a copy of which is attached to this petition as Appendix A.

JURISDICTION

On November 4, 2014, the Illinois Appellate Court issued its opinion, affirming Mr. Gaede's conviction. (App. A). On December 22, 2014, the court denied a timely filed Petition for Rehearing. (App. B). On March 25, 2015, the Illinois Supreme Court denied a timely filed Petition for Leave to Appeal. (App. C). This petition is being filed within ninety days of the denial of the Petition for Leave to Appeal. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

625 ILCS 5/11-501.1(a) (West 2012)

Any person who drives or is in actual physical control of a motor vehicle upon the public highways of this State shall be deemed to have given consent, subject to the provisions of Section 11-501.2, to a chemical test or tests of blood, breath, or urine for the purpose of determining the content of alcohol, other drug or drugs, or intoxicating compound or compounds or any combination thereof in the person's blood if arrested, as evidenced by the issuance of a Uniform Traffic Ticket, for any offense as defined in Section 11-501 or a similar provision of a local ordinance, or if arrested for violating Section 11-401. If a law enforcement officer has probable cause to believe the person was under the influence of alcohol, other drug or drugs, intoxicating compound or compounds, or any combination thereof, the law enforcement officer shall request a chemical test or tests which shall be administered at the direction of the arresting officer. ***

625 ILCS 5/11-501.2(c)(1) (West 2012)

If a person under arrest refuses to submit to a chemical test under the provisions of Section 11-501.1, evidence of refusal shall be admissible in any civil or criminal action or proceeding arising out of acts alleged to have been committed while the person under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof was driving or in actual physical control of a motor vehicle.

625 ILCS 5/6-208.1(a) (West2012)

Unless the statutory summary suspension has been rescinded, any person whose privilege to drive a motor vehicle on the public highways has been summarily suspended, pursuant to Section 11-501.1, shall not be eligible for restoration of the privilege until the expiration of:

1. Twelve months from the effective date of the statutory summary suspension for a refusal or failure to complete a test or tests authorized under Section 11-501.1, if the person was not involved in a motor vehicle accident that caused personal injury or death to another; or

2. Six months from the effective date of the statutory summary suspension imposed following the person's submission to a chemical test which disclosed an alcohol concentration of 0.08 or more, or any amount of a drug, substance, or intoxicating compound in such person's breath, blood, or urine ***.

STATEMENT OF THE CASE

As this Court noted in *Missouri v. McNeely*, 569 U.S.___, 133 S.Ct. 1552 (2013):

> "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. [citation]. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *Id.* at 1566.

Illinois law imposes these standard consequences. 625 ILCS 5/11-501.1(e) (West 2012) (summary suspension); 625 ILCS 5/11-501.2(c) (West 2012) (refusal evidence).

The issue posed by implied consent laws, even from a lay-person's perspective, is that they subject individuals to multiform punishment for doing nothing more than asserting the Fourth Amendment right to refuse consent to a warrantless search. Essentially, these statutes function as warrant-avoidance devices, relieving the State of the obligation of procuring a warrant before invading its citizens' bodies in search of incriminating evidence. In that way, these statutes not only circumvent constitutional protection, but worse, they represent an effective means by which the State can legislate Fourth Amendment rights out of existence—simply enact laws that punish anyone who asserts his or her rights.

Although the ultimate goal of implied consent statutes is no doubt admirable, that end must be achieved through constitutional means. And indeed, it can be. However, the current construction of most, if not all, such statutes fails in that respect in two fundamental ways: (1) by including a procedural mechanism that constitutional principles prohibit—punishment for asserting a right; and (2) by omitting a procedural safeguard that constitutional principles require—the right to request a warrant.

The remedy to these procedural defects, and the innumerable legal issues that flow therefrom, is seemingly very simple; in those drunk-driving investigations where consent is refused, but police can reasonably obtain a warrant, they should at least attempt to do so. In light of the availability of the exigent circumstances exception, it appears that if police do just that, they will either: (1) receive a warrant or (2) reasonably confront exigent circumstances.[1]

In either case, the requirements of the Fourth Amendment are respected, and the State is able to generate the very same evidence (BAC or refusal). Once satisfied, the Fourth Amendment no longer stands as an impediment to the imposition of significant civil and criminal consequences against those who refuse nonetheless. Thus, the same end is achieved, but through constitutional means, without denying the basic right to refuse consent to warrantless State intrusion into the human body.

The proposed rule, that police attempt to get a warrant, is not a bright-line or *per se* rule, as other exigencies may preclude even an attempt to procure a warrant. Nevertheless, it would provide essential guidance on what the Fourth Amendment requires of police in routine DUI investigations. The rule would not affect the removal of drunken motorists from the roadways, since it only applies after arrest. Nor would it pose significant administrative inconvenience. Most importantly, the rule would respect Fourth Amendment rights, and in that way, redress many of the constitutional issues posed by implied consent search schemes.

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[1] Given this Court's language in *McNeely*, 133 S.Ct. at 1563, 1568, that factors "such as the procedures in place for obtaining a warrant or the availability of a magistrate judge *** may establish an exigency that permits a warrantless search[,]" most courts would likely conclude that an officer faced an exigent circumstance if, in a routine DUI case, he or she made a good faith attempt to get a warrant, but was unable to do so.

Material Facts

On February 19, 2012, Mr. Gaede was stopped by police, not for suspicion of drunk driving, but because his motorcycle matched the description of the suspect vehicle of an alleged hit-and-run. (III, R. 88). During the stop, officers noticed the smell of alcohol on his breath and subjected him to field sobriety testing. (III, R. 89, 116). Believing he exhibited sufficient cues of intoxication, the officers arrested Mr. Gaede on suspicion of drunk driving. (III, R. 133). He was then taken to the county jail and asked to submit to breath analysis; he refused, believing it was his right to do so. (III, R. 141, 143, 231).

A jury trial was held on January 28, 2013. (III, R. 1). The arresting officer testified regarding Mr. Gaede's field sobriety testing, and essentially only described technical failures. (III, 130-133). During the walk-and-turn-test, Mr. Gaede allegedly turned around naturally, rather than taking five, small one-footed steps as directed, and his heel did not quite touch his toe three out of eighteen steps. (III, R. 129-130, 140). During the standing-leg-test, he counted as directed from 1,001 to 1,016, but did not count in the 1,000's from 17 to 30. (III, R. 132). Based on the officer's testimony, the Illinois Appellate Court opined generally that Mr. Gaede "performed poorly." *People v. Gaede*, 2014 IL App (4th) 130346, ¶ 8-9.

The officer admitted that the other alleged cues of intoxication had potentially innocent explanations. The smell of alcohol on Mr. Gaede's breath could have been caused by a single alcoholic beverage. (III, R. 147). His bloodshot and watery eyes could have been due to riding his motorcycle in the cold February weather. (III, R. 147). Another officer claimed that Mr. Gaede's speech seemed "unnatural for his normal

speaking ability," but admitted he had never spoken to Mr. Gaede before. (III, R. 114). Notably, the officers said that Mr. Gaede was polite and cooperative during the investigation with a cavalier and nonchalant demeanor. (III, R. 91, 153).

Three witnesses, who were merely acquainted with Mr. Gaede, testified that he went out with their group that evening and had two of beers, before boastfully refusing multiple drink offers because of what he called the "biker code." (III, R. 205-222). Mr. Gaede explained to the court that he lives by a code under which he only consumes two beers if he is out on his motorcycle. (III, R. 223, 225). Apparently, he touted this "biker code" with such pride that evening that it became a joke amongst the group. (III, R. 207).

The State offered to the jury, as evidence of guilt, the notice Mr. Gaede signed the night of his arrest, which warned of the one-year summary suspension of driving privileges for refusing to submit to breath analysis. (III, R. 142; State Ex. 4). The State mentioned multiple times that he refused breath analysis and asserted that this refusal was "evidence [of] his belief in his own guilt." (III, R. 81, 250-251). The State explained that Mr. Gaede worked out of town and that driving was "very important to his livelihood." (III, R. 250). The State argued it is "very telling" that he "chose to lose his driver's license rather than submit to the test." (III, R. 250).[2]

Thereafter, the jury found Mr. Gaede guilty of driving under the influence of alcohol. (C. 83). Mr. Gaede appealed.

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[2] Adverse inference evidence and commentary is authorized by statute, 625 ILCS 5/11-501.2(c)(1) (West 2012) ("evidence of refusal shall be admissible in any civil or criminal action or proceeding ****."), and by Illinois case law (*see, e.g., People v. Johnson*, 353 Ill.App.3d 954, 958 (2004) (citing 625 ILCS 5/11-501.2(c)(1) and holding that the State made a "legitimate inference" when it repeatedly argued that the defendant failed to prove his innocence by submitting to chemical analysis)).

Appellate Procedural History

On appeal, Mr. Gaede argued that Illinois' implied consent statute unconstitutionally authorizes civil and criminal penalties to punish anyone who exercises the Fourth Amendment right to refuse consent to a warrantless search. (Df. br. 8-25). He further argued that the statute's criminal penalty, adverse inference evidence, prevented a fair trial and contributed to his conviction. (Df. br. 25-29); *see People v. Gaede*, 2014 IL App (4th) 130346, ¶ 17 (describing arguments on appeal); *see also, e.g., People v. Bryant*, 128 Ill.2d 448, 454 (1989) (Illinois law provides that "a constitutional challenge to a statute can be raised at any time").

The Illinois Appellate Court disagreed, explaining, "Here, defendant withdrew his consent after his arrest. As a result, there was no warrantless, nonconsensual search. Thus, defendant's fourth-amendment rights could not have been violated." *Gaede*, 2014 IL App (4th) 130346, ¶ 24. The court also noted, "the various opinions in *McNeely* make clear a majority of the Supreme Court justices do not question the constitutionality of implied-consent statutes." *Id.* at ¶ 26 (citing *McNeely*, 133 S.Ct. at 1556, 1566, 1574); *see also People v. Harris*, 2015 IL App (4th) 140696, ¶ 48 (quoting *Gaede*, 2014 IL App (4th) 130346, ¶ 26).

Petition for Leave to Appeal to the Illinois Supreme Court was timely filed on January 23, 2015. The Petition alleged that Illinois' implied consent statute unconstitutionally authorizes punishment for asserting Fourth Amendment rights and that the criminal penalty impermissibly contributed to Mr. Gaede's conviction. (Df. PLA 7-18). The Illinois Supreme Court denied the petition on March 25, 2015.

REASONS FOR GRANTING CERTIORARI

I.

Illinois' implied consent statute unconstitutionally authorizes significant consequences for asserting Fourth Amendment rights.

Chemical analysis, such as breath testing, is an endeavor into the human body that utilizes technology to reveal intimate information about an individual that is otherwise undiscoverable. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-617 (1989) (search); *see Kyllo v. U.S.*, 533 U.S. 27, 34 (2001) (utilizing technology); *see also U.S. v. Jones*, ___U.S.___, 132 S.Ct. 945, 949-950 (2012) (same). It is therefore a search and subject to the strictures of the Fourth Amendment. *Skinner*, 489 U.S. at 616-617; *see also Maryland v. King*, 133 S.Ct. 1958, 1969 (2013) (affirming *Skinner*).

As a search, the warrant requirement applies generally to breath analysis. *See Schmerber v. California*, 384 U.S. 757, 770 (1966); *see Missouri v. McNeely*, 569 U.S. ___, 133 S.Ct. 1552, 1559 (2013) (discussing *Schmerber* and noting that "the warrant requirement applie[s] generally to searches that intrude into the human body"). Searches conducted without a warrant are *per se* unreasonable, unless an exception applies. *See e.g., McNeely*, 133 S.Ct at 1558; *Katz v. U.S*, 389 U.S. 347 (1967).

In the context of a DUI investigation, no warrant exception categorically excuses compliance with the basic command of the Fourth Amendment. *See McNeely*, 133 S.Ct. at 1558, 1561, 1563 (search incident to arrest and exigent circumstances); *see Schmerber*, 384 U.S. at 770-772 (same); *see also Arizona v. Gant*, 556 U.S. 332, 338-339 (2009) (search incident to arrest); *see Schneckloth v. Bustamonte*, 412 U.S. 218, 224-225, 228 (1973) (consent); *see Bumper v. N. Carolina*, 391 U.S. 543, 548 (1968)

(consent); *see also, e.g., Frost v. R.R. Comm'n of California*, 271 U.S. 583, 593-594 (1926) (doctrine of unconstitutional conditions); *see Ferguson v. City of Charleston*, 532 U.S. 67, 81-83 (2001) (special needs); *see City of Indianapolis v. Edmond*, 531 U.S. 32, 38-39, 42-48 (2000) (special needs); *Cf. Michigan Dept. of State Police v. Sitz*, 496 U.S. 444 (1990); *see also Skinner*, 489 U.S. at 621, n. 5.

As such, individuals generally have the right to refuse consent to warrantless breath analysis, and to demand compliance with the Warrant Clause, before the State invades their bodily integrity in search of incriminating evidence. *See e.g., Schneckloth*, 412 U.S. at 234 (refuse consent); s*ee, e.g., Florida v. Jimeno*, 500 U.S. 248, 252 (1991) (limit scope of consent); *see, e.g., U.S. v. Dyer*, 784 F.2d 812, 816 (7th Cir. 1986) (withdraw consent); *see, e.g., U.S. v. Tatman*, 397 F. App'x 152, 162 (6th Cir. 2010) (same); *see McNeely*, 133 S.Ct at 1561 ("where police officers can reasonably obtain a warrant ***, the Fourth Amendment mandates that they do so"); *see also Camara v. Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 540 (1967) (appellant had right to refuse consent to administrative search and demand a warrant); *see also, e.g., Michigan v. Tyler*, 436 U.S. 499, 511-512 (1978) ("'searches for evidence of crime,' [] ordinarily require a warrant"); *Cf. King*, 133 S.Ct. at 1972-80 (non-evidentiary search).

Because individuals have these Fourth Amendment rights, it reasonably follows that they cannot be punished for asserting them; to punish the exercise of a right, is to violate that very right. *See Griffin v. California*, 380 U.S. 609, 614 (1965) (Fifth Amendment); *see also Doyle v. Ohio*, 426 U.S. 610, 611 (1976) (same); *U.S. v. Prescott*, 581 F.2d 1343, 1352 (9th Cir.1978) (applying *Griffin* to the Fourth Amendment); *U.S. v. Taxe*, 540 F.2d 961, 969 (9th Cir. 1976) (same); *U.S. v Thame*, 846 F.2d 200, 206-207

(3d Cir. 1988) (same); *U.S. v. Moreno*, 233 F.3d 937, 941 (7th Cir. 2000) (same); *see also Camara*, 387 U.S. at 540 (holding that "appellant may not constitutionally be convicted for refusing to consent to the inspection"); *see also, e.g., Harman v. Forssenius*, 380 U.S. 528, 540 (1965) ("It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution.").

This is precisely the constitutional infirmity of Illinois' implied consent statute. It explicitly authorizes significant civil and criminal consequences for asserting the Fourth Amendment rights to refuse consent and demand a warrant. *See McNeely*, 133 S.Ct. at 1566 (discussing consequences). The motorist's driver's license is immediately suspended. 625 ILCS 5/11-501.1 (e) (West 2012) (summary suspension); 625 ILCS 5/6-208.1(a) (West 2012) (one year suspension). Worse, the statute authorizes the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution. 625 ILCS 5/11-501.2(c) (West 2012) ("evidence of refusal shall be admissible in any civil or criminal action***"); *see also, e.g., People v. Johnson*, 353 Ill.App.3d 954, 958 (2004) (citing 625 ILCS 5/11-501.2(c)(1) (West 2002) and holding that the State made a "legitimate inference" when it repeatedly argued that the defendant failed to prove his innocence by submitting to chemical analysis)); *see also, e.g., People v. Garriott*, 253 Ill.App.3d 1048, 1052 (1993) (refusal is admissible as evidence of "consciousness of guilt"). Thus, the implied consent statute not only discourages people from, but in fact punishes people for, asserting their rights.

Further, the statute does not afford the opportunity to request a warrant before being subjected to these significant consequences. *See* 625 ILCS 5/11-501 (West 2012). This procedural defect affects the voluntariness, and thus the validity, of every consent

to warrantless chemical-analysis, as individuals face the cruel dilemma—submit to warrantless State intrusion into one's body or suffer punishment for asserting a right. *See, e.g., Schneckloth*, 412 U.S. at 228 (valid "consent [can]not be coerced, by explicit or implicit means, by implied threat or covert force").

Illinois' implied consent statute is therefore unconstitutional both because it omits a procedural safeguard that constitutional principles require, the right to request a warrant, and because it includes a procedural mechanism that constitutional principles prohibit, punishment for asserting a constitutional right.

Mr. Gaede was subjected to this unconstitutional search scheme. The State discovered alcohol on his breath and demanded evidence. (III, R. 113, 142). He refused, asserting the basic constitutional right to be free from warrantless State intrusion into one's body. (III, R. 231). Consequently, he was punished. His driver's license was suspended for one year and his reliance on Fourth Amendment protection was admitted against him as evidence of guilt at his subsequent criminal trial. (III, R. 81, 141). This, as well as the State's corresponding adverse inference commentary, were constitutional errors that prevented a fair trial and contributed to his conviction. (III, R. 250-251). Because Mr. Gaede was prejudiced by the statute's constitutional infirmity, he is entitled to a new trial.

As such, this Court should grant Certiorari and hold: (1) motorists have the Fourth Amendment rights to refuse consent to warrantless breath-analysis, and to demand compliance with the Warrant Clause; (2) the State cannot punish motorists for asserting these Fourth Amendment rights; (3) Illinois' implied consent statute is procedurally defective; and (4) Mr. Gaede is entitled to a new trial.

II.

The Illinois Appellate Court decided an important question of federal law in a way that conflicts with this Court's precedent.

The Illinois Appellate Court concluded that Fourth Amendment rights cannot be violated where one is punished for asserting them simply because in such a case, no search occurs. *People v. Gaede*, 2014 IL App (4th) 130346, ¶ 24. This Court reached a contrary decision in *Camara*, 387 U.S. at 540, where, like here, no search occurred. That, however, did not preclude this Court from concluding that individuals cannot constitutionally be convicted of a crime for asserting the Fourth Amendment rights to refuse consent to administrative searches and to demand a warrant. *Id.*

The punishment at issue in *Camara*, conviction of a crime, is concededly more punitive than the civil and criminal consequences at issue here. Nevertheless, the search at issue in *Camara* was merely an administrative search of an apartment for housing code violations, which is much less constitutionally significant than the investigative searches of the human body for incriminating evidence at issue here. *Id.* at 530, 535, 537-538 (discussing administrative and investigative searches); *see McNeely*, 133 S.Ct. at 1558 (discussing *Schmerber*, 384 U.S. at 770 (noting the significance of invading the human body in search of evidence of guilt)); *see also Ferguson*, 532 U.S. at 83 (discussing the significance of "generat[ing] evidence *for law enforcement purposes*") (emphasis original); *see also Edmond*, 531 U.S. at 42 (impermissible primary purpose of search scheme was to "uncover evidence of ordinary criminal wrongdoing"); *Cf. King*, 133 S.Ct. at 1972-1980 (discussing the significance of the non-evidentiary nature of the search).

In any event, it is constitutionally impermissible to punish the exercise of Fourth Amendment rights. *See, e.g.*, *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) ("It has long been established that a State may not impose a penalty upon those who exercise a right guaranteed by the Constitution."). If this were not the case, and indeed Fourth Amendment rights could not be violated where an individual is punished for asserting them, then the State need only enact sweeping warrant-avoidance laws, criminalizing the exercise of the right, and in that way, it could effectively legislate Fourth Amendment rights out of existence.

Although "[i]t is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence" (*Frost*, 271 U.S. at 594), many states are beginning to do just that, making it a criminal offense to refuse consent to warrantless State intrusion into one's body. *See, e.g.*, N.D.C.C. 39-08-01(2)(a) (West 2015) (North Dakota); VA. Code Ann. 18.2-268.3(A) (West 2015) (Virginia); O.R.S. 813.095 (West 2015) (Oregon); Minn. Stat. Ann. 169A.51 (West 2015) (Minnesota).

The dangerously slippery-slope of warrant-avoidance laws needs no explanation. Under the Illinois Appellate Court's reasoning, any such statute would survive constitutional scrutiny, and not because it satisfies constitutional requirements, for there is nothing constitutional about punishing the exercise of a fundamental right. Rather, such a statute would survive because it only applies when no search occurs, and thus, when Fourth Amendment rights are apparently not implicated.

Without intervention by this Court, these warrant-avoidance statutes, which have thus far been successful in enabling warrantless State intrusion into the human

body, will likely next be utilized to gain entry into our "houses" and "effects" as well. The Illinois Appellate Court's decision, that Mr. Gaede's "fourth-amendment rights could not have been violated" since "there was no warrantless, nonconsensual search[,]" (*Gaede*, 2014 IL App (4th) 130346, ¶ 24), not only provides support for these laws, it conflicts with this Court's precedent. For those reasons, this Court should grant Certiorari and vacate the court's judgment.

III.

This case permits the Court to provide essential guidance on an issue of national significance—the constitutionality of implied consent statutes.

As Justice Kennedy noted in *McNeely*, "this Court, in due course, may find it appropriate and necessary to consider a case permitting it to provide more guidance than it undertakes to give today." *McNeely*, 133 S.Ct.at1569 (Kennedy, J. concurrence). The instant case does just that. Mr. Gaede was arrested for suspicion of drunk driving. The State requested his consent to breath analysis. He refused, believing it was his right to do so. The State punished him with significant civil and criminal consequences.

These simple and straightforward facts squarely present two important questions of federal law: (1) Do motorists have the Fourth Amendment rights to refuse consent to warrantless breath-analysis, and to demand compliance with the Warrant Clause, before the State invades their bodily integrity in search of incriminating evidence; and (2) if so, can the State punish motorists for asserting these Fourth Amendment rights?

Resolution of these questions permits this Court to provide essential guidance on an issue of national significance that, in the wake of *McNeely*, is being frequently litigated in State courts nationwide—the constitutionality of implied consent statutes. As of June 18, 2015, 472 cases have cited *McNeely*, and 293 of those reference implied consent. *See* https://a.next.westlaw.com/RelatedInformation/I10b5fb45a74511e2a160cacff148223f/kcCitingReferences.html?docSource=92ea8a635717401aa1b61e1930a1fb5d&pageNumber=1&facetGuid=h2df44f270a7ae9867386427d50494f70&transitionType=ListViewType&contextData=(sc.History*oc.Default) (last visited June 18, 2015).

The source of much of this litigation is the incongruity between this Court's admonition that police should get a warrant, at least with respect to blood analysis, where they can reasonably do so (*McNeely*, 133 S.Ct. at 1561), and this Court's apparent endorsement of implied consent laws (*Id.* at 1566 (discussing "legal tools")). *see also Gaede*, 2014 IL App (4th) 130346, ¶ 26 (citing *Id.* at 1556, 1566, 1574); *see also People v. Harris*, 2015 IL App (4th) 140696, ¶ 48 (quoting *Gaede*, at ¶ 26).

To that end, this case is the ideal vehicle for resolving this incongruity because the civil and criminal punishments authorized by Illinois' implied consent statute are the standard punishments described in *McNeely*, 133 S.Ct. at 1566. *See* 625 ILCS 5/11-501.1(e) (West 2012) (summary suspension); 625 ILCS 5/11-501.2(c) (West 2012) (refusal evidence). Accordingly, if this Court granted Certiorari and upheld the current construction of Illinois' implied consent statute, it would have the practical effect of endorsing all statutes with similar civil and criminal punishments.

This case is also the ideal vehicle for resolving the constitutionality of implied consent statutes as to breath analysis specifically. Because breath sample requires the individual's participation, and thus, the individual's consent of sort, it seems there are but two circumstances from which a constitutional challenge to implied consent as to breath analysis could arise.

First, an individual could consent, but allege the consent was coerced by the threat of significant consequences. Such a case, however, would involve a fact-intensive inquiry into the voluntariness of consent, from which any holding could be easily distinguishable. And such a case would offer little guidance as to the constitutionality of the consequences themselves, since they are only imposed when consent is refused.

Second, an individual could simply refuse consent and be punished for doing so, as Mr. Gaede was here. Such a case permits the Court to squarely address both the constitutionality of the consequences themselves, and resolve the voluntariness debate, for if this Court concluded that individuals have no right to refuse consent to warrantless breath-analysis, then voluntariness is a moot inquiry. If, however, this Court concluded that individuals do have the right to refuse warrantless breath-analysis, and cannot be punished for doing so, then the choice to forgo that right would presumably be voluntary.

In sum, the simple and straightforward facts of this case squarely present the opportunity to address two important questions of federal law. Resolution of those questions permits the Court to provide substantial, and much needed, guidance on a growing issue of national significance—the constitutionality of implied consent laws. "Given the large number of arrests for [DUI] in different jurisdictions nationwide ***" (*McNeely*, 133 S.Ct. at 1568), and thus, the vast number of people affected by implied consent search schemes, this Court should grant Certiorari to decided these important questions of federal law.

IV.

The proposed rule, that police attempt to get a warrant, will not impede effective law enforcement.

It would not impede effective law enforcement if this Court concluded that motorists have the Fourth Amendment rights to refuse consent to warrantless breath-analysis and demand compliance with the Warrant Clause, and accordingly, that the State cannot punish motorists for asserting these Fourth Amendment rights. Nor would it impede effective law enforcement if this Court therefore held that the procedural defects of Illinois' implied consent statute render it unconstitutional, and that in those drunk-driving investigations where consent is refused, but police can reasonably obtain a warrant, they should attempt to do so.

First, as noted above, in light of the availability of the exigent circumstances exception (*Riley v. California*, 134 S. Ct. 2473, 2494 (2014)), it appears that police need only make a good faith attempt to get a warrant. *See McNeely*, 133 S.Ct. at 1563, 1568. If police do just that, they will either: (1) receive a warrant or (2) reasonably confront exigent circumstances. *See Id.* (noting that factors "such as the procedures in place for obtaining a warrant or the availability of a magistrate judge *** may establish an exigency that permits a warrantless search"). In either case, the Fourth Amendment is respected and the State is able to generate the very same evidence (BAC or refusal).

This proposed rule, that police attempt to get a warrant, would in part address Chief Justice Robert's concerns in *McNeely* that police may have "no idea [] what the Fourth Amendment requires of [them.]" *McNeely*, 133 S.Ct. at 1569 (Roberts, C.J., concurring in part and dissenting in part). Though not a bright-line or *per se* rule, it would nevertheless provide a basic procedural framework that would generally satisfy the demands of the Fourth Amendment in routine DUI investigations.

Moreover, the proposed rule would not prevent the State from imposing the significant criminal and civil consequences. Once Fourth Amendment requirements have been satisfied by a warrant or by exigent circumstances, motorists would no longer have the constitutionally protected right to refuse consent, and could therefore be punished for refusing, without offending the constitution. In fact, refusal evidence would be all the more convincing where it is shown that one refused despite the issuance of a warrant. Additionally, the disparate license suspensions (6 months for impaired driving and 1 year for refusing consent) would be more justified where constitutional demands have been met. *See* 625 ILCS 5/6-208.1(a) (West 2012).

Notably, the proposed rule would only affect those DUI investigations where the motorist actually asserts the right to refuse. And it would only affect those cases where BAC evidence is actually needed. In cases where the individual is visibly intoxicated, video footage, which is increasingly more available, will generally be dispositive of the ultimate question of intoxication. As such, the proposed rule would primarily only affect close cases.

And it is in those close cases where the role of the impartial magistrate in objectively determining whether the intrusion is justified is most essential. *See Skinner*, 489 U.S. at 622; *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 667 (1989) (quoting *Johnson v. U.S.*, 333 U.S. 10, 14 (1948)) ("A warrant serves primarily to *** interpose a neutral magistrate between the citizen and the law enforcement officer 'engaged in the often competitive enterprise of ferreting out crime.'"); *see also Camara*, 387 U.S. 523, 529 (1967) (quoting, *Johnson*, 333 U.S. at 14) ("'When the right of privacy must reasonably yield to the right of search is, as a rule,

to be decided by a judicial officer, not by a policeman or government enforcement agent.'"); *see Schmerber*, 384 U.S. at 770 ("The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great."); *see McNeely*, 133 S.Ct. at 1567 ("although warrants do impose administrative burdens, their use can reduce breath-test-refusal rates and improve law enforcement's ability to recover BAC evidence").

To that end, because police have unbridled discretion in who they arrest for DUI, they effectively have unbridled discretion in who they subject to the implied consent statutes' warrantless search scheme. *See* 625 ILCS 11-501.1(a) (West 2012). Importantly, the proposed rule would divest police of this unbridled discretion. *Cf. Skinner*, 489 U.S. at 622 (lack of discretion vested in search scheme administrators supported dispensing with the warrant requirement); *see McNeely*, 133 S.Ct. at 1562-1563 (noting the "judge's essential role as a check on police discretion").

Nevertheless, the proposed rule would in no way impede law enforcement's immediate objective of removing impaired drivers from our highways, as implied consent laws only apply after the motorist has been arrested and is no longer a potential road hazard. *See, e.g.*, 625 ILCS 5/11-501.1(a) (West 2012); *McNeely*, 133 S.Ct. at 1566 (motorists in all 50 states must "consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense"); *Cf. Sitz*, 496 U.S. 444 (DUI checkpoints help remove drunk drivers); *see also McNeely*, 133 S.Ct. at 1567 ("We are aware of no evidence indicating that restrictions on nonconsensual blood testing have compromised drunk-driving enforcement efforts in the States that have them.").

The proposed rule would pose only a *de minimis* administrative inconvenience, as ever-evolving technology has vastly improved the efficiency of the warrant process. *McNeely*, 133 S.Ct. at 1561-1563 (describing how technology has made procuring a warrant much easier); *Id.* at 1573 (Roberts, C.J., concurring in part and dissenting in part) (describing jurisdiction where "police officers can e-mail warrant requests to judges' iPads [and] judges have signed such warrants and e-mailed them back to officers in less than 15 minutes"); *see also Riley v. California*, 134 S. Ct. 2473, 2493 (2014); *see also, e.g.*, 20 Ill.Adm.Code 1286.310 (mandating 20-minute observation period prior to breath-analysis reading).

In sum, the proposed rule, that police attempt to get a warrant, is only a minor modification to current police procedure. Modest as it is, the rule could nevertheless resolve many of the legal issues emanating from the *McNeely* decision. The rule provides a basic procedural framework to guide police in routine DUI investigations. The rule permits the same evidence to be generated and the same significant civil and criminal consequences to be imposed. The rule only applies where the individual asserts his or her rights, and only affects those close cases where the role of the impartial magistrate is most essential. The rule in no way impedes the removal of drunken motorist from the roadway, nor does it pose significant administrative inconvenience. The rule respects individuals' Fourth Amendment rights and encourages compliance with the Warrant Clause.

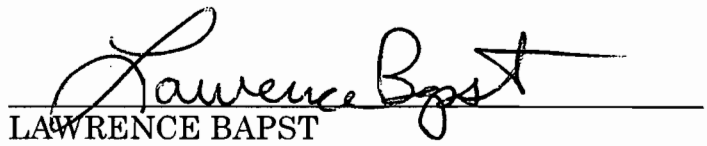
Accordingly, the same end can be achieved, but through constitutional means, without denying the basic right to refuse consent to warrantless State intrusion into the human body.

As such, this Court should grant Certiorari and hold that: (1) motorists have the Fourth Amendment rights to refuse consent to warrantless breath-analysis, and to demand compliance with the Warrant Clause; (2) the State cannot punish motorists for asserting these Fourth Amendment rights; (3) Illinois' implied consent statute is procedurally defective; (4) Mr. Gaede is entitled to a new trial; and (5) in those drunk-driving investigations where consent is refused, but police can reasonably obtain a warrant, they should attempt to do so.

CONCLUSION

For the foregoing reasons, petitioner, Christopher Gaede, respectfully petitions for a Writ of Certiorari to review the judgment of the Illinois Appellate Court.

Respectfully submitted,



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COUNSEL FOR PETITIONER

No.

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER GAEDE, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition for Writ of Certiorari to the
Illinois Appellate Court

PETITION FOR WRIT OF CERTIORARI

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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COUNSEL OF RECORD FOR PETITIONER

APPENDIX TO TABLE OF CONTENTS

2014 IL App (4th) 130346

NO. 4-13-0346

FILED
November 4, 2014
Carla Bender
4th District Appellate
Court, IL

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CHRISTOPHER M. GAEDE, Defendant-Appellant.	)	Appeal from Circuit Court of Macon County No. 12DT81 Honorable Timothy J. Steadman, Judge Presiding.

JUSTICE POPE delivered the judgment of the court, with opinion.
Justices Knecht and Turner concurred in the judgment and opinion.

OPINION

¶ 1 In January 2013, a jury found defendant, Christopher M. Gaede, guilty of driving under the influence (625 ILCS 5/11-501(a)(2) (West 2012)). In March 2013, the trial court sentenced defendant to 24 months' court supervision. Defendant appeals, arguing he is entitled to a new trial because the implied-consent statute (625 ILCS 5/11-501.1(a) (West 2012)) is facially unconstitutional and also unconstitutionally punishes individuals who assert their fourth-amendment (U.S. Const., amend. IV) right to refuse to consent to chemical analysis. We affirm.

¶ 2 I. BACKGROUND

¶ 3 On February 19, 2012, defendant was arrested for driving under the influence (625 ILCS 5/11-501(a)(2) (West 2012)), operating an uninsured vehicle (625 ILCS 5/3-707 (West 2012)), failing to report an accident to police authority (625 ILCS 5/11-407 (West 2012)),

and failing to give information after striking an unattended vehicle (625 ILCS 5/11-404 (West 2012)). Defendant refused to submit to a chemical breath test requested by the arresting officer.

¶ 4 A jury trial was held in January 2013. Randy Clem, a Decatur police officer, testified he received a dispatch at approximately 8 p.m. for a hit-and-run crash involving a blue, chopper-style motorcycle. He stopped defendant, who was driving a motorcycle matching the description. Defendant denied being in an accident and had a nonchalant, cavalier attitude. Officer Clem smelled the odor of alcohol on defendant's breath. Defendant also had bloodshot, glassy eyes.

¶ 5 Officer Kyle Daniels of the Decatur police department testified he was working on the evening in question and was dispatched to the parking lot behind Maustell's Pizza Inn and the Flashback Lounge because of a reported hit-and-run. A truck in the parking lot had damage to the front driver's side fender. Officer Daniels took the truck's owner to the location where defendant had been stopped, and the owner identified defendant as the person who had driven away from the accident in the parking lot.

¶ 6 Decatur police officer Chris Snyder testified he was dispatched to the accident scene but instead went to the location where Clem had stopped defendant. Snyder testified defendant's breath smelled of alcohol, his eyes were glassy and bloodshot, and his speech was slurred. Defendant stated he had consumed a couple of beers.

¶ 7 Officer Snyder noticed several scrapes on the right side of defendant's motorcycle and the motorcycle was missing its right turn signal lens cover. The scrapes appeared to be fresh. When asked about the lens cover, defendant said it had been missing for a long time.

Snyder radioed officers at the accident scene to see if the lens cover was there. Defendant said police would not find the lens cover at the scene of the accident.

¶ 8 Based on defendant's odor of alcohol, bloodshot and glassy eyes, and slurred speech, Snyder requested defendant perform field sobriety tests. During the horizontal gaze nystagmus (HGN) test, defendant did not keep his head still as directed. As a result, Snyder had to restart the test at least twice. The HGN test indicated defendant was under the influence of alcohol. Defendant's performance on the walk-and-turn test also indicated defendant might be under the influence of alcohol. Defendant also performed poorly on the one-legged-stand test. Based on the totality of the circumstances, Snyder arrested defendant for driving under the influence of alcohol. During the search incident to arrest, Snyder found the missing amber lens cover in defendant's sweatshirt pocket. The lens cover had damage consistent with having broken off the motorcycle. It also had paint transfers that matched the color of the paint on the truck that had been scraped in the parking lot. Defendant was adamant he did not put the lens cover in his pocket.

¶ 9 Defendant was taken to the Macon County jail and again performed poorly on the walk-and-turn test and the one-legged-stand test. Officer Snyder testified defendant still showed signs he was under the influence of alcohol. Officer Snyder read defendant the warning-to-motorist form, which defendant appeared to understand. Defendant refused to take the chemical breath test.

¶ 10 At the end of the State's case, the trial court granted defendant's motion for a directed verdict with regard to the charge of operating an uninsured vehicle.

¶ 11 Defendant called witnesses and testified on his own behalf he had two beers at the Wild Dog and nothing at Flashback's. As defendant is not challenging the sufficiency of the evidence to convict, we need not go into the specifics of this testimony.

¶ 12 At the end of defendant's case, the State moved to dismiss the charge alleging defendant failed to report the accident to the police, which the trial court granted. After deliberating, the jury found defendant guilty of driving under the influence of alcohol and not guilty of failing to give information after striking an unattended vehicle.

¶ 13 In March 2013, the trial court sentenced defendant to court supervision for 24 months.

¶ 14 This appeal followed.

¶ 15 II. ANALYSIS

¶ 16 Defendant argues the implied-consent statute is facially unconstitutional. According to defendant, under the statute, any person who drives on public roads is "deemed to have given consent" to chemical analysis of the "blood, breath, or urine for the purpose of determining the content of [intoxicating substances]." 625 ILCS 5/11-501.1(a) (West 2012). He also argues any consent is implicitly extracted by law and therefore is not freely and voluntarily given. Accordingly, defendant contends a search warrant is necessary to comport with fourth-amendment protections against unreasonable searches and seizures.

¶ 17 Defendant also argues the statute unconstitutionally punishes individuals who assert their fourth-amendment right to withdraw their implied consent to chemical analysis. The punishment occurs when the trial court allows evidence of a defendant's refusal of chemical testing as evidence on the ultimate issue of driving under the influence. According to defendant,

drivers are also punished civilly when they exercise their fourth-amendment right to refuse a consent search by loss of driving privileges for at least one year. Defendant contends he is entitled to a new trial because his conviction resulted from a constitutionally infirm statute.

¶ 18 At issue are several sections of the Illinois Vehicle Code. Section 11-501.1(a) of the Vehicle Code states, in relevant part:

> "Any person who drives or is in actual physical control of a motor vehicle upon the public highways of this State shall be deemed to have given consent, subject to the provisions of Section 11-501.2, to a chemical test or tests of blood, breath, or urine for the purpose of determining the content of alcohol, other drug or drugs, or intoxicating compound or compounds or any combination thereof in the person's blood if arrested, as evidenced by the issuance of a Uniform Traffic Ticket, for any offense as defined in Section 11-501 or a similar provision of a local ordinance, or if arrested for violating Section 11-401. If a law enforcement officer has probable cause to believe the person was under the influence of alcohol, other drug or drugs, intoxicating compound or compounds, or any combination thereof, the law enforcement officer shall *request* a chemical test or tests which shall be administered at the direction of the arresting officer. The law enforcement agency employing the officer shall designate which of the aforesaid tests shall be administered. A urine test may be

administered even after a blood or breath test or both has been administered." (Emphasis added.) 625 ILCS 5/11-501.1(a) (West 2012).

Section 11-501.1(c) provides "[a] person requested to submit to a test as provided above shall be warned by the law enforcement officer requesting the test that a refusal to submit to the test will result in the statutory summary suspension of the person's privilege to operate a motor vehicle, as provided in Section 6-208.1 of this Code." 625 ILCS 5/11-501.1(c) (West 2012). Section 6-208.1(a)(1) of the Vehicle Code (625 ILCS 5/6-208.1(a)(1) (West 2012)) provides for a summary suspension of a person's driving privileges if he withdraws his implied consent after an officer's request. Section 11-501.2(c) of the Vehicle Code (625 ILCS 5/11-501.2(c) (West 2012)) allows an individual's refusal to take a breath test at the officer's request to be admitted as evidence against the individual.

¶ 19 According to defendant, "[t]his scheme is fundamentally unfair and facially unconstitutional under the United States and Illinois Constitutions." Defendant argues:

> "Because people have a constitutional right to refuse consent to chemical analysis and demand compliance with the warrant requirement in [driving under the influence (DUI)] investigations, it reasonably follows that people cannot be punished for asserting that right. In short, State action that makes the assertion of a constitutional right costly constitutes a punishment for exercising the right—a punishment that is thereby itself a violation of that very constitutional right."

We disagree with defendant as his argument is based on a false premise.

¶ 20 We first note statutes are presumed constitutional. *People v. Devenny*, 199 Ill. 2d 398, 400, 769 N.E.2d 942, 943 (2002). An individual challenging the constitutionality of a statute bears the burden of demonstrating it is unconstitutional. *Id.* Our supreme court has stated:

> "A facial challenge to the constitutionality of a statute is the most difficult challenge to mount. [Citations.] A statute is facially unconstitutional only if there are no circumstances in which the statute could be validly applied. [Citations.] The fact that the statute could be found unconstitutional under some set of circumstances does not establish the facial invalidity of the statute. [Citation.] Thus, a facial challenge must fail if any situation exists where the statute could be validly applied." *People v. Davis*, 2014 IL 115595, ¶ 25, 6 N.E.3d 709.

Further, courts have a duty to construe a statute in a reasonable manner that upholds the validity of the statute. *Devenny*, 199 Ill. 2d at 400, 769 N.E.2d at 943. We apply a *de novo* standard of review when analyzing the constitutionality of a statute. *Id.*

¶ 21 We note the United States Supreme Court has stated a breath test like the one here is a search within the meaning of the fourth amendment. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 616-17 (1989). However, the fact a breath test constitutes a search does not mean a warrantless breath test is always unconstitutional. As the Supreme Court has stated:

"[T]he Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable. [Citations.] What is reasonable, of course, 'depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself. [Citation.] Thus, the permissibility of a particular practice 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.' [Citations.]

* * *

We have recognized *** that the government's interest in dispensing with the warrant requirement is at its strongest when, as here, 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.' [Citations.] *** [A]lcohol and other drugs are eliminated from the bloodstream at a constant rate, [citation], 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. [Citation.] Although the metabolites of some drugs remain in the urine for longer periods of time and may enable the *** estimat[ion] whether the [person] was impaired by those drugs at the time of a covered accident, incident, or rule violation,

[citation], the delay necessary to procure a warrant nevertheless may result in the destruction of valuable evidence." *Id.* at 619-23.

¶ 22 Defendant contends Illinois's implied-consent law is unconstitutional pursuant to the Supreme Court's decision last year in *Missouri v. McNeely*, __ U.S. ___, 133 S. Ct. 1552 (2013). In *McNeely*, the issue before the Supreme Court was "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for *nonconsensual blood testing in all drunk-driving cases*." (Emphasis added.) *Id.* at ___, 133 S. Ct. at 1556.

¶ 23 With regard to nonconsensual blood tests, the Court found a *per se* exigency did not exist, holding each case had to be judged by its own particular facts. *Id.* at ___, 133 S. Ct. at 1561. However, *McNeely* does not support defendant's position in this case. In *Schmerber v. California*, 384 U.S. 757, 770-72 (1966), the Supreme Court held a warrantless, nonconsensual blood test can be performed in certain situations depending on the totality of the circumstances in a particular case. The Court in *McNeely* noted:

> "[T]he natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*[;] [however,] it does not do so categorically. Whether 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*, __ U.S. at ___, 133 S. Ct. at 1563.

¶ 24 Here, defendant withdrew his consent after his arrest. As a result, there was no warrantless, nonconsensual search. Thus, defendant's fourth-amendment rights could not have

been violated. As stated earlier, a statute is only facially unconstitutional if the statute can never be constitutionally applied. Because the implied-consent statute allowed defendant to refuse the police officer's request to take the warrantless chemical breath test, we cannot find the statute facially unconstitutional.

¶ 25 Defendant next argues Illinois's implied-consent statutory scheme unconstitutionally circumvented his constitutional rights by punishing him for exercising his fourth-amendment right to refuse chemical analysis because his driver's license was suspended and his refusal was introduced as evidence against him at his criminal trial (625 ILCS 5/11-501.2(c) (West 2012)). As stated earlier, defendant's argument is built on a false premise. Defendant erroneously believes he always has a constitutional right to refuse a breath test. This is not true. In *McNeely*, the Supreme Court rejected a *per se* approach to warrantless blood draws based on the exigency of dissipation of alcohol in the blood over time. *McNeely*, ___ U.S. at ___, 133 S. Ct. at 1556. However, the Court noted natural dissipation of alcohol in the blood *may* support a finding of exigency in a specific case based on the totality of the circumstances. *Id.* at ___, 133 S. Ct. at 1563.

¶ 26 We also note the various opinions in *McNeely* make clear a majority of the Supreme Court justices do not question the constitutionality of implied-consent statutes. In Justice Sotomayor's opinion, which was joined by Justices Scalia, Ginsburg, and Kagan, she stated:

> "As an initial matter, States have a broad range of legal tools to enforce their drunk-driving laws and to secure [blood alcohol content (BAC)] evidence without undertaking warrantless

nonconsensual blood draws. For example, all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense. See NHTSA Review 173; *supra*, at 1556 (describing Missouri's implied consent law). Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against him in a subsequent criminal prosecution." *McNeely*, __ U.S. at ___, 133 S. Ct. at 1566.

Further, Chief Justice Roberts, joined by Justices Breyer and Alito, opined:

"The Court is correct when it says that every case must be considered on its particular facts. But the pertinent facts in drunk driving cases are often the same, and the police should know how to act in recurring factual situations. Simply put, *when a drunk driving suspect fails field sobriety tests and refuses a breathalyzer*, whether a warrant is required for a blood draw should come down to whether there is time to secure one." (Emphasis added.) *Id.* at ___, 133 S. Ct. at 1574 (Roberts, C.J., concurring in part and dissenting in part, joined by Breyer and Alito, JJ.).

In his dissent, Justice Thomas stated he would hold a "warrantless blood draw does not violate the Fourth Amendment" after any DUI arrest made with probable cause. *Id.* at ___, 133 S. Ct. at 1574 (Thomas, J., dissenting).

¶ 27 Defendant has failed to establish his constitutional rights were violated. As a result, we need not address his argument he is entitled "to a new trial because the constitutional infirmity of Illinois'[s] implied consent statute contributed to his conviction."

¶ 28 III. CONCLUSION

¶ 29 For the reasons stated, we affirm defendant's conviction. As part of our judgment, we award the State its $75 statutory assessment against defendant as costs of this appeal. 55 ILCS 5/4-2002 (West 2012).

¶ 30 Affirmed.

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT
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P.O. BOX 19206
SPRINGFIELD, IL 62794-9206

CLERK OF THE COURT
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RESEARCH DIRECTOR
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12/22/14

RE: People v. Gaede, Christopher M.
General No.: 4-13-0346
County: Macon
Trial Court No: 12DT81

TO COUNSEL:

The court today denied the petition for rehearing filed in the above entitled cause.

The mandate of this court will issue 35 days from today unless a petition for leave to appeal is filed in the Illinois Supreme Court.

If the decision is an opinion, it is hereby released today for publication.

Carla Bender

Carla Bender
Clerk of the Appellate Court

cc: Jacqueline L. Bullard
Deputy Defender, Office State Aplt. Defender

James Ryan Williams

Jay Scott
Macon County State's Attorney

David J. Robinson
Dep. Director, State's Attorneys Aplt.
Prosecutor

Luke McNeill

SUPREME COURT OF ILLINOIS
SUPREME COURT BUILDING
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March 25, 2015

Mr. James Ryan Williams
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No. 118803 - People State of Illinois, respondent, v. Christopher M. Gaede, petitioner. Leave to appeal, Appellate Court, Fourth District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on April 29, 2015.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

CHRISTOPHER GAEDE, Petitioner,

-vs-

PEOPLE OF THE STATE OF ILLINOIS, Respondent.

On Petition for Writ of Certiorari to the
Illinois Appellate Court

PETITION FOR WRIT OF CERTIORARI

NOTICE AND PROOF OF SERVICE

TO: Honorable William K. Suter, Clerk of the Supreme Court of the United States, Washington, D.C. 20543;

Lisa Madigan, Attorney General, 100 W. Randolph St., 12th Floor, Chicago, IL 60601;

David J. Robinson, Deputy Director, State's Attorneys Appellate Prosecutor 725 South Second Street, Springfield, IL 62704;

Christopher M. Gaede, 4040 N. Warren Street, Decatur, IL 62526

Please take notice that we have mailed the original and ten copies of the enclosed Motion for Leave to Proceed *In Forma Pauperis* and Petition for Writ of Certiorari to the Clerk of the above Court. We have also sent via State of Illinois messenger service three copies to the Attorney General of Illinois, and three copies to the to the State's Attorneys Appellate Prosecutor, and mailed one copy to the Petitioner in an envelope deposited in a U.S. mail box in Springfield, Illinois on June 22nd, 2015.

SUBSCRIBED AND SWORN
to before me on this 22nd day
of June, 2015.

Linsey M Carter
NOTARY PUBLIC

Official Seal
Linsey M Carter
Notary Public State of Illinois
My Commission Expires 09/30/2016

Lawrence Bapst

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