No. _____

In The

Supreme Court of the United States

JOSEPH WAYNE HEXOM,

Petitioner,

v.

STATE OF MINNESOTA,

Respondent.

On Petition For A Writ Of Certiorari To The Minnesota Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Minnesota law makes it a criminal offense for a motorist who has been arrested for driving under the influence to refuse to submit to a chemical test of the person's blood, breath, or urine. Any conduct other than successful submission to a search is deemed to be the criminal act of refusal. The law that criminalizes test refusal was enacted with the express intent to coerce drivers to submit to evidentiary searches in the absence of a warrant. The Supreme Court of Minnesota held that the test refusal law is not unconstitutionally coercive, and that submission to testing under penalty of criminal prosecution for refusal is free and voluntary consent to a warrantless search. The question presented is:

Whether the State may evade the Fourth Amendment warrant requirement by coercing submission to chemical testing by promising criminal prosecution for refusal, and then deeming that coerced submission to be the legal equivalent of free and voluntary consent to search.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Joseph Wayne Hexom, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Minnesota in this case.

OPINIONS BELOW

The Order of the Supreme Court of Minnesota denying further review of this matter, A14-1934, is unreported and is included at App. 1. The opinion of the Minnesota Court of Appeals denying Petitioner's requested relief, A14-1934, is unpublished and is included at App. 2. The order of the trial court in file 27-CR-13-17744 is included at App. 11.

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on December 24, 2015. That court denied Petitioner's petition for further review on November 17, 2015. App. 1. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> 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.

Minnesota law, Minn. Stat. § 169A.20, subd. 2, provides in relevant part:

> It is a crime for any person to refuse to submit to a chemical test of the person's blood, breath, or urine under section 169A.51 (chemical tests for intoxication), or 169A.52 (test refusal or failure; revocation of license).

Minnesota law, Minn. Stat. § 169A.51, provides in relevant part:

> 1. (a) Any person who drives, operates, or is in physical control of a motor vehicle within this state or on any boundary water of this state consents, subject to the provisions of sections 169A.50 to 169A.53 (implied consent law), and section 169A.20 (driving while impaired), 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.

STATEMENT OF THE CASE

This petition is one of several now before the Court presenting a question of exceptional importance: whether a State may criminalize a motorist's refusal to consent to chemical tests of his or her blood, breath, or urine. In affirming convictions for violation of these statutes, state courts have invoked a variety of justifications, among them that such tests may be treated as a routine search incident to arrest; that motorists may be *deemed* to have consented to the administration of such tests; and that such warrantless test requirements are *per se* reasonable. These holdings depart from decisions of this Court, conflict with the rulings of other federal and state courts, and contribute to widespread confusion about the governing rules in this significant area of the law.

The issue presented here accordingly warrants this Court's attention. For the reasons described more fully in the petition for certiorari in *Bernard v. Minnesota*, A14-1470, the Court should grant review in this case. Alternatively, the Court should hold the petition in this case pending disposition of that matter.

On March 16, 2013, Officers Linda Williams and Tyler Quesenberry of the Eden Prairie Police Department stopped Petitioner, Joseph Wayne Hexom, as he was driving in Hennepin County, Minnesota. After developing probable cause to believe that Hexom was driving under the influence of alcohol, officers searched, handcuffed, and locked Hexom in the back of Officer Quesenberry's squad car, and transported him to the Eden Prairie Police Department.

At the police department, Officer Quesenberry read the Minnesota Motor Vehicle Implied Consent Advisory to Hexom. After telling Hexom he was under arrest for driving while impaired, the officer further told Hexom that he was required by law to submit to testing. The officer then added that if Hexom refused, he would be committing an additional crime.

After being told he was required by law to submit to testing, Hexom believed that he did not have a choice in the matter. Officer Quesenberry never told Hexom that submitting to testing would be voluntary or that he had the right to refuse – only that he was required by law to submit. Ultimately, law enforcement obtained a urine sample from Hexom, although no warrant was sought or obtained prior to the execution of this warrantless search and seizure. Analysis of this urine sample led the State to criminally charge Hexom with driving a motor vehicle while over the legal limit.

On October 22, 2013, Petitioner moved to suppress the urine test and dismiss the charges, asserting that it is unconstitutional under the Fourth Amendment of the United States Constitution for a State to criminalize refusal to submit to a chemical test of a driver's urine. App. 14. The state district court denied his motion on March 31, 2014. App. 20. "Under the totality of the circumstances, the compliance with all statutory requirements, and the ruling in *Brooks* finding as a matter of law that the criminal test refusal penalty in the implied consent law is not coercive, Defendant's Motion to suppress test results must be denied." The court reasoned that "[t]he Minnesota Implied Consent Law is a legal tool to enforce drunk driving laws" and "Hexom's compliance with testing establishes consent given freely and voluntarily."

Following the district court's denial of his motion, Petitioner was found guilty of driving with an illegal urine alcohol concentration in a stipulated facts bench trial, paving the way to appeal the district court's Order Denying Motion. App. 4.

On August 17, 2015, the Minnesota Court of Appeals affirmed the district court's decision. App. 9.

Although the court acknowledged that "[a] urine test to determine alcohol concentration is a search," and "[a]n individual does not consent, however, simply by acquiescing to a claim of lawful authority," it concluded that Hexom freely and voluntarily consented to the search. The court based its conclusion

entirely on the Minnesota Supreme Court's decision in *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013), in which the district court found consent because "nothing in the record suggests that Brooks was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired."

"Hexom contends that his consent was coerced because he was read the implied consent advisory, which stated that he was required by law to submit to testing and that test refusal is a crime, while he was in police custody and because his decision to submit to testing was made 'without the advice of counsel and believing he had no choice.' But, in *Brooks*, the Supreme Court explicitly rejected the argument that the implied-consent advisory is unconstitutionally coercive under similar circumstances. 838 N.W.2d at 571. . . . Similarly to *Brooks*, Hexom was read the implied-consent advisory while in custody and informed that he was required by Minnesota law to take a chemical test and that test refusal is a crime. *See id* at 565. . . . Because the circumstances here are materially indistinguishable from those in *Brooks*, we find that Hexom was not unconstitutionally coerced." App. 8.

The Supreme Court of Minnesota subsequently denied Petitioner's request for review. App. 1.

REASONS FOR GRANTING THE WRIT

This petition is one of several that present the question of whether a State may criminalize a motorist's refusal to consent to a warrantless chemical search. This Court has granted review to three cases that raise this question, *see Bernard v. Minnesota*, No. 14-1470, and *State v. Beylund*, A14-1507; *State v. Birchfield*, A14-1468.

For reasons described at greatest length in the *Bernard* petition, Petitioner respectfully suggests that the Court grant certiorari in this matter.

This Court's review of the question presented is plainly warranted: the decision below is wrong; that decision conflicts with the holdings of other state and federal courts; and the question is one of tremendous practical and doctrinal importance.

The decision below cannot be reconciled with this Court's Fourth Amendment jurisprudence. In *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), the Court concluded that the natural metabolization of alcohol in the bloodstream does not present a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in drunk-driving cases. Instead, whether the circumstances justify an exception to the warrant requirement must turn on a case-by-case assessment that considers the totality of the circumstances. This holding is based upon the general principle that public officials may employ sweeping warrantless searches only in extraordinary circumstances. *See*

Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 619 (1989). Yet a routine DWI investigation, like the one in this case, is among the most ordinary of law enforcement functions and must be analyzed according to traditional Fourth Amendment principles, which preclude an "overly broad categorical approach . . . in a context where significant privacy interests are at stake." *McNeely*, 133 S. Ct. at 1564. *See also City of Charleston v. Ferguson*, 532 U.S. 67 (2001).

In light of this principle, a State's blanket policy of criminalizing refusals by a motorist to submit to a warrantless chemical test in cases of suspected drunk driving cannot withstand constitutional scrutiny; criminalizing refusal to submit precludes a finding of free and voluntary consent. The lower court's reasoning to the contrary in this case is incorrect.

The court was wrong in holding that "a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." It is settled that, where an individual has "a constitutional right" not to be searched absent a "warrant to search," a State may not criminalize "refusing to consent" to the search. *Camara v. Mun. Court of City & Cnty. of San Francisco*, 387 U.S. 523, 540 (1967). Likewise, the "unconstitutional conditions doctrine . . . vindicates the Constitution's enumerated rights by preventing the government from coercing people into giving them up." *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586, 2594 (2013). Thus, the "'government may not grant a benefit on the condition that the

beneficiary surrender a constitutional right.'" *Amelkin v. McClure*, 330 F.3d 822, 827 (6th Cir. 2003) (quoting Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 Harv. L. Rev. 1413, 1415 (1989)).

These doctrines apply fully in this setting, and establish that a State may not condition award of a driver's license on the driver's consent to submit to a warrantless search. Minnesota has criminalized all "refus[als] to consent" (*Camara*, 387 U.S. at 540) to warrantless chemical searches of motorists notwithstanding that – as *McNeely* and the Court's broader Fourth Amendment holdings make clear – the government is not authorized to conduct such warrantless searches in all cases. Thus, under *Camara*, the State may not prosecute a driver's refusal to consent to a search. Nor may the State suggest that such consent is implied as a condition on the motorist's privilege of obtaining a driver's license, as this would violate the unconstitutional conditions doctrine.

The reasoning of the Minnesota court of appeals also conflicts with that of other courts. Since *McNeely*, many courts have clarified that the legal fiction of implied consent does not constitute a *per se* justification for a warrantless chemical test: "an implied consent statute . . . does not justify a warrantless blood draw from a driver who refuses to consent[ ] . . . or objects to the blood draw . . . Consent to a search must be voluntary. . . . Inherent in the requirement that consent be voluntary is the right of the person to withdraw that consent." *State v. Halseth*, 339 P.3d 368, 371 (Idaho 2014).

Halseth is not alone. *See State v. Butler*, 302 P.3d 609, 613 (Ariz. 2013); *Flonnory v. State*, 2015 WL 374879, at *4 (Del. 2015) (unpublished); *Byars v. State*, 336 P.3d 939, 945-946 (Nev. 2014) (striking down a provision of the State's implied consent law on the ground that the statute could not by itself authorize a warrantless blood draw); *State v. Arrotta*, 339 P.3d 1177, 1178 (Idaho 2014); *State v. Wulff*, 337 P.3d 575, 582 (Idaho 2014); *State v. Fierro*, 853 N.W.2d 235, 241 (S.D. 2014); *Reeder v. State*, 428 S.W.3d 924, 930 (Tex. App. 2014); *State v. Declerck*, 317 P.3d 794, 804 (Kan. Ct. App. 2014); *United States v. Brown*, 2013 WL 5604589, at *4 & n.1 (D. Md. 2013).

Finally, there can be no disputing that the question posed in this case is one of the utmost practical importance. Thirteen States criminalize a motorist's refusal to consent to a chemical test. Those States' test-refusal statutes are applied with considerable frequency: tens, if not hundreds, of thousands of convictions each year turn on the question presented here. Other States, moreover, are considering legislation that would impose similar criminal penalties, or are otherwise considering the adoption of other "rules, procedures, and protocols that meet the reasonableness requirements of the Fourth Amendment" in response to this Court's decision in *McNeely*, 133 S. Ct. at 1569 (Kennedy, J., concurring in part). This Court's guidance on the question presented is thus necessary, both to settle the constitutionality of these myriad convictions and to provide the States with necessary prospective guidance on what tools may

appropriately be used to address driving under the influence.

If the Court concludes that review of the issue presented here is warranted, we suggest that it grant certiorari in this case. Alternatively, we urge the Court to hold the petition in this case pending the resolution of *Bernard v. Minnesota.*

CONCLUSION

The petition for a writ of certiorari should be granted. Alternatively, the petition in this case should be held pending the disposition of *Bernard v. Minnesota*.

Respectfully submitted,

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STATE OF MINNESOTA

IN SUPREME COURT

A14-1934

State of Minnesota,

Respondent,

vs.

Joseph Wayne Hexom,

Petitioner.

ORDER

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

IT IS HEREBY ORDERED that the petition of Joseph Wayne Hexom for further review be, and the same is, denied.

Dated: November 17, 2015

BY THE COURT:

/s/ Lorie Skjerven Gildea
Lorie S. Gildea
Chief Justice

STATE OF MINNESOTA
IN COURT OF APPEALS
A14-1934

State of Minnesota,
Respondent,

vs.

Joseph Wayne Hexom,
Appellant.

Filed August 17, 2015
Affirmed
Smith, Judge

Hennepin County District Court
File Nos. 27-CR-13-17744, 27-CV-13-7044

Lori Swanson, Attorney General, St. Paul, Minnesota; and

Jennifer M. Spalding, Margaret L. Evavold, Gregerson, Rosow, Johnson & Nilan, Ltd., Minneapolis, Minnesota, (for respondent).

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

Considered and decided by Larkin, Presiding Judge; Chutich, Judge; and Smith, Judge.

UNPUBLISHED OPINION

SMITH, Judge.

We affirm the district court's denial of appellant Joseph Hexom's motion to suppress his urine-test results and his motion to prohibit enhancement of his driving-while-impaired (DWI) charges because Hexom voluntarily consented to a urine test and because Wisconsin's operating-while-intoxicated statute is in conformity with Minnesota law.

FACTS

Eden Prairie police officers stopped Hexom on March 15, 2013, while he was driving and, after developing probable cause that he was under the influence of alcohol, arrested him. The police transported Hexom to the police department, and an officer read him the implied-consent advisory, which informed him that he was required to take an alcohol-concentration test and that test refusal is a crime. The officer also informed Hexom that he had a limited right to consult an attorney before deciding about testing. Hexom attempted to reach an attorney, but ultimately did not speak to one. Hexom then submitted to a urine test, which revealed a [sic] alcohol concentration of .18.

The state charged Hexom with two counts of DWI and one count of careless driving. The DWI charges were enhanced to second-degree offenses because Hexom had previously been convicted of

operating while intoxicated (OWI) in Wisconsin in 2004 and again in 2006. *See* Minn. Stat. §§ 169A.09, .095, .25 (2012) (describing how qualified prior DWI incidents may be used to enhance DWI charges). Each OWI conviction resulted in the revocation of Hexom's Wisconsin license as well.

Hexom moved to suppress the urine-test results and to prohibit enhancement of the DWI charges. The parties agreed to proceed on stipulated facts. *See* Minn. R. Crim. P. 26.01, subd. 4(f). After a hearing, the district court denied the motions. The district court subsequently found Hexom guilty of careless driving and DWI and convicted him.

DECISION

I.

Hexom argues that the district court erred by using his Wisconsin convictions and license revocations to enhance his DWI charges because the Wisconsin statutes are not in conformity with Minnesota's DWI laws. Whether Wisconsin's statutes are in conformity with Minnesota's statutes is a question of law, which we review de novo. *State v. Loeffel*, 749 N.W.2d 115, 116 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008).

To be guilty of second-degree DWI under these circumstances, a person must have committed a DWI crime while "two or more aggravating factors were

present." Minn. Stat. § 169A.25, subd. 1(a). An aggravating factor includes "a qualified prior impaired driving incident within the ten years immediately preceding the current offense." Minn. Stat. § 169A.03, subd. 3(1) (2012). Qualified prior impaired driving incidents include convictions from other states that are "in conformity with" Minnesota DWI convictions and license revocations from other states that are "in conformity with" Minnesota license revocations. Minn. Stat. § 169A.03, subds. 20-22 (2012).

First, Hexom argues that the Wisconsin statutes are not in conformity with Minnesota law because Wisconsin does not provide a statutory right to counsel before chemical testing. However, Minnesota courts have already determined that out-of-state convictions do not have to satisfy this requirement to be in conformity with Minnesota law. In *State v. Schmidt*, the supreme court held that South Dakota DWI convictions qualified as aggravating factors because Minnesota's "interest in preserving" the right to counsel before chemical testing did not outweigh its interest in using out-of-state convictions to enhance DWI charges. 712 N.W.2d 530, 539 (Minn. 2006). And, in *Loeffel*, we held that a Wisconsin license revocation was an aggravating factor even if the defendant was not permitted to consult with counsel before chemical testing. 749 N.W.2d at 116-17.

Second, Hexom argues that his 2004 Wisconsin conviction was not in conformity with Minnesota law

because, at the time, the legal blood alcohol concentration limit in Wisconsin was .08, while Minnesota's was .10. But the plain language of Minn. Stat. § 169A.03, subd. 20(7), compares the statutes under which the conviction was obtained, Wis. Stat. §§ 340.01(46m)(a), 346.63(1)(b) (2003-04), to the current law of Minnesota by cross-referencing Minn. Stat. § 169A.20 (2012). Because the legal limit in Minnesota is presently .08, Minn. Stat. § 169A.20, subd. 1(5), the Wisconsin statute is in conformity.

Third, Hexom argues that his Wisconsin convictions are not in conformity with Minnesota law because Wisconsin does not provide certain trial rights, such as requiring a unanimous jury and either a guilty plea establishing a sufficient factual basis or evidence proving a sufficient factual basis beyond a reasonable doubt for conviction. This argument essentially challenges the sufficiency of the evidence supporting his Wisconsin convictions. But this case comes to us on appeal under Minn. R. Crim. P. 26.01, subd. 4, which provides that "appellate review will be of the pretrial issue, but not of the defendant's guilt, or of other issues that could arise at a contested trial." Minn. R. Crim. P. 26.01, subd. 4(f). Therefore, although the pretrial issues were preserved, sufficiency of the evidence supporting the conviction is not properly before us.

II.

Hexom also argues that the district court erred by denying his motion to suppress his urine-test results. The district court found that Hexom's consent was "given knowingly, freely, and voluntarily." Whether a driver consented to a search is a question of fact, and we will not reverse the district court's finding unless it is clearly erroneous. *State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011).

The United States and Minnesota Constitutions prohibit unreasonable searches and seizures, U.S. Const. amend. IV; Minn. Const. art. I, § 10, and any evidence obtained as a result of an unreasonable search or seizure must be suppressed, *Wong Sun v. United States*, 371 U.S. 471, 484, 83 S. Ct. 407, 415-16 (1963); *State v. Askerooth,* 681 N.W.2d 353, 370 (Minn. 2004). Warrantless searches are per se unreasonable unless an exception applies, such as consent. *State v. Othoudt*, 482 N.W.2d 218, 222 (Minn. 1992).

A urine test to determine alcohol concentration is a search. *Skinner v. Ry. Labor Execs. Ass'n*, 489 U.S. 602, 617, 109 S. Ct. 1402, 1413 (1989); *State v. Brooks*, 838 N.W.2d 563, 568 (Minn. 2013), *cert. denied*, 134 S. Ct. 1799 (2014). To determine whether a person has voluntarily consented to a urine test, the district court must look at the totality of the circumstances. *Brooks*, 838 N.W.2d at 568. The totality-of-the-circumstances test examines primarily "the nature of the encounter, the kind of person the defendant is, and what was said and how it was said." *Id.* at 569 (quotation omitted). "An individual does not consent,

however, simply by acquiescing to a claim of lawful authority." *Id.*

Hexom contends that his consent was coerced because he was read the implied-consent advisory, which stated that he was required by law to submit to testing and that test refusal is a crime, while he was in police custody and because his decision to submit to testing was made "without the advice of counsel and believing he had no choice." But, in *Brooks*, the supreme court explicitly rejected the argument that the implied-consent advisory is unconstitutionally coercive under similar circumstances. 838 N.W.2d at 571. The supreme court observed that the district court noted that "nothing in the record suggests that Brooks was coerced in the sense that his will had been overborne and his capacity for self-determination critically impaired." *Id.* (quotation marks omitted). Similarly to *Brooks*, Hexom was read the implied-consent advisory while in custody and informed that he was required by Minnesota law to take a chemical test and that test refusal is a crime. *See id.* at 565. Hexom was also informed that he had a limited right to consult an attorney. *See id.* While Hexom did not ultimately consult an attorney, as Brooks did, *see id.*, that fact merely reinforced the consent finding in *Brooks* and is not dispositive here. *Id.* at 571. Because the circumstances here are materially indistinguishable from those in *Brooks*, we find that Hexom was not unconstitutionally coerced.

Affirmed.

STATE OF MINNESOTA

COURT OF APPEALS

JUDGMENT

State of Minnesota, Respondent, vs. Joseph Wayne Hexom, Appellant

Appellate Court # A14-1934

Trial Court # 27-CR-13-17744 and 27-CV-13-7044

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

Dated and signed: December 24, 2015

FOR THE COURT

Attest: AnnMarie S. O'Neill
Clerk of the Appellate Courts

By: */s/*
Clerk of the Appellate Courts

STATE OF MINNESOTA **COURT OF APPEALS TRANSCRIPT OF JUDGMENT**

I, AnnMarie S. O'Neill, 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 December 24, 2015
Dated

Attest: AnnMarie S. O'Neill
Clerk of the Appellate Courts

By: /s/
Clerk of the Appellate Courts

STATE OF MINNESOTA DISTRICT COURT
Hon. Marilyn Brown Rosenbaum

COUNTY OF HENNEPIN FOURTH JUDICIAL DISTRICT

State of Minnesota,

Plaintiff,

vs.

Joseph Wayne Hexom,

Defendant.

ORDER DENYING MOTION
Court File No.
27-CR-13-17744

The above-entitled matter came on before the Honorable Marilyn Brown Rosenbaum on January 28, 2014, for a *Rasmussen* hearing pursuant to Defendant's Motion to Suppress alcohol concentration test results, and to prohibit the State from using prior convictions to enhance the current offenses. After further submissions, the matter was taken under advisement on February 26, 2014 on stipulated facts and exhibits.

Jennifer M. Spalding Eden Prairie City Attorney, appeared and made submissions on behalf of Plaintiff, State of Minnesota.

Charles A. Ramsay, Esq., appeared and made submissions on behalf of Defendant Joseph Wayne Hexom.

Based upon the files, records, and proceedings herein, and being fully informed in the premises, the Court makes the following:

FINDINGS OF FACT

1. On March 16, 2013, Officers Linda Williams and Tyler Quesenberry ("Officer Quesenberry") of the Eden Prairie Police Department determined that probable cause existed for the arrest of Defendant Joseph Wayne Hexom ("Hexom") for a violation of Minn. Stat. 169A, et seq., Driving While Impaired.

2. Hexom was arrested, handcuffed, searched, placed in the rear of a squad car, and transported to the Eden Prairie Police Department.

3 At the police department, Officer Quesenberry read the Minnesota Implied Consent Advisory ("Advisory"), and did not deviate from the language contained in the Advisory

4. After being read the Advisory, Hexom was given from 11:04 p.m. to 11:31 p.m. to consult with an attorney. Although he tried to contact an attorney, he did not actually obtain the advice of counsel, or speak to an attorney.

5. Hexom would testify that after being read the Advisory he felt as if he had no choice but to submit to a warrantless search to determine his alcohol concentration.

6. Hexom submitted to a urine test within two hours of driving, operating or being in physical control of a motor vehicle. Analysis of Hexom's urine sample by the Minnesota Bureau of Criminal Apprehension revealed an ethyl alcohol concentration of 0.18 grams per 67 milliliters of urine.

7. Officers did not seek to obtain a warrant prior to Hexom providing the sample, and Hexom did not request that a warrant be obtained before submitting to a urine test. There is no evidence of "exigent" circumstances, justifying dispensing with efforts to obtain a warrant.

8. Hexom was charged with Count I – Second Degree Driving While Impaired, driving while under the influence of alcohol, with 2 or more aggravating factors, in violation of Minn. Stat. § 169A.20, subd. 1(1); Count II – Second Degree Driving While Impaired, driving with an alcohol concentration of .08 or more, with 2 or more aggravating factors, in violation of Minn. Stat. § 169A.20, subd. 1(5); and Count III – Careless Driving in violation of Minn. Stat. § 169.13.2

9. The charges in Count I and Count II were enhanced to Second Degree DWI based upon two aggravating factors, namely two prior Operating While Intoxicated ("OWI") convictions and subsequent license revocations in the state of Wisconsin as a result of incidents occurring on or about July 4, 2004 and May 27, 2006.

10. In Wisconsin at the time of the 2004 and 2006 incidents, Hexom was not afforded the right to consult with an attorney prior to testing.

11. At the time of the 2004 and 2006 incidents, pursuant to Wisconsin law, both first and subsequent OWI convictions were of offenses which could enhance later violations

12. At the time of the 2004 incident, Hexom was not entitled to a jury trial under Wisconsin law, because a first offense OWI was not considered a crime, similar to a Minnesota petty misdemeanor.

13. At the time of the 2004 incident, the legal limit in Wisconsin was .08 while in Minnesota the legal limit was .10.

14. Hexom claims the alcohol test result should be suppressed on the ground that Minn. Stat. § 169A.51, Chemical Test for License Revocation, and Minn. Stat. § 169A.20, Driving While Impaired, are unconstitutional in light of *State of Minnesota v. Wesley Eugene Brooks*, 838 N.W.2d 563, (Minn. 2013). Hexom also claims two prior Wisconsin OWI convictions cannot be used to enhance Counts I and II because Wisconsin law was not in conformity with Minnesota law, namely: 1) at the time of the 2004 and 2006 incidents, Hexom was not given an opportunity to speak with an attorney prior to testing; 2) at the time of the 2004 incident Hexom was not entitled to a jury trial; and 3) at the time of the 2004 incident the Wisconsin legal limit was .08 while the Minnesota legal limit was .10.

15. The State contends that the Motion to Suppress should be denied, claiming under *Brooks* and the totality of the circumstances Hexom consented to the test, and Minnesota's statutes are not unconstitutional. The State also contends that Wisconsin laws in effect at the times of Hexom's prior Wisconsin convictions were in legal conformity with Minnesota statutes and can be used to enhance Counts I and II.

CONCLUSIONS OF LAW

Enhancement

1. Hexom's prior Wisconsin convictions, resulting from the 2004 and 2006 incidents, are not prohibited from use to enhance Counts I and II on the ground that Hexom was not afforded the limited right to pretest consultation with an attorney.

2. Minnesota's "interest in preserving" the limited right to counsel granted in *Friedman v. Comm'r of Pub. Safety*, 473 N.W.2d 828 (Minn. 1991) is "not sufficient to prohibit the use of foreign convictions to enhance a Minnesota DWI charge." *State v Schmidt*, 712 N.W.2d 530, 538 (Minn. 2006) (holding that prior South Dakota DWI convictions based on chemical test decisions made without the limited right to counsel could be used to enhance the defendant's DWI charge).

3. Hexom's conviction or revocation resulting from the 2004 incident is a permitted conviction or

revocation, and can be used to enhance Counts I and II. The following Wisconsin statutes were in conformity with Minnesota law:

Wis. Stat. § 346.63 provides, in pertinent part, the following:

> (1) No person may drive or operate a motor vehicle while: (a) Under the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog under the influence of any other drug to a degree which renders him or her incapable of safely driving or under the combined influence of an intoxicant and any other drug to a degree which tenders him or her incapable or safely driving; or (b) The person has a prohibited alcohol concentration.

Wis. Stat. § 939.12 provides, in pertinent part, the following:

> Crime defined A crime is conduct which is prohibited by state law and punishable by fine or imprisonment or both. Conduct punishable only by a forfeiture is not a crime.

Wis. Stat. § 343.307 provides, in pertinent part, the following:

> Prior convictions, suspensions or revocations to be counted as offenses . . .

> (1) The court shall count the following to determine . . . the penalty under ss. 114.09(2) and 346.65(2):(a) convictions for violations under s 346.63(1), or a local ordinance in conformity with that section.

Wis. Stat. § 346.65(2)(am) provides, in pertinent part, the following:

> Any person violating s. 346.63(1):1, Shall forfeit not less than $150 nor more than $300 . . .

4. A statute in one state being in conformity with a statute in Minnesota is determined by whether the out-state statute "corresponds to an offense in Minnesota." *Pilger v. State*, 337 N.W.2d 695, 698 (Minn. 1983). An out-state conviction of a driving while intoxicated charge that required less proof than a corresponding Minnesota statute may be considered in Minnesota if the elements "are the same elements which, if proven in Minnesota, would justify a conviction for the offense of driving while under the influence." *Anderson v. State Dept of Public Safety and Dept of Transp.*, 305 N.W.2d 786, 787 (Minn. 1981)

5. At the time of the 2004 incident Wisconsin applied a .08 per se legal limit. The Wisconsin statute must be considered to have been in conformity with Minnesota statutes, since it required a stricter standard of proof than existing Minnesota law.

6. At the time of the 2004 incident, Hexom was not entitled to a jury trial. Hexom's first OWI was

punishable by forfeiture in an amount not less than $150 nor more than $300, making it "not a crime." The more lenient Wisconsin disposition, at base, is in conformity with Minnesota law under *Pilger* and *Anderson.*

7. At the time of the 2004 incident, a first offense OWI could be used to enhance a future OWI under Wisc. Stat. § 343.307(1)(a). Wisconsin law was in conformity with Minnesota's law allowing enhancement, and the 2004 incident can be used to enhance Counts I and II.

Suppression of Test Results

8. In light of *Brooks* and the totality of the circumstances in this case, Defendant's Motion to suppress test results must be denied. The Minnesota Implied Consent Law is a legal tool to enforce drunk driving laws and Hexom consented to the search.

9. The Fourth Amendment of the United States Constitution and Article I, Section 10 of the Minnesota Constitution prohibit unreasonable searches and seizures.

10. "[T]o challenge successfully the constitutional validity of a statute, the challenger bears the very heavy burden of demonstrating beyond a reasonable doubt that the statute is unconstitutional." *State v. Merrill*, 450 N.W.2d 318, 321 (Minn. 1990).

11. The Implied Consent Law, Minn. Stat. § 169A.51, Chemical test for intoxication, provides

that "[a]ny person who drives . . . a motor vehicle within this state consents . . . to a chemical test of that person's blood, breath, or urine for the purpose of determining the presence of alcohol."

12. The statute also includes an implied consent advisory requiring "[a]t the time a test is requested, the person must be informed: (1) that Minnesota law required the person to take a test [and] (2) that refusal to take a test is a crime. . . ." Minn. Stat. § 169A.51, subd. 2.

13. The collecting and testing of an individual's urine is deemed a search under the Fourth Amendment. *Skinner. v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 617 (1989)

14. Warrantless searches are generally unreasonable, subject to exceptions, including consent and exigent circumstances *See State v. Diede*, 795 N.W.2d 836, 846 (Minn. 2011) ("consent [of the person searched] is an exception to the warrant requirement"); *Netland*, 762 N.W.2d 202 at 212 (exigent circumstances provide an exception to the warrant requirement). " . . . [P]olice do not need a warrant if the subject of the search consents." *Brooks*, 838 N.W.2d at 568 (*citing Schneckloth v Bustamonte*, 412 U.S. 218, 219 (1973).

15. There is no evidence of exigent circumstances, but there is evidence of consent given knowingly, freely, and voluntarily. The reading of the Advisory, as required by the Implied Consent Law, did not result in an unconstitutional search. " . . . [A] driver's

decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test." *Brooks*, 838 N.W.2d at 570.

16. When a driver submits to chemical testing, the burden is on the State to show consent was given freely and voluntarily. *Bumper v North Carolina*, 391 U.S. 543, 548 (1968).

17. The State has sustained its burden and has established by a preponderance of the evidence that Hexom consented. Officers had probable cause to stop and arrest Hexom, the Advisory was properly read and was in compliance with statutory requirements, Hexom was granted the limited right to speak to an attorney prior to testing, and Hexom's compliance with testing establishes consent given freely and voluntarily.

18. Minn. Stat. § 169A.51 does not violate the "doctrine of unconstitutional conditions." The criminal sanctions imposed by the statute do not coerce or invalidate consent.

19. Hexom has failed to sustain his burden and has failed to demonstrate beyond a reasonable doubt that Minn. Stat. §§ 169A.51 and 169A.20 are unconstitutional.

20. Under the totality of the circumstances, the compliance with all statutory requirements, and the ruling in *Brooks* finding as a matter of law that the criminal test refusal penalty in the implied consent

law is not coercive, Defendant's Motion to suppress test results must be denied.

ORDER

1. The Motion of Defendant to Suppress evidence of the test results is denied.

2. The Motion of Defendant to prohibit enhancement of Count I and II is denied.

Dated: March 31, 2014

/s/ Marilyn B. Rosenbaum
The Honorable Marilyn
Brown Rosenbaum
Judge of District Court