MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. CUM-15-568

STATE OF MAINE
Appellee

v.

MICAH DAY
Appellant

On appeal from the Cumberland County Unified Criminal Docket

Brief of the Amicus Curiae Maine Association of Criminal Defense Lawyers

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INTEREST OF AMICUS CURIAE

The Maine Association of Criminal Defense Lawyers (MACDL) is an organization of over 240 Maine attorneys actively engaged in the practice of defending the rights of persons accused of crime or other misconduct. MACDL's mission objectives include promoting the administration of justice, protecting individual rights, and improving the criminal law, its practices, and its procedures. Hence, MACDL has an interest in the proper adjudication of the question on which the Court requested briefing from amici curiae.

QUESTION PRESENTED

The Court has invited briefs of amici curiae on the following issue: "Whether the admission of a defendant's refusal to submit to testing for blood-alcohol content at a trial for operating under the influence (OUI) violates the Fourth Amendment, despite the holding of the Supreme Court of the United States in *South Dakota v. Neville,* 459 U.S. 553, 563-64 (1983), that the *Fifth* Amendment does not prohibit the admission into evidence of a defendant's refusal to submit to testing for blood-alcohol content."

SUMMARY OF THE ARGUMENT

"The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *State v. Glover*, 2014 ME 49, ¶ 13, 89 A.3d 1077 (quoting *Grunewald v. United States*, 353 U.S. 391, 425 (Black, J., concurring)). Earlier this year, the Supreme Court of the United States held that one such constitutional privilege prevents the government from making it a crime to exercise one's right to refuse consent to a warrantless blood draw in a drunk-driving investigation. *Birchfield v. N. Dakota,* 576 U.S. --, 136 S. Ct. 2160, 2186 (2016). The question presented here is whether a state may side-step that holding by creating an indirect criminal penalty: allowing a prosecutor to argue to a jury that exercising the right to be free from a warrantless blood draw is a badge of guilt, and allowing a trial judge to tell the jury that "Maine law allows you to consider a person's failure to submit to a chemical test as evidence on the issue of whether that person was under the influence of intoxicants." (A. 21; Tr. 200:3-7.) The answer is no.

First, contrary to the State's argument, Maine's implied consent law does not create an irrevocable manifestation of "actual consent" to a blood test—that is, consent which is constitutionally required to be

knowing, intelligent, and voluntary, based on the totality of the circumstances. *Birchfield*, 136 S. Ct. at 2186 (remanding in the case of petitioner-Beylund, because the North Dakota Supreme Court failed to perform a totality of the circumstances analysis to decide if Beylund voluntarily consented to the blood test). Thus, absent circumstances not suggested here, a defendant has a constitutional right to refuse to submit to a blood-alcohol test.

Second, recognizing that a defendant has a right to refuse a blood test, admitting the exercise of that right as a badge of guilt in a criminal trial—and having the judge instruct the jury to the same effect—offends the Fourth Amendment by creating an indirect criminal penalty. The U.S. Supreme Court held in *Griffin v. California* that it violates the Fifth Amendment to allow a prosecutor to comment on the exercise of one's Fifth Amendment right at trial, because doing so makes the assertion of the Fifth Amendment costly by imposing a penalty for doing so. 380 U.S. 609, 611 (1965). Courts applying *Griffin* have applied its holding to other constitutional protections, including the Fourth Amendment, and this Court held in *Glover* that such evidence is of minimal probative value, and compromises the integrity

of constitutional protections. Thus, the Fourth Amendment prevents the State from admitting evidence of, or comment about, a motorist's exercise of his or her right to be free from unreasonable searches.

The U.S. Supreme Court held no differently in *South Dakota v. Neville* 459 U.S. 553 (1983), as that case (1) was based on the now-superseded assumption that the State can force a motorist to submit to a warrantless blood test, and (2) dealt with the question of whether the *Fifth* Amendment prohibited the use of such evidence, necessarily limiting the question to whether the refusal was testimonial. Thus, the Supreme Court's holding in *Neville* has no impact on this Court's Fourth Amendment analysis.

ARGUMENT

I. The Fourth Amendment prohibits admission of—or comment about—a motorist's exercise of the right to refuse consent to a warrantless blood test.

The Supreme Court has held that blood tests are searches under the Fourth Amendment, hence, they must be analyzed like any other search. *Birchfield*, 136 S. Ct. at 2186; *Missouri v. McNeely,* 576 U.S. --, 133 S.Ct. 1552, 1556 (2013). The question here is whether a person who exercises his or her right to decline consent to a search can be

criminally penalized under Maine's implied consent law, 29-A M.R.S. § 2521, by allowing the State to introduce the refusal as a badge of guilt during a criminal trial for operating under the influence.

As explained below, the answer is no. Section 2521 does not create an irrevocable manifestation of "actual consent" to a blood test—that is, consent which is constitutionally required to be knowing, intelligent, and voluntary, based on the totality of the circumstances. Thus, because a motorist has a constitutional right to refuse to consent to a warrantless blood test under the Fourth Amendment, introducing evidence of the exercise of that right as a badge of guilt in a criminal trial violates the Fourth Amendment.

A. Section 2521 does not create irrevocable consent to a test for blood alcohol content; a motorist has a Fourth Amendment right to refuse a blood test.

The Supreme Court has stated that warrantless blood tests offend the Fourth Amendment absent a valid exception to the warrant requirement, and that there is no "per se" exigent circumstance presented in drunk-driving investigations from the natural dissipation of alcohol in one's blood. *See Birchfield*, 136 S. Ct. at 2184 (2016); *McNeely,* 133 S.Ct. at 1556. Hence, the rule is that the investigating

officer must obtain consent of the motorist before performing a warrantless blood test, absent some other exception to the warrant requirement.

i. A statute cannot substitute for an individualized showing that consent was knowing, intelligent, and voluntary.

Consent to a search must be knowing, intelligent, and voluntary, and must be shown by "an objective manifestation of consent [] given by word or gesture by one bearing an appropriate relationship to the property searched." *State v. Bailey*, 2010 ME 15, ¶ 19, 989 A.2d 716, 722 (quoting *State v. Fredette,* 411 A.2d 65, 68 (Me.1979)); *see also Schneckloth v. Bustamonte*, 412 U.S. 218, 224 (1973). The State's suggestion that Section 2521 creates a *per se* rule that satisfies this constitutional requirement is unavailing, inconsistent with case law, and irreconcilable with the Supreme Court's decisions in *McNeely* and *Birchfield*.

To establish consent, the State has the burden of introducing some objective manifestation of consent of the defendant showing a voluntary decision. *Bailey*, 2010 ME 15, ¶ 19, 989 A.2d at 722. In the words of the First Circuit, "[p]roof of valid consent requires that the prosecution

show, by a preponderance of the evidence, that the consent was knowingly, intelligently, and voluntarily given." *U.S. v. Marshall,* 348 F.3d 281, 285–286 (1st Cir. 2003).

The problem with relying on a statute to show that consent was knowingly, intelligently, and voluntarily obtained is that there is still no manifestation of consent given *from the defendant* to the blood test. Instead, the alleged basis for the "consent" is simply a legislative statement that, by driving on Maine's roads, motorists are assumed to have impliedly consented to testing. But that accomplishes nothing for Fourth Amendment purposes; there is no connection to the constitutional standard of whether a defendant, in fact, knowingly, intelligently, and voluntarily agreed to consent to a test. Thus, the mere existence of a legislative decree about consent to blood testing does not do away with the decades of precedent developed by the courts, establishing that consent must be knowing, intelligent, and voluntary.

ii. Post-*McNeely* courts have held that implied consent statutes cannot act as substitutes for the warrant requirement, and *Birchfield* agrees.

Courts have agreed that implied consent statutes cannot substitute for an individualized showing of consent to a blood test. For

instance, in *Bailey v. State*, the Georgia Court of Appeals considered whether the Georgia's implied consent state equated to actual consent in the case of an unconscious motorist. -- S.E. 2d --, 2016 WL 3751822, at *4 (Ga. Ct. App. July 13, 2016). Though the same court previously held that a blood draw under these circumstances would be lawful, the court nonetheless recognized that, in the wake of *McNeely*, the defendant's "implied consent was insufficient to satisfy the Fourth Amendment, and he could not have given actual consent to the search and seizure of his blood and urine, as he was unconscious." *Id.* at *5. This was true even though Georgia's implied consent law reads that "any person who operates a motor vehicle ... shall be deemed to have given consent ... to a chemical test or tests of his ... bodily substances for the purpose of determining the presence of alcohol or any other drug" under certain circumstances. *Id.* at *2 (quoting OCGA § 40–5–55 (a)). The *Bailey* court did exactly what the courts should do when presented with a situation where the State seeks to justify a warrantless search by consent: determine whether there is evidence that *the defendant* manifested consent that was knowing, intelligent, and voluntary, based on the totality of the circumstances.

And this Court need not only rely on the Georgia Court of Appeals for guidance. Other post-*McNeely* cases have widely held that implied consent statutes do not equate to "actual consent" to blood tests. In *State v. Butler*, the Supreme Court of Arizona applied a totality of the circumstances approach, even though the defendant had been read implied consent and signed a consent form. 302 P.3d 609, 611-613 (Ariz. 2013)(en banc). In *People v. Schaufele*, the Supreme Court of Colorado recognized that *McNeely*'s holding necessarily commands a totality of the circumstances analysis for nonconsensual blood draws and, speaking of its own implied consent statute, stated "our own case law makes clear that Colorado's express consent statute does not abrogate constitutional requirements." 325 P.3d 1060, 1066 (Col. 2014), *cert. denied*, 135 S. Ct. 945 (2015). In *State v. Wulff*, the Supreme Court of Idaho explained that "[b]ecause *McNeely* prohibits per se exceptions to the warrant requirement and the district court correctly understood Idaho's implied consent statute operated as a per se exception, Idaho's implied consent statute does not fall under the consent exception to the Fourth Amendment of the United States Constitution." 337 P.3d 575,

582 (Idaho 2014). Numerous other state courts have reached similar conclusions, for similar reasons.[1]

And finally, if there was ever any question on this issue after *McNeely*, the Supreme Court's decision in *Birchfield* put it to rest. Michael Beylund—one of the three petitioners in *Birchfield*—was not prosecuted for refusing to submit to a blood test. Instead, he was told after his arrest that the law requires he consent to the test, so he did. 136 S. Ct. at 2186. In applying its legal conclusions to Beylund, the Supreme Court stated "the North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests … *[b]ecause voluntariness of consent to a search must be determined from the totality of all the circumstances*, we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the

[1] *See, e.g. State v. Carter*, 2016 WL 3044216, at *1 (Tenn. Crim. App. May 20, 2016)(unpublished); *People v. Arredondo*, 245 Cal. App. 4th 186, 196 (Cal. App. 6th Dist. 2016), *review granted and opinion superseded by*, 371 P.3d 240 (Cal. 2016); *Flonnory v. State*, 109 A.3d 1060, 1065 (Del. 2015); *Williams v. State*, 167 So.3d 483, 490 (Fla. Dist. Ct. App. 5th Dist. 27 2015); *Williams v. State*, 771 S.E.2d 373, 377 (Ga. 2015); *State v. Won*, 372 P.3d 1065, 1079-1080 (Haw. 2015), *as corrected* (Dec. 9, 2015); *State v. Modlin*, 867 N.W.2d 609, 618- 19 (Neb. 2015); *State v. Fierro*, 853 N.W.2d 235, 241 (S.D. 2015); *State v. Halseth*, 339 P.3d 368, 371 (Idaho 2014); *State v. Villareal*, 475 S.W.3d 784, 813 (Tex. Ct. Crim. App. 2014).

officer's advisory." *Birchfield*, 136 S. Ct. at 2186 (quotation marks and citation omitted, and emphasis added). Thus, *Birchfield*—by endorsing the totality of the circumstances approach in Beylund's case—put to rest any doubt as to whether an implied consent statute can trump the constitutional requirement that consent be voluntarily, intelligent, and knowing.

The takeaway is this: the State cannot immunize itself from the Fourth Amendment by saying that all motorists, simply by engaging in an activity of daily life such as driving a car, have consented to an otherwise unreasonable search. Whether the implied consent statute is unduly coercive, or may lawfully impose administrative consequences, is not the issue. Instead, the question is whether Section 2521 creates an impregnable *per se* exception to the Fourth Amendment, as the State seems to suggest in its brief, such that a motorist has no right to refuse a warrantless intrusion into his or her veins so the police can obtain evidence to use in a criminal trial. *McNeely,* 133 S.Ct. at 1558. As *Birchfield*, *McNeely*, and the above cases show, the answer is no.

B. Using a defendant's exercise of the right to be free from unreasonable searches as a "badge of guilt" in a criminal trial violates the Fourth Amendment.

For Fourth Amendment purposes, a warrantless blood test in an OUI case is analyzed the same as any other warrantless search. After all, a blood test is "a compelled physical intrusion beneath [a defendant's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation[,]" and represents "an invasion of bodily integrity [that] implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *McNeely,* 133 S.Ct. at 1558 (quoting *Winston v. Lee,* 470 U.S. 753, 760 (1985)). Using a motorist's exercise of the right to be free from such invasive searches as a badge of guilt during a criminal trial offends the Fourth Amendment.

i. *Glover* recognized the minimal probative value in—and the high risk of unfair prejudice from—admitting the exercise of the right to be free from unreasonable searches as evidence of guilt.

Though this Court has not yet ruled on the question presented, it did consider a related question in *Glover*, 2014 ME 49, 89 A.3d 1077. There, the defendant was convicted of gross sexual assault, and the question presented was whether it was error to allow the State to

introduce evidence that he had refused to voluntarily submit to a warrantless DNA swab. *Id.* ¶ 1, 89 A.3d at 1077. After concluding that the defendant indeed had a right to refuse law enforcement's request for a warrantless DNA swab, *id.* ¶ 10, 89 A.3d at 1082, *Glover* went on to conclude the evidence of the refusal was inadmissible under M.R. Evid. 403.

Though *Glover* applied the Maine Rules of Evidence, its reasoning turned on the constitutional guarantee of the right to be free from unreasonable searches:

> Here, the constitutional nature of the right at stake underscores the unfairly prejudicial nature of refusal evidence. The questionable probative value of such evidence does not justify compromising the integrity of the constitutional protection. "The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them." *Grunewald v. United States,* 353 U.S. 391, 425, 77 S.Ct. 963, 1 L.Ed.2d 931 (1957) (Black, J., concurring). "It would seem ... illogical to extend protections against unreasonable searches and seizures, including the obtaining of a warrant prior to implementing a search, and to also recognize an individual's right to refuse a warrantless search, yet allow testimony regarding such an assertion of that right at trial in a manner suggesting that it is indicative of one's guilt." *Commonwealth v. Welch,* 401 Pa.Super. 393, 585 A.2d 517, 519 (1991).

2014 ME 49, ¶ 13, 89 A.3d at 1082-83.

Glover adopted a rule that it violates Rule 403 to admit evidence of refusal to consent for the purpose of showing consciousness of guilt. *Id.* Though *Glover* stated, in dicta, that the Fourth Amendment does not itself prohibit introduction of evidence of refusal to consent to a search as proof of consciousness of guilt, *see id.*, the case here presents something that was missing in *Glover*: a statutory rule allegedly requiring[2] that the Court admit refusal evidence. 29-A M.R.S. § 2521(3)(B). Thus, the dicta from *Glover* about the Fourth Amendment should not prevent a fresh look at the issue. A basic assumption in *Glover*—the availability of a rules-based remedy—is lacking because of text of the implied consent statute. But *Glover*'s concern that allowing refusal evidence would denigrate the value of the Fourth Amendment's protections remains.

[2] Though MACDL concurs with appellant that a court may exclude refusal evidence under M.R. Evid. 403, it assumes, for purposes of this brief, that the Court has rejected the appellant's Rule 403 argument by reaching the constitutional question. *Malenko v. Handrahan*, 2009 ME 96, ¶ 25, 979 A.2d 1269, 1275 ("As an appellate court, we seek to avoid answering important statutory and constitutional questions unless the answer is truly necessary to the resolution of the parties' dispute.")

ii. It is unconstitutional to allow prosecutors to argue that a person's exercise of a constitutional right implies consciousness of guilt.

Though the Supreme Court has not considered whether it is unconstitutional to introduce evidence of the exercise of one's Fourth Amendment rights in a criminal trial, it has held that introducing evidence of or allowing comments about the exercise of one's Fifth Amendment privilege is. In *Griffin v. California*, the petitioner was convicted of first degree murder, after the prosecution argued to the jury "[t]hese things he has not seen fit to take the stand and deny or explain. And in the whole world, if anybody would know, this defendant would know. Essie Mae is dead, she can't tell you her side of the story. The defendant won't." 380 U.S. 609, 611 (1965). In reversing, the U.S. Supreme Court explained that allowing a comment on the refusal to testify is "a penalty imposed by the courts for exercising a constitutional privilege[,]" and reversed. *Id.* at 614.

Griffin's holding has been applied other constitutional protections, including those enshrined in the Fourth Amendment. For instance, in *Duran v. Thurman*, the Ninth Circuit Court of Appeals held that the "prosecution's repeated reference to Duran's refusal to provide blood

and urine samples violated Duran's Fourth Amendment rights[.]" 106 F.3d 407 at *4 (9th Cir. 1997)(unpublished). In *U.S. v. Thame*, the Third Circuit Court of Appeals stated "[w]e also see little, if any, valid distinction between the privilege against self-incrimination and the privilege against unreasonable searches and seizures" when discussing whether consciousness of guilt can be inferred from refusal to consent to a search. 846 F.2d 200, 207 (3d Cir. 1988). In *Bargas v. State*, the Supreme Court of Alaska—holding that evidence of refusal was inadmissible on Fourth Amendment grounds—stated that "[i]t would make meaningless the constitutional protection against unreasonable searches and seizures if the exercise of that right were allowed to become a badge of guilt." 489 P.2d 130, 132 (Alaska 1971); *see also Elson v. State*, 659 P.2d 1195, 1197 (Alaska 1983). And, in *State v. Gauthier,* the Washington Court of Appeals held that allowing a prosecutor to argue a refusal to submit to a DNA swab violated the Fourth Amendment, recognizing that "[c]ourts are appropriately reluctant to penalize anyone for the exercise of *any* constitutional right[.]" 298 P.3d 126, 132 (Wash. Ct. App. 2013)(quoting *State v. Burke*, 181 P.3d 1, 11 (Wash. 2008)(en banc)); *see also State v. Mecham*,

375 P.3d 604, 618 (Wash. 2016)(quoting *Gauthier* for the proposition that Washington citizens enjoy the right to refuse consent to a warrantless search under the Fourth Amendment).

There is good reason to prevent the State from introducing the evidence of the exercise of a Fourth Amendment right in a criminal trial. As *Glover* makes clear, the value of the evidence is minimal, and the risk of unfair prejudice is great. 2014 ME 49, ¶ 12, 89 A.3d at 1082. Indeed, as *Welch* explained, there are many personal reasons that one might refuse consent to a search, and that one cannot necessarily assume the refusal is based on the fact that one is attempting to prevent the discovery of incriminating evidence. 585 A.2d 517, 520 (1991). And, as *Griffin* noted, allowing comment at trial on the exercise of a constitutional privilege "mak[es] its assertion costly." 380 U.S. at 614. Suggesting otherwise turns the Fourth Amendment into a hollow promise: a motorist faced with a demand to submit to a warrantless blood draw must either (1) waive his or her Fourth Amendment rights, or (2) risk being unfairly tarred with a badge of guilt during the OUI trial that is sure to follow. *See Padgett v. State*, 590 P.2d 432, 434 (Alaska 1979) ("Padgett had a right under the fourth amendment … to

refuse to consent to a search of all or part of his car … [t]hat right would be effectively destroyed if, when exercised, it could be used as evidence of guilt"). As the Supreme Court of Alaska puts it, "This is entirely impermissible." *Bargas*, 489 P.2d at 132.

iii. *Neville* is inapposite because (1) it relies on the premise that a state can force a person to submit to a blood test, and (2) its holding turned on the Fifth Amendment's limitation to testimonial evidence.

The Supreme Court's decision in *South Dakota v. Neville*, 459 U.S. 553 (1983), does not affect the analysis here, because *Neville* rests on a proposition that has been superseded, and involved limitations unique to the Fifth Amendment. In *Neville*, the defendant was arrested for DWI, read his *Miranda* rights, and asked to submit to a blood alcohol test. 459 U.S. 553, 555 (1983). The defendant refused, stating "I'm too drunk, I won't pass the test." *Id.* The police unsuccessfully attempted to convince the defendant to take the test two more times. *Id.* The state court excluded the refusal evidence, on the ground that admitting the evidence would violate the defendant's Fifth Amendment rights, and the prosecution appealed.

Relying on the now-superseded assumption that "*Schmerber* . . . clearly allows a State to force a person suspected of driving while

intoxicated to submit to a blood alcohol test[,]" the Supreme Court reversed, holding that the petitioner had no right to refuse test under South Dakota's implied consent law. *Neville*, 459 U.S. at 559. In reversing, the Court also relied on the fact that a refusal to consent to a search is a physical, nontestimonial, act, so any evidence of refusal to consent would be outside the scope of the Fifth Amendment privilege. *Id.* at 560-561.

Given the above, *Neville* is inapposite for two reasons. First, *Neville* assumes that motorists do not have any right to refuse a blood alcohol test—an assumption that has now been rejected in both *McNeely* and *Birchfield*. Indeed, *Neville* was not a case about whether the assertion of a constitutional right is admissible at all. Instead, *Neville* concluded that the defendant had no right to refuse. Considering that *Neville*'s Fifth Amendment analysis relies on a premise that has since been superseded—that the State can always "force" a blood test in an drunk driving case—*Neville* has no effect on this Court's Fourth Amendment analysis today.

Second, *Neville*'s analysis was necessarily limited by the issue of whether the act of refusal or submission to a test was testimonial,

because the Fifth Amendment privilege only applies to testimonial evidence. *See, e.g. Fisher v. United States*, 425 U.S. 391, 408 (1976) (Fifth Amendment only applies to testimonial communications). Because evidence of one's refusal to take a blood alcohol test is nontestimonial, the Fifth Amendment does not come into play. *See id.* (citing *Schmerber* for the proposition that the Fifth Amendment does not apply to giving blood samples). In contrast, the decision of whether or not to take a blood test triggers Fourth Amendment rights, because the Fourth Amendment includes the right to be free from unreasonable searches, such as a warrantless blood draw.

Finally, *Birchfield*'s language that the decision should not be read to call the constitutionality of implied consent laws into doubt, is not the same as endorsing the use of evidentiary penalties for exercising the right to be free from unreasonable searches. 136 S. Ct. at 2185. Indeed, the Court never suggested that the question of whether the exercise of the right to refuse a warrantless search could be admissible in a criminal trial was before it, and was cautious to note that the parties had not raised the issue. *Id.* All the Supreme Court was doing was ensuring that its decision would not be over-read to facially invalidate

implied consent statutes. *Id.* ("Petitioners do not question the constitutionality of [implied consent] laws, and nothing we say here should be read to cast doubt on them"); *accord State v. Okken*, 364 P.3d 485, 490-493 (Ariz. Ct. App. 2015) (rejecting a facial challenge to Arizona's implied consent statute under the unconstitutional conditions doctrine). The question presented here is far more limited: whether a refusal to a blood test—which is a protected exercise of one's Fourth Amendment rights—can be constitutionally admitted as consciousness of guilt. As the above shows, it cannot.

CONCLUSION

The effect of Section 2521 is this: it allows the State to demand that a motorist waive his or her Fourth Amendment rights and, if the motorist refuses, the court will stack the deck in the State's favor during the OUI trial that is sure to follow. This denigrates the value of the Fourth Amendment, and turns it into a hollow promise for those on Maine roads. The Court should hold that admitting evidence of a defendant's exercise of his or her right to be free from unreasonable searches as evidence of guilt in an OUI trial violates the Fourth Amendment.

Respectfully submitted by:

Dated: September 7, 2016

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