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Criminal Law: Your Body Is Not Your Temple—State v. Bernard

Adrian S. LaFavor-Montez

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**CRIMINAL LAW: YOUR BODY IS NOT YOUR TEMPLE—
STATE V. BERNARD**

Adrian S. LaFavor-Montez[†]

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I. INTRODUCTION

The Minnesota Supreme Court recently held that a warrant is not required to perform a breath test of an individual arrested on suspicion of driving while intoxicated because such a search falls into the search-incident-to-arrest exception to the warrant

[†] JD Candidate, William Mitchell College of Law, 2016; BA Philosophy, University of Minnesota, 2011. I would like to thank Professors Anthony Winer and Mark Edwards for their valuable input and thoughtful discussion. I would also like to thank the Associates and Editors of the *Mitchell Hamline Law Review* for their hard work. Finally, I would like to thank all of my friends, family, and co-workers who have supported me throughout my law school journey.

requirement of the Fourth Amendment.¹ In so concluding, the court also held that a statute criminalizing one's refusal to take a breath test did not violate his or her due process under the Fourteenth Amendment because no fundamental right was violated.²

This case note first discusses the relevant case law surrounding Fourth Amendment searches in general and the justification required to conduct a search under the Fourth Amendment.³ It next discusses the facts and procedural history of the *Bernard* case, the Minnesota Supreme Court's findings and holdings, and the opinion of the dissenters.⁴ This note also examines how the Minnesota Supreme Court's holding contradicts Fourth Amendment jurisprudence by misinterpreting the search-incident-to-arrest exception to the warrant requirement.⁵ This note argues that, based on Fourth Amendment jurisprudence, a warrantless search of one's breath following an arrest is not justified under the search-incident-to-arrest exception to the warrant requirement.⁶ Also addressed in this note is how the holding violates public policy considerations courts often consider in due process violation situations.⁷ Finally, this note will conclude that Bernard's Fourteenth Amendment right to due process was violated because Minnesota has effectively criminalized his right to refuse unconstitutional searches.⁸

II. HISTORY OF THE RELEVANT CASE LAW

A. *Right to Be Free from Unreasonable Searches*

Both the United States Constitution and the Minnesota Constitution provide that the people shall be secure in their persons from unreasonable searches and seizures.⁹ Originally, the

1. State v. Bernard, 859 N.W.2d 762, 772 (Minn. 2015).

2. *Id.* at 773–74.

3. See *infra* Part II.

4. See *infra* Part III.

5. See *infra* Part IV.

6. See *infra* Part IV.

7. See *infra* Part IV.

8. See *infra* Part V.

9. U.S. CONST. amend. IV; MINN. CONST. art. I, § 10. In some circumstances, the Minnesota Constitution has been interpreted as providing greater protection than the Fourth Amendment to the United States Constitution. *Acher v. Comm'r*

Fourth Amendment was limited to protecting individuals from unreasonable searches by federal officials, but not from unreasonable searches by state officials.¹⁰ In *Weeks v. United States*, the Supreme Court interpreted the protection afforded by the Fourth Amendment as requiring evidence obtained as a result of an unreasonable search to be prohibited from use by the government against the accused at trial.¹¹ This rule has come to be known as the “exclusionary rule.”¹² The Fourth Amendment has since been incorporated to apply to state officials as well as federal officials through the Due Process Clause of the Fourteenth Amendment.¹³

Pub. Safety, 519 N.W.2d 183, 184–85 (Minn. 1994) (holding the use of temporary road blocks in order to conduct random investigatory stops on vehicles in the hope of finding drunk drivers was in violation of Minnesota Constitution Article I, Section 10 in contradiction to *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), which held that such a practice was not in violation of the Fourth Amendment); *see also* State v. Carter, 596 N.W.2d 654, 657 (Minn. 1999) (noting that in situations where “the Supreme Court’s decisions [were] ‘radical’ or ‘sharp’ departures from precedent,” deviation from federal holdings may be appropriate). However, generally, Article 1, Section 10 of Minnesota’s Constitution and the Fourth Amendment of the United States Constitution have been interpreted as providing the same protections. *Id.* at 658. In light of this general interpretation, this case note will treat the two provisions as providing the same amount of protection.

10. *See Weeks v. United States*, 232 U.S. 383, 398 (1914).

11. *Id.* (“We therefore reach the conclusion that the letters in question were taken from the house of the accused by an official of the United States . . . in direct violation of the constitutional rights of the defendant In holding them and permitting their use upon the trial, we think prejudicial error was committed.”).

12. *See, e.g., Mapp v. Ohio*, 367 U.S. 643, 650 (1961) (deriving the Court’s rationale from *Weeks* as “the Weeks exclusionary rule”).

13. *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949). While *Wolf* held that the Fourth Amendment was applicable to the states through the Due Process Clause of the Fourteenth Amendment, it did not extend the exclusionary rule delineated in *Weeks* to apply to evidence obtained illegally from state officials. *Id.* It was not until *Mapp* that the exclusionary rule was extended to protect citizens from the use of evidence obtained illegally by state officials. *Mapp*, 367 U.S. at 655. In *Mapp*, the Supreme Court stated:

Were it otherwise, then just as . . . the assurance against unreasonable federal searches and seizures would be “a form of words”, valueless and undeserving of mention in a perpetual charter of inestimable human liberties, so too, without that rule the freedom from state invasions of privacy would be so epemeral [sic] and so neatly severed from its conceptual nexus with the freedom from all brutish means of coercing

A search occurs within the meaning of the Fourth Amendment when the government intrudes into an area where a person has a “reasonable expectation of privacy.”¹⁴ What is considered reasonable is an objective test; it is not enough that an individual expects privacy. What matters is whether a reasonable person under the circumstances would expect privacy.¹⁵ “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. . . . But what he seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected.”¹⁶

Just because a search or seizure has occurred under the Fourth Amendment does not mean one’s constitutional rights have been violated. The Fourth Amendment does not protect against “all searches and seizures, but unreasonable searches and seizures.”¹⁷ As the Court stated in *Weeks*, protection against unreasonable searches and seizures

took its origin in the determination of the framers of the Amendments to the Federal Constitution to provide for that instrument a Bill of Rights, securing to the American people . . . those safeguards which had grown up in England to protect the people from unreasonable

evidence as not to merit this Court’s high regard as a freedom “implicit in the concept of ordered liberty.”

Id. (quoting *Elkins v. United States*, 364 U.S. 206, 213 (1960)).

14. *Katz v. United States*, 389 U.S. 347, 360 (1967) (Harlan, J., concurring); *State v. Larsen*, 650 N.W.2d 144, 148 (Minn. 2002).

15. *Oliver v. United States*, 466 U.S. 170, 177 (1984) (“The [Fourth] Amendment does not protect the merely subjective expectation of privacy, but only those ‘expectation[s] that society is prepared to recognize as reasonable.’” (quoting *Katz*, 389 U.S. at 361 (Harlan, J., concurring) (alteration in original))).

16. *Katz*, 389 U.S. at 351 (majority opinion) (citations omitted). The objective nature of this test has certainly resulted in some interesting holdings by the Supreme Court. *See, e.g.*, *California v. Greenwood*, 486 U.S. 35, 40 (1988) (finding no objective reasonable expectation of privacy in garbage bags left on the side of the curb in front of one’s home because “it is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public”); *California v. Ciraolo*, 476 U.S. 207, 209 (1986) (finding no objective reasonable expectation of privacy in the contents of one’s backyard that was surrounded by “a six-foot outer fence and a ten-foot inner fence completely enclosing the yard” blocking view at ground level because the yard was visible by aircraft from a height of 1,000 feet in navigable airspace).

17. *Elkins*, 364 U.S. at 222.

searches and seizures, such as were permitted under the general warrants issued under authority of the government, by which there had been invasions of the home and privacy of the citizens, and the seizure of their private papers in support of charges, real or imaginary, made against them.¹⁸

A general warrant, as described in this context, “is one that does not specify the items to be searched for or the persons to be arrested.”¹⁹ A general warrant also does not require a showing of probable cause to be issued.²⁰ It was in “[r]esistance to these practices . . . [that] the principle which was enacted into the fundamental law in the [Fourth] Amendment, that a man’s house was his castle, and not to be invaded by any general authority to search and seize his goods and papers” was established.²¹ Although the Fourth Amendment has generally been interpreted in terms of protecting privacy, perhaps its protection against unreasonable searches and seizures is better described as protecting individual *autonomy* against unreasonable *intrusion* by governmental officials.²²

B. *Justifying Governmental Intrusion*

The remainder of the Fourth Amendment provides that “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.”²³ The Fourth Amendment protects against unreasonable searches and seizures through its warrant requirement.²⁴

18. *Weeks v. United States*, 232 U.S. 383, 390 (1914).

19. 68 AM. JUR. 2D *Searches and Seizures* § 212 (2015).

20. *Id.*

21. *Weeks*, 232 U.S. at 390.

22. *See Katz v. United States*, 389 U.S. 347, 351 (1967) (“[T]he Fourth Amendment protects people, not places.”); *Weeks*, 232 U.S. at 391 (“It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense” (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886))).

23. U.S. CONST. amend. IV.

24. *Franks v. Delaware*, 438 U.S. 154, 164 (1978) (“The bulwark of Fourth Amendment protection, of course, is the Warrant Clause, requiring that, absent certain exceptions, police obtain a warrant from a neutral and disinterested magistrate before embarking upon a search.”).

Any search under the Fourth Amendment must be supported by probable cause and a warrant²⁵ or an exception to the warrant requirement.²⁶ The Supreme Court has adopted a “totality-of-the-circumstances approach” in determining whether probable cause exists.²⁷ “The process does not deal with hard certainties, but with probabilities.”²⁸

In addition to probable cause, governmental officials need a warrant to justify a search of a person or their property.²⁹ A neutral magistrate is to determine whether probable cause exists based on oath or affirmation by the official seeking the warrant.³⁰ A warrantless search is *per se* unreasonable under the Fourth Amendment, subject to “specifically established and well-delineated exceptions.”³¹ There are several recognized exceptions to the warrant requirement.³² Many of these exceptions derive out of

25. It would, perhaps, be more accurate to say that any *full* search under the Fourth Amendment must be accompanied by probable cause. The Supreme Court has recognized searches that fall short of a full search. In the landmark Fourth Amendment case of *Terry v. Ohio*, the Supreme Court recognized a type of search that was something less than a full search, one that is “limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby” during an investigatory stop. 392 U.S. 1, 26 (1968). Such searches need not be accompanied by probable cause, but only reasonable suspicion where “a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.” *Id.* at 27. Because *Bernard* involves a full search, this case note will focus on the justifications for full searches.

26. *See, e.g.*, *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (discussing the exigent circumstances exception to the warrant requirement); *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (discussing officer safety and the preservation of evidence as justifications for the search-incident-to-arrest exception); *Katz*, 389 U.S. at 357.

27. *Illinois v. Gates*, 462 U.S. 213, 230–31 (1983).

28. *Id.* (quoting *United States v. Cortez*, 449 U.S. 411, 418 (1981)).

29. *See, e.g.*, *McNeely*, 133 S. Ct. at 1558; *Gant*, 556 U.S. at 338; *Katz*, 389 U.S. at 357.

30. U.S. CONST. amend. IV. The oath or affirmation provision requires “that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter.” *Franks v. Delaware*, 438 U.S. 154, 165 (1978). The Fourth Amendment “takes the affiant’s good faith as its premise,” requiring that the underlying facts and circumstances be “‘truthful’ in the sense that the information put forth is believed or appropriately accepted by the affiant as true.” *Id.* at 164, 165.

31. *Katz*, 389 U.S. at 357.

32. *See McNeely*, 133 S. Ct. at 1558–59 (recognizing an exigent circumstances exception to protect imminent destruction of evidence, provide emergency

public policy concerns, such as “law enforcement’s need to provide emergency assistance to an occupant of a home . . . or enter a burning building to put out a fire and investigate its cause.”³³ It is important to remember, however, that a warrantless search is presumed to be unreasonable; it can become reasonable only if the situation would justify it.³⁴

Courts also decide whether to “exempt a given type of search from the warrant requirement ‘by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’”³⁵ The exception to the warrant requirement on which this case note will focus is the search-incident-to-arrest exception.³⁶ However, some discussion on the exigent circumstances exception is necessary to provide useful background information for a better understanding of the issues in *Bernard*, as the two exceptions overlap in some respects.

In *Missouri v. McNeely*, the Supreme Court addressed “whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk-driving investigations.”³⁷ The defendant was arrested on suspicion of driving while being impaired.³⁸ After the arrest, the officer asked the defendant to submit to a breath test, and he refused.³⁹ The officer informed the defendant that, under Missouri law, refusing to submit to a chemical test could result in license revocation for up to a year with the possibility of the refusal being used at a subsequent criminal proceeding.⁴⁰ After the defendant refused, the officer transported him to a nearby hospital for a blood test.⁴¹ After

assistance, or to allow police to maintain “hot pursuit” of a suspect); *Gant*, 566 U.S. at 338 (recognizing a search-incident-to-arrest exception).

33. *McNeely*, 133 S. Ct. at 1559.

34. *Id.* (“[A] warrantless search is potentially reasonable because ‘there is compelling need for official action and no time to secure a warrant.’” (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978))).

35. *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

36. *See infra* Part III.B.

37. 133 S. Ct. at 1558.

38. *Id.* at 1556–57.

39. *Id.* at 1557.

40. *Id.*

41. *Id.*

the defendant refused to take the blood test, the officer ordered the lab technician to take a blood sample anyway.⁴² The defendant moved to suppress the blood test and succeeded at trial.⁴³ The trial court concluded the exigent circumstances exception to the warrant requirement did not apply to the natural dissipation of alcohol in the blood stream.⁴⁴

The case was appealed all the way to the United States Supreme Court, which held that “in drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant,” refusing to acknowledge a “*per se* exigency” in all DWI cases.⁴⁵ The Supreme Court acknowledged, however, that under certain circumstances, a warrantless search of one’s blood could be justified by an exigency, but the exigency “must be determined case by case based on the totality of the circumstances.”⁴⁶ It is important to remember this holding when analyzing the majority’s opinion in *Bernard*.

C. *Search-Incident-to-Arrest Exception*

One exception to the warrant requirement arises when the search is incident to a lawful arrest.⁴⁷ The search-incident-to-arrest exception to the warrant requirement “derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations.”⁴⁸ The search-incident-to-arrest exception serves two purposes. First, an arresting officer may search a person arrested “in order to remove any weapons” that person might have on them; [o]therwise, the officer’s safety might well be endangered, and the arrest itself frustrated.”⁴⁹ Second, an arresting officer may search “the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”⁵⁰ The

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* at 1568.

46. *Id.* at 1563.

47. *Arizona v. Gant*, 556 U.S. 332, 338 (2009); *United States v. Robinson*, 414 U.S. 218, 224 (1973).

48. *Gant*, 556 U.S. at 338.

49. *Chimel v. California*, 395 U.S. 752, 763 (1969).

50. *Id.*

purpose of this is “to prevent [the evidence’s] concealment or destruction.”⁵¹ Limiting the search-incident-to-arrest exception to a specific, narrow interpretation “ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.”⁵² The search-incident-to-arrest exception is strictly limited to serve these two purposes.⁵³

One place that the Supreme Court considered essentially off-limits from warrantless searches is a person’s home.⁵⁴ This includes warrantless searches incident to arrest.⁵⁵ Such protection is grounded in important privacy and policy considerations.

D. *Right to Due Process of Law*

Both the U.S. Constitution and the Minnesota Constitution provide that the government shall not “deprive any person of life, liberty, or property without due process of law.”⁵⁶ Due process has both a procedural component and a substantive component.⁵⁷ In

51. *Id.*

52. *Gant*, 556 U.S. at 339.

53. *Id.* (“If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”).

54. *McDonald v. United States*, 335 U.S. 451, 455–56 (1948) (noting that requiring a warrant be issued by a neutral magistrate prior to a search “was done not to shield criminals nor to make the home a safe haven for illegal activities” but “was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law”). The Court in *McDonald* explained that “[t]he right of privacy [is] precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals.” *Id.* The Court went on to point out that power is dangerous, and stressed the importance of placing a neutral magistrate between police and the sanctity of people’s homes, noting that the “police acting on their own cannot be trusted.” *Id.*; *Weeks v. United States*, 232 U.S. 383, 390 (1914) (stating a man’s house is his castle and is “not to be invaded by any general authority to search and seize his goods and papers”).

55. *Chimel v. California*, 395 U.S. 752, 763 (1969).

56. U.S. CONST. amend. XIV, § 1; MINN. CONST. art. I, § 7.

57. *Washington v. Glucksberg*, 521 U.S. 702, 764 (1997) (“The text of the Due Process Clause thus imposes nothing less than an obligation to give substantive content to the words ‘liberty’ and ‘due process of law.’”); *Poe v. Ullman*, 367 U.S. 497, 541 (1961) (“Were due process merely a procedural safeguard it would fail to reach those situations where the deprivation of life, liberty or property was accomplished by legislation which by operating in the

addition to requiring the government to follow the procedures set forth in the Constitution, the Due Process Clause provides “heightened protection against government interference with certain fundamental rights and liberty interests.”⁵⁸ The court determines whether an asserted right is worthy of heightened protection by asking whether the right is “deeply rooted in this Nation’s history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if they were sacrificed.”⁵⁹ The Supreme Court has recognized several fundamental rights worthy of heightened constitutional protection.⁶⁰ The right to be free from unreasonable searches under the Fourth Amendment is considered a fundamental right worthy of heightened protection under the due process clause.⁶¹

Whenever a statute significantly interferes with a fundamental right, the court applies a “strict scrutiny” test to determine whether or not such interference violates substantive due process.⁶² In order for a statute to survive strict scrutiny analysis, “the state must demonstrate that the statute serves a compelling state interest, and that the state’s objectives could not be achieved by any less restrictive measures.”⁶³ This means that the statute must be “narrowly tailored” so that it “eliminates no more than the exact source of the ‘evil’ it seeks to remedy.”⁶⁴ If there is no compelling

future could, given even the fairest possible procedure in application to individuals, nevertheless destroy the enjoyment of all three.”).

58. *Glucksberg*, 521 U.S. at 720.

59. *Id.* at 720–21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503–04 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937); *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

60. *See, e.g., Roe v. Wade*, 410 U.S. 113, 153 (1973) (extending the fundamental right to privacy to include the fundamental right of a woman to decide whether to terminate her pregnancy); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (recognizing a fundamental right to marry); *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965) (recognizing a fundamental right to marital privacy); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942) (recognizing a fundamental right to have children); *see also Rochin v. California*, 342 U.S. 165, 174 (1952) (finding it “offensive to human dignity” to stomach pump a defendant against his will to obtain morphine pills to use against him at trial).

61. *Mapp v. Ohio*, 367 U.S. 643, 655–56 (1961) (noting that *Wolf v. Colorado*, 338 U.S. 25 (1949) extended “the substantive protections of due process to all constitutionally unreasonable searches—state or federal”).

62. 16A AM. JUR. 2D *Constitutional Law* § 403 (2015).

63. *Id.*

64. *Id.*

state interest, or if the statute is not narrowly tailored to achieve the compelling state interest, the statute fails strict scrutiny and violates substantive due process under the Fourteenth Amendment.⁶⁵

If a statute does not interfere with a fundamental right, substantive due process requires only that the statute be analyzed under a “rational basis” standard.⁶⁶ In order to pass the rational basis test, the court must determine “whether, in enacting legislation, the legislature is acting in pursuit of permissible state objectives and, if so, whether the means adopted are reasonably related to accomplishment of those objectives.”⁶⁷ This is a deferential test, where courts do not act as policy makers; rather, it is their duty to make sure the methods chosen are not an unreasonable means of achieving a permissible result.⁶⁸

Fourteenth Amendment due process protection depends greatly on whether or not a fundamental right has been implicated.⁶⁹ If the statute implicates a fundamental right, the statute is scrutinized more closely, protecting individuals from governmental overreach. If there is no fundamental right implicated, great deference is given to the state. This is why, as this case note will explore, it matters significantly whether a post-arrest warrantless search of one’s breath is an unreasonable search under the Fourth Amendment. If it is, then any statute criminalizing refusal to consent to such an unreasonable search would implicate a fundamental right. Such a statute could only be constitutional if it survives strict scrutiny.⁷⁰

65. *Id.*

66. 16B AM. JUR. 2D *Constitutional Law* § 965 (2015); *see also* *Washington v. Glucksberg*, 521 U.S. 702, 728 (1997) (noting that even though the court did not recognize physician-assisted suicide as a fundamental right, the state legislature still had the burden of demonstrating that banning physician-assisted suicide was “rationally related to legitimate government interests”).

67. 16B AM. JUR. 2D *Constitutional Law* § 965.

68. *Id.*

69. *Glucksberg*, 521 U.S. at 720.

70. *Id.* at 721 (“[T]he Fourteenth Amendment ‘forbids the government to infringe . . . “fundamental” liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.’” (quoting *Reno v. Flores*, 507 U.S. 292, 302 (1993))).

III. THE *BERNARD* DECISIONA. *Facts and Procedural Posture*

Police received a report on August 5, 2012, that three intoxicated individuals were trying to get a boat out of the water at a boat launch in South Saint Paul.⁷¹ When the police arrived at the boat launch, a witness informed them that the men's truck became stuck in the river while they were attempting to pull their boat out of the water.⁷² One of the men, William Robert Bernard, was in his underwear.⁷³ As the officers approached the men, they could smell a strong odor of alcohol coming from the group.⁷⁴ Bernard admitted to the officers that he had been drinking, but he denied driving the truck.⁷⁵ While speaking with Bernard, the officers noticed the smell of alcohol on his breath; his bloodshot, watery eyes; and the keys to the truck in his hand.⁷⁶ After refusing to perform a field sobriety test, the officers arrested Bernard on suspicion of driving while impaired.⁷⁷

At the police station, the officers read Bernard the Implied Consent Advisory⁷⁸ and gave Bernard an opportunity to speak with an attorney.⁷⁹ Bernard called his mother, told officers he did not need any more time, and refused to take a breath test.⁸⁰

The state charged Bernard with two counts of first-degree test refusal.⁸¹ Bernard filed a motion to dismiss the charges on the

71. *State v. Bernard*, 859 N.W.2d 762, 764 (Minn. 2015).

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. MINN. STAT. § 169A.51, subdiv. 2 (2014) (requiring a person arrested for driving while impaired to be advised that Minnesota law requires him or her to take a chemical test to determine if he or she is under the influence of alcohol, that refusal to take the test is a crime, and that he or she has a right to consult an attorney before taking the test, as long as there would not be any unnecessary delay in the administration of the test).

79. *Bernard*, 859 N.W.2d at 764–65.

80. *Id.* at 765.

81. *Bernard*, 859 N.W.2d at 765 n.1; *see also* MINN. STAT. §§ 169A.20, subdiv. 2, 169A.24, subdiv. 1 (criminalizing the refusal to submit to a chemical test for intoxication and making it a felony-level offense if the defendant has had three or more impaired driving incidents within ten years). Because Bernard had four DWI

grounds that the test-refusal statute violated his right to due process because the statute criminalizes refusing an unreasonable, warrantless search.⁸² The district court ruled that the test-refusal statute was not unconstitutional on its face, but it dismissed the charges, concluding the police needed a warrant to search Bernard.⁸³

The Minnesota Court of Appeals reversed this decision, holding that the test refusal statute did not violate Bernard's right to due process because the officers could have secured a warrant to search Bernard's breath.⁸⁴ The Minnesota Court of Appeals reasoned that, because "the officer could have just as lawfully asked an independent jurist to issue a search warrant to test Bernard's blood," he was justified in asking Bernard to take the test.⁸⁵ In dictum, the court of appeals also addressed the state's argument that the search-incident-to-arrest exception to the warrant requirement applies in this case to justify the post-arrest search of Bernard's breath.⁸⁶ It stated that the exception would not apply in this case because an exigent circumstance would also need to exist in order to satisfy that exception.⁸⁷ The Minnesota Supreme Court granted review.

B. The Minnesota Supreme Court's Decision

Before the Minnesota Supreme Court, Bernard argued that the test refusal statute, as applied to him, violated his right to substantive due process because it criminalized his Fourth Amendment right to be free from unconstitutional, warrantless searches.⁸⁸ The Minnesota Supreme Court first turned to the question of whether a warrantless search of Bernard's breath was reasonable under the Fourth Amendment.⁸⁹ After ruling that such a search was reasonable under the search-incident-to-arrest exception to the warrant requirement, the court asked the follow-

convictions since 2006, this offense qualified as a felony first-degree driving while impaired offense. *See id.* § 169A.24, subdiv. 1.

82. *Bernard*, 859 N.W.2d at 765.

83. *Id.*

84. *State v. Bernard*, 844 N.W.2d 41, 45 (Minn. Ct. App. 2014).

85. *Id.*

86. *Id.* at 47 (dictum).

87. *Id.*

88. *Bernard*, 859 N.W.2d at 765.

89. *Id.* at 766.

up question of whether such a search violated his right to substantive due process.⁹⁰ The court ruled that it did not.⁹¹

The Minnesota Supreme Court noted that a “warrantless search is generally unreasonable, unless it falls into one of the recognized exceptions to the warrant requirement.”⁹² The court then stated that a search incident to a lawful arrest is one exception to the warrant requirement.⁹³ The court explained that this exception allows police “to conduct a ‘full search of the person’ who has been lawfully arrested.”⁹⁴ The majority held in this case that a warrantless search of Bernard’s breath was a search incident to a lawful arrest and, therefore, did not violate his Fourth Amendment right to be free from unreasonable searches.⁹⁵

The Minnesota Supreme Court justified its holding by separating searches incident to arrest into two categories: (1) police may search the *person* of the arrestee including pockets and clothing, and (2) police may search “the area within the immediate control of the arrestee.”⁹⁶ The majority relied heavily on *United States v. Robinson* to support its position.⁹⁷ The court stated, “Subsequent cases have addressed and limited the second type of search under the search-incident-to-arrest exception . . . but they have not narrowed the exception with respect to a search of the arrestee’s body.”⁹⁸ The court supported this assertion by contending that previous cases have held “*a full search of the person* is not only an exception to the warrant requirement . . . but is also a ‘reasonable’ search under that Amendment.”⁹⁹ The majority went on to say that their interpretation of *Robinson* was that a warrantless search of a person’s body incident to arrest is “categorically reasonable under the Fourth Amendment as a search incident to that person’s valid arrest.”¹⁰⁰ The Minnesota Supreme Court recognized the applicability of the “categorical rule” here that was

90. *Id.* at 773.

91. *Id.* at 773–74.

92. *Id.* at 766 (citing *State v. Flowers*, 734 N.W.2d 239, 248 (Minn. 2007)).

93. *Id.* (citing *Arizona v. Gant*, 556 U.S. 332, 338 (2009)).

94. *Id.* (quoting *United States v. Robinson*, 414 U.S. 218, 235 (1973)).

95. *Id.* at 767.

96. *Id.* at 768–69 (quoting *Robinson*, 414 U.S. at 224).

97. *See id.* at 769–71; *see Robinson*, 414 U.S. at 235.

98. *See Bernard*, 859 N.W.2d at 769 (citing *Arizona v. Gant*, 566 U.S. 332, 351 (2009)).

99. *Id.* (quoting *Robinson*, 414 U.S. at 235).

100. *Id.* (citing *Missouri v. McNeely*, 133 S. Ct. 1552, 1559 (2013)).

addressed by the United States Supreme Court in *Riley v. California* where “a search of the person of an arrestee [is] justified only by the custodial arrest itself”¹⁰¹

The court continued its reasoning by addressing *Riley* and *United States v. Chadwick* to further distinguish a search of a person’s body post-arrest from a search of *the area within the person’s immediate control*.¹⁰² Both *Riley* and *Chadwick* placed limitations on the search-incident-to-arrest exception, but as the majority interpreted these cases, it only limits searches of the area within the arrestee’s control—it does not limit a search of one’s body.¹⁰³

Riley held, as the majority also pointed out, that a warrant is required to search the contents of a cell phone on a person post-arrest and that a warrantless search was not justified by the search-incident-to-arrest exception.¹⁰⁴ *Chadwick* also limited “the *type of property* that may be categorically searched as part of a search incident to arrest to property immediately associated with the arrestee.”¹⁰⁵ The court went on to say that because both *Riley* and *Chadwick* involved searches of property within the immediate control of the arrestee, any restrictions those holdings may have placed on searches incident to arrest applied only to searches of the area within the arrestee’s immediate control, and did not apply to searches of the arrestee’s body.¹⁰⁶

The majority supported its reasoning by comparing the search of Bernard’s breath to other searches incident to arrest that courts have held as valid.¹⁰⁷ The court also supported its holding by citing several other cases upholding the reasonableness of breathalyzer tests as searches incident to arrest.¹⁰⁸ The court concluded its

101. *Id.* at 770 (quoting *Riley v. California*, 134 S. Ct. 2473, 2484 (2014)).

102. *Bernard*, 859 N.W.2d at 770 (citing *Riley*, 134 S. Ct. 2473; *United States v. Chadwick*, 433 U.S. 1 (1977)).

103. *Id.* at 771.

104. *Riley*, 134 S. Ct. at 2494–95; *see also Bernard*, 859 N.W.2d at 770.

105. *Bernard*, 859 N.W.2d at 771 (interpreting *Riley*, 134 S. Ct. at 2484).

106. *Id.* at 771 (interpreting *Riley*, 134 S. Ct. at 2484, and *Chadwick*, 433 U.S. at 15).

107. *Id.* at 767 (citing *State v. Riley*, 303 Minn. 251, 255, 226 N.W.2d 907, 910 (1975)) (holding a warrantless inspection of an arrested man’s penis as a valid search incident to a lawful arrest). The court also cites *State v. Bonner*, where the court upheld the taking of an arrestee’s fingerprints and photographs, to illustrate its comparison with *Bernard*. 146 N.W.2d 770, 775 (Minn. 1996).

108. *Bernard*, 859 N.W.2d at 767 (citing *United States v. Reid*, 929 F.2d 990, 994 (4th Cir. 1991)) (holding reasonable searches incident to a lawful arrest to

analysis of the first issue by noting its inability to locate “a single case” in the United States holding warrantless breath tests impermissible under the exception.¹⁰⁹

Holding that a warrantless search of Bernard’s breath was not unreasonable, and therefore did not violate his Fourth Amendment right to be free from unreasonable searches, the court turned to the issue of whether such a search violated Bernard’s right to substantive due process.¹¹⁰ The court began its due process analysis by asking whether or not the challenged statute implicates a fundamental right.¹¹¹ The court reasoned that, because the search of Bernard’s breath was constitutional under the Fourth Amendment, no fundamental right was implicated by the test refusal statute.¹¹² Because the statute did not implicate a fundamental right, the court analyzed the test refusal statute under the rational basis standard.¹¹³ Finding that Minnesota has a legitimate interest in highway safety, and that criminalizing drivers suspected of driving while impaired for refusing to submit a breath test was a reasonable means to further that interest, the court held that the test refusal statute did not violate Bernard’s right to substantive due process.¹¹⁴ Based on this analysis, the majority affirmed the Minnesota Court of Appeals’ decision and Bernard’s conviction.¹¹⁵

include breathalyzer tests).

109. *Id.* at 767–68. But consider *Williams v. State*, decided after *Bernard*, where the Florida District Court of Appeals held that neither officer safety, nor preservation of evidence, would justify a breath test as permissible under the search-incident-to-arrest exception. *Williams v. State*, 167 So. 3d 483, 492 (Fla. Dist. Ct. App. 2015) (dictum), *cert. granted*, No. SC15-1417, 2015 WL 9594290 (Fla. Dec. 30, 2015). Although the majority is technically correct in its assertions, *Williams* draws into serious question the majority’s assumption that courts truly are all in agreement on this issue.

110. *Bernard*, 859 N.W.2d at 773.

111. *Id.*

112. *Id.*

113. *Id.*; see also *supra* notes 67–69 and accompanying text.

114. *Bernard*, 859 N.W.2d at 773–74.

115. *Id.* at 774.

C. *The Dissenting Opinion*

Justice Page and Justice Stras filed a joint dissenting opinion.¹¹⁶ The dissent began by arguing that the majority erred in two respects:

First, the court assumes, without support, that biological material may be taken from *inside* a person's body as part of a search incident to arrest. Second, the court assumes, again without support, that the rationales underlying the search-incident-to-arrest exception—officer safety and preventing the destruction of evidence—do not apply to searches of a person.¹¹⁷

The dissenters argued that “the Supreme Court has never implied, much less stated, that the search-incident-to-arrest exception extends to the forcible removal of substances from within a person's body.”¹¹⁸ They supported their argument by pointing out the facts surrounding the search in *Robinson*, stating, “The ‘full search of the person’ involved only a pat down and an examination of the contents of Robinson's pockets, not an invasive search to retrieve biological material from within his body.”¹¹⁹ The dissent argued that if the search had been more invasive factually, a full search may not have been justified.¹²⁰

The dissent continued by criticizing the majority's broad interpretation of *Robinson*, quoting *Riley* for support. The dissenters argued that “when [the Supreme Court] refers to a search of a person incident to arrest, as in *Robinson*, it is talking about personal property—that is, evidence—found *on* a person.”¹²¹ They pointed to the Supreme Court in *Robinson*, and cautioned on the proper scope of the exception, stating that “while *Robinson's* categorical rule strikes the appropriate balance in the context of *physical objects*, neither of its rationales has much force with respect to digital contents on cell phones.”¹²² The dissenting justices believed *Riley* clarified that *Robinson's* holding applies only to physical evidence

116. *Id.* (Page and Stras, JJ., dissenting).

117. *Id.* (citation omitted).

118. *Id.*

119. *Id.* at 775.

120. *Id.* (Page and Stras, JJ., dissenting) (“[T]he interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street” (quoting *Illinois v. Lafayette*, 462 U.S. 640, 645 (1983))).

121. *Id.*

122. *Id.* (quoting *Riley v. California*, 134 S. Ct. 2473, 2484 (2014)).

rather than digital content; in turn they stated that “the only logical conclusion is that removal of breath (or blood or urine) from the body to discover an arrestee’s blood alcohol level is not part of a search incident to arrest.”¹²³

The dissent’s second point of contention with the majority opinion was the majority’s assumption that “the rationales for the search-incident-to-arrest exception—officer safety and preventing the destruction of evidence—d[id] not apply to searches of a person.”¹²⁴ The dissent believed this “assumption [wa]s in conflict with Supreme Court precedent.”¹²⁵

The dissent argued that the majority unjustifiably separated searches incident-to-arrest into two categories: searches of the person and searches of the area within his or her immediate control.¹²⁶ It then argued that the majority further erred when it applied the justifications of officer safety and preservation of evidence only to the latter category of searches, allowing a full search of the arrestee justified by the arrest itself.¹²⁷ The dissent found this separation unjustified by precedent, arguing that *Robinson* and *Riley* did not reject the *Chimel* rationales of officer safety and preservation of evidence as justifications for the search-incident-to-arrest exception, and did not extend the scope of the search-incident-to-arrest exception beyond the purposes it intended to serve.¹²⁸

The dissent recognized the majority’s need to separate these searches into two different categories; if the majority did not, the *Chimel* rationales would not justify a search of Bernard’s breath:

The *only* justification for allowing police to conduct a warrantless breath test is the preservation of evidence due to the natural dissipation of alcohol from a person’s bloodstream. In *McNeely*, however, the Supreme Court specifically rejected the proposition that the natural metabolism of alcohol constitutes a *per se* exigency justifying a warrantless blood test.¹²⁹

123. *Id.* at 776.

124. *Id.* at 777.

125. *Id.*

126. *Id.* at 777–78.

127. *Id.*

128. *Id.* at 778.

129. *Id.*

The dissent believed the majority's separation of a search of one's body from a search of the area within his or her immediate control and recognition of a categorical "bright-line" rule was simply an attempt to "readopt[] a per se exigency under a different name."¹³⁰

The dissent then moved to the topic of whether the test refusal statute was constitutional. The dissent concluded "that, in Bernard's case, it [wa]s not."¹³¹ The dissent noted that "a state cannot criminalize the refusal to consent to an illegal warrantless search."¹³² They end their constitutional analysis by arguing that the state cannot criminalize Bernard's right to refuse unconstitutional searches; because of this, the test refusal statute violated Bernard's right to due process.¹³³

Although the dissent concluded that the test refusal statute was unconstitutional as applied to Bernard, it also acknowledged that there might be a situation where it would be constitutional to criminalize a test refusal, such as when it would be extremely difficult or impossible for law enforcement to get a search warrant.¹³⁴

IV. ANALYSIS

A. *Unjustifiable Separation of Searches Incident to Arrest*

Separating the search of a person's body and a search of the area within his or her immediate control incident to a lawful arrest is not supported by Fourth Amendment jurisprudence. The United States Supreme Court in *Chimel* made no attempt to separate searches of an arrestee's person from the area within his or her immediate control. In fact, the Supreme Court in *Chimel* seemed to think that

130. *Id.* at 779.

131. *Id.*

132. *Id.* (citing *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 540 (1967)).

133. *Id.* at 780.

134. *Id.* at 779–80 (citing *Missouri v. McNeely*, 133 S. Ct. 1552, 1561 (2013)). The United States Supreme Court in *McNeely* also acknowledged this possibility, noting that even though a warrantless blood test did not constitute a per se exigency, there might be situations where, because of the difficulty to obtain a warrant, an exigency could exist, justifying a warrantless blood test. *McNeely*, 133 S. Ct. at 1568. Such circumstances would, however, "vary depending upon the circumstances in the case." *Id.*

the underlying rationales applied to both types of searches.¹³⁵ The Court's rationale in *Chimel* behind the search-incident-to-arrest exception applies to both types of searches, as is evidenced by the use of the disjunctive word "or" in the phrase "[assaulting an officer and destroying weapons] might easily happen where the weapon or evidence is on the accused's person *or* under his immediate control."¹³⁶

The Supreme Court in *Arizona v. Gant* also made no distinction between a search of a person's body and a search of the area within his or her immediate control. Again, the language the Court used seemed to reiterate that the rationales behind the search-incident-to-arrest exception apply to both types of searches.¹³⁷ Quoting *Chimel*, the Supreme Court in *Gant* acknowledged the Supreme Court's justification for searches incident to arrest, noting that "searches incident to arrest are reasonable 'in order to remove any weapons [the arrestee] might seek to use' and 'in order to prevent [the] concealment or destruction' of evidence"¹³⁸ Like *Chimel*, the language in *Gant* suggests the rationales underlying searches of an arrestee's body are the same rationales underlying searches of the area within his or her immediate control.

The Minnesota Supreme Court argued that both *Robinson* and *Riley* justify making such a distinction.¹³⁹ However, a closer reading of *Riley* suggests it actually narrowed the scope of the search of a

135. *Chimel v. California*, 395 U.S. 752, 764 (1969) ("The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control. But these justifications are absent where a search is remote in time or place from the arrest." (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964))).

136. *Id.* (emphasis added).

137. *Arizona v. Gant*, 556 U.S. 332, 339 (2009) ("In *Chimel*, we held that a search incident to arrest may only include "the arrestee's person and the area 'within his immediate control', That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." (quoting *Chimel*, 395 U.S. at 763)).

138. *Id.* (alteration in original).

139. *Bernard*, 859 N.W.2d at 770.

person.¹⁴⁰ As the dissent in *Bernard* points out, *Riley* clarified that “while *Robinson’s* categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones.”¹⁴¹ Observing a categorical rule *in the context of physical objects* found on a person is completely consistent with the *Chimel* rationales of officer safety and evidence preservation. Physical objects can be both a weapon and destroyable evidence. It makes sense why the Supreme Court would justify a search of a cigarette package found on a person as a search incident to a lawful arrest based on officer safety and evidence preservation.¹⁴²

But *Riley* refused to extend the *Robinson* holding to the contents of cell phones because “[t]here are no comparable risks [to officer safety or evidence destruction] when the search is of digital data.”¹⁴³ Further, nowhere in *Robinson* or *Riley* does the Supreme Court say the *Chimel* rationales only apply to searches of the area within the immediate control of the arrestee.¹⁴⁴ The Minnesota Supreme Court is correct in its assertion that the particular cases it cited, *Chadwick*¹⁴⁵ and *Riley*,¹⁴⁶ limited the type of property that can be searched incident to arrest, but that is not to

140. *Riley v. California*, 134 S. Ct. 2473, 2490–91 (2014) (“In 1926, Learned Hand observed . . . that it is ‘a totally different thing to search a man’s pockets and use against him what they contain, from ransacking his house for everything which may incriminate him.’ If his pockets contain a cell phone, however, that is no longer true.”) (citation omitted).

141. *Bernard*, 859 N.W.2d at 775 (Page and Stras, JJ., dissenting) (emphasis added) (quoting *Riley*, 134 S. Ct. at 2484).

142. *United States v. Robinson*, 414 U.S. 218, 236 (1973) (“Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as ‘fruits, instrumentalities, or contraband’ probative of criminal conduct.”).

143. *Riley*, 134 S. Ct. at 2485.

144. *Bernard*, 859 N.W.2d at 778 (Page and Stras, JJ., dissenting) (“[N]either *Robinson* nor *Riley* rejected the *Chimel* rationales as bookends for the circumstances under which the search-incident-to-arrest exception applies.”). While *Robinson* does state that “[e]xamination of this Court’s decisions shows that these two propositions have been treated quite differently,” it goes on to say that the two types of searches are “likewise conceded *in principle*.” 414 U.S. at 224 (emphasis added). The *Robinson* decision then quotes *Chimel* and its underlying rationales of officer safety and evidence preservation. *Id.* at 225–26.

145. 433 U.S. 1 (1977) (holding that a warrantless search of a footlocker was not justified as a search incident to arrest).

146. 134 S. Ct. 2473.

say that the underlying principles of *Chimel* do not apply to other types of searches incident to arrest.

Finally, the Minnesota Supreme Court tried to justify its position by pointing to *State v. Riley*, which allowed a warrantless visual search of an arrested man's penis under the search-incident-to-arrest exception.¹⁴⁷ However, the Minnesota Supreme Court failed to mention *State v. Lussier*, which came to the opposite conclusion.¹⁴⁸ *Lussier* stated that the holding in *State v. Riley* did not apply to its situation because the search in *Lussier* went "significantly further than a visual inspection and involve[d] a greater privacy interest."¹⁴⁹ The court in *Lussier* concluded that the search was not justified by the arrest alone.¹⁵⁰

Furthermore, the Minnesota Court of Appeals in *Lussier* made no distinction between a search of person's body and a search of the area immediately surrounding him or her; in fact, the language again seems to suggest the exact opposite:

[N]either justification for the search-incident-to-arrest exception—officer safety and preservation of evidence—was present here given that respondent was handcuffed and was under constant police observation. Accordingly, we conclude that because respondent was restrained and observed by officers at all times, the warrantless collection of evidence from his genitals was not justified by the need to preserve evidence.¹⁵¹

Lussier, *Chimel*, and *Gant* all draw into serious question the Minnesota Supreme Court's claim that a "categorical rule" exists allowing a full search of the person of an arrestee.¹⁵² These cases are not the only ones to do so.¹⁵³ It is for these reasons the

147. See *Bernard*, 859 N.W.2d at 767; see also *State v. Riley*, 303 Minn. 251, 254, 226 N.W.2d 907, 909 (1975).

148. 770 N.W.2d 581, 589 (Minn. Ct. App. 2009) (holding that a warrantless SARS examination of the defendant's genitals was not valid under the search-incident-to-arrest exception), *reh'g denied*, (Minn. Ct. App. Nov. 17, 2009).

149. *Id.*

150. *Id.* (stating the search involved actual touching of the defendant's genitals while the search in *Riley* involved only a visual inspection).

151. *Id.* (citing *Arizona v. Gant*, 556 U.S. 332, 339 (2009)).

152. *Bernard*, 859 N.W.2d at 770.

153. See, e.g., *Cupp v. Murphy*, 412 U.S. 291, 295 (1973) (holding a warrantless search of defendant's fingernails was justified where probable cause to arrest existed, noting "[t]he basis for this exception is that when an arrest is made, it is reasonable for a police officer to expect the arrestee to use any weapons he may have and to attempt to destroy any incriminating evidence then in his

Minnesota Supreme Court should have analyzed the warrantless search of Bernard’s breath under the rationales set forth in *Chimel*.

B. Under Proper Fourth Amendment Jurisprudence, a Breath Test Is Not Justified as a Search Incident to Arrest

As the dissent points out, the majority must separate searches of one’s body and searches of the area within his or her immediate control in order to reach its result.¹⁵⁴ Application of the *Chimel* rationale behind searches incident to arrest—officer safety, and evidence preservation¹⁵⁵—reveals that a warrantless search of one’s breath is not justified by the search-incident-to-arrest exception.¹⁵⁶

To begin with, a breath test is clearly not being used for officer safety. Therefore, the only rationale that could justify a breath test as a search incident to arrest is evidence preservation. Searches for evidence preservation are justified to prevent the *active* concealment or destruction of evidence, that is, to prevent *the defendant* from concealing or destroying evidence.¹⁵⁷ A defendant cannot actively destroy the concentration of alcohol in his body. As discussed above, the natural dissipation of alcohol alone does not justify a search of one’s body under the Fourth Amendment.¹⁵⁸ *McNeely* made it clear that there was no per se exigency from the

possession”); *State v. Robb*, 605 N.W.2d 96, 100 (Minn. 2000) (“One exemption from the warrant requirement is that a person’s body and the area within his or her immediate control may be searched incident to a lawful arrest This exemption ensures officer safety by allowing officers to remove any weapons the arrestee might reach and also prevents the arrestee from tampering with or destroying evidence or contraband.”) (citation omitted).

154. *Bernard*, 859 N.W.2d at 778 (Page and Stras, JJ., dissenting).

155. *See Chimel v. California*, 395 U.S. 752, 762–63 (1969).

156. *Gant*, 566 U.S. at 339 (stating if it is impossible for an arrestee to gain access to the area officers are trying to search, then the exception does not exist).

157. *See id.* (“That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest *that an arrestee might conceal or destroy.*”) (emphasis added); *Chimel*, 395 U.S. at 763 (“[I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction. . . . [This includes] the area ‘within his immediate control’—construing that phrase to mean the area from within which *he might gain* possession of a weapon or destructible evidence.”) (emphasis added).

158. *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013) (“[T]he natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant.”).

natural dissipation of alcohol in the blood stream.¹⁵⁹ Because a defendant cannot actively destroy the alcohol in his bloodstream, and because the Supreme Court has already rejected the natural dissipation of alcohol as a per se exigent circumstance authorizing a warrantless search, the evidence preservation rationale in *Chimel* does not justify a warrantless breath test as a search incident to arrest.¹⁶⁰ Therefore, the search-incident-to-arrest exception should not have been applied in this case.

C. *Despite the Bernard Holding, Your Body Is Still Your Temple*

It is undisputed that “the Fourth Amendment protects people, not places.”¹⁶¹ “The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State.”¹⁶² Bodily integrity is at the heart of Fourth Amendment privacy concerns.¹⁶³ Because of this, we should not accept the Minnesota Supreme Court’s assertion that a warrantless intrusion into a body cavity is ever justified.¹⁶⁴

As stated, warrantless searches are per se unreasonable under the Fourth Amendment.¹⁶⁵ Because personal privacy and bodily integrity are at the heart of the Fourth Amendment, courts must

159. *Id.*

160. *See Gant*, 556 U.S. at 339 (citing *Chimel*, 395 U.S. at 763) (“If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”).

161. *Katz v. United States*, 389 U.S. 347, 351 (1967); *see United States v. Chadwick*, 433 U.S. 1, 7 (1977) (“[M]ore particularly, it protects people from unreasonable government intrusions into their legitimate expectations of privacy.”); *see also Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (noting that the Fourth Amendment’s exclusionary doctrine was “an essential part of the right to privacy”).

162. *Schmerber v. California*, 384 U.S. 757, 767 (1966).

163. *See id.* at 772 (“The integrity of an individual’s person is a cherished value of our society.”); *see also McNeely*, 133 S. Ct. at 1558 (“[A] compelled physical intrusion beneath [the defendant’s] skin and into his veins [constitutes] an invasion of bodily integrity [that] implicates an individual’s ‘most personal and deep-rooted expectations of privacy.’” (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985))).

164. *Cf. Maryland v. King*, 133 S. Ct. 1958, 1989 (2013) (Scalia, J., dissenting) (“I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their mouths for royal inspection.”).

165. *See Katz*, 389 U.S. at 357 (“[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.”).

balance the degree that an exception to the warrant requirement impedes on an individual's reasonable expectation of privacy against the degree that an exception promotes legitimate governmental interests.¹⁶⁶ The Supreme Court has invalidated many searches that cross the line from promoting governmental interests into the realm of intruding upon individual autonomy and privacy.¹⁶⁷

Of course, the government has a compelling interest in protecting people from drunk drivers.¹⁶⁸ However, creating an exception to the Fourth Amendment warrant requirement is not "needed for the promotion"¹⁶⁹ of this interest. If the Minnesota Supreme Court is worried about people refusing to take chemical tests to determine if they are intoxicated—which would allow the evidence in their breath, blood, and urine to slowly dissipate while a warrant is secured—a much simpler remedy is available.

Instead of criminalizing test refusal under the guise of expedited testing, the Minnesota legislature could lower the statutory intoxication limit or extend the time frame that law enforcement officials have to secure a test.¹⁷⁰ Once a warrant is secured, then the search is reasonable under the Fourth Amendment, provided officers abide by the warrant.¹⁷¹ If the legislature were to criminalize a warranted search as a test refusal, it

166. *Riley v. California*, 134 S. Ct. 2473, 2484 (2014) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)).

167. *See, e.g., id.* at 2485 (arguing that, because cell phones "place vast quantities of personal information literally in the hands of individuals," the privacy interests associated with warrantless searches of cell phones outweigh the comparable risk of losing evidence); *Chimel v. California*, 395 U.S. 752, 763 (1969).

168. In 2012, 114 people were killed by drunk drivers in Minnesota alone; this constituted 29% of all traffic related deaths. *2012 Drunk Driving Fatalities by State*, MADD BLOG (Nov. 15, 2013), <http://www.madd.org/blog/2013/november/2012-drunk-driving-fatalities.html>.

169. *Riley*, 134 S. Ct. at 2484 (quoting *Houghton*, 526 U.S. at 300).

170. A person is statutorily intoxicated for the purposes of the driving-while-impaired statute if "the person's alcohol concentration at the time, or as measured within two hours of the time, of driving, operating, or being in physical control of the motor vehicle is 0.08 or more." MINN. STAT. § 169A.20, subdiv. 1(5) (2014).

171. *See* 68 AM. JUR. 2D *Searches and Seizures* § 306 (2015) ("When law enforcement officers execute a valid search warrant and act in a reasonable manner to protect themselves from harm, the Fourth Amendment is not violated.").

would be free to do so, because the Fourth Amendment does not protect against reasonable searches and seizures.¹⁷²

To minimize a person's right to personal privacy, individual autonomy, and bodily integrity is one thing, but to argue that Fourth Amendment jurisprudence sanctions it is quite another. As "every man's house is his castle,"¹⁷³ so too is his *body* his temple. It seems contradictory to hold that people have a greater privacy interest in the contents of their cell phones and in their homes than they do inside their body cavities—their bladder or inside their veins. As the dissent in *Bernard* points out, if the digital contents of a cell phone are safe from a search incident to arrest, "the only logical conclusion is that the removal of breath (or blood or urine) from the body to discover an arrestee's blood alcohol level is not part of a search incident to arrest."¹⁷⁴ Just as the Supreme Court in *Riley* refused to extend the holding in *Robinson* to the search of data on a cell phone, and the Court in *Chimel* and *Mincey* refused to allow the search of one's home incident to arrest, the Minnesota Supreme Court should not have justified a warrantless search of Bernard's breath.¹⁷⁵

D. Due Process

As mentioned above, due process provides "heightened protection against government interference with certain fundamental rights and liberty interests."¹⁷⁶ Fundamental rights are those rights and liberties that are "'deeply rooted in this Nation's history and tradition' . . . and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed.'"¹⁷⁷ The Due Process Clause of the Fourteenth

172. See U.S. CONST. amend. IV.

173. *Weeks v. United States*, 232 U.S. 383, 390 (1914).

174. *State v. Bernard*, 859 N.W.2d 762, 776 (Minn. 2015) (Page and Stras, JJ., dissenting).

175. *Riley v. California*, 134 S. Ct. 2473, 2485 (2014); see also *Bernard*, 859 N.W.2d at 777 (Page and Stras, JJ., dissenting) ("[A] person taking a breath test must insert a tube into his or her mouth and then comply with the officer's instructions [on how] to blow *into* the tube at a specified rate The court does not cite a single Supreme Court case authorizing such a profound intrusion into a person's bodily integrity during a search incident to arrest.")

176. *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997); see *supra* Part II.D.

177. *Glucksberg*, 521 U.S. at 720–21 (quoting *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Palko v. Connecticut*, 302 U.S. 319, 325–26 (1937)).

Amendment imposes a duty on the Supreme Court to review laws of the states to determine whether laws violate our fundamental rights and liberty interests.¹⁷⁸

The Supreme Court considers state action unconstitutional under the Due Process Clause if the conduct “shocks the conscience.”¹⁷⁹ For example, in *Rochin v. California*, the Supreme Court reversed a conviction based on conduct that did just that—conduct that is not too far off from Bernard’s situation.¹⁸⁰ When officers entered the open Rochin residence and forced their way into his bedroom on a tip that he was selling narcotics, they found him sitting on his bed partly dressed with his common-law wife.¹⁸¹ Upon seeing the officers, Rochin grabbed two capsules off his nightstand and shoved them in his mouth.¹⁸² Rochin was handcuffed and taken to a hospital where officers ordered doctors to force “an emetic solution through a tube into Rochin’s stomach against his will.”¹⁸³ After doctors pumped Rochin’s stomach against his will, he vomited up the capsules, which were used against him at trial and resulted in his conviction.¹⁸⁴ The Supreme Court reversed his conviction, finding that the officer’s conduct shocked the conscious and violated Rochin’s right to due process of law.¹⁸⁵

By criminalizing Bernard’s right to refuse an unreasonable search, the Minnesota legislature has effectively allowed officers to pry open a defendant’s mouth and shove a tube inside of it in order to gain evidence to use against them at trial without a warrant. You can refuse, but you will be charged with a new crime.¹⁸⁶ This is no choice in any sense of the word—the option to

178. *Rochin v. California*, 342 U.S. 165, 169 (1952) (noting that the Supreme Court reviews laws “in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses.” (quoting *Malinski v. New York*, 324 U.S. 401, 416–17 (1945))).

179. *Id.* at 172.

180. *Id.* at 174.

181. *Id.* at 166.

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 172 (“Illegally breaking into the privacy of the petitioner, the struggle to open his mouth and remove what was there, the forcible extraction of his stomach’s contents—this course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities. They are methods too close to the rack and the screw to permit of constitutional differentiation.”).

186. *See* MINN. STAT. § 169A.51, subd. 2 (2014).

refuse a drug test presents only the appearance of a choice; however, the individual will be charged regardless. The Minnesota test refusal statute violates one of our most deeply rooted fundamental liberties: the right to be free from unreasonable searches and seizures under the Fourth Amendment.¹⁸⁷

If a statute violates a fundamental right under the Fourteenth Amendment due process clause, its constitutionality is subject to strict scrutiny.¹⁸⁸ Having argued that a breath test is not justified under the search-incident-to-arrest exception, the Minnesota Supreme Court should have analyzed the mandatory breath test statute under a strict scrutiny standard.¹⁸⁹ While the state has a compelling interest in highway safety, the test-refusal statute is not narrowly tailored to achieve that interest. There is a much less restrictive means to achieve this interest: either lower the statutory intoxication level or extend the time allowed to secure a warrant.¹⁹⁰ After that, go get a warrant.

V. CONCLUSION

The Minnesota Supreme Court ruled in *Bernard* that a statute criminalizing the refusal to take a breath test did not violate Bernard's right to due process because a warrantless breath test was reasonable under the Fourth Amendment as a search incident to a lawful arrest.¹⁹¹ Review of the relevant case law has demonstrated that the court misinterpreted the search-incident-to-arrest exception and failed to consider important public policy considerations required by the Fourth Amendment. Holding a warrant is required to search the contents of a cell phone and to search one's dwelling after a lawful arrest, but finding a warrant is

187. *Missouri v. McNeely*, 133 S. Ct. 1552, 1558 (2013); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (noting that the Fourth Amendment protects people's "freedom from all brutish means of coercing evidence"); *Wolf v. Colorado*, 338 U.S. 25, 27–28 (1949) ("The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause.").

188. See *supra* notes 63–66 and accompanying text.

189. See *Katz v. United States*, 389 U.S. 347, 357 (1967) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment.").

190. See MINN. STAT. § 169.20 (2014).

191. *State v. Bernard*, 859 N.W.2d 762, 773–74 (Minn. 2015).

not required to stick a tube in one's mouth after a lawful arrest is confusing, inconsistent, and deserves reconsideration by the U.S. Supreme Court.¹⁹²

192. On June 15, 2015, Bernard petitioned for a writ of certiorari to the U.S. Supreme Court. Petition for a Writ of Certiorari, *Bernard v. Minnesota*, No. 14-1470 (U.S. June 15, 2015). The U.S. Supreme Court granted the petition on December 11, 2015. *Bernard*, 859 N.W.2d 762, *cert. granted sub nom.*, *Bernard v. Minnesota*, 136 S. Ct. 615 (2015); David Chanen, *U.S. Supreme Court to Review Constitutionality of Minnesota's DWI Test-Refusal Law*, STAR TRIB. (MINNEAPOLIS) (Dec. 12, 2015, 7:49 AM), <http://www.startribune.com/u-s-supreme-court-to-review-constitutionality-of-minnesota-s-dwi-test-refusal-law-/361634621>. The U.S. Supreme Court did not state explicitly why it took the case. *Id.* However, it usually takes cases for a specific reason: the case may have an impact on the entire country, there may be a split among the federal circuits, or a case may alter current precedent. *Supreme Court Procedures*, U.S. COURTS (Dec. 17, 2015, 8:24 PM), <http://www.uscourts.gov/about-federal-courts/educational-resources/about-educational-outreach/activity-resources/supreme-1>. This case will no doubt have national impact, as forty-seven states currently have similar implied-consent laws. Chanen, *supra* note 192. Minnesota's implied consent law is somewhat unique in that it is only one of twelve to actually criminalize refusing to take a chemical test following a DWI arrest. *Id.* It is estimated that the Court's holding will affect approximately 20,000 chemical tests in Minnesota each year, not to mention the effect it will have on other cases around the country. *Id.* Although not always, it is believed that the Court will generally hear a case in order to reverse it. Stephen Wermiel, *SCOTUS for Law Students: Scoring the Circuits*, SCOTUSBLOG (June 22, 2014, 10:28 PM), <http://www.scotusblog.com/2014/06/scotus-for-law-students-sponsored-by-bloomberg-law-scoring-the-circuits> (noting that between 2011 and 2014, the Court reversed approximately 70.5% of the cases it reviewed). The Court will review *Bernard*, along with a North Dakota case, to determine the constitutionality of the implied-consent laws. Dan Koewler, *Chuck Ramsay Interviewed by Minnesota Lawyer Regarding the Bernard Case*, MINN. DWI DEFENSE (December 18, 2015), <http://www.mndwifenseblog.com/articles/fourth-amendment>. Minnesota criminal defense lawyers are hopeful, and "don't think it's likely that the U.S. Supreme Court just wants to pat Minnesota and North Dakota on the back and say, 'Hey, you're doing a great job of upholding the United States Constitution!'" *Id.* Hopefully the U.S. Supreme Court will acknowledge that the U.S. Constitution applies all of the time, whether its two o'clock in the afternoon, or two o'clock in the morning.