CASE NO: SC18-792

In the Supreme Court of Florida

BYRON MCGRAW,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON DISCRETIONARY REVIEW
FROM THE FOURTH DISTRICT COURT OF APPEAL
DCA No.: 4D17-232

PETITIONER'S INITIAL BRIEF ON THE MERITS

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INTRODUCTION

In *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), the United States Supreme Court rejected arguments to apply *per se* warrant exceptions to justify warrantless blood draws of motorists, instead requiring that the reasonableness of the blood draws be evaluated under the totality of the circumstances. The Supreme Court did so in recognition that a blood draw is not a mundane search but an "invasion of bodily integrity [that] implicates an individual's most personal and deep-rooted expectations of privacy." *McNeely*, 569 U.S. at 148 (quotation omitted).

In this case, the Fourth District Court of Appeal has certified a question of great public importance concerning whether a provision of Florida's implied consent statutes creates a *per se* exception to the warrant requirement for blood draws. That exception would permit officers to perform warrantless blood draws upon unconscious motorists based only upon implied consent. Because blood draws implicate significant privacy concerns and statutory "implied" consent from unconscious motorists does not satisfy the Fourth Amendment requirement that consent be voluntary, Petitioner requests that this Court answer the certified question in the negative. Within this Brief, the following symbol will be used:

"R" Record on appeal, followed by the appropriate page number

STATEMENT OF THE CASE AND FACTS

Petitioner Byron McGraw was charged with two counts of driving under the influence (DUI) causing or contributing to injury to person or property. (R. 36-38). The evidence of Petitioner's impairment derived from a warrantless blood draw performed pursuant to section 316.1932(1)(c), Florida Statutes (2016), while Petitioner was unconscious at a hospital. Section 316.1932(1)(c) is part of Florida's implied consent statutory scheme and provides, in relevant part, that

> [a]ny person who is incapable of refus[ing implied consent] by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to [a blood draw and testing].

In a written motion, Petitioner moved to suppress the results of the warrantless blood draw as a "violation of his rights under the Fourth and Fourteenth Amendment[s]." (R. 50). Relying upon the United States Supreme Court's decisions in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), and *Missouri v. McNeely*, 569 U.S. 141 (2013), Petitioner argued the blood draw was unlawful because "warrantless blood draws are not permissible incident to arrest, and are not *per se* permissible under the exigent circumstances exception." (R. 51). Furthermore, Petitioner asserted no exigent circumstances existed to justify the blood draw because the investigating officer "made no effort[] to get a warrant for [Petitioner's] blood," despite the ability to do so. (R. 52).

I. The Suppression Hearing

At a suppression hearing, Officer Brian De Santis testified that on April 16, 2016, at around 8:00 a.m., he responded to the scene of a single-car accident to find Fire Rescue personnel removing Petitioner from the driver's side of a flipped-over vehicle. (R. 123-25, 133, 138, 141). Petitioner was "unconscious and not responsive to any of the Fire Rescue personnel." (R. 125, 133). While Petitioner was being removed, Officer De Santis "detected an odor of an unknown alcoholic beverage emanating from his body, his clothing, and from the vehicle." (R. 125).

After being extracted from the car, Petitioner was placed on a stretcher and transported to the hospital, where he received treatment. (R. 125-27, 133). Officer De Santis followed Petitioner to the hospital—a trip that took around five minutes—and met with hospital staff. (R. 127).

Although not appearing to have suffered traumatic injuries, Petitioner remained unconscious at the hospital. (R. 127, 129). To facilitate the DUI investigation, Officer De Santis tried to help Petitioner regain consciousness by "rub[bing Petitioner's] sternum to see if there would be any kind of reaction from pain compliance"—however, Petitioner "never reacted to the stimulus." (R. 128).

Without attempting to obtain a search warrant, (R. 136), Officer De Santis requested at about 9:00 a.m. that blood be drawn "by the registered nurse who was assigned to the case inside the hospital." (R. 129, 134). Officer De Santis explained

that he ordered "the blood draw because of the simple fact that [Petitioner] was unconscious and [the officer] was investigating a DUI crash." (R. 132, 136-37). Furthermore, the officer agreed that the length of time Petitioner remained in the hospital did not impact his decision to order the blood draw. (R. 132).

In total, Officer De Santis's involvement in Petitioner's case entailed about thirty minutes to an hour. (R. 129, 134, 138).

After the close of evidence, Petitioner argued the blood draw results should be suppressed because there were no exigent circumstances to justify the warrantless search and Officer De Santis never attempted to obtain a search warrant. (R. 144). In addition, Petitioner contended that the warrantless search could not be justified under section 316.1932(1)(c)'s implied consent provision because "[s]tatutory implied consent is not equivalent to . . . Fourth Amendment consent." (R. 144, 147, 150, 152).

The State countered that section 316.1932(1)(c) justified the warrantless blood draw because "there was reasonable cause to believe that [Petitioner] was operating a motor vehicle while under the influence of alcohol" and he had been rendered unconscious at the hospital. (R. 145). In addition, the State argued that Petitioner—by virtue of being unconscious—never refused the implied consent.

II. The Trial Court's Order

In a detailed written order, the trial court found the warrantless blood draw constituted an unlawful search under the Fourth Amendment. However, the trial court denied Petitioner's suppression motion based upon the "good faith" exception to the exclusionary rule. (R. 65-73).

The trial court's analysis began with the premise "that taking a blood draw from a suspected DUI defendant implicates federal constitutional concerns under the Fourth Amendment." (R. 66). With regards to the search, the trial court wrote that: (1) "[a] blood draw without a search warrant, absent valid consent or exigent circumstances, is not authorized as merely incident to a lawful arrest," (R. 67); (2) the United States Supreme Court's decision in *Missouri v. McNeely*, 569 U.S. 141 (2013), dictated "that the natural metabolizing of blood does not, in and of itself, present an exigency giving rise to an exception to the warrant requirement in all DUI cases," (R. 66-67); and (3) the Fifth District Court of Appeal's decision in *State v. Liles*, 191 So. 3d 484 (Fla. 5th DCA 2016), held that "statutory implied consent is not the equivalent of Fourth Amendment consent and does not constitute a per se exception to the warrant requirement." (R. 67).

Applying these concepts, the trial court analyzed the following passage from section 316.1932(1)(c)'s implied consent provision:

> Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is

> deemed not to have withdrawn his or her consent to such [blood] test.

(R. 68). Based upon *Liles*, the trial court found this provision "does not provide consent as required under the Fourth Amendment for a blood draw." (R. 68). Thus, Petitioner "did not consent to the blood draw." (R. 69).

Regarding exigent circumstances, the trial court applied *McNeely* to find that the facts of Petitioner's case "d[id] not support [a] finding [that] an exigency existed at the time the blood draw was taken." (R. 70). The court noted "[t]he total time the officer spent with [Petitioner] was no more than one hour, from the time the officer arrived on the scene, went to the hospital where [Petitioner] had been taken, had blood drawn, and left the hospital." (R. 70). And it was clear Petitioner "would not be discharged while remaining unconscious." (R. 70).

During this time, Officer De Santis "made no attempts to obtain a warrant for the blood draw." (R. 70). Given that the accident occurred around 8:00 a.m., the trial court explained that obtaining a warrant would not have been difficult:

> [The Fifteenth Judicial Circuit] utilizes an electronic system for obtaining search warrants so that warrants can be issued more promptly than previous methods employed to obtain a warrant. Also, the entire incident took place at a time (8:00 a.m., approximately) when logistics of arranging the involvement of the State Attorney's Office and the duty judge would have been much simpler than had a warrant attempted to be obtained at, for example, . . . 3:00 a.m.

(R. 70). “Had the officer attempted to obtain a warrant and experienced significant delay,” the trial court wrote “exigent circumstances might very well have arisen.” (R. 70). But that was not the situation in this case.

Notwithstanding these conclusions, the trial court denied Petitioner’s motion to suppress based on the “good faith” exception to the exclusionary rule. (R. 71). Because the blood draw occurred on April 16, 2016, the trial court found itself in “essentially the same position as” the Fifth District in *Liles*, which applied *Illinois v. Krull*, 480 U.S. 340 (1983), to deny a defendant relief. (R. 71). The trial court noted that “[o]f the three decisions which substantially guide[d] th[e trial court] in reaching its conclusion of law, the McNeely opinion was issued in 2013, but the Liles opinion was issued April 8, 2016, only eight days before the incident, and the Birchfield opinion was issued June 23, 2016, more than two months after the incident.” (R. 71). As a result, the trial court found “it was reasonable for Officer De Santis to have a good faith belief in the constitutional validity of a warrantless blood draw authorized by section 316.1932(1)(c), Florida Statutes,” under the circumstances presented. (R. 71).

In concluding the order, the trial court certified the following question of great public importance to the Fourth District Court of Appeal:

> Does the following sentence in § 316.1932(1)(c), Florida Statutes,

> Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to such [blood] test.
>
> remain constitutionally valid under the Fourth Amendment to United States Constitution and Article 1, Section 12 of the Florida Constitution in light of *Missouri v. McNeely*, 133 S. Ct. 1552, 185 L. Ed. 2d 7 (2013), *State v. Liles*, 191 So. 3d 484 ([Fla.] 5th DCA 2016), and *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016).

Petitioner then pled guilty to one of the DUI charges, reserving the right to appeal the dispositive motion to suppress. (R. 170-71).

III. The Fourth District Court of Appeal's Decision

In a divided opinion,[1] the Fourth District Court of Appeal held that because Florida's implied consent laws do not impose criminal penalties for non-compliance, section 316.1932(1)(c) is constitutionally valid and the warrantless blood draw performed in this case did not violate the Fourth Amendment—despite the absence of any exigent circumstances. (Pet. App. 13). The majority opinion noted that resolving the case involved evaluating "the continued constitutionality

[1] The Fourth District Court of Appeal's opinion is included in an appendix filed at the same time as this Brief. Citations to the opinion will reference the page number as included in the appendix.

of certain implied consent laws." (Pet. App. 9). Upon that issue, Judge Gross dissented.[2] (Pet. App. 14-21).

The majority opinion disagreed with Petitioner and Judge Gross that *Birchfield* and *McNeely* "render [Florida's] implied consent law unconstitutional." (Pet. App. 9). Recognizing that on a national level "[i]nterpreting *Birchfield* is a path well-traveled" but one without legal consensus, the majority construed language from *Birchfield* consistent with decisions from Colorado, Virginia, Idaho, Minnesota, and Wisconsin[3] to hold that Officer De Santis could rely upon Petitioner's implied consent alone—which was not withdrawn due to his unconsciousness—to perform the warrantless blood draw. The majority also held that Petitioner's consent was implied from the context of his decision to drive on Florida roadways. (Pet. App. 11). However, the majority "recognize[d] that not all courts addressing this issue after *Birchfield* have reached the same conclusion."[4]

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[2] Judge Gross concurred in the decision to affirm Petitioner's conviction based upon the "good faith" exception. (Pet. App. 21-24).

[3] *See People v. Hyde*, 393 P.3d 962 (Colo. 2017); *Wolfe v. Commonwealth*, 793 S.E.2d 811 (Va. Ct. App. 2016); *State v. Charlson*, 377 P.3d 1073 (Idaho 2016); *Vondrachek v. Comm'r of Pub. Safety*, 906 N.W.2d 262 (Minn. Ct. App. 2017); *State v. Howes*, 893 N.W.2d 812, 834 (Wis. 2017) (Gableman, J., concurring).

[4] The examples discussed in the opinion include *State v. Romano*, 800 S.E.2d 644 (N.C. 2017), and *State v. Havatone*, 389 P.3d 1251 (Ariz. 2017).

By contrast, Judge Gross believed the "majority ha[d] read *Birchfield* too broadly" and wrote that the "reasoning of [*Birchfield*] supports the conclusion that the statutorily implied consent of an unconscious defendant under section 316.1932(1)(c) is 'not equivalent to Fourth Amendment consent.'" (Pet. App. 21). "[B]ecause of the significant privacy concerns surrounding blood draws," Judge Gross asserted "consent to a blood draw cannot be indirectly implied from the act of driving on Florida roads." (Pet. App. 21). And applying the Supreme Court's Fourth Amendment jurisprudence for consent, Judge Gross would hold that, "[f]rom an unconscious defendant, blood may be drawn pursuant to a warrant or under the exigent circumstances exception to the warrant requirement." (Pet. App. 21). "Only a conscious defendant," Judge Gross explained, "may voluntarily *consent* to a blood draw consistent with the Fourth Amendment." (Pet. App. 21).

On May 16, 2018, upon Petitioner's motion, the Fourth District Court of Appeal certified the following question as being of great public importance:

> Under the Fourth Amendment, may a warrantless blood draw of an unconscious person, incapable of giving actual consent, be pursuant to section 316.1932(1)(c), Florida Statutes (2016) ("Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to [a blood draw and testing]."), so that an unconscious defendant can be said to have "consented" to the blood draw?

This Court accepted jurisdiction to answer this question.

SUMMARY OF THE ARGUMENT

The certified question of great public importance should be answered in the negative. In evaluating warrantless blood draws under the Fourth Amendment, the United States Supreme Court in both *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), rejected requests to apply *per se* warrant exceptions to justify the blood draws upon motorists. This conclusion derived, in large part, from the Supreme Court's recognition that extracting blood "implicates an individual's most personal and deep-rooted expectations of privacy." As a result, the Supreme Court has required that the reasonableness of a decision to draw blood be evaluated on a case-by-case basis.

This case is no different. Although the Supreme Court in *Birchfield* expressed its approval of implied consent laws that impose civil or evidentiary penalties, it did not suggest that a statute explicitly imputing consent to drivers would sustain a warrantless blood draw of its own force. To treat section 316.1932(1)(c), Florida Statutes (2016), as an irrevocable rule of implied consent would be contrary to well-established Fourth Amendment jurisprudence requiring that a suspect's consent to be freely and voluntarily given. Accordingly, implied consent alone cannot be a viable justification for a warrantless search where the subject of the search does not have the option to revoke the consent.

Applying these principles, the warrantless blood draw performed in this case constituted an unlawful search that violated Petitioner's Fourth Amendment rights. Officer De Santis did not attempt to obtain a warrant, no exigent circumstances prevented him from obtaining a warrant, and Petitioner did not provide voluntary consent to the warrantless blood draw. Furthermore, the "good faith" exception to the exclusionary rule does not bar Petitioner from obtaining relief because controlling Florida precedent did not reasonably support Officer De Santis's decision at the time her ordered the warrantless blood draw.

ARGUMENT

THIS COURT SHOULD ANSWER THE CERTIFIED QUESTION IN THE NEGATIVE BECAUSE IMPLIED CONSENT LAWS DO NOT CONSTITUTE A PER SE EXCEPTION TO THE WARRANT REQUIREMENT FOR UNCONSCIOUS MOTORISTS

This Court should answer the certified question in the negative and hold that the implied consent provisions of section 316.1932(1)(c), Florida Statutes (2016), do not—by themselves—confer an unconscious motorist's voluntary consent to a warrantless blood draw. This is because, "under the Fourth Amendment, a blood draw of an unconscious person, incapable of giving consent, must be done pursuant to a warrant or to a recognized exception to the warrant requirement, such as exigent circumstances; a statutorily created consent 'implied' by the act of driving on Florida roads does not satisfy the Fourth Amendment, so an unconscious defendant cannot be said to have 'consented' to the blood draw." (Pet. App. 15) (Gross, J., concurring in part and dissenting in part).

Because extracting blood "implicates an individual's most personal and deep-rooted expectations of privacy,"[5] the United States Supreme Court has twice rejected the application of *per se* warrant exceptions to justify warrantless blood draws. Instead, the Court has required blood draws to be analyzed on a case-by-

[5] *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)).

case basis. Implied consent is no substitute, as section 316.1932(1)(c) can only constitutionally be applied when case-specific exigent circumstances prevent law enforcement from obtaining a warrant.

In this case, the warrantless blood draw constituted an unlawful search under the Fourth Amendment because (1) no exigent circumstances existed and (2) Petitioner did not actually consent to the search. Furthermore, the "good faith" exception to the exclusionary rule does not apply because controlling Fourth Amendment case law from Florida courts did not reasonably support Officer De Santis's actions at the time he ordered the blood draw.

I. Standard of Review

A trial court's ruling on a motion to suppress is a mixed question of fact and law. *See Wyche v. State*, 987 So. 2d 23, 25 (Fla. 2008). This Court must "defer to [the] trial court's findings of fact as long as they are supported by competent, substantial evidence, but . . . review de novo [the] trial court's application of the law to the historical facts." *Ross v. State*, 45 So. 3d 403, 414 (Fla. 2010). The constitutionality of a statute is a question of law subject to de novo review. *See City of Miami v. McGrath*, 824 So. 2d 143, 146 (Fla. 2002).

II. Fourth Amendment Principles

The Fourth Amendment of the United States Constitution and section 12, Article 1 of the Florida Constitution protect against warrantless searches and

seizures. Warrantless searches are deemed "per se" unreasonable unless they fall within a recognized exception to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). The warrant requirement ensures that "inferences to support the search '[are] drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.'" *Schmerber v. California*, 384 U.S. 757, 770 (1966) (quoting *Johnson v. State*, 333 U.S. 10, 14 (1948)). Evidence obtained from an unlawful search is inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 485 (1963).

Exceptions to the warrant requirement "have been jealously and carefully drawn,'" *Jones v. United States*, 357 U.S. 493, 499 (1958), and include "'(1) consent, (2) incident to a lawful arrest, (3) with probable cause to search but with exigent circumstances, (4) in hot pursuit, and (5) stop and frisk.'" *Reed v. State*, 944 So. 2d 1054, 1058 (Fla. 4th DCA 2006) (quoting *Gnann v. State*, 662 So. 2d 406, 408 (Fla. 2d DCA 1995)). Specific to the context of blood draws:

> A blood draw conducted at the direction of the police is a search and seizure under the Fourth Amendment. *Schmerber v. California*, 384 U.S. 757 (1966); *State v. Geiss*, 70 So. 3d 642, 646 (Fla. 5th DCA 2011). To comply with the Fourth Amendment, law enforcement officers must obtain a warrant or consent for a blood draw, or there must be some other exception to the warrant requirement. *See Kilburn v. State*, 54 So. 3d 625, 627 (Fla. 1st DCA 2011). When, as here, no warrant is obtained, "[t]he state has the burden to prove that an exception to the warrant requirement applies." *Id.*

State v. Liles, 191 So. 3d 484, 486 (Fla. 5th DCA 2016). The exceptions pertinent to this case are consent and exigent circumstances.

III. United States Supreme Court Decisions

Beginning with *Schmerber v. California*, 384 U.S. 757 (1966), and continuing with *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), the United States Supreme Court has (1) recognized that blood draws implicate significant privacy concerns and (2) repeatedly rejected applying bright line "per se" rules to permit nonconsensual, warrantless blood draws of motorists. To provide an overview, this Brief will address each decision.

Schmerber v. California

In *Schmerber v. California*, 384 U.S. 757 (1966), the defendant was "arrested at a hospital while receiving treatment for injuries suffered in an accident involving the automobile that he had apparently been driving." *Id.* at 758. Without trying to obtain a warrant, the officer instructed a physician at the hospital to draw the defendant's blood. *Id.* When prosecuted, the defendant moved to suppress the blood test results "as the product of an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments." *Id.* at 766.

The Supreme Court rejected the defendant's contention that the warrantless blood draw was unreasonable, finding that the officer's search was justified by

exigent circumstances. *Id.* at 770. The Court premised its decision, in part, on the defendant's injuries that had delayed the officer's ability to secure a warrant:

> We are told that the percentage of alcohol in the blood begins to diminish shortly after drinking stops, as the body functions to eliminate it from the system. Particularly in a case such as this, where time had to be taken to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant. Given these special facts, we conclude that the attempt to secure evidence of blood-alcohol content in this case was an appropriate incident to petitioner's arrest.

Id. 770-71. Consequently, the Supreme Court surmised that "[t]he officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." *Id.* at 770.

Missouri v. McNeely

"After *Schmerber*, disagreement arose in the lower courts regarding whether *Schmerber* mandated a per se rule that warrantless blood tests were always reasonable because of the inherent evanescence of blood-alcohol content . . . evidence." *Williams v. State*, 167 So. 3d 483, 488 (Fla. 5th DCA 2015), *vacated on other grounds by* SC15-1417, 2016 WL 6637817 (Fla. Nov. 9, 2016). Florida was

one such jurisdiction that applied the *per se* rule.[6] However, this disagreement was resolved in *Missouri v. McNeely*, 569 U.S. 141 (2013). In that case, the Supreme Court considered "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *Id*. at 145.

In *McNeely*, the defendant was arrested at approximately 2:08 a.m. after an officer smelled alcohol in his breath and the defendant performed poorly in field sobriety tests. *Id*. at 145-46. The officer transported the defendant to a hospital when he would not consent to a breathalyzer test. *Id*. at 146. After the defendant refused to consent to providing a blood sample, the officer directed a hospital lab technician to draw the defendant's blood. *Id.*

The Supreme Court affirmed the suppression of the defendant's blood test, refusing to adopt a *per se* rule that the dissipation of alcohol in an individual's blood always provides an exigency to justify a warrantless drawing of a driver's blood. *Id*. at 147, 151-56. The Supreme Court recognized that, under some situations, "exigent circumstances justifying a warrantless blood sample may arise in the regular course of law enforcement due to delays from the warrant application

[6] *See, e.g., State v. Bender*, 382 So. 2d 697, 698 (Fla.1980); *State v. McInnis*, 581 So. 2d 1370, 1373 (Fla. 5th DCA 1991); *State v. Langsford*, 816 So. 2d 136, 138–39 (Fla. 4th DCA 2002).

process." *Id.* at 156. To that end, the Supreme Court tethered exigent circumstances with the ability to obtain a warrant:

> Other factors present in an ordinary traffic stop, such as the procedures in place for obtaining a warrant or the availability of a magistrate judge, may affect whether the police can obtain a warrant in an expeditious way and therefore may establish an exigency that permits a warrantless search. The relevant factors in determining whether a warrantless search is reasonable, including the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence, will no doubt vary depending upon the circumstances in the case.

Id. at 164.

The infirmity in *McNeely* was that the prosecution presented no circumstances aside from the dissipation of alcohol to explain why the arresting officer could not have obtained a warrant. *Id.* at 163. At the suppression hearing, the arresting officer testified that a prosecutor would have been available to apply for a warrant and "he had no reason to believe that a magistrate judge would have been unavailable." *Id.* Accordingly, because the record did not provide "an adequate analytic framework for a detailed discussion of all the relevant factors," the Supreme Court affirmed the suppression of the blood test. *Id.* at 165.

In deciding *McNeely*, the Supreme Court expressed general disapproval of applying *per se* warrant exceptions to justify blood draws. While recognizing that "the desire for a bright-line rule is understandable," the Supreme Court explained

"that the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." *Id.* at 158. In that regard, "a case-by-case approach [wa]s hardly unique within our Fourth Amendment jurisprudence." *Id.*

Consistent with this denunciation, the Supreme Court explained that the "exigency in this context [has to] be determined case by case based on the totality of the circumstances." *Id.* at 145. And in those cases where an officer can obtain either a warrant or consent "without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 152.

Birchfield v. North Dakota

Most recently, in *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2172 (2016), the Supreme Court consolidated three implied-consent cases "to decide whether motorists lawfully arrested for drunk driving may be convicted of a crime or otherwise penalized for refusing to take a warrantless test measuring the alcohol in their bloodstream." Ultimately, the cases' holdings differentiated between blood and breath tests, finding that the Fourth Amendment permits warrantless breath tests incident to a lawful arrest for drunk driving, but does not permit warrantless blood tests incident to a lawful arrest for drunk driving. *Id.* at 2184-85.

In determining whether warrantless breath or blood tests incident to arrest comported with the Fourth Amendment, the Supreme Court examined "'the degree

to which [these tests] intrude[ ] upon an individuals' privacy and . . . the degree to which [they are] needed for the promotion of legitimate governmental interests.'" *Id.* at 2176 (quoting *Riley v. California*, 134 S. Ct. 2473, 2484 (2014)). In this regard, the Supreme Court found that a blood test imposes and implicates significantly higher privacy concerns than a breath test. *Id.* at 2178.

Unlike a breath test, a blood test requires "piercing the skin" and "extract[ing] a part of the subject's body." *Id.* "And while humans exhale air from their lungs many times per minute, humans do not continually shed blood." *Id.* Although "[i]t is true, of course, that people voluntarily submit to the taking of blood samples as part of a physical examination, and the process involves little pain or risk," the Supreme Court noted that, "for many, the process is not one they relish" because "[i]t is significantly more intrusive than blowing into a tube." *Id.* Furthermore, a blood test provides the police with a sample they may store and potentially test for many things other than blood alcohol content, which may result in anxiety for the person forced to submit to the blood test. *Id.*

Turning to governmental need, the Supreme Court reaffirmed that "[t]he States and the Federal Government have a 'paramount interest . . . in preserving the safety of . . . public highways.'" *Id.* at 2178 (quoting *Mackey v. Montrum*, 443 U.S. 1, 17 (1979)). However, blood tests impose significant intrusions, such that their reasonableness has to "be judged in light of the availability of the less

invasive alternative of a breath test." *Id.* at 2184. "Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, [the Supreme Court] conclude[d] that a breath test, but not a blood test, may be administered as a search incident to a lawful arrest for drunk driving." *Id*. at 2185.

Finally, the Supreme Court rejected the State's argument that warrantless blood tests incident to arrest were justified based on a motorist's implied consent when threatened with criminal punishment. *Id*. The Supreme Court explained that "[i]t is well established that a search is reasonable when the subject consents, and that sometimes consent to a search need not be express but may be fairly inferred from context." *Id.* The Supreme Court also wrote that its "prior opinions ha[d] referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply."[7] *Id.* However, the Supreme Court held it was "another matter . . . for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on

[7] For that proposition, the Supreme Court cited to *McNeely*, 133 S.Ct. at 1565-66, and *South Dakota v. Neville*, 459 U.S. 553, 560 (1983). In these cases, the Supreme Court upheld the statutory consequences placed on defendants who refused to comply, but the Court did not address applying implied consent as an exception to the Fourth Amendment's warrant requirement.

the refusal to submit to such a test." To that end, a defendant cannot be deemed to consent to a blood test on pain of criminal prosecution. *Id.* at 2186.

Within this context, the Supreme Court mentioned that all fifty states have enacted implied consent laws, *id.* at 2169, but it did not state that warrantless blood draws were authorized as consensual by the implied consent statutes. To the contrary, the Supreme Court suggested that, for an unconscious defendant, the preferred method of obtaining blood is through a warrant:

> It is true that a blood test . . . may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, ***the police may apply for a warrant if need be***.

Id. 2184-85 (emphasis added).

By the above bolded language, the Supreme Court tipped its hand that a warrant would be required in situations like the present unless exigent circumstances exist. Lest there be doubt as to what the Court meant when it stated officers "may apply for a warrant if need be," the Court emphasized "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not." *Id.* at 2184.

IV. Florida Case Law[8]

Prior to *McNeely*, Florida jurisprudence dictated that "[t]here [wa]s no constitutional impediment to a blood alcohol analysis with or without consent where probable cause has been established." *State v. Bender*, 382 So. 2d 697, 698 (Fla. 1980); *see also State v. McInnis*, 581 So. 2d 1370, 1373 (Fla. 5th DCA 1991); *State v. Langsford*, 816 So. 2d 136, 138–39 (Fla. 4th DCA 2002).

However, two years after *McNeely* issued, the Fifth District Court of Appeal decided *Williams v. State*, 167 So. 3d 483, 488 (Fla. 5th DCA 2015), *vacated on other grounds in* SC15-1417, 2016 WL 6637817 (Fla. Nov. 9, 2016),[9] which recognized changes in the legal tide. *Williams* concerned whether warrantless breath alcohol tests were constitutionally authorized—in that context, the Fifth District rejected the State's suggestion that the defendant voluntarily consented to

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[8] Petitioner includes a discussion of prior Florida case law both to illustrate how other courts have analyzed similar issues and to demonstrate the state of the law at the time Officer De Santis ordered the blood draw, as is relevant to the application of the "good faith" exception to the exclusionary rule.

[9] This Court accepted jurisdiction to review *Williams* prior to the United States Supreme Court issuing its decision in *Birchfield*. "Because the Fifth District did not have the benefit of the United States Supreme Court's opinion in *Birchfield* when it decided *Williams*," this Court "vacate[d] the decision in *Williams* and remand to the Fifth District for reconsideration in light of *Birchfield*." *Williams v. State*, SC15-1417, 2016 WL 6637817 (Fla. Nov. 9, 2016). On remand, the Fifth District held that "breath-alcohol tests are permissible under the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement." *Williams v. State*, 210 So. 3d 774, 776 (Fla. 5th DCA 2017). By the time of the blood draw in this case, *Williams* had not be been vacated and remained good law.

the breath test by virtue of section 316.1932(1)(a)1.a., Florida Statutes (2013), which is part of Florida's legal trilogy of implied consent laws. *Id.* at 490.

In so ruling, the Fifth District aligned itself with the majority of state appellate courts[10] in holding (1) that "statutory implied consent is not equivalent to Fourth Amendment consent" and (2) that "statutory implied consent does not constitute a per se exception to the warrant requirement." 167 So. 3d at 490-91. Because "statutory consent is not necessarily given freely and voluntarily," the Fifth District held that "allowing implied-consent statutes to constitute a per se, categorical exception to the warrant requirement would make a mockery of the many precedential Supreme Court cases that hold that voluntariness must be determined based on the totality of the circumstances." *Id.*

Further bolstering this conclusion was the "improbable" notion "that the [United States] Supreme Court would mention implied-consent statutes in *McNeely,* yet completely ignore this important potential exception to the warrant requirement." *Id.* As the Fifth District explained:

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[10] The opinion cited to the following examples: *Arizona v. Butler*, 302 P.3d 609, 613 (Ariz. 2013) (en banc); *Idaho v. Wulff*, 337 P.3d 575, 581–82 (Idaho 2014); *South Dakota v. Fierro,* 853 N.W.2d 235, 242–43 (S.D. 2014); *Tennessee v. Wells*, No. M2013–01145–CCA–R9–CD, 2014 WL 4977356, *13 (Tenn. Ct. Crim. App. Oct. 6, 2014); *Texas v. Villarreal*, No. PD–0306–14, 2014 WL 6734178, *1 (Tex. Ct. Crim. App. Nov. 26, 2014).

> In *McNeely*, the [Supreme] Court recognized that nearly every state had an implied-consent statute, including Missouri. *See* 133 S.Ct. at 1566. When McNeely was arrested, he was told that refusal to submit to the test would lead to the revocation of his driver's license and could be used against him in future prosecutions. *Id.* at 1557. Still, the Court in *McNeely* assumed that he had not consented. *See id.* at 1556 (framing issue as "nonconsensual" blood testing). Allowing implied consent to constitute a per se warrant exception would devour the *McNeely* rule and contradict *McNeely*'s general reasoning that these cases must be decided using a totality-of-the-circumstances approach.

Id. Accordingly, the *Williams* court held that the defendant "did not necessarily consent to a breath test when he got behind the wheel of his car." *Id.* "To the extent that he did," the court held "he revoked that consent when he affirmatively refused the breath test." *Id.*

One year later, the Fifth District reached the same conclusion in *State v. Liles*, 191 So. 3d 484, 486 (Fla. 5th DCA 2016), but in the context of warrantless blood draws. In *Liles*, two defendants were involved in separate fatal traffic crashes. *Id.* at 486. Both accidents occurred prior to *McNeely*'s issuance. *Id.* After suspecting the drivers were impaired, investigating officers requested that the defendants submit to blood draws pursuant to section 316.1933(1)(a), Florida Statutes (2011), which permitted officers to draw motorists' blood by force:

> If a law enforcement officer has probable cause to believe that a motor vehicle driven by or in the actual physical control of a person under the influence of alcoholic beverages, any chemical substances, or any

> controlled substances has caused the death or serious bodily injury of a human being, a law enforcement officer shall require the person driving or in actual physical control of the motor vehicle to submit to a test of the person's blood for the purpose of determining the alcoholic content thereof or the presence of chemical substances as set forth in s. 877.111 or any substance controlled under chapter 893. The law enforcement officer may use reasonable force if necessary to require such person to submit to the administration of the blood test. The blood test shall be performed in a reasonable manner. Notwithstanding s. 316.1932, the testing required by this paragraph need not be incidental to a lawful arrest of the person.

Initially, both defendants refused the officers' blood draw requests. *Liles*, 191 So. 3d at 486. However, "they ultimately complied with the warrantless blood draw after being told that law enforcement would forcibly take their blood, if necessary." *Id.* The trial court granted the defendants' motions to suppress the blood draws, "finding that *McNeely* either required a warrant or exigent circumstances, and that the . . . good-faith exception to the exclusionary rule did not apply." *Id.* The Fifth District reversed, holding that although the warrantless blood draws were unconstitutional, the officers had acted in good faith.

Regarding consent, the Fifth District held that section 316.1933(1)(a) was not, by itself, sufficient to permit the officers to perform the warrantless blood draw.[11] *Id.* at 486-87. In so ruling, the Fifth District relied upon *Williams* and held:

> that statutory implied consent was not equivalent to Fourth Amendment consent, explaining that valid consent has long been recognized as a "jealously and carefully drawn" exception to the warrant requirement and for a search based upon consent to be valid, it must be freely and voluntarily given and cannot be the product of coercion. Further, statutory implied consent laws do "not constitute a per se exception to the warrant requirement."

Liles, 191 So. 3d at 487 (quoting *Williams*, 16 So. 3d at 491). Because the defendants did not voluntarily consent to the blood draws, the Fifth District "conclude[d] that the warrantless blood searches were not authorized by the consent exception." *Id.* at 488. Furthermore, the Fifth District held that the exigent circumstances did not justify the warrantless blood draw. *Id*.

Although neither consent nor exigent circumstances justified the warrantless blood draw, the Fifth District "reverse[d] the suppression of the blood draws based on the police officers' good-faith reliance on section 316.1933." *Id.* The Fifth District recognized that the officers ordered the warrantless blood draws prior to *McNeely*'s issuance. Applying the standard of reasonableness set forth in *Illinois v.*

[11] The State conceded on appeal that the defendants "did not give actual consent to the blood draws" and, as a result, relied entirely upon the implied-consent statute. *Id.* at 487.

Krull, 480 U.S. 340 (1983), the court concluded it was "reasonable for the officers to have a good-faith belief in the constitutional validity of a warrantless blood draw authorized by section 316.1933(1)(a)," particularly where Florida law, at the time of the blood draw, sanctioned such practice. *Liles*, 191 So. 3d at 489.

V. Application to this Case and the Certified Question

In this case, the State argued below that Officer De Santis was authorized to perform the warrantless blood draw under section 316.1932(1)(c), Florida Statutes (2016). That statute "is part of the trilogy of statutes comprising the implied consent statutory scheme," *Liles*, 191 So. 3d at 487 n.2,[12] and provides, in part:

> Any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state is, by operating such vehicle, **deemed to have given his or her consent to submit to an approved blood test** for the purpose of determining the alcoholic content of the blood or a blood test for the purpose of determining the presence of chemical substances or controlled substances as provided in this section if there is reasonable cause to believe the person was driving or in actual physical control of a motor vehicle while under the influence of alcoholic beverages or chemical or controlled substances and the person appears for treatment at a hospital, clinic, or other medical facility and the administration of a breath or urine test is

[12] Section 316.1933, Florida Statutes, which was the applicable statute in *Liles*, requires a police officer to obtain a driver's blood when the officer has probable cause to believe an impaired driver has caused death or serious injury to a human being and to use reasonable force if necessary. Section 316.1934, Florida Statutes, sets forth various legal presumptions associated with different blood alcohol levels and the testing methods.

> impractical or impossible. . . . The blood test shall be performed in a reasonable manner. **Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to such test.** . . .

§ 316.1932(1)(c), Fla. Stat. (2016) (emphasis added). Under the statute, a suspected DUI motorist who is unconscious does not have to be given the opportunity to willfully refuse the blood test.

Exigent Circumstances

With regards to exigent circumstances, the Supreme Court has made clear in *McNeely* that an exigency in the context of warrantless blood draws must "be determined case by case based on the totality of the circumstances." *McNeely*, 569 U.S. at 145. And in those cases where an officer can reasonably obtain either a warrant "without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *Id.* at 152.

Here, the trial court made a specific factual finding that, given Officer De Santis's failure to attempt to obtain a warrant, exigent circumstances did not support the warrantless blood draw. As the court's order explained, (R. 70):

> [Officer De Santis] made no attempt to obtain a warrant for the blood draw. Our circuit utilizes an electronic system for obtaining search warrants so that warrants can be issued much more promptly than previous methods employed to obtain a warrant. Also, the entire incident took place at a time (8:00 a.m., approximately) when logistics of arranging the involvement of the State Attorney's Office and the duty judge would have been

> much simpler than had a warrant attempted to be obtained at, for example, at 3 :00 a.m. Had the officer attempted to obtain a warrant and experienced significant delay, exigent circumstances might very well have arisen.

Officer De Santis's only justification for the blood draw was "the simple fact that [Petitioner] was unconscious and [he] was investigating a DUI crash." (R. 132, 136-37). Nothing denotes the officer would have had difficulty obtaining a search warrant—and the trial court's findings show otherwise. Accordingly, there were no exigent circumstances to justify the warrantless blood draw.

Consent

The more pressing issue—which is the subject of the certified question of great public importance—concerns consent. Specifically, whether the implied consent provisions of section 316.1932(1)(c) constitute a *per se* exception to the warrant requirement for unconscious motorists. Based upon the Supreme Court's Fourth Amendment precedent regarding consent, the Supreme Court's repeated refusal in both *McNeely* and *Birchfield* to adopt *per se* warrant exceptions, and the Supreme Court's recognition that blood draws implicate uniquely personal privacy concerns, this Court should answer the question in the negative.

1. Implied Consent Does Not Satisfy the Fourth Amendment Voluntariness Requirement for the Consent Exception

By virtue of being unconscious, Petitioner was incapable of providing consent through traditional means when his blood was drawn. "This distinguishes the case from the more common situation in which a defendant manifests actual consent to a blood draw, but later contends the consent was vitiated by coercion." *People v. Arredondo*, 199 Cal. Rptr. 3d 563, 569 (Ct. App. 2016), *review granted and opinion superseded*, 371 P.3d 240 (Cal. 2016). The question presented is whether "implied consent"—a condition for all motorists using Florida public highways—equates to voluntary consent for Fourth Amendment purposes.

Consent can authorize a warrantless search, but only if the suspect's consent is voluntarily given. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 226-28 (1973). Not suited to bright-line rules, determining "[w]hether a suspect voluntarily consent[ed] to a search is a question of fact to be determined by the totality of the circumstances." *Davis v. State*, 594 So. 2d 264, 266 (Fla. 1992). "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he [or she] has the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548–49 (1968).

"The standard for measuring the scope of a suspect's consent under the Fourth Amendment is that of 'objective' reasonableness . . . . " *Florida v. Jimeno*, 500 U.S. 248, 251 (1991). Consent cannot be deemed voluntary where it is the

"product of duress or coercion, express or implied," *Bustamonte* 412 U.S. at 227, although consent may under appropriate circumstances be fairly inferred from context. *See, e.g., Florida v. Jardines*, 569 U.S. 1, 8-9 (2013). Ultimately, the consent analysis does not "turn[] on the presence or absence of a single controlling criterion" but instead requires "a careful scrutiny of all the surrounding circumstances." *Bustamone*, 412 U.S. at 226.

Treating section 316.1932(1)(c) "as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances." *State v. Romano*, 800 S.E.2d 644, 652 (N.C. 2017); *see also* Wayne R. LaFave et al, 2 *Criminal Procedure* § 3.10(b) (4th ed. 2017) (noting that "a rule to the contrary would in effect nullify" *McNeely*). To that end, nothing in *McNeely* or *Birchfield* "cast[s] doubt upon the principle that the consent exception to the warrant requirement requires analysis under the totality of the circumstances, and may not be satisfied merely by legislative proclamation." *Commonwealth v. Myers*, 164 A.3d 1162, 1180 (Pa. 2017).

As the Fifth District recognized in *Williams* and *Liles*, a contrary interpretation has been rejected by the majority of courts[13] [14] and would illogically

[13] For unconscious motorists, the following decisions found that implied consent laws do not act as a per se exception to the warrant requirement. *See, e.g., State v. Havatone*, 389 P.3d 1251, 1253, 1255 (Ariz. 2017) (holding that the

swallow Fourth Amendment jurisprudence related to blood draws by creating a *per se* warrant exception applicable in all fifty states. "While the desire for a bright-line rule is understandable," the Supreme Court has instructed that "the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake." *McNeely*, 569 U.S. at 158. Instead, the Supreme Court has explained that the availability of the exigency exception for circumstances that

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"unconscious clause" of the implied-consent statute was unconstitutional as applied to the defendant and further determining that it can be constitutionally applied only when exigent circumstances prevent law enforcement from obtaining a warrant); *Romano*, 800 S.E.2d 644 (holding that applying implied consent statute allowing a blood draw from an unconscious driver suspected of impairment was unconstitutional in light of *McNeely* and *Birchfield*); *Myers*, 164 A.3d at 1173 (holding that implied consent law does not authorize a warrantless blood test of an unconscious person because statutes "cannot authorize what the Fourth Amendment . . . would prohibit"); *Arredondo*, 199 Cal.Rptr.3d 563 (holding that the defendant's unconsciousness rendered him incapable of manifesting voluntary consent to a blood draw, and that implied consent was insufficient to justify the failure to obtain a warrant).

[14] As to conscious motorists, the following decisions rejected applying implied consent to justify warrantless blood draws. *See State v. Pettijohn*, 899 N.W.2d 1, 28 (Iowa 2017); *State v. Baird*, 386 P.3d 239, 249 n.8 (Wash. 2016); *Williams v. State*, 771 S.E.2d 373, 376–77 (Ga. 2015); *People v. Mason*, 214 Cal.Rptr.3d 685, 702 (Cal. App. Dep't Super. Ct. Dec. 29, 2016); *Flonnory v. State*, 109 A.3d 1060, 1065 (Del. 2015); *State v. Modlin*, 867 N.W.2d 609, 619 (Neb. 2015); *Byars v. State*, 336 P.3d 939, 946 (Nev. 2014); *State v. Wulff*, 337 P.3d 575, 581 (Idaho 2014); *State v. Fierro*, 853 N.W.2d 235, 243 (S.D. 2014); *State v. Declerck*, 317 P.3d 794, 804 (Kan. Ct. App. 2014); *Aviles v. State*, 443 S.W.3d 291, 294 (Tex. App. 2014).

"make obtaining a warrant impractical" is "reason . . . not to accept the 'considerable overgeneralization' that a per se rule would reflect." *Id.* at 153.

In contrast to Fourth Amendment principles, section 316.1932(1)(c) does not take into account the totality of the circumstances, but instead focuses upon rigid statutory criterion—irrespective of the unconscious motorist's desires. Since the unconscious motorist is provided no opportunity to refuse the warrantless blood draw, it cannot be said that the motorist's "implied consent" is truly "voluntary," so as to comply with Fourth Amendment jurisprudence. Implied consent alone cannot be a viable justification for a warrantless search where the subject of the search does not have the option to revoke consent.

2. The *Birchfield* Decision Does Not Endorse Warrantless Blood Draws Pursuant to Implied Consent As *Per Se* Warrant Exceptions

Despite this backdrop, the Fourth District's majority opinion interpreted language from *Birchfield* to hold that because section 316.1932(1)(c) does not impose criminal penalties for non-compliance, it is constitutionally valid and could legally confer Petitioner's consent to the warrantless blood draw. For this proposition, the Fourth District majority relied upon five cases from other jurisdictions—*People v. Hyde*, 393 P.3d 962 (Colo. 2017), *Wolfe v. Commonwealth*, 793 S.E.2d 811 (Va. Ct. App. 2016), *State v. Howes*, 893 N.W.2d 812, 834 (Wis. 2017) (Gableman, J., concurring), *Vondrachek v. Comm'r of Pub.*

Safety, 906 N.W.2d 262 (Minn. Ct. App. 2017), and *State v. Charlson*, 377 P.3d 1073 (Idaho 2016). Of these, only *Hyde* involved an unconscious motorist.

In *Hyde*, the Supreme Court of Colorado interpreted *Birchfield* as approving warrantless blood draws performed pursuant to "implied consent laws that impose civil penalties if a driver refuses to take a blood test." 393 P.3d at 968. Because Colorado's Expressed Consent Statutes imposed only civil penalties, the court held *Birchfield* allowed officers to rely upon implied consent alone to perform warrantless blood draws upon unconscious motorists. *Id.* at 968-69. The other decisions discussed by the Fourth District's majority opinion interpreted *Birchfield* similarly but in the context of conscious motorists. *See Wolfe*, 793 S.E.2d at 814 (holding that *Birchfield* "referred approvingly to the general concept of implied consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply [but] drew a distinction between statutes that impose civil penalties and those that impose criminal penalties"); *Vondrachek*, 906 N.W.2d at 271 (holding that because the Minnesota law did not criminalize refusal to submit to a test, it survived *Birchfield*.); *Charlson*, 377 P.3d at 1080 (same).

As previously mentioned, many courts have held to the contrary, s*ee supra* notes 13 and 14, and for good reason. This is because, read in context, the *Birchfield* decision's endorsement of implied consent laws "in no way suggests that the existence of a statutory implied consent provision obviates the

constitutional necessity that consent to a search must be voluntarily given, and not the result of duress or coercion, express or implied." *Myers*, 164 A.3d at 1178.

Through its endorsement of implied consent laws, the Supreme Court did not suggest that a statute explicitly *imputing* consent to drivers would sustain a warrantless blood draw of its own force. Rather, the Supreme Court was saying that states may impose civil penalties or evidentiary presumptions upon conscious DUI suspects that refuse chemical testing, to "induce motorists to submit to BAC testing." *Birchfield*, 136 S. Ct. at 2179. As Judge Gross explained in this case:

> Under *Birchfield*, implied consent laws permit law enforcement to apply some coercion to secure consent to a blood draw subject to Fourth Amendment limitations—threatening a suspect with administrative sanctions is permissible, threatening criminal penalties is not. This is consistent with the notion of "consent" under the Fourth Amendment, which "has come to mean that set of circumstances that the law will tolerate as an exception to the probable cause or warrant requirement." *Ruiz v. State*, 50 So. 3d 1229, 1231 (Fla. 4th DCA 2011).

(Pet. App. 20) (Gross, J., concurring in part and dissenting in part). Where, as here, a suspect is unconscious, *Birchfield* instructs that "the police may apply for a warrant if need be." 136 S. Ct. at 2185.

This interpretation is supported by the Supreme Court's treatment of one of the petitioners in *Birchfield*, Steve Beylund. *Id.* at 2172. Mr. Beylund acquiesced to a blood draw after being provided implied consent warnings that threatened criminal penalties for refusal; he argued in the trial court that his consent was

coerced and thus involuntary. *Id.* Addressing the facts of Mr. Beylund's case, the Supreme Court explained that "[b]ecause voluntariness of consent to a search must be 'determined from the totality of all the circumstances,' *Schneckloth*, [412 U.S. at 227, 93 S.Ct. 2041], we leave it to the state court on remand to reevaluate Beylund's consent" given the officer's erroneous warning that the law required him to submit to a blood test. *Birchfield*, 136 S.Ct. at 2186. This language shows that consent must be actual and voluntary based on the totality of the circumstances, not from statutory implied consent.

In addition, the Fourth District majority opinion's interpretation cannot be reconciled with the United States Supreme Court's treatment of *Aviles v. State,* 385 S.W.3d 110 (Tex. App. 2012), *cert. granted, judgment vacated*, 134 S. Ct. 902 (2014). In *Aviles,* an officer arrested the defendant for driving while intoxicated (DWI) and discovered the defendant had two prior DWIs. *Id.* at 112-13. A Texas statute authorized police officers to forcibly draw a suspect's blood without a search warrant if, at the time of arrest, "the officer possesses or receives reliable information from a credible source that the person, on two or more occasions, has been previously convicted of or placed on community supervision" for DWI. *Id.* at 112. Adhering to the statute, the officer ordered a nurse to draw the defendant's blood, despite his refusal and the lack of any exigency. *Id.* at 112-13.

A Texas appellate court held the blood draw did not violate the Fourth Amendment because the officer complied with the implied consent statute. *Id.* at 115-16. The defendant sought review in the United States Supreme Court, which granted certiorari, vacated the Texas court's judgment, and remanded "for further consideration" in light of *McNeely*. *See Aviles v. Texas*, 134 S. Ct. 902 (2014). On remand, the Texas appellate court "concluded that because the [challenged] statutes 'do not take into account the totality of the circumstances present in each case, but only consider certain facts,' an approach rejected in *McNeely*, the statutes were not substitutes for a warrant or legal exception to the Fourth Amendment warrant requirement." *Aviles v. State*, 443 S.W.3d 291, 294 (Tex. App. 2014).

Numerous state courts have since interpreted the Supreme Court's decision to vacate and remand *Aviles* as "indicat[ive] that *McNeely*'s holding includes examining the totality of the circumstances in all cases where an officer orders a forced warrantless blood draw," even if implied consent statutes permit such a search. *State v. Wulff*, 337 P.3d 575, 581 (Idaho 2014); *see also Byars v. State*, 336 P.3d 939, 946 (Nev. 2014); *State v. Wells*, 2014 WL 4977356, at *9 (Tenn. Crim. App. Oct. 6, 2014). This Court should hold the same, as it is the only conclusion consistent with the well-established principle that the voluntariness of consent must be determined from a careful review of the totality of the circumstances, not from singular and rigid factors.

3. Petitioner's Consent to the Blood Draw Cannot Be Inferred From His Decision to Drive on Public Roadways

Along with the above analysis, the Fourth District majority opinion relied upon a concurring opinion in *Hyde*, 393 P.3d 962, to hold that Petitioner's consent to a warrantless blood draw could be "inferred" as a matter law from the "context" of his decision to drive on Florida roadways. (Pet. App. 10-11). In the concurring opinion, Justice Eid of the Supreme Court of Colorado analyzed *Marshall v. Barlows, Inc.*, 436 U.S. 307 (1978), and concluded that "[d]riving on the roads and being engaged in a highly regulated industry are two . . . contexts from which consent can be inferred." *Hyde*, 393 P.3d at 972 (Eid, J., concurring).

This analysis should be rejected. The Supreme Court in *Birchfield* expressly stated that "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." 136 S. Ct. at 2185. Waiver of a deeply personal constitutional right based upon the mere act of driving, so that police may forcibly extract part of their body, must exceed such consequential limits. As Professor LaFave has explained: "Consent in any meaningful sense cannot be said to exist merely because a person (a) knows that an official intrusion into his privacy is contemplated if he does a certain thing, and then (b) proceeds to do that thing." 4 Wayne R. LaFave et al., *Search & Seizure: A Treatise on the Fourth Amendment*, § 8.2(l) at 164-65 (5th ed. 2012).

The Fourth District's majority opinion latched on to language from *Birchfield* that "sometimes consent to a search need not be express but may be fairly inferred from context." 136 S. Ct. 2185. However, the two cases cited by the Supreme Court for this proposition—*Florida v. Jardines*, 569 U.S. 1 (2013), and *Marshall, Inc.*, 436 U.S. 307—demonstrate that the Fourth Amendment limits the extent to which consent may be inferred from context or conduct.

In. *Jardines*, the Supreme Court held that although people impliedly provide a license for others to enter their home's curtilage to, for example, knock on their door, a warrantless dog sniff conducted on the front porch of a home exceeds the scope of such an implied license. 569 U.S. at 8-9. In *Marshall*, the Supreme Court explained that an exception to the search warrant requirement has been recognized for "pervasively regulated business[es]" and for "closely regulated" industries "long subject to close supervision and inspection," such as firearm dealers and liquor distributors.[15] 436 U.S. at 313. The Supreme Court described these industries as "exceptions" that "represent responses to relatively unique circumstances." *Id.* However, the Supreme Court also observed that the "owner of

[15] *See, e.g., United States v. Biswell*, 406 U.S. 311, 316-17 (1972) (warrantless search of gun dealer's locked storeroom as part of an inspection did not violate the Fourth Amendment); *Colonnade Catering Corp. v. United States*, 397 U.S. 72 (1970) (holding that "Congress has broad power to design . . . powers of inspection under the liquor laws as it deems necessary to meet the evils at hand").

a business has not, by the necessary utilization of employees in his operation, thrown open the areas where employees alone are permitted to the warrantless scrutiny of Government agents." *Id.* at 315.

Driving on roadways cannot be equated to firearms dealers and liquor distributors, where individuals choose to enter the professional field fully aware that doing so subjects their businesses to heavy regulation. For most Florida citizens, driving upon public roadways is not just a privilege but a matter of necessity. To permit the Legislature to waive citizens' core constitutional rights through the mere act of driving could lead to dire and unintended consequences. As one California appellate court has explained:

> We fear the Fourth Amendment could be left in tatters by a rule empowering the state to predicate a search on conduct that does not in fact constitute a manifestation of consent but is merely "deemed" to do so by legislative fiat. It is far from implausible, for example, that a legislative body—state or federal—might decree, in the name of public safety or national security, that the use of the mails, or the phone lines, or the Internet—all of which rely to a greater or lesser extent on publicly owned property or facilities or publicly provided services—constitutes consent to search the contents of all communications thus conducted. Consent to search homes might be "deemed" to be given by anyone taking advantage of various publicly provided or subsidized privileges—like use of public utilities, libraries, or schools. Consent to search the person might be "deemed" to be given by use of a public sidewalk or occupancy of a public place.

Arredondo, 199 Cal. Rptr. at 577-78.

Legislative waiver of citizens' constitutional rights for the use of what are essentially public utilities is not a future the Fourth Amendment can condone. Petitioner is not to arguing that police can never administer blood draws upon motorists suspected of DUI. To the contrary, "[t]he state is never powerless to secure a blood sample from a nonconsenting drunk driving suspect whose blood is reasonably believed to constitute evidence of driving under the influence." *Arredondo*, 199 Cal. Rptr. at 578. However, blood draws can only be performed if (1) officers obtain a warrant, (2) the motorist actually consents to the blood draw, or (3) a warrant exception applies.

In this case, compliance with the above rubric would have been straightforward. As the trial court found in its order, Officer De Santis could have applied for and obtained a search warrant with relative ease, faithfully adhering to the Constitution's preferred method for conducting searches. *See United States v. Lefkowitz*, 285 U.S. 452, 464 (1932) ("[T]he informed and deliberate determinations of magistrates empowered to issue warrants as to what searches and seizures are permissible under the Constitution are to be preferred over the hurried action of officers and others who may happen to make arrests . . . . "). Instead, the Fourth District's majority has condoned an officer making no attempt to obtain a warrant, even when it was simple. Citizens' constitutional rights must be more firmly protected, lest they be legislatively excised over time.

VI. The Good-Faith Exception Does Not Apply

Erroneously believing it to be in the same position as the Fifth District in *Liles*, the trial court in this case denied Petitioner relief based upon the "good faith" exception to exclusionary rule. The legal landscape in *Liles* was, however, drastically different than the instant case, as the officers in *Liles* not only administered the blood draws prior to both *McNeely* and *Williams*, but controlling Florida case law at the time supported those officers' actions. By contrast, when Officer De Santis ordered the blood draw in this case, Florida case law clearly provided "that statutory implied consent is not equivalent to Fourth Amendment consent." *Williams*, 167 So. 3d at 490; *Liles*, 191 So. 3d at 487.

The Contours of the "Good Faith" Exception

The purpose of the exclusionary rule is to deter future Fourth Amendment violations, *see Herring v. United States*, 555 U.S. 135, 141 (2009), "not to remedy prior invasion of a defendant's constitutional rights." *Montgomery v. State*, 69 So. 3d 1023, 1033 (Fla. 5th DCA 2011). "By operating to exclude evidence obtained unlawfully, the exclusionary rule encourages officers to act within Fourth Amendment limits. That encouragement, in turn, protects the public from unlawful intrusions." *Tims v. State*, 204 So. 3d 536, 538–39 (Fla. 1st DCA 2016).

The "good faith" exception to the exclusionary rule applies "where someone other than a police officer has made the mistaken determination that resulted in the

Fourth Amendment violation." *United States v. Herrera*, 444 F.3d 1238, 1249 (10th Cir. 2006). "The rationale behind the good faith exception is that the exclusionary rule 'is designed to deter police misconduct rather than to punish the errors of" judges, magistrates, or legislators. *State v. McGill*, 125 So. 3d 343, 352 (Fla. 5th DCA 2013). As the Supreme Court has explained:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused. Where the official conduct was pursued in complete good faith, however, the deterrence rationale loses much of its force.

United States v. Leon, 468 U.S. 897, 919 (1984) (quotation omitted).

In *Illinois v. Krull*, 480 U.S. 340, 346, 360-61 (1987), the Supreme Court expanded the good-faith exception to encompass situations where an officer conducts a warrantless search under the authority of a statute, but the statute is later found to be unconstitutional. The crux of the decision was that the officer had not committed any wrongful conduct that a court could deter; the officer was simply carrying out his official duty in good-faith reliance on an unchallenged statute. *Id.* The party actually at fault—the state legislature—was charged with enacting broad laws that affect many people in the criminal justice system. *Id.* at 350–51. In that regard, the legislature's deliberative decision-making process was markedly

different than "the hurried judgment of a law enforcement officer engaged in the often competitive enterprise of ferreting out crime." *Id.* at 351.

Krull was not, however, without limitation as the Supreme Court carved out an exception where the statute's provisions are such that a reasonable officer should have known that the statute was not constitutional. *Krull,* 480 U.S. at 355; *see also Michigan v. DeFillippo*, 443 U.S. 31, 38 (1979). This exception implicitly recognizes that "[r]esponsible law-enforcement officers will take care to learn 'what is required of them' under Fourth Amendment precedent and will conform their conduct to these rules." *Davis v. United States*, 564 U.S. 229, 241 (2011) (quoting *Hudson v. Michigan*, 547 U.S. 586, 599 (2006)).

In situations like the present, where the law is unsettled, "exclusion of the evidence obtained" in a questionable search or seizure "may deter Fourth Amendment violations." *Davis*, 564 U.S. at 250 (Sotomayor, J., concurring). This is because if the exclusionary rule is not applied in "close" cases, "law enforcement officials would have little incentive to err on the side of constitutional behavior. Official awareness of the dubious constitutionality of a practice would be counterbalanced by official certainty that, so long as the Fourth Amendment law in the area remained unsettled, evidence obtained through the questionable practice" would not be precluded. *United States v. Johnson*, 457 U.S. 537, 561 (1982).

Recently, this Court followed these principles to decide *Carpenter v. State*, 228 So. 3d 535 (Fla. 2017), holding that "[t]he rule on searches in questionable areas of law is simple and unequivocal: Get a warrant." *Id.* at 542. The posture of *Carpenter*, though somewhat complex, is instructive to this case.

Before *Carpenter* was decided, the First District Court of Appeal issued an opinion in *Smallwood v. State* (*Smallwood I*), 61 So. 3d 448 (Fla. 1st DCA 2011), that authorized a type of warrantless search but certified a question of great public importance. Thereafter, this Court accepted jurisdiction and quashed the First District's decision. *See Smallwood v. State* (*Smallwood II*), 113 So. 3d 724 (Fla. 2013). In the interim, the officers in *Carpenter* had relied upon *Smallwood I* to justify a warrantless search. Although the search violated the Fourth Amendment, the State argued in *Carpenter* that the good faith exception should apply because the officers relied upon *Smallwood I*, which was binding authority.

This Court disagreed and explained that because *Smallwood I* certified a question of great public importance, law enforcement officers were "plac[ed] . . . on actual notice that the case was subject to further consideration <u>on the face of the opinion</u>." *Carpenter*, 228 So. 3d at 540. Therefore, until this Court "issued either an order declining review or an opinion deciding the issue, *Smallwood I* was not final, well-settled, unequivocal, or clearly established" such that it could reasonably be relied upon to perform a warrantless search. *Id.*

This Court contrasted the situation from *Davis v. United States*, 564 U.S. 229, 238 (2011), where law enforcement officers relied upon "longstanding, thirty-year [binding] precedent" to make their decision. In making this comparison, this Court emphasized that "[t]he 'conscientious police work' discussed in *Davis* requires that officers not engage in warrantless searches unless clearly authorized by law to do so." *Carpenter*, 228 So. 3d at 541. "Thus, if the law on a particular issue is still developing, it is not reasonable for officers to rely on questionable decisions in pipeline cases to justify warrantless searches" and they must err on the side of getting a warrant. *Id.*

Application to this Case

In *Liles*, the Fifth District Court of Appeal applied *Krull* to deny the defendants' suppression motions because, "**before *McNeely***, it was reasonable for . . . officers to have a good-faith belief in the constitutional validity of a warrantless blood draw authorized by section 316.1933(1)(a)." 191 So. 3d at 489 (emphasis added). This makes sense. Prior to *McNeely*, Florida case law dictated that "[t]here [wa]s no constitutional impediment to a blood alcohol analysis with or without consent where probable cause has been established." *Bender*, 382 So. 2d at 698. Therefore, a reasonable officer prior to *McNeely* would confidently believe he or she had firm grounds to perform the blood draw.

McNeely's issuance, however, greatly shifted the legal landscape. Three years before the blood draw in this case, *McNeely* commanded that where an officer can reasonably obtain either a warrant "without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." 569 U.S. at 152. More importantly, one year before the blood draw in this case, the Fifth District in *Williams*, 167 So. 3d at 490-91,[16] held that implied-consent is not the same as Fourth Amendment consent, and therefore is not a per se warrant exception. Likewise, eight days before the blood draw in this case, *Liles* held that a blood draw statute within Florida's legal trilogy of implied consent laws—section 316.1933(1)(a)—did not comprise a warrant exception.

By the time Officer De Santis ordered the blood draw in this case, the Fifth District had twice held—in no uncertain terms—"that statutory implied consent is not equivalent to Fourth Amendment consent." *Williams*, 167 So. 3d at 490; *Liles*, 191 So. 3d at 487 (recognizing "that statutory implied consent [i]s not equivalent to Fourth Amendment consent"). These decisions applied this reasoning to provisions within the same implied consent statutory scheme as 316.1932(1)(c) Though police officers may not be lawyers, they are expected to be trained in Fourth Amendment jurisprudence and these decisions should have sent up red flags

[16] *Williams* was vacated by this Court after Officer De Santis ordered the blood draw in this case.

about relying upon implied consent to perform a warrantless search. *See Davis*, 564 U.S. at 241.

From the accident's inception, it was clear Petitioner would be incapable of actually consenting to a blood draw because he was unconscious. If the officers in *Carpenter* should have known that a certified question in an appellate court raises doubts about that opinion's continued applicability, an objectively reasonable officer in Officer De Santis's position should have known—based on *Williams* and *Liles*—that he could not rely on implied consent alone to justify a warrantless search. The law extracted from these cases could not be clearer: "statutory implied consent is not equivalent to Fourth Amendment consent." By not obtaining a warrant, Officer De Santis did not act in good faith but instead took an unnecessary legal gamble—the type of gamble the exclusionary rule seeks to curb. Accordingly, the trial court erred by applying the "good faith" exception.

CONCLUSION

Based on the foregoing arguments and authorities, this Court should answer the certified question in the negative, quash the Fourth District Court of Appeal's decision, and remand for a discharge.

CERTIFICATE OF SERVICE

I certify that this brief was electronically filed with the Court and a copy of it was served to Richard Valuntas, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at CrimAppWPB@MyFloridaLegal.com; and to Flem K. Whited, III, Whited Law Firm, 150 S. Palmetto Avenue, Suite 102, Daytona Beach, Florida 32114, by email at NancyA@WhitedLawFirm.com; on this 29th day of August, 2018.

/s/ BENJAMIN EISENBERG
BENJAMIN EISENBERG

CERTIFICATE OF FONT

I certify that this brief was prepared with 14 point Times New Roman type in compliance with Florida Rule of Appellate Procedure 9.210(a)(2).

/s/ BENJAMIN EISENBERG
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