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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 REPLY BRIEF ON THE MERITS

CAREY HAUGHWOUT
Public Defender
Fifteenth Judicial Circuit
421 Third Street
West Palm Beach, Florida 33401
(561) 355-7600

Benjamin Eisenberg
Assistant Public Defender
Florida Bar No. 0100538
beisenberg@pd15.state.fl.us
appeals@pd15.org

Counsel for Petitioner

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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 Must Decide the Certified Question

The State wants to put the proverbial cart before the horse by asking this Court to discharge jurisdiction on the basis that the instant case "can effectively be resolved on other grounds, i.e., the blood draw was permissible under the good faith exception to the warrant requirement." (AB. 6). Not only was this argument tacitly rejected during this case's jurisdiction briefing stage,[1] the argument must fail because the good faith exception only comes into play once there has been a Fourth Amendment violation. *See Ryder v. United States*, 515 U.S. 177, 185 (1995) (explaining that the good faith exception "den[ies] criminal defendants an exclusionary remedy from Fourth Amendment violations").

One thing both sides to this appeal agree upon is that section 316.1932(1)(c), Florida Statutes, on its face authorized the blood draw performed in this case. The statutory provision is limited in scope and applicable where the accused is unconsciousness and incapable of actually consenting to or refusing a blood draw. If the blood draw performed by Officer De Santis violates the Fourth Amendment,

[1] The State made the same argument in its jurisdictional answer brief.

then, so too, section 316.1932(1)(c)'s application was unconstitutional. Only once this finding of unconstitutionality has been made—and the certified question is answered—can the exclusionary rule and "good faith" exception be analyzed.

The importance of the certified question is borne out by cases like *State v. Liles*, 191 So. 3d 484 (Fla. 5th DCA 2016). There, the Fifth District did not simply jettison the Fourth Amendment question to discern the good faith exception's application. Rather, the Fifth District reached the good faith exception only after it "conclude[d] that neither the consent nor exigent circumstances exceptions applie[d] to" the cases before it. *Id.* at 489. So too, this Court's first necessary step is to pass upon the constitutionality of Officer De Santis's actions and the statute's application—i.e., this Court must answer the certified question. To proceed otherwise would lead to constitutional issues never being decided.

By its argument, the State misunderstands that the "good faith" exception is not an exception to the warrant requirement[2] but an exception to the exclusionary

[2] In its Answer Brief, the State makes several references to the "good faith exception to the warrant requirement." (AB. 6, 9, 24). Further, the State criticizes the Amicus by asserting that "there is an exception 'to the warrant requirement at play in this case other than McGraw's consent." (AB. 9). However, the Amicus's assessment is legally correct. The "good faith" exception is not an exception to the warrant requirement, but an exception to the exclusionary rule. *See Smallwood v. State*, 113 So. 3d 724, 739 (Fla. 2013) (referring to the "good faith exception to the exclusionary rule"); *State v. Edwards*, 853 N.W.2d 246, 250 (S.D. 2014) ("We note that in denying the motion to suppress, the circuit court did so pursuant to the 'good faith exception to the *warrant requirement.*' The circuit court's use of this 'warrant exception' was in error, because no such warrant exception exists. Indeed,

rule. In *United States v. Leon*, 468 U.S. 897, 924 (1984), the United States Supreme Court rejected the argument "that application of a good-faith exception to searches conducted pursuant to warrants will preclude review of the constitutionality of the search or seizure, deny needed guidance from the courts, or freeze Fourth Amendment law in its present state." That is because "[t]here is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated." *Id.* at 924. "If the resolution of a particular Fourth Amendment question is necessary to guide future action by law enforcement officers and magistrates, nothing . . . prevent[s] reviewing courts from deciding that question before turning to the good-faith issue." *Id.* at 925.

In the instant case, Petitioner maintains that a reasonable officer in Officer De Santis's position should have known that the implied consent provision of section 316.1932(1)(c) did not, by itself, establish Petitioner's actual consent for Fourth Amendment purposes. Law enforcement officers are expected to "have a reasonable knowledge of what the law prohibits" *Leon,* 468 U.S. at 919 fn.20. And

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case law instructs that the good faith exception is an exception to the exclusionary rule.") (footnote omitted).

case law at the time of the search established in no uncertain terms that "statutory implied consent is not equivalent to Fourth Amendment consent." *Williams v. State*, 167 So. 3d 483, 490 (Fla. 5th DCA 2015), *vacated on other grounds by* SC15-1417, 2016 WL 6637817 (Fla. Nov. 9, 2016); *State v. Liles*, 191 So. 3d 484, 487 (Fla. 5th DCA 2016).

Nevertheless, should this Court disagree with Petitioner's assessment, the good faith exception's application would not affect this Court's jurisdiction or negate this Court's obligation to determine the Fourth Amendment challenge. Because the certified question is clearly one of great public importance—both nationally and within the state of Florida—this Court must render a decision to provide guidance to law enforcement officers, magistrates, and judicial officers.

The "Special Needs" Exception of Skinner *Does Not Apply*

Turning to the certified question, the State's reliance upon *Skinner v. Railway Labor Executives' Ass'n*, 489 U.S. 602 (1989), is misplaced. (AB. 16-17). The *Skinner* decision was predicated upon the "special needs" doctrine, which applies to a search performed pursuant to a regulatory scheme where special governmental needs are present. *See Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987). Such "special needs" are typically limited to situations where "the usual warrant or probable-cause requirements" have somehow been rendered

impracticable. *See Griffin*, 483 U.S. at 873; *Skinner*, 489 U.S. at 619.[3] Moreover, the exception can only be applied where "'special needs' other than the normal need for law enforcement provide sufficient justification." *Ferguson v. City of Charleston*, 532 U.S. 67, 76 n.7 (2001).

A "program" or "general scheme" of searches qualifies for treatment under the special needs doctrine only if the program's "primary purpose" is *not* a "general interest in crime control." *Indianapolis v. Edmond*, 531 U.S. 32, 38, 44, 46, 48 (2000). "In no case has the Supreme Court indicated that a search for evidence *qua* evidence might qualify as a 'special need' that would warrant reasonableness balancing. Common sense suggests that it is not."[4] *Jardines v.*

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[3] *See Camara v. Municipal Court*, 387 U.S. 523, 533 (1967) (explaining that the creation of a general warrant exception due to public interest requires a compelling government interest in conducting a search without a warrant, "which in turn depends in part upon whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.").

[4] Examples where the Supreme Court applied the "special needs" doctrine include: *National Treasury Employees Union v. Von Raab*, 489 U.S. 656 (1989) (upholding urinalysis drug testing of Customs Service employees in line for promotion to exclude drug users from holding sensitive positions); *Vernonia School Dist. 47J v. Acton*, 515 U.S. 646 (1995) (upholding random urinalysis drug testing of students participating in high school athletics to deter drug use); *Griffin*, 483 U.S. at 878 (the need to preserve "the deterrent effect of the supervisory arrangement" of probation); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (warrantless searches of student's property by school officials of student property are justified by special need to maintain security and an educational environment); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (warrantless searches of desks and offices of public employees justified by special needs of government as employer).

State, 73 So. 3d 34, 52 (Fla. 2011), *aff'd* 569 U.S. 1 (2013); *see, e.g.*, *Ferguson*, 532 U.S. at 81, 83–84 (holding that drug testing was not justified under the "special needs" doctrine where the purpose actually served by the searches was ultimately indistinguishable from the general interest in crime control); *Edmond*, 531 U.S. at 34-35, 40-42 (finding that the primary purpose of drug interdiction checkpoints was to enforce criminal drug laws).

In *Skinner*, the United States Supreme Court applied the "special needs" doctrine to uphold Federal Railroad Administration regulations authorizing mandatory warrantless drug and alcohol testing for employees involved in certain train accidents. 489 U.S. at 606, 609, 614, 633. However, the Supreme Court only did so because the Government's need to "regulat[e] the conduct of railroad employees to ensure safety" was distinct from "normal law enforcement." *Id.* at 620. Moreover, the difficulty in obtaining a warrant arose from the need for the government to rely upon railway company employees–untrained in Fourth Amendment jurisprudence and procedure—to order the blood tests. *Id*. at 623-624.

No such difficulty arises with blood draws obtained from unconscious motorists pursuant to section 316.1932(1)(c) because it is police officers, not private railroad personnel, that make the decision regarding whether to order the blood draw. Further, the need in the present context does not go "beyond the normal need for law enforcement," nor does it "make the warrant and probable-

cause requirement impracticable," *Griffin*, 483 U.S. at 873, because the purpose of section 316.1932 is to collect evidence to prosecute drunk drivers. *See State v. Quinn*, 178 P.3d 1190, 1195 (Ariz. Ct. App. 2008) ("The prosecution of impaired drivers for DUI or other criminal charges is a law enforcement function . . . . ").

For the above reasons, numerous appellate courts have held that statutes authorizing warrantless blood draws of motorists suspected of impairment do not present a "special need." *See State v. Villarreal*, 475 S.W.3d 784, 807 (Tex. Crim. App. 2014) ("[W]e conclude that the special-needs doctrine is inapplicable in the present context, when the search of a DWI suspect's blood is undertaken by law-enforcement officers for the primary purpose of generating evidence to be used in a criminal prosecution."); *State v. Fierro*, 853 N.W.2d 235, 242 (S.D. 2014) ("We disagree with the State's argument that the seizure of Fierro's blood falls under this exception to the warrant requirement. The primary purpose of the warrantless seizure of Fierro's blood was evidentiary and prosecutorial."); *Cooper v. State*, 587 S.E.2d 605, 611 (Ga. 2003), *overruled on other grounds by Olevik v. State*, 806 S.E.2d 505 (Ga. 2017) (holding that no matter how important the purpose of protecting citizens from intoxicated drivers, "it does not create a special need to depart from the Fourth Amendment's requirement of probable cause").

This Court should hold the same.

The Act of Driving Did Not Manifest Petitioner's Consent to a Blood Draw

Without discussing the cases' factual postures, the State analogizes the present situation to four cases where persons impliedly consented through their conduct to searches while in secure and restricted areas such as an airport, prison, or military base. *See Shapiro v. State*, 390 So. 2d 344 (Fla. 1980); *United States v. Doran*, 482 F.2d 929 (9th Cir. 1973); *Clark v. State*, 395 So. 2d 525 (Fla. 1981); *Morgan v. United States*, 323 F.3d 776 (9th Cir. 2003). An examination of these cases, however, shows that they distinguishable.

In each case, the record supported a factual determination—based upon the totality of the circumstances—that the defendants provided actual, voluntary consent to the search through their actions. None of the cases involved a search as invasive as a blood draw. *See Schmerber v. California*, 384 U.S. 757, 769-70 (1966) (recognizing that a blood draw invades the interior of the human body and implicate interests in dignity and privacy). And none concerned imputing a defendant's consent from a legislative statute.

In *Shapiro v. State*, 390 So. 2d 344, 346 (Fla. 1980), the defendant was criminally charged after 6.5 pounds of cocaine was seized from his suitcase during a search at an airport security boarding area. *Id.* "Looking to the totality of the circumstances," this Court found the defendant voluntarily consented to the search because "he was fully aware that upon entering the security boarding area of the

airport, he was subject to a security search for weapons or other devices which could be employed to hijack an airliner." *Id.* at 348. Those circumstances included (1) that the defendant testified he "had boarded airplanes at least twenty times and that he was aware that there is a checkpoint at every airport where carry-on baggage must be submitted for inspection," *Id.* at 347, (2) that notices had been posted "in front of boarding areas inform[ing] prospective air passengers that all are subject to anti-hijacking searches," *Id.* at 347-48, and (3) that the defendant "knew he did not have to go through the checkpoint and did not have to board the plane, or that he did not have to carry his suitcase onto the plane." *Id.* at 348.

In *United States v. Doran*, 482 F.2d 929, 932 (9th Cir. 1973), "[t]he record clearly establishe[d] that signs and public address warnings announcing that all passengers were subject to search were in use at the time [the defendant] attempted to board."[5] "Having been exposed to the existence of the regulations and having

[5] Several courts—including the Ninth Circuit—have stepped away from the notion that searches at airports are justified by consent and have instead begun upholding the searches upon administrative grounds. *See, e.g., United States v. Aukai,* 497 F.3d 955, 960–61 (9th Cir. 2007) (en banc) (overruling prior cases that predicated the reasonableness of airport screening on ongoing consent or irrevocable implied consent; "[G]iven that consent is not required, it makes little sense to predicate the reasonableness of an administrative airport screening search on an irrevocable implied consent theory."); *see also Corbett v. Transp. Sec. Admin.,* 767 F.3d 1171, 1180 (11th Cir. 2014) (describing airport search as administrative search); *George v. Rehiel*, 738 F.3d 562, 575 (3d Cir. 2013) (airport screening was permissible under administrative search doctrine); *Elec. Privacy Info. Ctr. v. Dep't of Homeland Sec.*, 653 F.3d 1, 10 (D.C. Cir. 2011) (same).

chosen to participate in the activity," the Ninth Circuit held "the implication of [the defendant's] consent [wa]s unavoidable." *Id.* However, in reaching this result, the court contrasted the situation from a prior case where "there was no indication that the [the defendant] was aware of the search program being conducted and so . . . consent, either implied or actual, could not be found on the record." *Id.*

In *Clark v. State*, 395 So. 2d 525, 529 (Fla. 1981), this Court held that the defendant impliedly consented to a "shakedown" search at the prison where he worked because he was aware of the routine prison procedures. Specifically, the defendant (1) had received a booklet that described the rules for security checks of the guards, (2) had been briefed by chief security on shakedown searches when the defendant first came to work at the prison, and (3) it was "probable that [the defendant] had seen or even participated in a prior shakedown" search. *Id.*

Finally, in *Morgan v. United States*, 323 F.3d 776, 782 (9th Cir. 2003), the Ninth Circuit held "that a person may impliedly consent to a search on a military base." However, the court recognized this is not a blanket rule and that implied consent to search must be based on factual circumstances that would inform a person his conduct would be construed as consent. "Because such installations often warn of the possibility of search as a condition to entry," the court "remand[ed] to the district court to allow the development of a more complete factual record to determine whether implied consent was present." *Id.* at 778.

The common thread amongst these decisions was that the defendant's actual and voluntary consent could be inferred based upon facts on the record demonstrating that the defendant was aware his or her actions would constitute consent to be searched. Such circumstances could arise from a defendant's entry into a secure area, like an airport or prison, after being advised that he or she would be subject to search by being in the secure area; or other facts evincing that specific defendant's knowledge that his or her conduct together with other circumstances would reasonably be construed as consent to be searched.[6]

Given the factual scenarios, these decisions comport with the tenet that "consent sufficient to sustain a search may be 'implied' as well as explicit," but that implied consent must "nonetheless [be] *actual* consent, 'implied' only in the sense that it is manifested by *conduct* rather than words." *People v. Arredondo*, 199 Cal. Rptr. 3d 563, 571 (Cal Ct. App. 2016), *review granted and opinion superseded*, 371 P.3d 240 (Cal. 2016).[7] This is because consent can be "inferred from conduct constituting an *actual manifestation* of consent." *Id.*

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[6] The courts in *Doran* and *Morgan* noted that these rules were not categorical and that a finding of consent required a "complete factual record."

[7] The *Arredondo* decision was superseded pursuant to California Rule of Court 8.1115(e), which provides that when the California Supreme Court grants review of a lower court decision, "a published opinion of a Court of Appeal in the matter has no binding or precedential effect," but "**may be cited for potentially persuasive value**" unless the court orders otherwise. (Emphasis added).

No comparable principles apply to an unconscious motorist whose consent is imputed by an implied consent statute. "[M]ere compliance with statutory implied consent requirements does not, per se, equate to actual, and therefore voluntary, consent on the part of the suspect so as to be an exception to the constitutional mandate of a warrant." *Williams v. State*, 771 S.E.2d 373, 377 (Ga. 2015). As the appellate court explained in *Arredondo*:

> The mere operation of a motor vehicle is not a manifestation of *actual* consent to a later search of the driver's person. To declare otherwise is to adopt a construct contrary to fact. Indeed this view of the statute is implicit in its own language—in particular, its declaration that driving is "deemed" to constitute consent. . . . When a legal rule is stated in the form "A is deemed to be B," it means that A must be *treated as* B for purposes of the rule, even though *they are not the same thing*. . . . It "'has been traditionally considered to be a useful word when it is necessary to establish a *legal fiction* either positively by "*deeming" something to be what it is not* or negatively by "deeming" something not to be what it is . . . .'"

199 Cal. Rptr. 3d at 571-72 (citations omitted).

Furthermore, a person driving a non-commercial vehicle for personal reasons—such as commuting—cannot be said to be engaged in the type of heavily regulated business from which one might be able to infer knowledge. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 271 (1973) (rejecting application of the administrative search exception for border patrol to stop of a private vehicle and explaining: "A central difference between those cases and this one is that businessmen engaged in such federally licensed and regulated enterprises accept

the burdens as well as the benefits of their trade, whereas the petitioner here was not engaged in any regulated or licensed business. The businessman in a regulated industry in effect consents to the restrictions placed upon him.").

The problem with implied consent statutes like section 316.1932(1)(c) is that they do not just replace the the totality of the circumstances analysis constitutionally required for consent—they give an unconscious defendant no choice at all. Although "implied consent" statutes have the word "consent" in their name, blanket legislative declarations of "consent" are distinct from the factual, voluntary consent the United States Supreme Court has established as a warrant exception. *See Schneckloth v. Bustamonte*, 412 U.S. 218, 225-28 (1973). Because an unconscious defendant is incapable of "conduct, gestures or words" that can indicate consent, *State v. Gomez*, 34 So. 3d 245, 247 (Fla. 2d DCA 2010), statutory implied consent "cannot be squared with the requirement that, to be valid for Fourth Amendment purposes, consent must be freely and voluntarily given based on the totality of the circumstances." *Villarreal*, 475 S.W.3d at 800.

In this case, the record is completely devoid of any evidence demonstrating that Petitioner knew of section 316.1932(1)(c), let alone understood that by driving on a public roadway he was consenting to a warrantless blood draw while

unconscious.[8] There was no evidence, for example, of road signs warning Petitioner that he could be subjected to a warrantless blood draw if rendered unconscious, nor was there evidence that Petitioner had ever been told or presented materials related to section 316.1932(1)(c). Imputing Petitioner's knowledge, therefore, would be based on pure conjecture.

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. To treat section 316.1932(1)(c), Florida Statutes (2016), as an irrevocable[9] rule of implied consent would be contrary to the well-established Fourth Amendment jurisprudence requiring that a suspect's consent to be freely and voluntarily given. A state legislature cannot reach a contrary result by extinguishing a right granted by the Constitution. *See Weber v. City of Fort Lauderdale*, 675 So. 2d 696, 698 (Fla. 4th DCA 1996).

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[8] In a traditional sense, a driver's "actual consent occurs after the driver has" been warned of the sanctions for refusal, "weighed his or her options (including the refusal penalties), and decided whether to give or decline actual consent." *State v. Brar*, 898 N.W.2d 499, 527 (Wis. 2017) (Abrahamson, J., dissenting).

[9] Section 316.1932(1)(c) is "irrevocable" because an unconscious defendant is incapable of refusing the advanced consent.

Unintended Consequences

In its Answer Brief, the State asserts that Petitioner's fears regarding unintended consequences "are unfounded and ignore the fact that implied consent laws have existed in America for over sixty years, and the specific language at issue in this case has been on the books in Florida for approximately 50 years." (AB. 23). However, 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). By asserting the Legislature can statutorily waive motorist's constitutional rights, the State has changed the analysis in a dangerous way.

Under the State's argument, the opportunity to refuse an unconstitutional search could become be a matter of legislative grace—a mere condition of driving. "If the ability to withdraw consent is merely statutory," one must wonder whether "the legislature [can] remove the ability to withdraw consent entirely? For the Fourth Amendment to have any meaning, such a result cannot stand." *State v. Mitchell*, 914 N.W.2d 151, 176 (Wis. 2018) (Bradley, J., dissenting).

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 28th day of November, 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
BENJAMIN EISENBERG