IN THE SUPREME COURT OF FLORIDA

WILLIAM WILLIAMS,

Petitioner,

v.

Supreme Court Case No. SC15-1417
Lower Case No.: 5D14-3543

STATE OF FLORIDA,

Respondent.

_____/

SECOND AMENDED JURISDICTIONAL BRIEF
ON BEHALF OF THE PETITIONER

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STATEMENT OF THE CASE AND FACTS

Appellant William Williams was convicted in Volusia County Court after entering a no contest plea to the misdemeanor offense of refusing to submit to a breath test[1] and expressively reserving his right to appeal the denial of his dispositive Motion to Dismiss arguing §316.1939 was unconstitutional facial or as applied. Prior to entry of the plea, the County Court issued a written order denying appellant's Motion to Dismiss but certifying the question below as one of great public importance to the Fifth District Court of Appeals:

> "If the implied[-]consent statute provides consent to search as an exception to the Fourth Amendment warrant requirement, then can that consent be withdrawn by refusal to submit to an otherwise lawful test of breath, blood or urine and can the second such refusal be punishable as a criminal offense?"

On June 5, 2015, the Fifth District Court issued its opinion (A-1-18). The relevant facts are in Section I of the opinion (A 2-3) and clarify Williams was convicted of a crime for declining to submit to a warrantless request for a breath test absent proof of any exigent circumstances (A-2). The District Court notes this was a case of "first impression" (A-9) and in response to the certified question found a "implied consent" exception to the warrant requirement did not apply (A-10-12) on the facts of this case. A search incident to arrest exception also was

[1] Mr. Williams was acquitted at trial on the charges of driving under the influence and drive while license suspended, canceled or revoked. Upon his plea he was adjudicated guilty and sentenced to time already served (two days) and assessed the standard court costs and fines.

inapplicable (A-13-14). However, the District Court went on to find §316.1939, Fla. Stat. (2013) was constitutional, as applied to Williams, because the search Williams refused satisfied the "general reasonableness requirement" of the Fourth Amendment (A-15) and was therefore a permissible search even absent a warrant.

A timely Motion for Rehearing, Certification or Both was filed on June 18, 2015. During the time for rehearing, *City of Los Angeles, California v. Patel et al.*, 135 S.Ct. 2443 (2015) was decided (a Notice of Supplemental authority was filed on June 24, 2015) further supporting appellant's position there is no "general reasonableness" exception that was applicable to this case:

> "**Based on [the Fourth Amendment], the Court has repeatedly held that " 'searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions.'** " ... Search regimes where no warrant is ever required may be reasonable where " 'special needs ... make the warrant and probable-cause requirement impracticable,' " ... and where the "primary purpose" of the searches is '[d]istinguishable from the general interest in crime control,'"
> *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443, 2451-52 (2015)
>
> Emphasis supplied. Internal Citations Omitted.

Appellant's Motion for Rehearing, Certification or Both was denied on July 1, 2015 (A-19). Following issuance of the Order Denying Rehearing, Certification or Both timely notice invoking this Court's discretionary jurisdiction was filed in the Fifth District Court of Appeal on July 29, 2015.

SUMMARY OF ARGUMENT

The District Court's opinion in *Williams v. State*, No. 5D14-3543, (Fla. Dist. Ct. App. June 5, 2015) expressly holds §316.1939, Fla.Stat. (2013) constitutional, as applied to appellant William Williams. Therefore, this Court should exercise its discretionary jurisdiction to hear the issue raised and determine the constitutionality of the statutes challenged below.

Further, this Court should exercise its discretionary jurisdiction because the District Court's opinion creates a 'new' exception to the Fourth Amendment's warrant requirement and in doing so expressly conflicts with rulings of the United States Supreme Court, most recently *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) and *City of Los Angeles, California v. Patel et al.*, 135 S.Ct. 2443 (2015). Finally the District Court recognized appellant's case as one of first impression in Florida and signaled the pending conflict with established federal law in holding:

> "because pre-*McNeely* Florida case law simply cited *Schmerber*, no Florida case specifically states what exception to the warrant requirement, if any, applies to breath-alcohol test conducted immediately after a DUI arrest. ***As such, this is an issue of first impression***."*Williams v. State*, No. 5D14-3543, (Fla. Dist. Ct. App. June 5, 2015). (emphasis added)

As further grounds for exercise of this Court's discretionary review, because *Williams* expands an otherwise extremely narrow exception to the warrant

requirement in conflict with existing United States Supreme Court decisions, *Williams* impacts thousands of cases statewide and this Court's review is vital.

ARGUMENT

THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION AS THE DISTRICT COURT'S OPINION EXPRESSLY CONSTRUES SEC. 316.1939, FLA. STAT., CONSTITUTIONAL IN A MANNER INCONSISTENT WITH RULINGS OF THE UNITED STATES SUPREME COURT, INVOLVES AN ISSUE OF FIRST IMPRESSION IN FLORIDA AND AN ISSUE OF GREAT PUBLIC IMPORTANCE IMPACTING THOUSANDS OF CASES STATEWIDE.

Williams expressly construes §316.1939, Fla.Stat. (2013) constitutional in determining whether, as applied, appellant can be convicted of a crime for declining to submit to a warrantless breath test absent exigent circumstances. In what the District Court notes is a matter of "first impression" (A-9), *Williams* expressly discusses multiple Fourth Amendment issues including determining whether the "unconstitutional conditions" doctrine applies to prohibit the Government "punishing" the exercise of a constitutional right (*Williams* holds the appellants reasoning on this issue correct), whether Florida's implied consent scheme is a "per se exception to the warrant requirement" (*Williams* holds it is not) and whether any other search incident to arrest exception applies to appellant case (*Williams* holds no other exceptions apply). But, in an abrupt one hundred eighty degree turn, the District Court, relying on a "general reasonableness" exception to the Fourth Amendment ultimately determines the search at issue is a reasonable

one and so no warrant is required. Accordingly, the District Court found Florida's refusal statute constitutional as applied to Williams. The use of "general reasonableness" as an exception to salvage the constitutionality of the search misapprehends binding precedent which limits "general reasonableness" to searches sufficient detached from criminal investigation.

In *City of Los Angeles, California v. Patel et al.,* 135 S.Ct. 2443 (2015), decided while appellant's Motion for Rehearing was pending, the U.S Supreme Court stated:

> Based on this constitutional text, the Court has repeatedly held that "searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate [judge], are *per se* unreasonable ... subject only to a few specifically established and well-delineated exceptions. *Id.*

In conflict with *Patel* and the cases cited therein, *Williams* states:

> "[u]ltimately, we hold that warrantless breath-alcohol tests are justified as reasonable under the Fourth Amendment, even though they do not fall under a specific categorical exception to the warrant requirement"

Accordingly, *Williams* conflicts with two recent U.S. Supreme Court decisions interpreting the Fourth Amendment of the Constitution which are binding on Florida Courts. See Art I, §12, Fla.Const.

Appellant's case was unquestionably a routine DUI investigation and there is nothing magical about a DUI investigation (which every law enforcement officer

from fresh recruit to seasoned Captain has handled) which "trumps" or abrogates the Fourth Amendment in hopes of warding off "carnage on the highways." In *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), the U.S. Supreme Court case that prompted a national reexamination of State drunk-driving laws, the Court held "our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception." *Id*. at 1558. Further,

> "... the general importance of the government's interest in the area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical in a particular case. ***To the extent that the State and its amici contend that applying the traditional Fourth Amendment totality of the circumstances analysis to determine whether an exigency justified a warrantless search will undermine the governmental interest in presenting and prosecuting drunk driving offenses, we are not convinced***." Id. at 1566 (Emphasis added)"

McNeely finds no recognized exception for DUI investigations in reaching its holding and rejects the idea the pervasive regulation of vehicles capable of traveling on the public highways somehow diminishes an individual's right to demand a search warrant before an intrusion into their body. In *Williams* the District Court was concerned with diminished expectations of privacy and balanced this against their belief a breath test was “minimally intrusive”, this concern misapprehends the U.S. Supreme Court precedent articulated in and expressly rejected throughout *McNeely*.

McNeely and *Patel*, together with the "special needs search" decisions such as *Maryland v. King*, 133 S.Ct. 1958 (2013), make it clear *Williams* reliance on "general reasonableness" is premised on a misapprehension of precedent and results in an unauthorized expansion of the jealously guarded area of exceptions to the Fourth Amendment's warrant requirement. By their very nature, these "special needs" searches are not tools for ordinary criminal investigation.

Just as a rose by any other name remains a rose, the District Court's "generally reasonable" exception in *Williams* is still a "special needs" exception and inapplicable. The "general reasonableness" exception to the Fourth Amendment, as the District Court acknowledged, is narrow and limited to only those governmental purposes aside from crime-solving; so-called "special needs" searches are "divorced from the State's general interest in law enforcement." *Ferguson v. Charleston*, 121 S.Ct. 1281 (2001). So despite William's footnote five (5) where the District Court acknowledges the "special needs" exception would not apply to appellant's case because the exception did not cover cases where the main purpose of the search was "general interest in crime control," the District Court still conducts the same "special needs" balancing test to reach the result that a warrantless breath-alcohol test is a constitutionally permissible search because it was generally reasonable.

The District Court's opinion relies heavily on *Maryland v. King*, 133 S.Ct. 1958 (2013) in framing its analysis and reaching its conclusion the breath test is "generally reasonable" as applied; but this analysis leads to the wrong result because *King* was a "special needs" case. Ultimately, by specifically distinguishing appellant's breath test request as not being a "special needs" search but finding it "generally reasonable", the Court places post-arrest breath tests (not urine or blood tests?) into a new category, and in doing so, expands the ranks of exceptions to Fourth Amendment's protection and creates a conflict with established binding case law interpreting the Fourth Amendment.

In *Arizona v. Gant*, 129 S.Ct. 1710 (2009), the Court stated:

> "Consistent with our precedent, our analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with the basic rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (footnote omitted)." *Id.* at 1716.

And in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), the Court stated "our cases have held that a warrantless search of the person is reasonable only if it falls within a recognized exception." *Id*. at 1558. *McNeely* finds no recognized exception for DUI investigations in reaching its holding; but, in this case of first impression, the District Court held "Williams had no Fourth Amendment right to refuse the test

because, under the totality of the circumstances, a warrantless breath-alcohol test would have been **reasonable**." (emphasis added) - the District Court's ultimate conclusion a warrantless breath-alcohol test is reasonable and therefore permissible under the Fourth Amendment rests on novel ground as a result of grappling with an issue of first impression in Florida. Here, "general reasonableness" does not apply nor permit a warrantless search by law enforcement conducting a routine DUI investigation and seeking evidence of wrong-doing. Rather, "general reasonableness" analysis is reserved for so-called "special needs searches" which may not be used for routine criminal investigations. The District Court's expansion of the "general reasonableness" exception is contrary to the holdings in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013) and *City of Los Angeles, California v. Patel et al.*, 135 S.Ct. 2443 (2015). See also *Skinner v. Ry. Labor Executives' Ass'n*, , 109 S. Ct. 1402, 1414, (1989) *Chandler v. Miller*, 117 S. Ct. 1295 (1997), *Samson v. California*, 126 S. Ct. 2193 (2006), *Maryland v. King*, 133 S.Ct. 1958 (2013) and *State v. Villarreal*, No. PD-0306-14, 2014 WL 6734178 (Tex. Crim. App. Nov. 26, 2014), *reh'g granted* (Feb. 25, 2015).

CONCLUSION

Williams involved a routine misdemeanor DUI investigation and a proposed search of appellant's breath. Because the breath test was sought solely for use in prosecuting a suspected "drunk driver," a "general reasonableness" analysis is inapplicable. All searches either require a warrant or must fit within an established exception. Here, there was no legal basis to support William's prospective warrantless search, therefore appellant was free to exercise his constitutional right to decline an illegal search and should not be criminally punished for exercising this right. Appellant's conviction should be set aside and the statute declared unconstitutional as applied to him.

To grant this relief, this Court should exercise its discretionary jurisdiction to review the District Court's opinion, holding §316.1939, Fla.Stat. (2013) constitutional, as applied, which is in conflict with clearly established and binding holdings of the U.S. Supreme Court. Accepting review would also permit this Court to address a matter of first impression which State and Federal Courts throughout these United States are now addressing in light of *McNeely* and its clarification of *Schermber* and impact cases throughout the State.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 3rd day of September, 2015, to Office of the Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida, 32118, at crimappdab@myfloridalegal.com.

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CERTIFICATE OF COMPLIANCE

Counsel for Appellant does hereby certify that the foregoing document was prepared in Times New Roman 14 point font in compliance with Fla. R. App. P 9.210.