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.

_____/

PETITIONER'S INITIAL BRIEF

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PREFACE

In this brief, the petitioner William Williams is referred to as Petitioner. Respondent is referred to as the Government or State. The following symbol is used:

(R-X) -- Record on Appeal where X is the page(s) used

STATEMENT OF CASE AND FACTS

Petitioner challenges the constitutionality of his conviction for refusing to submit to a breath test when he was not presented with a warrant, and he accepts the District Court's June 5, 2015, opinion's recitation of facts. (R-162-163) Briefly, on October 14, 2013, at approximately 10:17 p.m., petitioner William Williams was arrested for driving under the influence. (R-162-163) Less than twenty minutes later, the arresting officer asked petitioner to submit to a search of his breath as part of a DUI investigation. (R-162-163) Petitioner refused. (R-162-163) There was no warrant and no finding of exigent circumstances. (R-162-163) Williams filed a motion to dismiss the charge of "Refusal to Submit," a violation of Fla. Stat. Ann. § 316.1939, (the "refusal statute") with stipulations as to many of the facts. (R-163-164)

The trial Court denied the motion, but certified a question 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 withdrawn by refusal to submit to an otherwise lawful test of breath, blood or urine and can the second such refusal be punishable as a criminal offense?" (R-164)

Williams, found not guilty at trial on the DUI and other charges, pled to the refusal and was sentenced to time served. (R-164) Williams specifically reserved the right to appeal the dispositive denial of his Motion to Dismiss. (R-164)

Answering the trial Court's certified question, the Court holds Petitioner was properly convicted of a crime for refusing to submit to a warrantless search of his breath absent proof of any exigent circumstances. (R-165-179) The District Court notes this is a case of "first impression" and in response to the certified question states an "implied consent" exception to the warrant requirement does not apply on the facts of this case. (R-165-179) A search incident to arrest exception also is inapplicable. (R-165-179) However, the District Court finds the refusal statute constitutional as applied to Petitioner because the search he refused satisfies the "general reasonableness requirement" of the Fourth Amendment and is therefore a permissible search, even absent a warrant. (R-165-179)

A timely Motion for Rehearing, Certification or Both was filed on June 18, 2015. (R-180-193) Appellant's Motion for Rehearing, Certification or Both was denied on July 1, 2015 (R-248). On July 29, 2015, 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. (R-250-251) On December 30, 2015, this Court accepted jurisdiction.

SUMMARY OF THE ARGUMENT

This petition presents a question of exceptional importance and first impression: whether Fla. Stat. Ann. § 316.1939 (the "refusal statute") may criminalize a driver's second refusal to submit to a chemical test of his or her blood breath or urine. Stated another way, petitioner shows Florida's refusal statute is unconstitutionally applied to him because he was free to refuse a search of his breath (via an infrared breath test) to determine its alcoholic content. Petitioner was not presented with any warrant and no exigent circumstances existed. Starting from the premise a search is presumptively unconstitutional, absent a warrant or exigent circumstances, it follows naturally petitioner cannot be convicted of a crime for refusing a breath test. Petitioner did not consent to a search; there was no warrant and no record evidence of exigent circumstances. No other exception to the warrant requirement applies to a routine DUI investigation.

In order to uphold petitioner's conviction, the Fifth District relies on the theory a chemical test of a DUI suspect is a generally reasonable search and so does not offend the Fourth Amendment. This exception has never been recognized or applied before and is an exception so wide it threatens to swallow the Fourth Amendment whole. Petitioner's search was not reasonable and is prohibited by the

Fourth Amendment. So, as Petitioner demonstrates, Florida's refusal statute is unconstitutional as applied when there is neither a warrant nor one of the very limited exceptions to the warrant requirement.

ARGUMENT

PETITIONER DEMONSTRATES FLA. STAT. § 316.1939 (FLORIDA'S REFUSAL STATUTE) IS UNCONSTITUTIONAL, AS APPLIED TO HIM, BECAUSE IT CRIMINALIZES THE EXERCISE OF PETITIONER'S CONSTITUTIONAL RIGHT TO BE FREE FROM WARRANTLESS SEARCHES ABSENT EXIGENT CIRCUMSTANCES.

A. Standard of Review

Constitutional challenges to statutes involve pure questions of law reviewable on appeal *de novo*. *State v. Glatzmayer*, 789 So. 2d 297 (Fla. 2001) Further, *de novo* review is appropriate because petitioner and the Government stipulated to all pivotal facts before the trial court.

B. The State may not punish the exercise of a constitutional right to be free from an unreasonable search.

The Government may not criminalize the exercise of a constitutional right. Our State and Federal Constitutions protects citizens from the Government's coercive methods of foisting the surrender of rights upon the people; the "unconstitutional conditions" doctrine "prevent[s] the government from coercing people into giving [their rights] up." *Koontz* v. *St. Johns River Water Mgmt. Dist*., 133 S. Ct. 258 (2013) Further, the Government "may not grant a benefit on the

condition that the beneficiary surrender a constitutional right." *Amelkin v. McClure*, 330 F.3d 822 (6th Cir. 2003) This protection clearly applies to a constitutional right to be free from unreasonable searches i.e. warrantless searches. *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523 (1967). Applying these principles, the Fifth District properly determined petitioner could not be prosecuted if there was a valid constitutional right to be free from search. *Williams v. State*, 167 So. 3d 483 (Fla. 5th DCA 2015), *reh'g denied* (July 1, 2015), *review granted*, SC15-1417, 2015 WL 9594290 (Fla. 2015)

C. Williams correctly held "implied consent" is not a valid substitute for Fourth Amendment consent.

Constitutional protections are the people's aegis interposed against the Government's inherent immense power coercively obtaining a citizen's consent to search their person property or both. Therefore, consent must be freely and voluntarily given. The Government always has the burden of proving that the consent was freely and voluntarily given. *Bumper v. N. Carolina*, 391 U.S. 543 (U.S. 1968) and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). Without free and voluntary consent, the Government almost always requires a warrant to search a person or place. Florida's "implied consent" law, an "automatic" consent to a chemical test of the driver's breath blood or urine "implied" by driving on the roads of the State, is not valid Fourth Amendment consent. *Williams*.

Multiple States have reached the same conclusion; "implied consent" is not "Fourth Amendment Consent" and may be revoked. *Missouri v. McNeely*, 133 S.Ct. 1552 (2013), prompted a national review of drinking and driving jurisprudence. State courts increasingly recognize the significance of McNeely's clarification of *Schmerber v. California*, 384 U.S. 757 (1966) as they struggle to reconcile their statutory implied consent schemes with the Fourth Amendment. In the process, many States have reached the same conclusion as the Fifth District: "implied consent" is not "Fourth Amendment" consent. For example, Texas, Georgia and Idaho. *State v. Villarreal*, PD-0306-14, 2014 WL 6734178, (Tex. Crim. App. 2014), *reh'g granted* (Feb. 25, 2015), *Williams v. State*, 296 Ga. 817, 771 S.E.2d 373 (2015). *State v. Wulff*, 157 Idaho 416, 337 P.3d 575 (2014). On this rationale, Hawaii suppressed a breath test as being unduly coerced. *State v. Won*, 136 Hawai'i 292, (2015), *as corrected* (Dec. 9, 2015). Mindful of the ripples caused by its decision in *McNelly*, the United States Supreme Court accepted jurisdiction to address three consolidated cases presenting a trilogy of DUI scenarios i.e. breath test, blood test, and a refusal to submit. The outcome of the lead case, *Birchfield v. N. Dakota*, 136 S. Ct. 614 (2015), should help resolve petitioner's case. Further, several of the cases cited above at lower appellate levels were relied on in *Williams*, and their subsequent reversal at their State high court show these types of laws are no longer unassailable post *McNeely*.

D. Warrantless searches are presumptively unreasonable and may not be upheld on the theory they are reasonable.

A search without a warrant is *per se* unreasonable unless the search falls into one of "a few specifically established and well-delineated exceptions." *Arizona v. Gant*, 556 U.S. 332 (2009). When there is a Fourth Amendment right to refuse a search (chemical test), criminalizing the exercise of that right is unconstitutional, unless the arresting officer had a legal right to search without a warrant because an exception to the warrant requirement applies. To salvage the constitutionality of Fla. Stat. Ann. § 316.1939 and uphold petitioner's conviction, the District Court creates a "new exception," (described as a "generally reasonable" exception) to the warrant requirement.

The Court held a search of a driver's blood breath or urine is a "generally reasonable search" not prohibited by the Fourth Amendment; "[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." *Williams*, 167 So.3d 483. However, the United States Supreme Court has consistently held "searches outside the judicial process, without prior approval [by a judge or a magistrate judge] are *per se* unreasonable ... subject to a few specifically established and well-delineated exceptions.' *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015).

The "generally reasonable" exception relied on in *Williams* appears identical to the "special needs" exception. Like Shakespeare's rose (*Romeo & Juliet*, Act II, Scene II, 1597) whether one calls an exception "special needs" or "generally reasonable," when the Fifth District Court applies the "special needs" exception analysis, the exception by another name is still that exception. Beginning in *Skinner* through *Maryland v. King*, 133 S. Ct. 1958, (2013) and *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015), the Supreme Court has rejected sweeping warrantless searches, except in extraordinary circumstances. And the Court repeatedly instructs us that these extraordinary circumstances are never criminal investigations. The Fourth Amendment does permit the use of the special needs balancing test in a routine criminal investigation. "Special needs" are precisely that - special - and this exception finds use only in limited cases dealing with narrow segments of the population, such as drug testing student athletes, or regulating critical industries like railroads. *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989). To hold otherwise would impermissibly expand the intentionally narrow category of special needs searches and run riot over the safe guards repeatedly bolstered by precedent.

E. McNeely holds the only applicable exception, in a routine DUI, is an as-applied determination of exigent circumstances and rejects any other exception as inapplicable.

Our guiding Fourth Amendment decisions have always understood a search to be permissible "only if it falls within a recognized exception" to the warrant requirement. *McNeely* at 1558. *McNeely* inherently rejects a warrantless search in a DUI case because the Court considered and rejected all exceptions to the warrant requirement, writing primarily on why the "exigency" exception was not applicable as a *per se* exception. M*cNeely*'s plurality 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 state." *Id.* at 1565. Anticipating the "carnage on the highway" argument, the Court specifically addressed "the compelling government interest in combating drunk driving" and added "the general importance of the government's interest in this area does not justify departing from the warrant requirement without showing exigent circumstances that make securing a warrant impractical." *Id.* at 1565. This analysis considers and rejects the District Court's rationale in *Williams*.

The Constitution's Fourth Amendment has few and clearly defined exceptions. The District Court finds the search "would have been reasonable," and holds petitioner could not refuse the search. By finding petitioner's search

"generally reasonable," the District Court creates a new exception to the warrant requirement. As we explained the "generally reasonable" search seems identical to a "special needs search" yet our Courts have never permitted a "special needs search" in a routine criminal investigation. Petitioner's case is far from extraordinary; it is a nightly occurrence through the States. Ultimately, whether termed a "special needs" or "generally reasonable" exception, the District Court erred in creating a new or misapplying such an exception to find a constitutionally permissible warrantless search. It seems unlikely the Supreme Court would fail to uphold the search in *McNeely* as "generally reasonable" when considering and rejecting other rationale for justifying the warrantless search. Indeed, "objectively reasonable" is at the heart of the "exigent circumstances" exception. Post-*McNeely*, exigent circumstances are the only possible exception to the warrant requirement. The inescapable conclusion is the Fourth Amendment prohibits petitioner's search and he cannot be punished criminally for refusing to submit to a search.

CONCLUSION

Petitioner was convicted for violating Florida's refusal statute when, confronted with a warrantless search of his breath, he refused the search. Beginning with the premise a warrantless search is presumptively unconstitutional, it naturally follows the petitioner cannot be convicted of a crime for exercising the right to be free from unreasonable searches by refusing a breath test. The Fifth District Court's "generally reasonable" exception is indistinguishable from a "special needs" exception. By any name, such an exception does not apply to petitioner's routine DUI arrest; it is not a generally reasonable search if the goal is to obtain evidence for a criminal investigation.

By holding the petitioner's prospective search was "generally reasonable," the Fifth District Court erred by expanding the exceptionally few instances where a search warrant is not required to obtain evidence for use in a criminal prosecution. As we demonstrated, petitioner exercised a valid right to be free from a warrantless search. The Government cannot punish this valid exercise of a right. Petitioner urges this Court to find Florida's refusal statute unconstitutional as applied to him, quash the decision of the Fifth District Court and to remand for directions to discharge him from any criminal liability for his refusal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 16th day of February, 2016, 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 WITH FONT REQUIREMENT

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.