IN THE SUPREME COURT OF FLORIDA

WILLIAM WILLIAMS,

Petitioner,

v. CASE NO. SC15-1417

STATE OF FLORIDA,

Respondent.
_____/

ON DISCRETIONARY REVIEW FROM
THE FIFTH DISTRICT COURT OF APPEAL

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF FACTS

Respondent submits the following additions to Petitioner's Statement of Facts:

For purposes of the motion to dismiss, the parties stipulated that: (1) the initial stop of Petitioner's vehicle was lawful; (2) the police had probable cause to ask Petitioner to submit to a breath test; (3) Petitioner refused to take the breath test; (4) Petitioner's driving record reflected a prior refusal to submit to a breath test; and (5) the motion to dismiss was dispositive as to the Refusal to Submit charge. (R. 14-16).

The district court of appeal crafted a lengthy opinion affirming the trial court's order denying the motion to dismiss and finding that the request for a breath test under the implied consent statute is a reasonable search under the Fourth Amendment. Williams v. State, 167 So. 3d 483 (Fla. 5th DCA 2015). This Court accepted jurisdiction to review that decision.

SUMMARY OF ARGUMENT

The district court properly affirmed the trial court's order denying the Defendant's motion to dismiss. The United States Supreme Court has not eliminated the states' long-standing right to condition the privilege of driving on consenting to a breath test under certain limited circumstances, nor has the Court so much as hinted that the refusal to participate in such testing cannot be subject to sanctions as delineated by the Legislature. Instead, to the extent the Court has discussed implied consent statutes at all, it has cited them with approval.

Florida's statutory implied consent scheme, like those throughout the country, requires that drivers consent to a minimally invasive breath test when arrested for driving under the influence of alcohol. The statute allows the arrestee to revoke his consent and avoid a search, but this choice subjects the individual to civil and criminal penalties.

This statute does not create an unconstitutional condition, as the condition imposed (consent to a breath test) is directly related to the privilege granted (sober driving). Further, no warrant is needed to search a driver's breath under this statute, where the search is based on voluntary consent, where the search is a proper search incident to a lawful arrest, and where the search is a reasonable search under the Fourth Amendment.

ARGUMENT

THE DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT THE IMPLIED CONSENT STATUTE IS CONSTITUTIONAL.

The Defendant asks this Court to find that Florida's implied consent statute is unconstitutional. No precedent from this Court or the United States Supreme Court requires such a result, and the district court of appeal properly rejected the Defendant's argument.

The Florida Legislature has determined that the privilege to drive must be conditioned on consent to a minimally invasive breath test when the driver has been arrested for driving under the influence of alcohol. This is a valid condition properly attached to the granting of this privilege. A person arrested for driving under the influence has no constitutional right to refuse this search. While an arrestee may, as a matter of statutory grace, withdraw that consent to a breath test, such a refusal carries consequences delineated by statute, and those consequences were properly applied here.

Standard of Review

In determining the validity of a statute, courts are bound by the premise that all doubts must be resolved in favor of the statute's constitutionality. See, e.g., State v. Stalder, 630 So. 2d 1072, 1076 (Fla. 1994). Further, if there is any way to construe the statute in a constitutional manner, it must be construed in such a way, as long as such construction is consistent

with legislative intent and does not effectively rewrite the statute. Id.

The statute at issue here is part of Florida's implied consent scheme, providing as follows:

> Any person who has refused to submit to a chemical or physical test of his or her breath, blood, or urine, as described in s. 316.1932, and whose driving privilege was previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, and:
>
> (a) Who the arresting law enforcement officer had probable cause to believe was driving or in actual physical control of a motor vehicle in this state while under the influence of alcoholic beverages, chemical substances, or controlled substances;
>
> (b) Who was placed under lawful arrest for a violation of s. 316.193 unless such test was requested pursuant to s. 316.1932(1)(c);
>
> (c) Who was informed that, if he or she refused to submit to such test, his or her privilege to operate a motor vehicle would be suspended for a period of 1 year or, in the case of a second or subsequent refusal, for a period of 18 months;
>
> (d) Who was informed that a refusal to submit to a lawful test of his or her breath, urine, or blood, if his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, is a misdemeanor; and
>
> (e) Who, after having been so informed, refused to submit to any such test when requested to do so by a law enforcement officer or correctional officer
>
> commits a misdemeanor of the first degree.

§ 316.1939(1), Fla. Stat. (emphasis added).

Under this statute, then, a person commits a first degree misdemeanor *the second time* he refuses to submit to a breath test, but only after he has been placed under lawful arrest for driving

under the influence of alcohol, and only after he has been specifically warned that such refusal carries particular consequences under Florida law.

The Defendant argues that this statute, and the entire implied consent statutory scheme, is unconstitutional after the Supreme Court's decision in Missouri v. McNeely, 133 S.Ct. 1552 (2013). This argument construes McNeely much too broadly and is contrary to long-standing Florida law and Supreme Court precedent.

Pre-McNeely DUI Law

In 1966, the United States Supreme Court issued its landmark decision in Schmerber v. California, 384 U.S. 757 (1966). There, the Court held that a state could physically force a defendant suspected of driving under the influence of alcohol to submit to a blood test without a warrant, as the rapid dissipation in the level of alcohol in the blood, along with other circumstances, constituted an exigency.

In response to this decision, all 50 states, including Florida, passed implied consent statutes. These statutes were designed to restrict the seemingly unrestrained blood draws authorized by Schmerber, imposing a specific set of limitations on police officers and corresponding responsibilities on drivers.

Florida's current statute provides in pertinent part as follows:

> Any **person who accepts the privilege** extended by the laws of this state of operating a motor vehicle within this state is, by so operating such vehicle, **deemed to have**

> **given his or her consent** to submit to an approved chemical test or physical test including, but not limited to, an infrared light test of his or her breath for the purpose of determining the alcoholic content of his or her blood or breath **if the person is lawfully arrested** for any offense allegedly committed while the person was driving or was in actual physical control of a motor vehicle while under the influence of alcoholic beverages. The chemical or physical breath test must be **incidental to a lawful arrest** and administered at the request of a law enforcement officer who has **reasonable cause to believe such person was driving** or was in actual physical control of the motor vehicle within this state while **under the influence of alcoholic beverages**.

316.1932(1)(a), Fla. Stat. (emphasis added).

Under this statute, then, anyone who accepts the privilege (not the right) to drive in Florida consents to a breath test under certain limited circumstances.

The driver is also given the ability to withdraw that consent, but there are consequences for doing so:

> The person shall be told that his or her failure to submit to any lawful test of his or her breath will result in the **suspension of the person's privilege to operate a motor vehicle** for a period of 1 year for a first refusal, or for a period of 18 months if the driving privilege of such person has been previously suspended as a result of a refusal to submit to such a test or tests, and shall also be told that if he or she refuses to submit to a lawful test of his or her breath and his or her driving privilege has been previously suspended for a prior refusal to submit to a lawful test of his or her breath, urine, or blood, he or she **commits a misdemeanor** in addition to any other penalties. The refusal to submit to a chemical or physical breath test upon the request of a law enforcement officer as provided in this section is **admissible into evidence** in any criminal proceeding.

Id. (emphasis added).

The Unites States Supreme Court addressed the constitutionality of such consequences in South Dakota v. Neville, 459 U.S. 553 (1983). Specifically, the Court addressed whether the Fifth Amendment was violated by the use of a defendant's refusal as evidence of guilt in a criminal trial. In concluding that it was not, the Court specifically recognized the legitimate interests served by South Dakota's implied consent law, including its use of various consequences to discourage defendants from choosing to refuse the test mandated by statute. Id. at 560.

Noting that the blood-alcohol test was "safe, painless, and commonplace," the Court concluded as follows:

> Given, then, that the offer of taking a blood-alcohol test is clearly legitimate, the action becomes no *less* legitimate when the State offers a second option of refusing the test, with the attendant penalties for making that choice. Nor is this a case where the State has subtly coerced respondent into choosing the option it had no right to compel, rather than offering a true choice. To the contrary, the State wants respondent to choose to take the test, for the inference of intoxication arising from a positive blood-alcohol test is far stronger than that arising from a refusal to take the test.

Id. at 563-64 (emphasis in original).

Other sanctions for a lack of cooperation have been approved by the Supreme Court as well, in the DUI context and in the context of other searches. See Hiibel v. Sixth Judicial Dist. Court of Nevada, 542 U.S. 177, 189 (2004) ("stop and identify statute" did not violate Fourth Amendment; criminally punishing suspect who refused to disclose name during valid investigative stop had

immediate relation to purpose, rationale, and practical demands of investigative stop, and "threat of criminal sanction helps ensure that the request for identity does not become a legal nullity"); Mackey v. Montrym, 443 U.S. 1, 18-19 (1979) (rejecting challenge to Massachusetts implied consent law's summary suspension of driver's license upon refusal of breath test; "compelling interest in highway safety" justified summary suspension, serving as strong inducement to take a test that provides reliable evidence for use in subsequent criminal proceedings and promptly removes such drivers from the road, which contributes to public safety).

Florida courts followed Neville in evaluating Florida's implied consent law, finding that the statute was supported by an important state interest and offered drivers a legitimate choice – agree to the breath test required by statute or refuse the test and accept the consequences spelled out therein. See, e.g., Sambrine v. State, 386 So. 2d 546, 549 (Fla. 1980) (Legislature had power to provide more protection against unreasonable searches than that given by constitution, and did so in implied consent law, giving right to refuse breath test, with attendant penalties spelled out in statute); State v. Bender, 382 So. 2d 697, 699 (Fla. 1980) (compelling state interest in highway safety justified Legislature's decision to allow suspension of driver's license for failure to take breath test); State v. Langsford, 816 So. 2d 136, 139 (Fla. 4th DCA 2001) (suppressing blood test result because blood draw did not comply with implied consent statute, even though draw

was permissible under constitution, as implied consent statute imposed higher standards on police conduct in obtaining breath, urine, and blood samples than required by Fourth Amendment); State v. McInnis, 581 So. 2d 1370, 1374 (Fla. 5th DCA) (Legislature gave some drivers right to refuse testing, with attendant consequences, under implied consent law, as a rational public policy decision), cause dismissed, 584 So. 2d 998 (Fla. 1991); State v. Young, 483 So. 2d 31 (Fla. 5th DCA 1985) (implied consent law gave legal right to refuse to be tested, but only with attendant consequences provided in statute), rev. dismissed, 517 So. 2d 691 (Fla. 1988); State v. Pagach, 442 So. 2d 331, 333 (Fla. 2d DCA 1983) (addition of new penalty to implied consent statute, providing that refusal to submit to test was admissible evidence in any criminal proceeding, was within Legislature's prerogative); State v. Sowers, 442 So. 2d 239 (Fla. 5th DCA 1983) (following Neville; reversing order finding implied consent statute unconstitutional under Fourth, Fifth, and Fourteenth Amendments).

Given this long established case law, the district court properly concluded that the Defendant had no constitutional right to refuse this reasonable request for a search, and his statutory option to refuse was properly subject to certain conditions – including his potential exposure to misdemeanor sanctions.

The United States Supreme Court has already recognized that states can properly use evidence of a refusal at trial and can summarily suspend a driver’s license without infringing on a

defendant's constitutional rights. The only question, in light of these cases, is whether making a refusal a misdemeanor requires a different result, and the answer to that question is "no."

A misdemeanor sanction for repeat offenders is but a small step up in sanctions, and the Defendant cites no authority indicating that this additional sanction goes too far. As this Court explained when first addressing sanctions for refusals:

> It is a matter peculiarly within the legislative sphere to establish penalty provisions for noncompliance with substantive law. The legislature may have concluded that it was preferable to enforce the implied consent law through this method than mandate that its law enforcement officials be required to physically restrain every individual who refused to submit to the test.

Sambrine, 386 So. 2d at 549.

Further, this Court should reject the Defendant's argument that this long-standing line of cases was eviscerated when the United States Supreme Court considered a significantly different factual situation in McNeely. Indeed, McNeely says nothing negative about either implied consent laws or Neville and its progeny. To overturn this prominent and important statutory scheme on the basis of this case would do a grave injustice to the people of Florida.

McNeely's Facts & Holding

In McNeely, the defendant was stopped shortly after 2 am, after an officer observed his vehicle speeding and repeatedly crossing the center line. 133 S.Ct. at 1556. Based on the defendant's intoxicated appearance and poor performance on field-

sobriety tests, the officer began to transport him to the police station, then changed his mind and took the defendant to a nearby hospital for blood testing when the defendant refused to provide a breath sample. Id. at 1557. The blood sample was drawn less than 30 minutes after the initial stop. Id.

Nothing in the Supreme Court's opinion indicates that Missouri's implied consent law allowed the blood draw to take place notwithstanding the defendant's refusing consent. Id. at 1567. In fact, the opinion from the Missouri Supreme Court specifically states that the compelled blood draw **exceeded the scope** of Missouri's implied consent law. State v. McNeely, 358 S.W.3d 65, 68 n.2 (Mo. 2012).

The facts of McNeely indicate that the case involved a blood draw in a routine DUI case, with no accident or harm. McNeely, 358 S.W.3d at 67-68. Under the Missouri implied consent statute, a person can refuse a blood test under these circumstances, although there are consequences for doing so, and a forced blood draw is not permissible. Mo. Rev. Stat. § 577.041.[1]

Arguing that the blood test was a permissible search anyway, the prosecution in McNeely relied in part on an amendment to the implied consent statute, which removed specific language that had

[1]Indeed, under Florida law, the defendant's blood could not have been drawn under these circumstances either, as a defendant retains the right to refuse such testing under the implied consent statute in the absence of death or serious bodily injury – although there are certainly penalties for such a refusal. § 316.1932, Fla. Stat.

provided that after a person refused both the breath and blood test then "none shall be given." The prosecution claimed that this amendment removed any barrier to such testing under the statute (which, like Florida's statute, provided more protection than that found in Schmerber), and accordingly allowed a warrantless search under a broad reading of Schmerber. The Missouri Supreme Court, and ultimately the United States Supreme Court, disagreed with that argument. McNeely, 358 S.W.3d at 68 n.2.

On certiorari review, the United States Supreme Court addressed the following *narrow* question: "whether the natural dissipation of alcohol in the bloodstream establishes a *per se* exigency that suffices on its own to justify an exception to the warrant requirement for **nonconsensual blood testing** in drunk-driving investigations." 133 S.Ct. at 1558 (emphasis added). The Court held that there was no such per se exigency, and instead warrantless, nonconsensual searches in DUI cases, like in all cases, need to be evaluated based on the totality of the circumstances. Id.

McNeely took place in a completely different context than the instant case. In McNeely, the arresting officer compelled the defendant to submit to a blood draw after he refused a breath test under the implied consent law; in the instant case, the Defendant was not so compelled. In McNeely, the Court addressed whether the results of that blood test should be suppressed; in the instant case, the Defendant challenges the criminal charge of refusal to

submit to testing. Most importantly, in McNeely, the officer's actions were outside the parameters of the implied consent law; in the instant case, the officer acted in full compliance with the implied consent law.

Given the actual facts and issues presented, then, McNeely does not stand for the broad proposition offered by the Defendant – that a warrant, or a specific exigency, is required for every breath test. Instead, the McNeely holding is much more narrow. The Court simply recognized that the totality of the circumstances must be considered in determining whether the situation is sufficiently exigent to justify acting without a warrant or consent. 133 S.Ct. at 1563.

Further, McNeely does not stand for the broad proposition that implied consent statutes are unconstitutional. First, such a question was not even presented in that case, as the law enforcement officer was not proceeding under Missouri's implied consent statute, but was instead acting well outside the parameters of that statute.

Second, the Supreme Court made no such ruling. Instead, the Court blunted the arguments of the prosecution and the dissenting opinion – that the ruling would undermine effective enforcement of drunk driving laws -- by specifically recognizing that states retain the ability to secure blood alcohol evidence by acting pursuant to their implied consent laws:

> As an initial matter, States have a broad range of **legal tools** to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws. For example, all 50 states have adopted **implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing** if they are arrested or otherwise detained on suspicion of a drunk-driving offense.

McNeely, 133 S.Ct. at 1566 (emphasis added).

Simply stated, then, the Court did not call into question implied consent laws, let alone conclude (sub silentio, at that) that these laws are no longer valid.

At most, McNeely could be read to hint at the future of implied consent statutes, and there is no indication of any disapproval of these statutes. Had the Court intended to invalidate searches conducted under state implied consent laws, it would not have expressly recognized those laws as "legal tools" to combat the crime of driving under the influence. Id. at 1566.

Accordingly, the long-standing precedent upholding such laws should continue to be followed by this Court. See United States v. Sugiyama, 2015 WL 4092494 (D. Maryland June 6, 2015) (implied consent laws imposing penalties for refusing to submit to breath test were constitutional after McNeely, which did not address such statutes).

The Unconstitutional Conditions Doctrine

That McNeely has no applicability here is perhaps best evidenced by the fact that no search even took place in this case

(unlike McNeely, where the defendant's blood was drawn). While a breath test is a search, the Defendant did not submit to a breath test here. Instead, he affirmatively refused to do so.

Because there was no search, the instant case does not present a simple Fourth Amendment issue. Instead, this Court must decide whether the State can impose negative consequences on this choice to refuse. Cf. State v. Pellegrini, 2015 WL 6950491 *4 (Penn. Super. Ct. July 6, 2015) ("it is clear there was no unreasonable search and seizure here, as no evidence was seized, and that it is unreasonable for Appellant to suggest that police must have a warrant to simply ask for consent to draw blood") (unpublished decision); State v. Duncan, 2015 WL 2266474 *5 (Ky. May 14, 2015) (appellant was not subject to any unreasonable search and seizure and McNeely did not apply where officer requested that appellant submit to blood test, but appellant refused), petition for cert. pending, 84 U.S. Law Wkly. 3388 (Dec. 22, 2015).

Under the plain terms of the implied consent statute, any person who chooses to exercise the privilege (not the right) to drive in Florida has by doing so affirmatively consented to a breath test under the circumstances delineated in the statute. § 316.1932, Fla. Stat. Section 316.1939, quoted above, provides that refusing such a test is a first degree misdemeanor, but only under certain circumstances – where the defendant has been placed under lawful arrest for driving under the influence, where the defendant was informed of the consequences of such a refusal, and where the

defendant has had his driving privilege suspended for a prior refusal. All of these circumstances were present here. (R. 14-16).

The Defendant contends that this consent requirement, and the related consequences for withdrawing consent, violate the unconstitutional conditions doctrine. Under this doctrine, the government may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government, where that benefit has little or no relationship to the right. See Dolan v. City of Tigard, 512 U.S. 374, 385 (1994) (discussing this doctrine in context of right to receive just compensation when property is taken for a public use); Lebron v. Florida Dept. of Children and Families, 710 F.3d 1202, 1217 (11th Cir. 2013) (discussing this doctrine in context of suspicionless drug testing of applicants for family assistance).

The Defendant has failed to show that the mandatory consent required by the implied consent statute constitutes an unconstitutional condition. As the trial court correctly recognized:

> In this instance, [consent] in advance to a breath, blood or urine test upon probable cause that one is driving while impaired is **directly related** to the asserted right to drive. It is beyond question that drunk driving is a dangerous crime that affects all people on public highways. So, the discretionary benefit of driving conferred by the government is directly related to a driver's consent in advance to submit to a test upon lawful arrest for DUI.

(R. 97) (emphasis added).

Simply stated, the State has the right to regulate, and withhold, the privilege of driving, and accordingly the State may condition that privilege upon the surrender of the unimpeded right to refuse a search, as long as that condition is reasonably related to the privilege.

Through the plain provisions of the implied consent statute, Florida has conferred to drivers the privilege of soberly operating a motor vehicle. In exchange, each driver accepts a statutory condition – when law enforcement has reasonable cause to believe the driver is driving under the influence, the driver agrees to undergo a non-invasive breath test for evidence of intoxication, or he will face civil and possibly criminal penalties if he chooses not to cooperate.

This condition is not unconstitutional, because it directly relates to the safe operation of the vehicle. There is a direct and proportional nexus between the legislation and the government's legitimate need for public safety, and there is no violation of the unconstitutional conditions doctrine.

Further, contrary to the Defendant's argument, he and other drivers in Florida are not required by this statute to give up a constitutional right in order to exercise the privilege to drive, as the limited search authorized by the implied consent statute does not violate the Fourth Amendment.

The Fourth Amendment provides in pertinent part that the right of the people to be secure in their persons "against unreasonable

searches and seizures" shall not be violated. U.S. Const. amend IV. While a warrantless search is generally unreasonable, the Defendant is incorrect that only an exigency can permit such a search. Instead, courts have recognized several exceptions to the warrant requirement, including consent and search incident to a lawful arrest.

The implied consent statute provides for such reasonable searches under the Fourth Amendment, and the statute is constitutional. Consent under this statute is valid legal consent, and a search under this statute constitutes a lawful search incident to arrest. Finally, as the district court correctly concluded, a search that complies with the terms of the implied consent statute is a reasonable search.

Consent

In general, consent under the Fourth Amendment is evaluated based on the totality of the circumstances, with courts ultimately determining whether the consent was freely and voluntarily given. See generally Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Here, the consent is legally implied by the defendant's choice to drive. That is, pursuant to Florida law, a driver is deemed to have affirmatively consented to the search of his breath in those circumstances contemplated by the statute.

The consent under the implied consent statute is admittedly different from the standard consent exception to the Fourth Amendment. Unlike the typical consent to search, when the consent

is given here, the circumstances triggering the search may never arise. Further, the driver's consent will not come into play at all until he is actually arrested for driving under the influence.

In addition, in typical consent to search cases, the consent may be withdrawn at any time, without consequence. Here, on the other hand, the revocation of consent carries consequences (and, for blood tests in cases involving death or serious bodily injury under section 316.1933, consent cannot be revoked at all).

While this is certainly unusual, this does not render implied consent invalid. Instead, implied consent is a quid pro quo type of consent where the benefit of the bargain (driving on Florida roads) is accepted and enjoyed by the driver until circumstances arise allowing the State to insist on a search, in which case withdrawal of consent has consequences.

Notably, those circumstances arise through the defendant's own choices. No one is forced to drive on the roads of this state, where traffic laws apply and where everyone is subject to being stopped by law enforcement. More importantly, no one is forced to drive while under the influence of alcohol. By making the affirmative choice to do so, defendants actively trigger the consequences of the implied consent statute - submitting to a breath test or facing the consequences for refusals.

Further, that consequences are suffered for withdrawing consent does not make the consent itself coerced. As long as there is an actual choice, as there is here, consent is voluntary. See

State v. Brooks, 838 N.W.2d 563, 570 (Minn. 2013) (on remand after McNeely; driver's decision to take test was not coerced simply because statute makes it a crime to refuse test; consent is voluntary as long as there is a choice), cert. denied, 134 S.Ct. 1799 (2014); United States v. Millner, 2015 WL 3557546 *6-8 (D. Md. June 3, 2015) (rejecting argument that consent was coerced by possibility of criminal liability for refusal; criminal sanction was reasonable means to facilitate permissible state objective; that choice to submit or refuse is difficult one does not equal coercion).

As a practical matter, the search of a defendant's breath or urine cannot be physically compelled.[2] If a defendant chooses not to expel his breath as necessary for a breath test, or chooses not to release urine from his bladder, there is little the State can do about it. Accordingly, cooperation is enticed through the use of consequences for refusal. As discussed above, such consequences have never been deemed to render the implied consent statute invalid.

The Defendant consented to the breath test when he got behind the wheel of his car that night, and he had no right to rescind that legal consent without consequences. See Young, 483 So. 2d at 33 (implied consent statute gives no legal *right* to refuse to be

[2]A blood test, of course, is a different matter, and may be physically compelled, but only under extreme circumstances. § 316.1933, Fla. Stat.

tested, but instead gives the *option* to refuse to submit to the test as a choice, with attendant consequences, is provided in statute itself); Rowley v. Commonwealth, 629 S.E.2d 188, 191 (Va. Ct. App. 2006) (consent under implied consent law is not qualified or conditional and is valid consent under Fourth Amendment; "To allow it to be unilaterally withdrawn would virtually nullify the Implied Consent Law."); Burnett v. Municipality of Anchorage, 634 F.Supp. 1029, 1037-38 (D. Alaska) (driver consents to testing under law by operating a car; consent cannot be legally recanted or withdrawn after being lawfully arrested for driving while intoxicated), aff'd, 806 F.2d 1447 (9th Cir. 1986). See also State v. Nickell, 21 Fla. L. Wkly. Supp. 933a (Volusia Cty. May 22, 2014) (denying motion to dismiss charge of refusal to submit to breath testing, rejecting McNeely challenge to implied consent); State v. Caporuscio, 21 Fla. L. Wkly. Supp. 930b (Volusia Cty. May 22, 2014) (same).

This Court should find that the consent implied by statute is legally valid consent, and the Defendant's argument to the contrary should be rejected.

Admittedly, the district court found that McNeely precluded such a finding, noting that the Supreme Court mentioned implied consent statutes but ignored consent as a possible exception to the warrant requirement. Williams, 167 So. 3d at 491. Not only does this discussion improperly reach a conclusion based on the *absence* of any mention of this argument in the McNeely opinion, but it also

fails to appreciate the significance of the fact that the blood test in McNeely took place outside Missourí's implied consent statute, as discussed above. The State of Missouri could not have argued that Mr. McNeely consented to the blood draw under the implied consent statute when the statute itself did not allow such a test.

Search Incident to a Lawful Arrest

In addition to consent, the request for a breath test was valid as a search incident to a lawful arrest. See generally Arizona v. Gant, 556 U.S. 332, 335 (2009). As the United States Supreme Court recognized long ago, this exception is justified on two grounds: (1) officer safety; and (2) preventing the destruction of evidence. Chimel v. California, 395 U.S. 752, 763 (1969). This exception applies as a bright-line rule to allow officers to conduct a full search of a person who has been lawfully arrested; no further justification is required. United States v. Robinson, 414 U.S. 218, 235 (1973).

This exception has never been understood to exclude obtaining biological evidence from the body, and courts have repeatedly upheld such tests of arrestees. See, e.g., Cupp v. Murphy, 412 U.S. 291, 295 (1973) (scraping detainee's fingernails for evidence); United States v. Johnson, 445 F.3d 793, 795-96 (5th Cir.) (testing arrestee's hands for gunpowder residue), cert. denied, 547 U.S. 1199 (2006); Espinoza v. United States, 278 F.2d 802, 804 (5th

Cir.) (searching arrestee's mouth for narcotics), cert. denied, 364 U.S. 827 (1960).

Preventing destruction of evidence is a direct concern in DUI cases. While the arrestee in these cases is not actively destroying evidence, his body itself is passively destroying it, and this is a distinction without a difference. Cf. State v. Payano-Roman, 714 N.W.2d 548, 559-61 (Wis. 2006) (administering laxative to defendant who swallowed bag filled with heroin was reasonable search incident to arrest; officers were justified in seeking to preserve evidence of crime), cert. denied, 549 U.S. 935 (2006).

A number of federal and state courts have upheld the admission of breath tests under the search incident to arrest exception. See, e.g., State v. Bernard, 859 N.W.2d 762, 766-68 (Minn.), cert. granted, 136 S.Ct. 615 (2015); United States v. Reid, 929 F. 2d 990, 994 (4th Cir. 1991); Burnett v. Municipality of Anchorage, 806 F.2d 1447, 1450 (9th Cir. 1986) ("It is clear then that the breathalyzer examination in question is an appropriate and reasonable search incident to arrest which appellants have no constitutional right to refuse."); Wing v. State, 268 P.3d 1105, 1110 (Alaska Ct. App. 2012); State v. Dowdy, 332 S.W.3d 868, 870 (Mo. Ct. App. 2011); State v. Hill, 2009 WL 1485026 *5 (Ohio Ct. App. May 22, 2009); Commonwealth, Dep't of Transp. v. McFarren, 525 A.2d 1185, 1188 (Pa. 1987). This Court should do the same.

The Implied Consent Statute allows Reasonable Searches

Finally, even if a breath test under the implied consent statute does not fall squarely under the classic exceptions to the warrant requirement discussed above, the statute is still valid, as it allows a limited, reasonable search that does not improperly infringe on any reasonable expectation of privacy.

The Fourth Amendment does not preclude all searches, but only those searches that are not reasonable. Indeed, reasonableness is the ultimate touchstone of the Fourth Amendment. See, e.g., Maryland v. King, 133 S.Ct. 1958, 1968 (2013).

The entire purpose of the Fourth Amendment is to impose a standard of reasonableness on the exercise of discretion by law enforcement officers in conducting searches. See, e.g., Delaware v. Prouse, 440 U.S. 648, 653-54 (1979). Accordingly, the permissibility of a law enforcement practice "ïs judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Id. at 654.

Under this analysis, the Fourth Amendment does not prohibit a search unless the person subject to search has a reasonable expectation of privacy – that is, an expectation that society is prepared to recognize as reasonable . See, e.g., California v. Ciraolo, 476 U.S. 207, 211 (1986); Oliver v. United States, 466 U.S. 170, 177 (1984).

Applying that standard here, the district court properly concluded that a breath test conducted under the strictures of the implied consent law is a reasonable test. Williams, 167 So. 3d at 492-94. Its decision should be affirmed. See also Beylund v. Levi, 859 N.W.2d 403, 412-14 (N.D.) (blood test required under implied consent law was reasonable), cert. granted, 136 S.Ct. 614 (Dec. 11, 2015); State v. Birchfield, 858 N.W.2d 302, 309-10 (N.D.) (penalty for refusing breath test compelled by implied consent law was reasonable), cert. granted, 136 S.Ct. 614 (Dec. 11, 2015).

Individuals who choose to exercise their privilege (not their right) to drive in Florida have a reduced expectation of privacy, in light of the clear statutory language stating that by doing so they have consented to a search of their breath under certain limited circumstances – including the circumstances present here. In short, drivers are put on express notice that they can expect some limited police intrusion under these specific circumstances.

Additionally, by definition a person who is subject to a breath test under the implied consent law has deliberately placed himself in a situation that subjects him to extensive regulation by the State – driving a car on a public roadway. See Chapters 316-324, Fla. Stat. (regulating motor vehicles and driver conduct on Florida roads). Traffic stops are a routine, everyday occurrence – a minimal invasion that people readily accept as part of driving a car.

Further, a person subject to testing under the implied consent law has an even more diminished expectation of privacy because he must be arrested to be subject to such a search. § 316.1932(1)(a)1.a., Fla. Stat. ("The chemical or physical breath test must be incidental to a lawful arrest"). As the United States Supreme Court has repeatedly recognized, an individual taken into police custody necessarily has a diminished expectation of privacy. See, e.g., King, 133 S.Ct. at 1978. Once arrested, both his person and his property will be searched at the jail, and this search of his person may constitutionally involve an extensive and invasive exploration, including requiring the arrestee to lift his genitals or cough in a squatting position. Florence v. Board of Chosen Freeholders, 132 S.Ct. 1510, 1520 (2012).

In addition to the reduced expectation of privacy resulting from the limited circumstances in which the implied consent law applies, there is also a reduced societal recognition of such privacy. As discussed above, implied consent statutes have been in force across the country for decades. Given the pervasiveness of implied consent schemes, it is questionable whether society is prepared to view this purported expectation of privacy as reasonable at all. One would be hard pressed to find an ordinary citizen who was not aware that these statutes existed, yet the public is in no way clamoring for its elected officials to repeal or mitigate such statutes.

Weighed against this lesser individual privacy interest is the State's significant and legitimate interest in combating drunk driving. As the McNeely opinion itself recognized, "[n]o one can seriously dispute the magnitude of the drunken driving problem or the State's interest in eradicating it," as "drunk driving continues to exact a terrible toll on our society." McNeely, 133 S.Ct. at 1565 (quotation omitted). See also Neville, 459 U.S. at 558 ("The carnage caused by drunk drivers is well documented and . . . [this Court] has repeatedly lamented the tragedy"); Breithaupt v. Abram, 352 U.S. 432, 439 (1957) ("The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield").

Indeed, states are not the only authorities with an articulated interest in combating this crime, and in using such specific blood alcohol level testing to do so. The federal government has explicitly tied transportation funding to the enactment of state statutes punishing drivers based on their blood alcohol content, rather than circumstantial evidence of impairment. See 23 U.S.C.A. § 163(a) (providing for grant "to any State that has enacted and is enforcing a law that provides that any person with a blood alcohol concentration of 0.08 percent or greater while operating a motor vehicle in the State shall be deemed to have committed a per se offense of driving while intoxicated (or an equivalent per se offense").

These "DUBAL"[3] statutes, present in all 50 states, further evidence the State's interest in securing scientific evidence of actual blood alcohol levels, rather than relying on circumstantial evidence of impairment. Cf. John Doe No. 1 v. Reed, 561 U.S. 186, 221 (2010) (Scalia, J., concurring in judgment) ("A governmental practice that has become general throughout the United States, and particularly one that has the validation of long, accepted usage, bears a strong presumption of constitutionality").

Florida's implied consent statute is narrowly tailored to support this important government interest. Drivers are not routinely stopped and tested, but instead such testing depends on individualized reasonable suspicion supporting the traffic stop itself and reasonable cause to believe that the person was operating a vehicle while under the influence of alcohol - cause sufficient to justify an arrest. § 316.1932(1)(a)1.a., Fla. Stat. Accordingly, the testing takes place only on a narrow subset of drivers – those from whom the State has a greater interest in securing test results.

In addition, the breath test itself is minimally intrusive. The skin is not pierced, and the test can be conducted safely outside any medical environment, with minimal inconvenience or embarrassment beyond the arrest itself.

[3]"Driving with an Unlawful Blood Alcohol Level"

Additionally, as anyone who has litigated DUI cases is aware, the method of securing and testing this evidence is highly regulated and subject to challenge if all requirements are not followed. § 316.1932(1)(a)2, Fla. Stat.

The chemical test itself is further limited in its reach – only the level of alcohol can be discerned; nothing else. Cf. United States v. Jacobsen, 466 U.S. 109, 123 (1984) (field test of possible controlled substance was not a search subject to Fourth Amendment because it did not infringe an expectation of privacy that society is prepared to consider reasonable; "chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy").

In fact, this testing serves an interest that goes beyond criminal convictions. For those who are innocent of the suspected offense, blood alcohol test results will provide important evidence that can exonerate them in the face of contradictory lay testimony. Further, for all drivers, including those driving drunk, the roads are safer when drunk drivers are removed.

Florida's misdemeanor sanctions for refusal are also limited by their application only to repeat offenders. These drivers are, as a practical matter, more aware of the importance of blood alcohol tests and often more likely to refuse such tests if they have, indeed, been drinking. Accordingly, imposing greater sanctions provides an additional incentive to recidivists to cooperate with this testing.

Moreover, the implied consent statute also serves to protect law enforcement officers from confrontations with motorists. Should officers be forced to secure warrants in all DUI cases,[4] this will increase the number of individuals that can be physically forced to comply with more invasive blood draws – increasing the risk of injury to officers, inebriated suspects who might resist such efforts, and medical personnel caught in between.

In light of the limited nature of an implied consent search in both breadth and circumstance, the express statutory notice and consent given by those who choose to drive in Florida, and the important societal interests served by this statute, enforcing the implied consent law is reasonable under the Fourth Amendment.

The United States Supreme Court has recognized the reasonableness of searches conducted in similar circumstances. See King, 133 S.Ct. at 1969 (taking DNA sample of everyone arrested for violent felony was reasonable under Fourth Amendment, given compelling government interest, probable cause supporting custody, and negligible bodily intrusion); Sampson v. California, 547 U.S. 843, 850-53 (2006) (suspicionless search under California statute requiring parolee to agree to be subject to search by officer at

[4]In fact, under current law, a warrant could not legally be secured in the vast majority of DUI stops – that is, those involving misdemeanor DUI charges -- as the only appellate decision addressing this issue in Florida has held that it is not possible to lawfully obtain a warrant to search for blood, breath, or urine in misdemeanor cases. State v. Geiss, 70 So. 3d 642 (Fla. 5th DCA 2011), rev. dismissed, 88 So. 3d 111 (Fla. 2012).

any time, even without cause, was reasonable under Fourth Amendment, given parolee's lesser expectation of privacy, express notice of condition, and substantial state interest in supervising parolees and reducing recidivism); United States v. Knights, 534 U.S. 112, 118-22 (2001) (search of home based on reasonable suspicion and authorized by statutory probation condition was reasonable); Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 625-26 (1989) (regulations allowing breath test of railroad employees was reasonable under Fourth Amendment, where government interest in safety of traveling public was strong, permissible searches were narrowly and specifically defined by regulations, employees were well aware of these circumstances, and delay necessary to obtain warrant would serve little purpose in light of specific requirements and could result in destruction of evidence through dissipation of alcohol). This Court should reach the same conclusion here.

As discussed in detail above, the United States Supreme Court has not expressed hostility toward implied consent statutes, nor has it in any way indicated that modern blood alcohol testing is somehow suspect. To the contrary, the Court has specifically recognized the utility of such testing, and its reasonableness when compared to an individual's privacy interests:

> Modern community living requires modern scientific methods of crime detection lest the public go unprotected. The increasing slaughter on our highways, most of which should be avoidable, now reaches the astounding figures only heard of on the battlefield. The

> States, through safety measures, modern scientific methods, and strict enforcement of traffic laws, are using all reasonable means to make automobile driving less dangerous. As against the right of an individual that his person be held inviolable, even against so slight an intrusion as is involved in applying a blood test of the kind to which millions of Americans submit as a matter of course nearly every day, must be set the interests of society in the scientific determination of intoxication, one of the great causes of the mortal hazards of the road. And the more so since the test likewise may establish innocence, thus affording protection against the treachery of judgment based on one or more of the senses. Furthermore, since our criminal law is to no small extent justified by the assumption of deterrence, the individual's right to immunity from such invasion of the body as is involved in a properly safeguarded blood test is far outweighed by the value of its deterrent effect due to public realization that the issue of driving while under the influence of alcohol can often by this method be taken out of the confusion of conflicting contentions.

Breithaupt, 352 U.S. at 439-40 (finding that evidence of blood alcohol content obtained by doctor drawing blood from unconscious defendant was admissible over objection that such a blood draw violated due process).

Florida's implied consent statute is constitutional, and the conclusion of the Fifth District Court of Appeal should be affirmed.

Post-McNeely Supreme Court Cases

Finally, the State notes that the United States Supreme Court has granted certiorari review of the above cited cases from North Dakota and Minnesota: Birchfield v. North Dakota (case number 14-1468), Bernard v. Minnesota (case number 14-1470), and Beylund v.

Levi (case number 14-1507). Briefing is in progress on these cases, and oral argument is scheduled for April 20.

The question presented in these cases is as follows:

> In the absence of a warrant, may a State make it a crime for a driver to refuse to take a chemical test to detect the presence of alcohol in the driver's blood?

Given these pending cases, many of the issues presented in this case could possibly be resolved by the Supreme Court in the near future. At the very least, the Court will hopefully provide further clarity regarding the reach of its holding in McNeely. Should the Court issue an opinion in the above cases before the instant case is decided, supplemental briefing by the parties would be appropriate.

In the meantime, law enforcement, attorneys, and the general public await this Court's resolution of the issues presented herein. The district court's conclusion that Florida's implied consent statute is constitutional should be affirmed.

CONCLUSION

Based on the arguments and authorities presented herein, Respondent respectfully requests this honorable Court approve the decision of the Fifth District Court of Appeal.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief On the Merits has been furnished to Eric Latinsky and Aaron Delgado, counsel for Petitioner, 227 Seabreeze Boulevard, Daytona Beach, Florida 32118, by e-service to adelgado@communitylawfirm.com and elatinsky@communitylawfirm.com, this 13th day of April, 2016.

CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies that this brief was typed using 12 point Courier New, a font that is not proportionately spaced.

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