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

AMICUS BRIEF IN SUPPORT OF RESPONDENT BY THE FLORIDA PROSECUTING ATTORNEYS ASSOCIATION

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STATEMENT OF IDENTITY OF AMICUS PARTY AND INTEREST IN THE CASE

The Florida Prosecuting Attorneys Association (FPAA) is a nonprofit corporation whose members are the 20 elected State Attorneys and over 2000 Assistant State Attorneys. They are concerned about matters which involve the criminal justice system in Florida. The matter pending before the Court involves an issue that is significant to the FPAA and its members and the FPAA supports the Respondent State of Florida and the constitutionality of section 316.1939, Florida Statutes.

SUMMARY OF ARGUMENT

Petitioner concedes that his "Unconstitutional Conditions" argument depends on a determination that he has a Fourth Amendment right to refuse a breath test. However, no such Fourth Amendment right has ever existed under Florida law. Indeed, prior to *Missouri v. McNeely*, it was well-established as a result of a combination of *South Dakota v. Neville* and the Fifth District Court of Appeal case of *State v. Sowers* that there is no such right.

And nothing in *McNeely* changed that status. In fact, *McNeely* dealt only with blood draws – and specifically "compelled" blood draws. The instant case involves no blood and no use of force. In fact, the Petitioner had a choice to either submit to or refuse the breath test. Moreover, a passage from *McNeely* actually cited to *Neville* and clearly appeared to approve the concept of conditioning a motorist's privilege to drive on consenting to submission of a chemical test. Further, appellate courts in this country are nearly uniform in interpreting *McNeely* as holding that there is no Fourth Amendment violation where a defendant has the *option* to refuse but *chooses* to submit to the test (or to refuse to submit to the test) after being warned of the statutory adverse consequences.

Finally, the Fifth District below correctly concluded that section 316.1939 satisfies the general reasonableness requirement of the Fourth Amendment. Petitioner's arguments to the contrary misconstrue the doctrine.

ARGUMENT

Neither *McNeely v. Missouri* nor the "Unconstitutional Conditions" doctrine support Petitioner's argument that Florida's Implied Consent statute is unconstitutional.

A. Prior to *McNeely*, no Fourth Amendment right to refuse a breath test had ever existed under Florida law.

Petitioner contends that section 316.1939, Florida Statutes, "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." (Petitioner's Initial Brief at page 4). The FPAA agrees that the Government cannot criminalize the exercise of a constitutional right. *See*, *Koontz v. St. Johns River Water Mgmt. Dist.*, ––– U.S. ––––, 133 S.Ct. 2586, 2594, 186 L.Ed.2d 697 (2013) ("We have said in a variety of contexts that 'the government may not deny a benefit to a person because he exercises a constitutional right.'") (quoting *Regan v. Taxation With Representation of Wash.*, 461 U.S. 540, 545, 103 S.Ct. 1997, 76 L.Ed.2d 129 (1983)). However, the "constitutional right to be free from warrantless searches absent exigent circumstances" does not necessarily translate into a constitutional right to *refuse a breath test*.

As noted by the Fifth District Court of Appeal below: "*If* Williams had a Fourth Amendment right to refuse a breath test, criminalizing his assertion of that right would be unconstitutional." *Williams v. State*, 167 So.3d 483, 487 (Fla. 5th DCA 2015). (Emphasis added). However, in the context of the administrative and

evidentiary penalty for refusal (i.e., admissibility of the refusal at trial), the United States Supreme Court long ago stated in *South Dakota v. Neville*, 459 U.S. 553, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) that "a person suspected of drunk driving has no constitutional right to refuse to take a blood-alcohol test." 459 U.S. at 560, n. 10. And in the context of the administrative penalty of a driver's license suspension, the Supreme Court stated: "Such a penalty for refusing to take a blood-alcohol test is unquestionably legitimate, assuming appropriate procedural protections." *Id.*, at 560.

Moreover, the Supreme Court in *Neville* clarified that there is no coercion involved when requesting that a DUI defendant decide whether to submit to or refuse the blood-alcohol test:

> We recognize, of course, that the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices. [Citation omitted]. We hold, therefore, that a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination.

Id., at 563-564. (Footnote omitted).

Admittedly, the specific constitutional provision at issue before the Supreme Court in *Neville* was the Fifth Amendment, rather than the Fourth Amendment. However, shortly after *Neville* was decided, the Fifth District Court of Appeal in *State v. Sowers*, 442 So.2d 239 (Fla. 5th DCA 1983) applied *Neville* to other

constitutional provisions, including the Fourth Amendment, specifically rejecting the trial court's ruling that the defendant's refusal "to submit to a chemical test for intoxication" was inadmissible on the theory that the statute authorizing its admission into evidence was "unconstitutional because it violates the *Fourth*, Fifth and Fourteenth Amendments to the U.S. Constitution and Article 1, Section 9 and Section 12 of the Florida Constitution." 442 So.2d at 239. (Emphasis added).

Thus, prior to *Missouri v. McNeely*, ––– U.S. ––––, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013), it was well-established as a result of a combination of *Neville* and *Sowers* that a Florida DUI defendant had no Fourth Amendment right to refuse a blood-alcohol test – or a breath-alcohol test. [1] And as will be shown in Section B of this Amicus Brief, nothing in *McNeely* changed that status. Accordingly, although the Fifth District below based its ruling on the "general reasonableness" doctrine (with which the FPAA agrees, as addressed in Section C of this Amicus Brief), the Court was clearly correct when it concluded that "Williams had no Fourth Amendment right to refuse the test." 167 So.3d at 494.

[1] *Neville* dealt with a "blood-alcohol" test and the type of "chemical test" in *Sowers* was not identified in the opinion. However, the Third District Court of Appeal in *State v. Whitehead*, 443 So.2d 196, 197 (Fla. 3d DCA 1983) later relied on both of these cases to reject a challenge to the portion of section 316.1932 which authorized admission into evidence of a "refusal to submit to a chemical breath or urine test."

B. Even after *McNeely*, there is still no Fourth Amendment right to refuse a breath test under Florida law.

There is nothing in *McNeely* that purports to give a DUI defendant a constitutional right to refuse a breath test. In fact, *McNeely* itself dealt only with blood draws – and specifically "compelled" blood draws. *See, e.g., McNeely*, at 133 S.Ct. 1558 ("the type of search at issue in this case . . . involved a *compelled* physical intrusion beneath McNeely's skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation."). (Emphasis added). More particularly, the officer in that case directed a hospital lab technician to take a blood sample from McNeely even after he had refused a blood draw, thus leaving him with no option to refuse. The instant case involves no blood draw – and no use of force. Clearly, Petitioner was not compelled to submit to the breath test in this case. In fact, no breath sample was ever obtained from Petitioner; rather, he was given the choice to either submit to, or refuse, the test, and he chose to refuse the test.

This distinction is significant. [2] Appellate courts in this country are nearly uniform in interpreting *McNeely* as holding that there is no Fourth Amendment violation where a defendant has the *option* to refuse but

[2] The FPAA wishes to make it clear that by pointing out this distinction, it is not conceding that the recent case of *Liles v. State*, 2016 WL 1385925 (Fla. 5th DCA April 8, 2016) was correctly decided. That is, the FPAA does not concede that the consent exception to the Fourth Amendment's warrant requirement did not apply to the blood draws obtained in that case.

chooses to submit to the test, or to refuse to submit to the test, after being warned of adverse consequences authorized by the applicable implied consent statute. [3] *See, e.g., Burr v. State*, 2016 Ark. App. 182, 2016 WL 1243545, *4 (Ark. App. March 30, 2016) ("In contrast to the nonconsensual blood draw of *McNeely*, section 5–65–205(a)(1) prohibits administering a chemical test when an arrestee explicitly refuses, and no compelled chemical testing was administered after Burr refused."); *State v. Smith*, 2015 WL 9177646 *13, (Tenn. App. Dec. 15, 2015) ("In this case, because Defendant actually consented to the blood draw and never expressly revoked his implied consent, Officer Richardson was authorized by the implied consent statute to take Defendant's blood without a warrant."); *State v. Melograna*, 2015 WL 6951672, *5 (Penn. App. Nov. 9, 2015) ("When a motorist consents to the blood draw, as Melograna did, or when a motorist refuses the draw and the police do not compel the draw anyway, *McNeely* simply is not applicable."); *California v. Harris*, 234 Cal. App. 4th 677, 689 (Cal. App. 2015) ("That the motorist is forced to

[3] Until very recently, appellate courts were *completely* uniform on this issue. *See, State v. Okken*, 364 P.3d 485, 490, n.2 (Ariz. App. 2015) ("Statutes that create revocable consent have uniformly been held constitutional, even where refusal carries criminal penalties. *See, e.g., U.S. v. Sugiyama*, 113 F.Supp.3d 784, 789–96, 2015 WL 4092494, at *4–10 (D.Md.2015) (collecting cases)."). However, since that pronouncement in *Okken*, a few appellate courts have reached contrary results. *See, e.g., Hawai'i v. Won*, 361 P.3d 1195 (Haw. 2015); *State v. Ryce*, 2016 WL 756686 (Kan. Feb. 26, 2016).

choose between submitting to the chemical test and facing serious consequences for refusing to submit, pursuant to the implied consent law, does not in itself render the motorist's submission to be coerced or otherwise invalid for purposes of the Fourth Amendment."); *State v. Brooks*, 838 N.W.2d 563, 572 (Minn. 2013), *cert denied,* 134 S.Ct. 1799 (2014) ("a driver's decision to agree to take a test is not coerced simply because Minnesota has attached the penalty of making it a crime to refuse the test. . . . Although refusing the test comes with criminal penalties in Minnesota, the Supreme Court has made clear that while the choice to submit or refuse to take a chemical test 'will not be an easy or pleasant one for a suspect to make,' the criminal process 'often requires suspects and defendants to make difficult choices.'" (quoting *Neville,* 459 U.S. at 564, 103 S.Ct. at 923) (footnote omitted)); *Contra, Hawai'i v. Won*, 361 P.3d 1195, 1214 (Haw. 2015) (in a 3-2 ruling which relied on Hawai'i Constitution, majority concluded: "Won had no other alternative to avoid prosecution for the refusal offense but to submit to the search; . . . withholding consent was futile, as any other course would have resulted in Won's commission of a crime.").

Petitioner's argument herein fails to acknowledge this distinction. For example, Petitioner states: "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.” (Petitioner’s Initial Brief at page 5). This argument is inapplicable in the present case for reasons best expressed in the *Melograna* case, *supra*:

> *McNeely* also did not render implied consent laws unconstitutional. Melograna contends that, post-*McNeely*, implied consent laws cannot function as a per se exception to the warrant and probable cause requirements of the Fourth Amendment. The fault with Melograna's argument lies in his continued misinterpretation of the impact that *McNeely* has on his case. *McNeely* simply does not extend to situations in which a driver has consented to a blood draw or where the driver has refused consent and where a police officer abides by the refusal and does not pursue the blood draw. In those situations, Pennsylvania's implied consent law applies with full force.

2015 WL 6951672, at *5.

Many of the above-cited cases cite to the following passage from the plurality opinion in *McNeely*:

> 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. See NHTSA Review 173; *supra*, at 1556 (describing Missouri's implied consent law). Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked, and most States allow the motorist's refusal to take a BAC test to be used as evidence against

> him in a subsequent criminal prosecution. See NHTSA Review 173–175; see also *South Dakota v. Neville*,459 U.S. 553, 554, 563–564, 103 S.Ct. 916, 74 L.Ed.2d 748 (1983) (holding that the use of such an adverse inference does not violate the Fifth Amendment right against self-incrimination).

133 S.Ct. at 1566.

For example, the appellate court in *Harris, supra,* stated: "We find it significant that, in its discussion of state implied consent laws, the *McNeely* plurality cited *Neville* with approval." 234 Cal. App. 4th at 687. (Emphasis added). And the Minnesota Supreme Court in *Brooks, supra*, emphasized the Court's reliance on implied consent statutes as "legal tools" to enforce DUI laws**:** "By using this 'legal tool' and revoking a driver's license for refusing a test, a state is doing the exact thing Brooks claims it cannot do—conditioning the privilege of driving on agreeing to a warrantless search. 838 N.W.2d at 572.

The Fifth District below also acknowledged the above passage from *McNeely* and found it to be "notabl[e]." 167 So.3d at 489. Yet the Court also stated: "The plurality did not, however, mention criminal penalties for withdrawing consent. Therefore, although some courts have inferred a great deal from section III of the *McNeely* opinion, we do not find this section to be dispositive." *Id.* The FPAA respectfully disagrees with the Fifth District's decision to summarily discard the importance of the

passage from *McNeely*. The FPAA urges this Court to recognize that in that passage, a plurality of the United States Supreme Court was clearly acknowledging, as noted in *Brooks*, that a state *can* "condition[] the privilege of driving on agreeing to a warrantless search."

The FPAA would also urge his Court to consider the explanation regarding the "Unconstitutional Conditions" issue that was provided by the North Dakota Supreme Court in *Beylund v. Levi*, 859 N.W.2d 403 (N.D.), *cert granted*, 136 S.Ct. 614 (Dec. 11, 2015), a case dealing with the constitutionality of a criminal refusal statute. The Court there reviewed cases from other courts that had addressed the "Unconstitutional Conditions" doctrine and stated: "[W]e agree that to prevail Beylund must show the statutes criminalizing refusal authorize an unconstitutional search." 859 N.W.d at 412. The Court ultimately concluded that no such unconstitutional search is authorized by North Dakota's statutes:

> Beylund has not pointed out any statute under North Dakota's implied consent laws that requires him to submit to a blood test contrary to the Fourth Amendment, in other words, an unreasonable search without a warrant or an exception to the warrant requirement. Under the facts of this case, Beylund consented to the test, and consent is an exception to the warrant requirement. *City of Fargo v. Wonder*, 2002 ND 142, ¶ 20, 651 N.W.2d 665 (stating "[c]onsent is a recognized exception to the warrant requirement"). Second, if Beylund had refused the test, no search would have occurred. Law enforcement is not authorized to force a test as N.D.C.C. § 39–20–04(1) specifically provides if a test is refused, "none may be given."

Id., at 859 N.W.2d 412.

In the instant case, as in *Beylund*, no part of Florida's Implied Consent Statutes required Petitioner "to submit to a [breath] test contrary to the Fourth Amendment, in other words, an unreasonable search without a warrant or an exception to the warrant requirement." That is, under Florida's Implied Consent Statutes, Petitioner retained the choice of whether to submit to the test or not. As such, there would have been no unconstitutional search had he chosen to submit. Accordingly, there is no violation of the Unconstitutional Conditions doctrine in the instant case.

C. The Fifth District correctly concluded that the warrantless post-arrest breath test satisfies the general reasonableness requirement of the Fourth Amendment.

The FPAA agrees with the Fifth District's conclusion – as well as with the well-reasoned presentation in the State's Answer Brief – that the post-arrest warrantless breath-alcohol test satisfies the general reasonableness requirement of the Fourth Amendment. The FPAA respectfully disagrees with the Petitioner's critique of the Court's analysis for reasons already explained in the Florida Police Chiefs Association's Amicus Brief. The FPAA would only point out one other disagreement it has with Petitioner's arguments as to this issue: Petitioner suggests that the United States Supreme Court has rejected "sweeping warrantless searches, except in extraordinary circumstances," and that such circumstances "are

never criminal investigations." (Petitioner's Initial Brief at page 4). Petitioner, however, has overlooked the three United States Supreme Court cases involving criminal investigations cited and summarized at pages 30-31 of the State's Answer Brief before this Court.

CONCLUSION

There is simply no lawful basis to find section 316.1939 unconstitutional. Petitioner's "Unconstitutional Conditions" argument fails because it depends on a determination that he has a Fourth Amendment right to refuse a breath test – and this has never been the law in Florida and – for reasons explained herein – it still is not the law today.

The Fifth District below correctly concluded that section 316.1939 satisfies the general reasonableness requirement of the Fourth Amendment. Petitioner's critique of the Fifth District's determination analysis misperceives the Court's analysis and the case law regarding this doctrine.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by e-mail to Aaron D. Delgado, Esquire at adelgado@communitylawfirm.com, Eric A. Latinsky, Esquire at elatinsky@communitylawfirm.com and Robert W. Rawlins, Esquire at rrawlins@communitylawfirm.com (Counsel for Petitioner), Kristen Davenport, Esquire, at kristen.davenport@myfloridalegal.com (Counsel for Respondent), Tracey Wood, Esquire, at tracey@traceywood.com (Counsel for Amici Curiae National College for DUI Defense), and Sonya Rudenstine, Esquire at srudenstine@yahoo.com and Karen Gottlieb, Esquire at kgottlie@fiu.edu (Counsel for Amici Curiae FACDL) this 22nd day of April, 2016.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the font used in this brief is 14-point Times New Roman, in compliance with Rule 9.210(a)(2) of the Florida Rules of Appellate Procedure.

Respectfully Submitted,

/s/ Arthur I. Jacobs

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