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 REPLY BRIEF

Aaron D. Delgado
Florida Bar No. 0796271
Eric A. Latinsky
Florida Bar No. 302831
Damore, Delgado & Romanik
227 Seabreeze Boulevard
Daytona Beach, Florida 32118-3951
(386) 255-1400

COUNSEL FOR PETITIONER

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REPLY TO STATEMENT OF CASE AND FACTS

Petitioner relies on the State of Case and Facts in the initial brief; respondent's Statement of Facts provides additional accurate facts. There is no factual dispute between the parties.

SUMMARY OF THE ARGUMENT

There are no exceptions to the Fourth Amendment, only to the warrant requirement; there are only a handful of well-drawn exceptions. Absent a warrant, or an exception, a search is unlawful. There is no "general reasonableness" exception to the Fourth Amendment applicable in a routine criminal investigation. In a routine driving under the influence case, where a breath test is conducted at a police station following a minimum twenty minute observation period, there is ample time to obtain a search warrant.

The Government may not criminalize the exercise of a constitutional right including the right to be free from a warrantless and therefore unreasonable search. So here, petitioner cannot be convicted of a crime for refusing a breath test, a search under the Fourth Amendment, when there were no exigent circumstances and he was not presented with a warrant.

ARGUMENT

A. Warrantless searches are presumptively unreasonable and are disfavored.

The Constitution normally requires a warrant as a precedent to a search. This allows a neutral and detached magistrate to ensure the search is not a random or arbitrary act, but rather authorized by law and narrowly limited to objective and scope. While the "[u]ltimate standard set forth in the Fourth Amendment is reasonableness," (*Cady v. Dombrowski*, 413 U.S. 433 (1973)), the United States Supreme Court instructs that searches without warrants are *per se* unreasonable. *City of Los Angeles, Calif. v. Patel*, 135 S. Ct. 2443 (2015). "Law enforcement must, whenever practicable, obtain advanced judicial approval of searches and seizures through the warrant procedure." *Terry v. Ohio,* 88 S. Ct. 1868 (1968).

There are only a few, well-delineated, exceptions to the warrant requirement: free and voluntary consent, search incident to lawful arrest, stop and frisk, probable cause plus exigent circumstances, the emergency doctrine, inventory searches, plain view or feel and administrative searches of closely regulated businesses. *State v. Johnson*, 301 P.3d 287 (2014). None of these exceptions rest solely on probable cause (as the Government suggests is sufficient in the constitutional conditions context); rather most require probable cause plus other circumstances for the warrant exception to apply. See *Katz v. United States*,

88 S. Ct. 507 (1967) ("Searches conducted without warrants have been held unlawful 'notwithstanding facts unquestionably showing probable cause.'").

B. Breath tests are a search and should not be treated differently than a blood or urine test.

Certainly breath tests are searches of constitutional magnitude; in Fourth Amendment jurisprudence, there has never been a legal distinction between a breath, urine or blood test. All three are considered searches. See *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989), *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), *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). *State v. Won*, 136 Hawai'i 292, (2015), *as corrected* (Dec. 9, 2015), *State v. Ryce*, 368 P.3d 342 (Kan. 2016), *State v. Nece*, 367 P.3d 1260 (Kan. 2016), *State v. Wycoff*, 367 P.3d 1258 (Kan. 2016), and *State v. Wilson*, __ P. 3d __ (2016).

Although a needle may pierce the skin, obtaining a breath sample of deep lung air is not a trivial matter. A driver is held for twenty minutes, made to open their mouth for inspection, then ordered to blow into a machine until it stops beeping; typically several seconds of hard exhalation is required to satisfy law enforcement. See Fla. Admin. Code Ann. r. 11D-8.007 (breath test administrator shall reasonably ensure the subject has not taken anything by mouth or regurgitated

for at least twenty (20) minutes before administering a breath test) and Fla. Admin. Code Ann. r. 11D-8.002 (two (2) samples within fifteen (15) minutes required). There are portable breath test devices, used for screening purposes, but these are not the machines at issue - for a DUI prosecution, the breath test is taken on an Intoxilyzer 8000, at an approved secure breath test facility (usually a police station or jail). See Fla. Admin. Code Ann. r. 11D-8.007 (instrument shall be kept in a secure environment).

The misconception a breath test is a simple "puff" into a straw dramatically understates the intrusion the test represents. The United States Supreme Court clearly treats a breath test as a search, recognizing no legal basis to distinguish it from a blood or urine test. *Skinner*.

C. Implied Consent is not valid Fourth Amendment Consent and cannot serve here as an exception to the warrant requirement.

Consent, freely and voluntarily given, is an exception to the warrant requirement. The Government always has the burden of proving that the consent was freely and voluntarily given. *Bumper v. N. Carolina*, 391 U.S. 543, 88 S. Ct. 1788 (U.S. 1968) and *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973). 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 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). *Williams* correctly held "implied consent" is not a valid substitute for Fourth Amendment consent. See also *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). *State v. Won*, 136 Hawai'i 292, (2015), *as corrected* (Dec. 9, 2015), *State v. Ryce*, 368 P.3d 342 (Kan. 2016), *State v. Nece*, 367 P.3d 1260 (Kan. 2016), *State v. Wycoff*, 367 P.3d 1258 (Kan. 2016), and *State v. Wilson*, __ P. 3d __ (2016).

D. "Exigent Circumstances" due to dissipating blood alcohol are not a p*er se* exception to the warrant requirement nor do they apply to petitioner's case.

Missouri v. McNeely, 133 S. Ct. 1552 (2013), holds the "exigent circumstances" exception to the warrant requirement is not applicable as a *per se* exception in routine DUI cases where blood alcohol levels may be dissipating. In this day and age, law enforcement can easily obtain a search warrant, probably in less time than it takes to "warm up the breath test machine" (twenty minutes). Circumstances may make obtaining a warrant impractical but that is a reason to decide each case on its facts, as in *Schmerber*, not to accept the "considerable overgeneralization" that a *per se* rule would reflect.

Petitioner argues the ruling of the Fifth District improperly creates a per se rule that a post arrest, warrantless demand for a breath sample is always reasonable, without considering the individual circumstances of the case. Petitioner adopts the well-reasoned argument set more fully in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), *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). *State v. Won*, 136 Hawai'i 292, (2015), *as corrected* (Dec. 9, 2015), *State v. Ryce*, 368 P.3d 342 (Kan. 2016), *State v. Nece*, 367 P.3d 1260 (Kan. 2016), *State v. Wycoff*, 367 P.3d 1258 (Kan. 2016), and *State v. Wilson*, __ P. 3d __ (2016).

E. No Other Exception to the Warrant Requirement Applies.

On the record, the Government cannot demonstrate any other exception applies to petitioner's case. Still, the Government argues the "search incident to lawful arrest" exception could be pressed into service. However, neither the District Court nor the trial court applied this exception, for good reason. "Search incident to lawful arrest" is an exception justified by two factors: (1) officer safety; and (2) intentional destruction of evidence; and has "little applicability with respect to searches involving intrusions beyond the body's surface." See *Arizona v.* Gant, 129 S. Ct. 1710 (2009) and *Schmerber v. California*, 86 S. Ct. 1826 (1966) ("'absent an emergency, no less could be required where intrusions into the human

body are concerned', even when the search was conducted following a lawful arrest.") *Missouri*, 133 S. Ct. at 1558 (quoting *Schmerber v. California*, 384 U.S. 757 (1966)). See also *Filmon v. State*, 336 So. 2d 586 (Fla. 1976) (dissenting opinion). While *Schmerber* does not explicitly state a warrantless search of a bodily fluid for chemical or controlled substances cannot be justified as "incident to a lawful arrest," *McNeely* makes that point clear. Further, the United States Supreme Court has clarified the "search incident to lawful arrest" exception is limited to "personal property ... immediately associated with the person of the arrestee." *Riley v. California*, 134 S. Ct. 2473 (2014).

Petitioner adopts the well-reasoned explanation set forth more fully by the Kansas Supreme Court in *State v. Ryce*, 368 P.3d 342 (Kan. 2016), *State v. Nece*, 367 P.3d 1260 (Kan. 2016), *State v. Wycoff*, 367 P.3d 1258 (Kan. 2016), and *State v. Wilson*, __ P. 3d __ (2016).

F. Warrantless searches may not be upheld on the theory they are reasonable.

As we demonstrated in our initial brief, the "general reasonableness" analysis does not apply to routine criminal investigations, only in closely regulated industries or "administrative searches." In the "last 45 years, the Court has identified only four industries that have 'such a history of government oversight that no reasonable expectation of privacy could exist for a proprietor.'" *City of Los*

Angeles, Calif., 135 S. Ct. at 2454 See also *Maryland v. King*, 133 S. Ct. 1958 (2013), *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989) (outlining the special needs exception applicable to a heavily regulated industry like the railroads and also holding a breath, urine or blood test is a search under the Fourth Amendment) There is no "special need" that justifies a warrantless breath test; the only setting in which this type breath, blood or urine tests are administered is in the course of a normal criminal investigation. To create such an exception would eviscerate the Fourth Amendment.

G. In the 1980s, this Court recognized Implied Consent as providing greater protection against Government intrusion post-*Schmerber* and the existence of a "right to refuse" testing. However, § 319.1939, Fla.Stat. (2002), was subsequently enacted, adding a criminal penalty for "refusing to submit to testing" so this Court's early decisions need to be revisited.

In reaction to *Schmerber*, which was widely misconstrued, the Legislature enacted Florida's Implied Consent ("Implied Consent") scheme - a trilogy of statutes designed to provide a framework for obtaining chemical tests and to provide the motoring public with greater protections against Government intrusion i.e. a blood test. See *Sambrine v. State*, 386 So. 2d 546 (Fla. 1980) and *State v. Bender*, 382 So. 2d 697 (Fla. 1980). And as the Government mentions in their Answer brief, Implied Consent was meant to be a source of greater protection for

the citizen by, in part, creating a "right to refuse testing" (albeit with attendant consequences). Yet petitioner stands convicted for exercising precisely that right.

Petitioner concedes courts have receded from this language in a series of opinions relied on in the Government's Answer. The Government cites cases discussing the driver's "legitimate choice - agree to the breath test or refuse the test and accepted **the consequences spelled out there**" (emphasis added) as if this dilemma was easily addressed. Actually, the consequences, **at the time those opinions were authored**, were purely administrative or evidentiary, not criminal. The cases cited by Government, including this Court's 1980 decisions in *Sambrine* and *Bender*, discussing "the consequences spelled out there" for refusing under Implied Consent were decided more than twenty (20) years before the enactment of § 316.1939, Fla. Stat. which created a misdemeanor offense for refusing to submit Implied Consent.

This Court has never approved criminal penalties for refusing to submit to a chemical test. The cases cited, approving sanctions for violating Implied Consent, were written at a time when incarceration, probation and a fine were not possibly sanctions. Petitioner's position is consistent with this Court's early opinions in *Bender* and *Sambrine*. Petitioner may have to suffer adverse evidentiary inferences or even civil consequences, such as an administrative suspension, but

petitioner cannot be convicted for exercising his right to refuse to submit to a breath test.

In *Missouri v. McNeely*, 133 S. Ct. 1552, 1566 (2013) the court stated "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" but did not indicate that criminal sanctions could be imposed for declining to submit to a warrantless test under an implied consent scheme. The suggestion that losing driving privileges is "worse" than jail likely comes from those with little experience in Florida's jails.

H. The State may not criminalize the assertion of a Fourth Amendment right.

Petitioner primarily relies on his initial brief on this point however he also adopts the well-reasoned explanation set forth more fully by the Kansas Supreme Court in *State v. Ryce*, 368 P.3d 342 (Kan. 2016), *State v. Nece*, 367 P.3d 1260 (Kan. 2016), *State v. Wycoff*, 367 P.3d 1258 (Kan. 2016), and *State v. Wilson*, __ P. 3d __ (2016).

CONCLUSION

Our State and Federal rights must be carefully protected against erosion and exceptions that swallow the rule; whether hunting for drugs in a physical location or in a person's blood stream, law enforcement must obtain a warrant prior to the search. Going forward without a warrant, the Government risks violating a citizen's rights. And unless faced with a warrant, a citizen may refuse the Government's search.

The Fifth District Court erred by applying a "special needs exception" analysis and creating a new broad exception to the warrant requirement. No exceptions to the warrant requirement are applicable to petitioner. Absent an exception, a warrant was required. Petitioner exercised a valid constitutional right to be free from a warrantless search, yet was convicted for doing so. This result is unjust. To this end, 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 23rd day of May, 2016, to Office of the Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida, 32118, at crimappdab@myfloridalegal.com.

/s/ Aaron D. Delgado

AARON D. DELGADO, ESQUIRE
Florida Bar No. 0796271
227 Seabreeze Blvd.
Daytona Beach, FL 32118
Telephone: (386) 255-1400
Facsimile: (386) 255-8100
Attorney for Appellant
adelgado@communitylawfirm.com

/s/ Eric A. Latinsky

ERIC A. LATINSKY, ESQUIRE
Florida Bar No. 0302831
227 Seabreeze Boulevard
Daytona Beach, FL 32118
Telephone: (386) 255-1400
Facsimile: (386) 255-8100
Attorney for Appellant
elatinsky@communitylawfirm.com

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.