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 SUPPLEMENTAL BRIEF ON THE MERITS

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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's statement of the case and facts remains the same.

## SUMMARY OF THE SUPPLEMENTAL ARGUMENT

**THE FIFTH DISTRICT WAS CORRECT IN AFFIRMING THE RULING OF THE COUNTY COURT BUT UTILIZED AN INCORRECT RATIONALE WHICH SHOULD BE CLARIFIED TO CONFORM WITH *BIRCHFIELD V. N. DAKOTA*, 136 S. Ct. 2160 (2016).**

This petition presented a question of exceptional importance and first impression: whether Fla. Stat. § 316.1939 (the "refusal statute") may criminalize a driver's unlawful refusal to submit to a chemical test of his or her blood, breath or urine if the driver has a prior unlawful refusal to submit to a chemical test of his or her blood, breath or urine. The Fifth District agreed with Williams that the "incident to arrest" exception to the warrant requirement did not apply and in order to uphold petitioner's conviction, the Fifth District relied 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.

In *Birchfield*, 136 S. Ct. 2160 the United States Supreme Court found that a breath test following a lawful arrest for drunk driving was lawful under the incident to arrest exception. Accordingly the Fifth District was correct to affirm the ruling of the county court but utilized an incorrect rationale. This court should correct the rationale utilized in this cause to be consistent with *Birchfield v. N. Dakota* which utilized a more narrow rationale. This correction is important in order to facilitate a determination of whether a person who is charged under Sec. 316.1939 has currently refused to submit to a lawful test of his breath, blood or urine under Sec. 316.1932 and has previously unlawfully refused to submit to lawful test under Sec. 316.1932.

## ARGUMENT

**THE FIFTH DISTRICT WAS CORRECT IN AFFIRMING THE RULING OF THE COUNTY COURT BUT UTILIZED AN INCORRECT RATIONALE WHICH SHOULD BE CLARIFIED TO CONFORM WITH *BIRCHFIELD V. N. DAKOTA*, 136 S. Ct. 2160 (2016).**

### A. Standard of Review

This constitutional challenge to the statutes involve pure questions of law reviewable on appeal *de novo*. *State v. Glatzmayer*, 789 So. 2d 297 (Fla. 2001**).**

### B. Discussion

In the opinion below the Fifth District concluded that a warrantless breath test would not have been justified under the search-incident-to-arrest exception, *Williams v. State*, 167 So.3d 483, 491 (Fla. 5th DCA 2015) but found that the warrantless post-arrest breath was permissible "under a general reasonableness test". 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). The United States Supreme Court on June 23, 2016 issued its decision in *Birchfield v. N. Dakota*, 136 S. Ct. 2160 (2016) and after finding that breath tests do not implicate significant privacy concerns, observed that the search-incident-to- arrest doctrine has an ancient pedigree, *Birchfield*, 136 S. Ct. at 2174 and found this exception to the warrant requirement did apply to facts similar to the pending case. The United States Supreme Court stated:

> Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.
>
> We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

*Birchfield v. N. Dakota*, 136 S. Ct. at 2184, emphasis supplied

The continued discussion in *Birchfield* clarifies that a warrant is required for a blood test absent exigent circumstances. For example the *Birchfield* opinion states:

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

*Birchfield v. N. Dakota*, 136 S. Ct. 2160, 2184–85 (2016)

In order for Williams to be convicted for a violation of Sec. 316.1939 it requires proof of an unlawful refusal to submit to breath, blood or urine test as described in Sec. 316.1932 and also a previous suspension for a prior refusal to submit to a lawful test of the person's breath, blood or urine. Sec. 316.1939 is not limited to breath tests. Accordingly while *Birchfield* stands for the proposition that Williams can be criminally prosecuted for refusing a warrantless breath test if the request for a breath test is incident to a lawful arrest for drunk driving it also appears that the

scope of 316.1932 on its face and as it has been applied does exceed the exception to the Fourth Amendment warrant requirement as set out in *Birchfield*. For example, in *State, Dept. of Highway Safety & Motor Vehicles v. Whitley*, 846 So. 2d 1163, 1165 (Fla. 5th DCA 2003) the decision finds that Florida law did not require that the individual be lawfully arrested for Dui as a predicate to administration of a breath test under Section 316.1932 and that an arrest for fleeing and eluding met the statutory requirement. Sec. 316.1932 also purports in certain instances to require submission to warrantless blood tests when a person appears for treatment at a medical facility and a breath test is impractical which is inconsistent with *Birchfield*. In this instance, Williams did not raise the issue of the lawfulness of his prior suspension at the trial court level. It is respectfully argued that it is important that this court clarify that the appropriate rationale/reasoning in determining the lawfulness of a demand for a breath, blood or urine test under Fourth Amendment standards is set out by the rationale/reasoning in *Birchfield* and *Missouri v. McNeely*, 133 S. Ct. 1552, 1555 (2013) as opposed to the broader rationale utilized by the Fifth District in this cause. This clarification furthers a proper determination of whether a request/demand for a blood, breath or urine test is lawful on a case by case basis.

## CONCLUSION

Petitioner was convicted for violating Florida's refusal to submit statute in a case involving a breath test as opposed to blood or urine. Williams stipulated that his record did show a prior refusal of a breath, blood or urine test. By holding the petitioner's prospective search was constitutional as an exception to the Fourth Amendment's warrant requirement under a "generally reasonable," standard the Fifth District Court utilized an incorrect rationale. In *Birchfield* the United State Supreme Court ruled that a warrantless breath test is permissible under the incident to arrest exception to the warrant requirement. Accordingly, the decision of the Fifth District is correct but the rationale utilized was wrong. This court should clarify that consistent with *Birchfield* a warrantless breath test is permissible incident to a lawful arrest for driving under the influence of alcoholic beverage under the search incident to lawful arrest exception to the warrant requirement but a warrantless blood test is not permissible absent proof of exigent circumstances consistent with *Birchfield* and *Missouri v. McNeely*, 133 S. Ct. 1552 (2013).

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished this 1st day of August, 2016, to Office of the Attorney General, 444 Seabreeze Blvd., Suite 500, Daytona Beach, Florida, 32118, at crimappdab@myfloridalegal.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.


*/s/ Aaron D. Delgado*

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