

IN THE SUPREME COURT OF FLORIDA

BYRON MCGRAW,  
Petitioner,

vs.

CASE NO. SC18-792

STATE OF FLORIDA,  
Respondent.

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**PETITIONER BYRON MCGRAW'S RESPONSE TO RESPONDENT'S  
MOTION FOR REHEARING AND CLARIFICATION**

Petitioner Byron McGraw, through counsel, files the following response to Respondent's December 9, 2019 motion for rehearing and clarification:

On November 27, 2019, this Court issued its opinion in *McGraw v. State*, SC18-792, 2019 WL 6333909 (Fla. Nov. 27, 2019). Adhering to the conformity clause of the Florida Constitution, this Court applied the analysis and remedy recently espoused by the United States Supreme Court in *Mitchell v. Wisconsin*, 139 S. Ct. 2525 (2019), to vacate the Fourth District Court of Appeal's decision below and remand to the trial court for further factual determinations.

***Motion for Clarification***

Petitioner agrees that Respondent's motion for clarification should be granted. The instant case derived from the County Court of the Fifteenth Judicial Circuit in and for Palm Beach County. The Fourth District Court of Appeal accepted discretionary review of the case—and bypassed the circuit court in its

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appellate capacity—because the county court had certified a question of great public importance. *See McGraw v. State*, 245 So. 3d 760, 761 (Fla. 4th DCA 2018) *vacated*, SC18-792, 2019 WL 6333909 (Fla. Nov. 27, 2019).

This Court’s opinion “remand[ed] with directions that the case be remanded to the **Circuit Court** of the Fifteenth Judicial Circuit.” *McGraw*, SC18-792, 2019 WL 6333909, at \*3 (emphasis added). Given the case’s posture, the bolded appears to be an oversight. Accordingly, this Court should grant Respondent’s motion for clarification and correct the opinion to state that the case will be remanded to the County Court of the Fifteenth Judicial Circuit.

### ***Motion for Rehearing***

Respondent’s motion for rehearing should, on the other hand, be denied. The “good faith” exception to the exclusionary rule was addressed at length during this case’s briefing and at oral arguments. As it did previously, Respondent misunderstands that the “good faith” exception is an exception to the *exclusionary rule*, not to the warrant requirement. The good faith exception only comes into play once there has been a Fourth Amendment violation. *See Ryder v. United States*, 515 U.S. 177, 185 (1995) (explaining that the good faith exception “den[ies] criminal defendants an exclusionary remedy from Fourth Amendment violations”).

The good faith exception to the exclusionary rule has been adopted in Wisconsin, where *Mitchell* originated. See *State v. Kerr*, 913 N.W.2d 787, 795 (Wis. 2018), *cert. denied*, 139 S. Ct. 848 (2019) (“In Wisconsin, we have adopted the good-faith exception.”). Nevertheless, the Supreme Court in *Mitchell* did not address the good-faith exception at all, choosing instead to remand the case to the trial court to make factual determination. *Mitchell*, 139 S. Ct. at 2539. The absence of any “good faith” exception analysis can be attributed to the fact that the Supreme Court could not determine without additional factual findings whether a Fourth Amendment violation had or had not occurred.

Much like *Mitchell*, the record in this case does “not rule out the possibility that” Petitioner’s case is one such “unusual case [where] a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties.” *Mitchell*, 139 S. Ct. at 2539. Until Petitioner is provided the opportunity to make such a showing, and the trial court makes accompanying factual findings, it cannot be determined whether a Fourth Amendment violation occurred. And without a Fourth Amendment violation, any “good faith” exception determination would be premature. Accordingly, Respondent’s motion for rehearing should be denied.

WHEREFORE, Petitioner Byron McGraw respectfully requests that Respondent's Motion for Clarification be granted, but that Respondent's Motion for rehearing be denied.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify that this response was electronically filed with the Court and a copy of it was served to Richard Valuntas, Assistant Attorney General, Office of the Attorney General, Ninth Floor, 1515 N. Flagler Drive, West Palm Beach, Florida 33401-3432, by email at [CrimAppWPB@MyFloridaLegal.com](mailto:CrimAppWPB@MyFloridaLegal.com); and to Flem K. Whited, III, Whited Law Firm, 150 S. Palmetto Avenue, Suite 102, Daytona Beach, Florida 32114, by email at [NancyA@WhitedLawFirm.com](mailto:NancyA@WhitedLawFirm.com); on this 23rd day of December, 2019.

/s/ Benjamin Eisenberg  
Benjamin Eisenberg