IN THE SUPREME COURT OF THE STATE OF FLORIDA

BYRON MCGRAW,	)	
Appellant,	)	
vs.	)	CASE NO. SC 18-792
	)	L.T. Case No: 4D17-232
STATE OF FLORIDA,	)	
Appellee	)	
	)	

BRIEF OF AMICUS CURIAE NATIONAL COLLEGE FOR DUI DEFENSE SUPPORTING THE APPELLANT - BYRON MCGRAW

ON APPEAL FROM
THE DISTRICT COURT OF APPEAL 4TH DISTRICT

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Identity and Interest of Amicus

The National College for DUI Defense (NCDD) is a non-profit professional organization of attorneys dedicated to the education and training of attorneys engaged in the practice of defending citizens accused of driving while under the influence. There are more than one thousand five hundred members of NCDD throughout the United States and Canada. Through its extensive educational programs, its website, and its e-mail list, the NCDD trains lawyers to more effectively represent persons accused of driving under the influence. The NCDD is authorized by the American Bar Association to issue Board Certifications in the area of DUI/DWI Defense to qualifying attorneys.

NCDD seeks to augment the issues presented by the petitioner by addressing constitutional questions raised in this case that are of national importance. The question presented in this case is does the state legislature have the power to "deem" into existence "facts" operating to negate individual rights arising under the U.S. and Florida State constitutions.

Table of Citations

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The Certified Question posed by the County Court

Does the following sentence in § 316.1932(1)(c), Florida Statutes,

> Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to such [blood] test.

remain constitutionally valid under the Fourth Amendment to the United States Constitution and Article 1, Section 12 of the Florida Constitution in light of *Missouri v. McNeely*, [569 U.S. 141, 133 S. Ct. 1552, 185 L. Ed. 2d 696] (2013), *State v. Liles*, 191 So. 3d 484 (Fla. 5th DCA 2016), and *Birchfield v. North Dakota*, —— U.S. —— –, 136 S. Ct. 2160, 195 L. Ed. 2d 560 (2016)?

The Certified Question as rephrased by the DCA

Under the Fourth Amendment, may a warrantless blood draw of an unconscious person, incapable of giving actual consent, be pursuant to section 316.1932(1)(c), Florida Statutes (2016) ("Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to [a blood draw and testing]."), so that an unconscious defendant can be said to have "consented" to the blood draw?

The Majority Below

The majority below has completely missed the point. They conclude, that because Florida's implied consent law at issue here does not impose criminal penalties, the statute does not violate the Fourth Amendment. Whether the law does or does not impose criminal penalties meant nothing to McGraw. He was unconscious. Had he been awake and law enforcement requested consent to a blood draw after being advised of the administrative sanctions upon refusal, then it might matter under a "totality of the circumstances" analysis.

But, McGraw was unconscious. The fact that he was driving and taken to a medical facility deems his consent to a blood test. His unconscious state deems that his prior deemed consent cannot be withdrawn. As Judge Gross observed below, the statute operates to provide consent where none is present. It should be held unconstitutional. That issue is squarely before this Court.

Section 316.1932(1)(c)

Section 316.1932(1)(a) is the provision of the implied consent law that deals with the implied consent of a person arrested for DUI that is not involved in a crash.

Section 316.1932(1)(c) is the provision that applies where a crash, not involving serious bodily injury, is involved. Section 316.1932(1)(c) begins by providing that "any person who accepts the privilege extended by the laws of this state of operating a motor vehicle within this state *is, by operating such vehicle, deemed* to have given his or her consent to submit to an approved blood test" to determine the alcoholic content of the blood or the presence of controlled substances *if* certain facts are present, such as appearing at a medical facility for treatment, *if* the officer has reasonable cause to believe the person was driving under the influence of alcohol or controlled substances, and *if* a breath test is impracticable or impossible. § 316.1932(1)(c), Fla. Stat. (emphasis added).

It further provides that, if the person is conscious, they must be advised of their obligations under the implied consent law and resulting sanctions if they refuse, one of which is that, if this is a second refusal, it is a misdemeanor. *See id.*

It goes on to provide: "Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition *is deemed not to have withdrawn his or her consent* to such [blood] test." *Id.* (emphasis added).

In summary, if the person is conscious, they must be advised that if they refuse, their license will be suspended, and if a second refusal, they have committed a misdemeanor. Their options are then to agree to the blood draw or refuse. If the person is incapable of refusal by reason of unconsciousness or other mental or physical condition, they are deemed to have not withdrawn their consent to the blood test.

If there has been a crash involving serious injury or death, section 316.1933(1)(a) provides for the forcible taking of the blood. The Fifth District has held that the implied consent provisions of that section cannot substitute for actual consent. *State v. Liles*, 191 So. 3d 484, 486-88 (Fla. 5th DCA 2016).

Summary of Argument

It is the position of the Amicus that a statute that provides the act of driving operates as a per se exception to the warrant requirement for the taking of a person's

blood is unconstitutional. Likewise, any statute that provides that a person cannot withdraw their consent upon the proof that they are unconscious is also unconstitutional.

Ultimately, no state legislature has the power to pass a law which would negate individual rights arising from the U.S. and State Constitutions.

Argument

There is no question that the taking of McGraw's blood by law enforcement was a search which is protected by the U.S. and Florida Constitutions. The Fourth Amendment protects against unreasonable searches and seizures. The Florida Constitution requires section 12 to "be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const.; *Liles*, 191 So. 3d at 486 (citing *Schmerber v. California*, 384 U.S. 757, 767 (1966)). "To comply with the Fourth Amendment, law enforcement officers must obtain a warrant or consent for a blood draw, or there must be some other exception to the warrant requirement." *Liles*, 191 So. 3d at 486.

There are no other exceptions to the warrant requirement at play in this case other than McGraw's consent.

There is no doubt that McGraw did not give actual consent by any of his words or actions. He was unconscious at the time his blood was taken from him. The State

relies entirely on the words in section 316.1932(1)(c) as a substitute for his actual consent to the blood test and his inability to withdraw that consent.

Constitutional Consent / *Schneckloth v. Bustamonte*

Amicus agrees that a search conducted pursuant to a valid consent is constitutionally permissible. *Katz v. United States*, 389 U.S. 347, 358 (1967).

When consent is used to justify a warrantless search, the State has "the burden of proving that the consent was, in fact, freely and voluntarily given." *Bumper v. North Carolina*, 391 U.S. 543, 548 (1968).

"But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting 'consent' would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973).

"Our decision today is a narrow one. We hold only that when the subject of a search is not in custody and the State attempts to justify a search on the basis of his consent, the Fourth and Fourteenth Amendments require that it demonstrate that the consent was in fact voluntarily given, and not the result of duress or coercion, express or implied. Voluntariness is a question of fact to be determined from all the circumstances, ..." *Id.* at 248-249.

The statute in question here has "deemed" the act of driving to be consent to a search of the person driving. If the person is unconscious they are "deemed" not to have withdrawn their prior "deemed" consent.

> When a legal rule is stated in the form "A is deemed to be B," it means that A must be *treated as* B for purposes of the rule, even though *they are not the same thing.* (See Black's Law Dict. (10th ed. 2014) p. 504, col. 2 [defining "deem" as "[t]o treat (something) as if (1) it were really something else, or (2) it has qualities that it does not have"].) It "'has been traditionally considered to be a useful word when it is necessary to establish a *legal fiction* either positively by *"deeming" something to be what it is not* or negatively by "deeming" something not to be what it is . . . .'" (Ibid. quoting G.C. Thornton, Legislative Drafting (4th ed. 1996). p. 99, italics added.) Or as Mr. Justice Cave wrote of an English statute, "When you talk of a thing being deemed to be something, you do not mean to say that it is that which it is to be deemed to be. It is rather *an admission that it is not what it is to be deemed to be,* and that, notwithstanding it is not that particular thing, nevertheless, for the purposes of the Act, it is to be deemed to be that thing." (*The Queen v. County Council of Norfolk* (1891) 60 Q.B. 379, 380–381, italics added.)

People v. Arredondo, 199 Cal. Rptr. 3d 563, 571-72 (Cal. Ct. App. 2016), *rev. granted*, 371 P.3d 240 (Cal. 2016).

The court in *Arredondo* went on to say:

> Obviously consent of this kind cannot be characterized as "free[ ]" (*People v. Michael, supra,* (1955) 45 Cal.2d 751, 753, 290 P.2d 852), or "'knowingly and intelligently made'" (*People v. Bravo, supra,* 43 Cal.3d 600, 605, 238 Cal.Rptr. 282, 738 P.2d 336, quoting *People v. Myers, supra,* 6 Cal.3d 811, 819, 100 Cal.Rptr. 612, 494 P.2d 684.) It cannot be "voluntarily given." (*Bumper v. North Carolina, supra,* 391 U.S. 543, 548, 88 S.Ct. 1788, fn. omitted.) For the same reason, it can never be tested for "duress or coercion." (*Schneckloth, supra,* 412 U.S. at p. 227, 93 S.Ct. 2041.) In short, it is not real consent.

Arredondo, 199 Cal Rptr. 3d at 573.

Actual Consent vs. Deemed Consent

It is clear that McGraw's free, voluntary consent knowingly made as contemplated by the United States Supreme Court cannot be proved by the State. Section 316.1932(1)(c) has eviscerated that rule of law.

Under settled law on this issue a trial judge would typically hear testimony regarding the facts surrounding a defendant's alleged consent to a search. The judge would then weigh those facts and render a decision one way or the other considering the totality of the circumstances.

The Florida Legislature has, through the passage of section 316.1932(1)(c), legislated a new rule as it relates the act of driving and consent to a blood test. If you are taken to a medical facility and are incapable of refusal by reason of unconsciousness or other mental or physical condition, you are also deemed to have not withdrawn your previously deemed consent. No longer does the State have the burden of making a warrant application; having to prove the required probable cause to an independent magistrate or, in the case of the consent exception, proving to a trial court that the totality of the circumstances shows the driver's consent was freely and voluntarily given.

The ultimate question this Court has to answer is whether the legislature has the power to pass a law that negates a person's rights under the United States and Florida Constitutions.

Evaluating the Constitutionality of a Statute

Any statute in conflict with the Constitution is a nullity. *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824). A state legislature does not have the power to pass a law that declares certain facts to be true such that they would operate to negate a person's individual rights arising under the U.S. Constitution. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-80 (1803). "It is clear, of course, that no Act of Congress can authorize a violation of the Constitution." *Almeida-Sanchez v. United States*, 413 U.S. 266, 272 (1973). The same rule applies to laws passed by state legislatures. *Ybarra v. Illinois*, 444 U.S. 85, 96 n.11 (1979) ("The statute purports instead to authorize the police in some circumstances to make searches and seizures without probable cause and without search warrants. This state law, therefore, falls within the category of statutes purporting to authorize searches without probable cause, which the Court has not hesitated to hold invalid as authority for unconstitutional searches.").

The majority below has picked various portions of *Missouri v. McNeely*, 569 U.S. 141 (2013), and *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016), to justify

their conclusion that, since the United States Supreme Court has not specifically rejected the lawfulness of implied consent statutes generally, they are now allowed to substitute for actual consent. Amicus would argue that a series of cases beginning in 2013 would provide a contrary result.

Missouri v. McNeely

The United States Supreme court in *Missouri v. McNeely* resolved the split of authority on the question of 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. They held it does not.

> The Court explained:
>
> While the desire for a bright-line rule is understandable, the Fourth Amendment will not tolerate adoption of an overly broad categorical approach that would dilute the warrant requirement in a context where significant privacy interests are at stake. Moreover, a case-by-case approach is hardly unique within our Fourth Amendment jurisprudence. Numerous police actions are judged based on fact-intensive, totality of the circumstances analyses rather than according to categorical rules, including in situations that are more likely to require police officers to make difficult split-second judgments.

McNeely, 569 U.S. at 158.

Further, the Court acknowledged that implied consent statutes are among the "broad range of legal tools [States have] to enforce their drunk-driving laws and to secure [blood alcohol content] evidence without undertaking warrantless

nonconsensual blood draws." *Id.* at 160-61. (emphasis added). *McNeely* dealt with the specific issue of the State's desire for the United States Supreme Court to carve out a per se rule that, when a person has been drinking, that automatically creates an exigency.

Just before the delivery of *McNeely,* a court of appeals in Texas ruled that their implied consent law was a valid substitute for actual consent. In *Aviles v. State,* 385 S.W.3d 110 (Tex. App. 2012), the court upheld the taking of blood based on their state implied consent statute. The Texas Court of Appeals rejected the defendant's petition. The case then went to the United States Supreme Court. In a short opinion, the Court said ". . . case remanded to the Court of Appeals of Texas, Fourth District, for further consideration in light of *Missouri v. McNeely*, 569 U.S. ——, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013)." *Aviles v. Texas*, 571 U.S. 1119 (2014).

Reversing its previous decision, the Texas appellate court held:

> It is undisputed that Officer Rios did not obtain a warrant prior to requiring Aviles to submit to a blood draw. Once Aviles established the absence of a warrant, it was incumbent upon the State to prove the warrantless blood draw was reasonable under the totality of the circumstances. *See Amador,* 221 S.W.3d at 666, 672–73. The State may satisfy this burden by proving the existence of an exception to the warrant requirement. *See Gutierrez v. State,* 221 S.W.3d 680, 685 (Tex. Crim. App. 2007). Here the only exception to the warrant requirement proposed by the State was section 724.012(b)(3)(B), the mandatory blood draw statute. Because this is not a permissible exception to the warrant requirement, and the State has not argued or established a

> proper exception to the Fourth Amendment's warrant requirement, we hold the blood draw violated Aviles's rights under the Fourth Amendment, i.e., the blood draw was an unconstitutional search and seizure.

Aviles v. State, 443 S.W.3d 291, 294 (Tex. App. 2014); *see also State v. Villarreal*, 475 S.W.3d 784 (Tex. Crim. App. 2014) (implied consent statute cannot serve as free and voluntary consent).

Following that reasoning the Supreme Court of Pennsylvania held:

> Following the Supreme Court's remand of *Aviles* for reconsideration in light of *McNeely*, the Texas court concluded that, because the challenged statutes "do not take into account the totality of the circumstances present in each case, but only consider certain facts, an approach rejected in *McNeely*, the statutes were not substitutes for a warrant or legal exceptions to the Fourth Amendment warrant requirement." *Aviles v. State*, 443 S.W.3d 291, 294 (Tex. App. 2014) (citation and internal quotation marks omitted). Professor Wayne R. LaFave has noted, citing, *inter alia*, *Flonnory*, *Byars*, and *Fierro*, that "[o]ther courts have reached the same conclusion, and rightly so, as a rule to the contrary would in effect nullify the Supreme Court's decision in *McNeely*. Nothing in the more recent *Birchfield* decision casts any doubt upon that conclusion." 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.10(b) (4th ed.) (footnote omitted).
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> * * *
>
> In light of the foregoing, we conclude that the language of 75 Pa.C.S. § 1547(a) providing that a DUI suspect "shall be deemed to have given consent" to a chemical test does not constitute an independent exception to the warrant requirement of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

Commonwealth v. Myers, 164 A.3d 1162, 1180 (Pa. 2017) (emphasis added); *see also Byars v. State*, 336 P.3d 939, 946 (Nev. 2014) ("Although this very short order

appears to hold limited precedential value on its own, it undermines support for the conclusion that consent alone is a viable justification for a warrantless search where the subject of the search does not have the option to revoke consent.").

Birchfield v. North Dakota

This case involved the combined facts of three defendants. Two of the cases involved the taking of blood, Birchfield and Beylund. The third defendant, Bernard, submitted to a breath test.

Mr. Birchfield was criminally prosecuted for refusing a warrantless blood draw. That conviction was reversed. In reversing that conviction, the Court said "the search he refused cannot be justified as a search incident to his arrest or *on the basis of implied consent*." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2186 (2016). Since *Birchfield* several states have reversed convictions under criminal refusal statutes. *State v. Wilson*, 413 P.3d 363, 370 (Haw. Ct. App. 2018) ("Based on the analysis in Won, the State could not prosecute Wilson for Refusal to Submit to Testing. We therefore reverse Wilson's . . . conviction."); *State v. Vargas*, 404 P.3d 416, 421-22 (N.M. 2017) (statute providing as an aggravating factor the refusal to submit to blood testing violated Fourth Amendment); *State v. Ryce*, 396 P.3d 711, 721-22 (Kan. 2017) (statute criminalizing refusing to submit to breath test unconstitutional); *State v. Webster*, 891 N.W.2d 769, 771-73 (N.D. 2017) (statute and jury instruction that provided that a person could be convicted of DUI if they

refused a chemical test unconstitutional); *State v. Helm*, 901 N.W.2d 57, 63 (N.D. 2017) (defendant cannot be prosecuted for refusing warrantless urine test); *Commonwealth v. Giron*, 155 A.3d 635, 638-40 (Pa. Super. Ct. 2017) (court holds it is unconstitutional to subject a person to enhanced penalties upon refusal to submit to blood test); *Commonwealth v. Evans*, 153 A.3d 323, 331 (Pa. Super. Ct. 2016) (statute criminalizing refusing to submit to blood test unconstitutional); *State v. Thompson*, 886 N.W.2d 224, 233-34 (Minn. 2016) (statute criminalizing both refusal to submit to blood and urine test unconstitutional); *State v. Trahan*, 886 N.W.2d 216, 220-21 (Minn. 2016) (same).

Another defendant in *Birchfield*, Beylund, actually agreed to the blood test after being advised the law required his submission, plus his license would be suspended and he would be fined in an administrative proceeding. The Supreme Court reversed the State court and remanded for a factual finding of actual consent:

> The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests. Because voluntariness of consent to a search must be "determined from the totality of the circumstances," *Schneckloth*, *supra*, at 227, 93 S.Ct. 2041[,] we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory.

Birchfield, 136 S. Ct. at 2186. The partial inaccuracy being that the law

required his submission.[1]

Regarding the unconscious driver, the *Birchfield* Court said that the preferred method of obtaining blood is through a warrant:

> 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.

Id. at 2184-85.

The Supreme Court acknowledged the positive aspects of Implied Consent laws. But, one cannot conclude that whatever the Court said positively about them can be construed to allow a state statute to literally turn upside down the law of consent as an exception to the warrant requirement. As Professor LaFave observed, to do so would overrule *Missouri v. McNeely*. The per se rule that driving in all cases provides constitutional consent would write out the warrant requirement. It would further take an eraser to *Schneckloth* and its progeny. The Florida legislature does not have that much power.

Out-of-State Authority

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[1] Post *Birchfield* in Beylund's criminal case, the North Dakota Supreme Court remanded the case back to the trial court to allow him to withdraw his plea. *State v. Beylund,* 885 N.W.2d 77 (N.D.2016). Upon remand from the United States Supreme Court, the North Dakota Supreme Court held the exclusionary rule did not apply in administrative license suspension cases. *Beylund v. Levi,* 889 N.W.2d 907 (N.D.2016)

See also State v. Henry, 539 S.W.3d 223, 236 (Tenn. Crim. App. 2017) ("Given the Court's reasoning in Birchfield, we can confidently conclude that Henry's warrantless blood draw pursuant to the mandatory blood draw section of the statute was not justified based on his legally implied consent."); *Dortch v. State*, 544 S.W.3d 518, 528 (Ark. 2018) (implied consent law held unconstitutional, holding: "While we agree that the criminal penalty imposed pursuant to Arkansas's refusal-to-consent law is much less severe than the penalties at issue in *Birchfield,* the plain language utilized in our statutes demonstrates that these are nonetheless criminal penalties.").

In *State v. Romano*, 800 S.E.2d 644 (N.C. 2017) the North Carolina Supreme Court observed that neither *McNeely* nor *Birchfield* specifically answered the question of whether their implied consent statute, as a per se consent exception to the warrant requirement, was constitutional. *See id.* at 652. But, applying the rationale of *McNeely* and *Birchfield* and guidance from the Supreme Court's prior precedent regarding consent, the court concluded their statute could not be justified as a per se exception to the warrant requirement. *See id.* The court then stated, "Treating subsection 20-16.2(b) as an irrevocable rule of implied consent does not comport with the consent exception to the warrant requirement because such treatment does not require an analysis of the voluntariness of consent based on the totality of the circumstances." *Id.*

An implied consent statute cannot substitute for actual consent. *State v. Butler*, 302 P.3d 609, 613 (Ariz. 2013) (establishing that absent an exception to the warrant requirement, nonconsensual, warrantless blood draws from DUI suspects are unconstitutional); *State v. Havatone*, 389 P.3d 1251, 1255 (Ariz. 2017) (concluding that the unconscious clause can be constitutionally applied only when case-specific exigent circumstances prevent law enforcement from getting a warrant); *Williams v. State*, 771 S.E.2d 373, 376-77 (Ga. 2015) (mere compliance with statutory implied consent for blood draw for DUI suspect did not, per se, equate to actual, and therefore voluntary, consent); *Bailey v. State*, 790 S.E.2d 98, 104-05 (Ga. Ct. App. 2016) (blood draw from unconscious driver based on statute that provides the driver to have deemed not to have withdrawn his otherwise deemed consent by driving held unconstitutional); *State v. Fierro*, 853 N.W.2d 235, 243 (S.D. 2014) (implied consent statute did not provide an exception to the search warrant requirement as relates to conscious driver); *State v. Medicine*, 865 N.W.2d 492, 495-500 (S.D. 2015) (statute cannot substitute for actual consent; totality of the circumstances did not show defendant freely and voluntarily consented to blood draw); *State v. Won*, 372 P.3d 1065, 1083-84 (Haw. 2015) (driver's consent to breath test after implied consent advisory was not voluntary); *State v. Wulff*, 337 P.3d 575, 581 (Idaho 2014) (concluding that "irrevocable implied consent operat[ing] as a per se rule . . . cannot fit under the consent exception because it does not always analyze

the voluntariness of that consent"); *Flonnory v. State*, 109 A.3d 1060, 1065-66 (Del. 2015) (trial court required to perform totality of the circumstances analysis to determine if defendant voluntarily consented to the blood draw); *State v. Pettijohn*, 899 N.W.2d 1, 29 (Iowa 2017) (implied consent statute cannot automatically constitute effective consent to breath test under state constitution); *State v. Modlin*, 867 N.W.2d 609, 619 (Neb. 2015) (whether consent to search was voluntary is to be determined from the totality of the circumstances surrounding the giving of the consent); *Byars v. State*, 336 P.3d 939, 945-46 (Nev. 2014) (holding unconstitutional a statute that provided for use of reasonable force to take blood and that made implied consent irrevocable); *State v. Baird*, 386 P.3d 239, 241-42 (Wash. 2016) (implied consent statute does not authorize a search, it authorizes a choice between consenting or refusing knowing the sanctions); *People v. Ling*, 222 Cal.Rptr.3d 463, 15 Cal.App.5th Supp 1 (2017).

Judge Gross hit the nail on the head.[2] Or should I say "You got that right. Said you got that right. Well, you got that right. Sure got that right."[3]

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[2] "The origin of the idiom 'hit the nail on the head' is carpentry, although no one is certain when it was first used. This analogy is a wonderfully straightforward one; missing the nail when hammering is imprecise and can cause damage to the surface beneath the hammer. Hitting the nail on the head leads to the desired results." *'Hit the Nail on the Head'*, Gingersoftware.com, https://www.gingersoftware.com/content/phrases/hit-the-nail-on-the-head/#.W1Zty62ZOV5 (last accessed July 23, 2018).

[3] Lynyrd Skynyrd, *You Got That Right*, *on* Street Survivors (MCA Records 1977).

> Under reams of case law, Fourth Amendment consent is the product of a conscious mind. An unconscious defendant cannot be coerced or intimidated. An unconscious defendant is incapable of "conduct, gestures, or words" that can indicate consent. *State v. Gamez*, 34 So.3d 245, 247 (Fla. 2d DCA 2010). For an unconscious defendant, if exigent circumstances do not exist, "the police may apply for a warrant if need be." *Birchfield*, 136 S.Ct. at 2185. *Birchfield* leads to the conclusion that because of the significant privacy concerns surrounding blood draws, consent to a blood draw cannot be indirectly implied from the act of driving on Florida roads. The government cannot create a statutory sidestep of the Fourth Amendment to "imply" a consent where actual consent or exigent circumstances do not exist. From an unconscious defendant, blood may be drawn pursuant to a warrant or under the exigent circumstances exception to the warrant requirement. *See, e.g., Goodman v. State*, 229 So.3d 366, 380–82 (Fla. 4th DCA 2017). Only a conscious defendant may voluntarily *consent* to a blood draw consistent with the Fourth Amendment.

McGraw v. State, 44 Fla. L. Weekly D618, 2018 WL 1413038 (Fla. 4th DCA Mar. 21, 2018) (Gross, J., dissenting in part and concurring in part).

Conclusion

Justice Hatchett wrote in his dissent in *Filmon v. State*, 336 So. 2d 586 (Fla. 1976):

> It is well to keep in mind the words of Mr. Justice Bradley, which have been quoted with approval many times since:
>
> > It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if

> it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.

Id. at 598 (Hatchett, J., dissenting, with Adkins, J., concurring) (quoting *Boyd v. United States*, 116 U.S. 616, 635 (1874)).

Section 316.1932(1)(c) is one of those "stealthy encroachments". Florida courts are bound to follow United States Supreme Court precedent on Fourth Amendment issues. That precedent, as outlined herein, compels only one result. The Florida Legislature does not have the power to pass a law statutorily defining constitutional consent. Further, it does not have the power to prohibit withdrawal of the constitutional power to withdraw one's consent. Section 316.1932(1)(c) is unconstitutional.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

Undersigned Counsel HEREBY CERTIFIES that a true and correct copy of the foregoing has been furnished this ____ day of September, 2018 by U.S. mail or e-mail to the following:

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I HEREBY CERTIFY that the font used in this pleading is 14-point Times New Roman.

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