IN THE SUPREME COURT OF FLORIDA

WILLIAM WILLIAMS,

Petitioner, **CASE NO.: SC15-1417**

vs.

STATE OF FLORIDA,

Respondent.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

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 two thousand members of NCDD. 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.

STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopt the petitioner's Statement of the Case and Facts.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases Cited

Cases

ARGUMENT

I. THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION PROHIBITS WARRANTLESS NONCONSENSUAL SEARCHES. THUS, PUNISHING CITIZENS FOR EXERCISING THEIR RIGHT TO NOT CONSENT TO SUCH SEARCHES IS CONTRARY TO THAT AMENDMENT

A. The right to privacy in one's breath and bodily fluids.

The United States Supreme Court has consistently held that warrantless searches are generally unreasonable under the Fourth Amendment, subject to a few carefully delineated exceptions. That Court has emphasized that "[t]he integrity of an individual's person is a cherished value of our society." *Schmerber v. California*, 384 U.S. 757, 772 (1966). Because of the great interests in human dignity and privacy that are at stake, searches that intrude beyond the surface of the body require more than mere probable cause to arrest in order to pass constitutional muster. *See*, *Id*. at 770.

The Court has recognized that a warrant is ordinarily required before obtaining a blood sample from a suspected drunk driver. *See, Schmerber*, 384 U.S. at 770. In *Schmerber*, a police officer arrived at the scene of a car accident shortly after it occurred. The officer smelled alcohol on the defendant's breath and noted the defendant's bloodshot, watery and glassy eyes. Less than two hours later, the same officer saw the defendant at the hospital and noted similar evidence of drunkenness. The officer arrested the defendant and, over the defendant's objections,

directed a blood sample to be drawn from the defendant by a physician at the hospital. The defendant moved for suppression of the chemical analysis as the product of an unlawful search and seizure.

The Court explained that a warrant is required where intrusions into the human body are concerned, but under the specific facts of the case, the Court held that "exigent circumstances" excused law enforcement's failure to procure a warrant before going forward with the invasive procedure at issue. ***Id.*** at 771. The specific facts upon which the Court relied were that, due to the fact that "the percentage of alcohol in the blood begins to diminish shortly after drinking stops," "[t]he officer . . . might reasonably have believed that he was confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threatened the destruction of evidence." ***Id.*** at 770 (internal quotation mark omitted). The Court further noted that "the test chosen to measure petitioner's blood-alcohol level was a reasonable one," and that "the test was performed in a reasonable manner." ***Id.*** at 771 (emphasis added). Thus, the Court concluded that the specific facts of the case demonstrated that the "delay necessary to obtain a warrant…threatened the destruction of evidence." ***Id.*** at 770 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)) (internal quotation marks omitted).

The recent United States Supreme Court case of *Missouri v McNeely*, 133 S.Ct. 1552 (2013) further examined *Schmerber* and made it clear that *Schmerber*

was *never* intended to authorize a sweeping departure from the otherwise fact-dependent nature of Fourth Amendment jurisprudence. The Supreme Court noted in *McNeely*:

> In those drunk-driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. See *McDonald v. United States*, 335 U.S. 451, 456, 69 S.Ct. 191, 93 L.Ed. 153 (1948)("We cannot…excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made [the search] imperative.")

Id. at 1561 (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

McNeely rejected the *per se* reading of *Schmerber* but left room for some findings of exigency—the only exception to the warrant requirement even considered by the United States Supreme Court in drunk driving cases thus far. Those jurisdictions which advanced the *per se* reading of *Schmerber* were harshly rebuked by the United State Supreme Court's issuance of *McNeely*, in which the inadequacy of that doctrinal framework is conclusively revealed. *McNeely* persuasively rejects not just this specific *per se* exception but also the very idea of a departure from the "case by case assessment of exigency." *McNeely*, 133 S.Ct. at 1561. *McNeely* takes a corrective approach to doctrinal drift amongst those

jurisdictions whose zeal to prosecute drunken-driving apparently led them to lose sight of the requisite "case by case" inquiry and of the requirements of the United States Constitution. *Id***.** For example, the Wisconsin Supreme Court was forced to conclude that the legal landscape had indeed changed. *State v. Tullberg*, 359 Wis. 2d. 421, 857 N.W.2d 120, 134 (2014).

Simply put, the question facing courts now is: when does a warrant process become so burdensome to law enforcement that it makes sense to invoke an exception thereto? *McNeely* offers an answer, suggesting that "where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so." *McNeely*, at 1561.

B. Pending Supreme Court cases relating to criminalizing refusals.

In the aftermath of *McNeely*, it was inevitable that states would differ as to how to determine which scenarios permit warrantless draws, given that the decision flatly rejects *per se* rules but otherwise leaves the door open to some unspecified scenario in which a warrantless blood draw is proper: "We do not doubt that some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test." *Id.*

The case at bar involves constitutional questions that are of national importance. The United States Supreme Court has already granted certiorari in three cases on the issue of whether a motorist may be criminally punished for refusing a breath, blood, or urine test. Those cases are docketed in the United States Supreme Court as follows: *State v. Birchfield,* 858 N.W.2d 302 (N.D. 2015), *cert. granted, Birchfield v. North Dakota*, 136 S. Ct. 614 (U.S. Dec. 11, 2015) (No. 14-1468); *State v. Bernard*, 859 N.W.2d 762 (Minn. 2015), *cert. granted, Bernard v. Minnesota*, 136 S.Ct. 615 (U.S. Dec. 11, 2015) (No. 14-1470); *Beylund v. Levi*, 859 N.W.2d 403 (N.D. 2015), *cert. granted, Beylund v. North Dakota*, 136 S.Ct. 614 (U.S. Dec. 11, 2015) (No. 14-1507).

Those cases are in the briefing stage, so there is obviously no decision as of yet. But there is a strong possibility that the decision of the United States Supreme Court as to whether punishment is permitted for refusal to submit to a warrantless evidential search in a drunk driving case will give guidance to those states having such laws.

In *Bernard*, the question is whether the Minnesota Supreme Court's finding that a person may be compelled through refusal criminalization to submit to a warrantless breath test under a search incident to arrest exception to the warrant requirement should be upheld. In *Birchfield*, the issue is whether North Dakota's criminalization of refusals to submit to breath, blood, or urine tests in the absence of

warrants is permissible. Finally, in *Beylund*, the dispute is whether petitioner's constitutional rights were violated when he submitted to the test upon threat of facing a criminal-refusal charge.

There are a small number of states which currently have laws permitting such prosecutions, with Florida being one of them. Previously, rulings from other states have recognized situations where exigent circumstances exist as one such exception to the warrant requirement. In this case, however, the Fifth District Court of Appeals expanded a very narrow exception to the warrant requirement, that of "general reasonableness", to drunken-driving cases. The issues, therefore, in the instant case are first, whether such a search without warrant is permissible under this proposed exception to the warrant requirement and, second, whether states may punish the refusal to give consent to such a search. It is highly likely that the decisions pending before our highest court will at least address the second issue.

C. Citizens have the right to not consent to warrantless searches; thus, they cannot be criminally punished for exercising that right.

The United States Supreme Court held in *Camera v. Municipal Court of City and County of San Francisco*, 387 U.S. 523 (1967), that an ordinance criminalizing an individual's refusal to consent to a warrantless search was unconstitutional. The case involved a property owner's refusal to consent to an inspection of his property without a warrant to search. The law at issue punished refusals to permit such an

inspection by criminalizing those refusals and permitting fines and jail terms for noncompliance.

The Supreme Court noted the importance of the warrant requirement in such situations, stating:

> Yet, only by refusing entry and risking a criminal conviction can the occupant at present challenge the inspector's decision to search. And even if the occupant possesses sufficient fortitude to take this risk, as appellant did here, he may never learn any more about the reason for the inspection than that the law generally allows housing inspectors to gain entry. The practical effect of this system is to leave the occupant subject to the discretion of the official in the field. This is precisely the discretion to invade private property which we have consistently circumscribed by a requirement that a disinterested party warrant the need to search. See cases cited, p. 1731, supra. We simply cannot say that the protections provided by the warrant procedure are not needed in this context; broad statutory safeguards are no substitute for individualized review, particularly when those safeguards may only be invoked at the risk of a criminal penalty.

Id. at 531. (citations omitted).

Importantly, since the briefing commenced in this case, the Hawaii Supreme Court has ruled that its statute criminalizing refusals is unconstitutional and that any consent to submit to a breath test in the wake of that statute is involuntary. *State v. Won*, 361 P.3d 1195 (Haw. 2015). That court stated:

> It is manifestly coercive to present a person with a "choice" that requires surrender of the constitutional right to refuse a search in order to preserve the right to not be arrested for conduct in compliance with the

> constitution. It is equally coercive to "allow" the person to preserve the fundamental right to refuse a search by requiring the person to relinquish the right to not be arrested for conduct that does not violate the constitution.

Id. at 1213.

Additionally, the Kansas Supreme Court on February 26, 2016 issued four opinions finding the refusal statute in that state unconstitutional and any alleged consent to testing in the face of that statute involuntary. See: *State v. Wycoff*, Docket Number 110,393; *State v. Nece*, Docket Number 111,401; *State v. Ryce*, Docket Number 111,698; *State v. Wilson*, Docket Number 112,009 (February 26, 2016 Kansas Supreme Court). Thus, two courts have reconsidered the validity of a statute criminalizing a refusal to submit to a warrantless search in the wake of *McNeely*, and found that any consent to submit to such a search is involuntary.

Furthermore, today's electronic and telephonic warrant processes provide law enforcement with quick and efficient methods to obtain evidence without lessening constitutional protections. These processes make quick review by a court possible and show there is no need to dispense with the warrant requirement in the vast majority of cases. As the *McNeely* Court stated:

> The State's proposed *per se* rule also fails to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple…Well over a majority of States allow police officers or prosecutors to apply for search warrants

> remotely through various means, including telephonic or radio communication, electronic communication such as e-mail and video-conferencing. And in addition to technology-based developments, jurisdictions have found other ways to streamline the warrant process, such as by using standard-form warrant applications for drunk-driving investigations.

McNeely at 1561-2.

Additionally, there is no evidence that criminalizing refusals lessens the number of refusals. A study by the National Highway Traffic Safety Administration suggested that the criminalization of refusals had little impact on refusal rates:

> There is evidence that license suspension alone will not prevent refusal for many "hard core" refusers with a past history of DWI, test refusal, and other serious traffic offenses. Strong criminal sanctions (including jail terms) for refusal may help deter these individuals. However, we doubt that such sanctions alone will prevent many of this group of high-risk refusers from future refusals, and suspect that a large percentage will require treatment for other dysfunctional behaviors (including alcoholism) that are no doubt related to DWI and implied consent violations. [1]

This study thus found that many other factors (other than criminalization) had a greater effect on reducing the number of refusals.

In criminalizing a refusal to search in the implied consent realm, the state has enacted a statute which violates the Fourth Amendment by allowing police to disregard the warrant requirement, as emphasized by *McNeely*, and permitting police

[1] *See* Ralph K. Jones et al., U.S. Dep't of Transp., Nat'l Highway Traffic Safety Admin., DOT HS 807 765, *Implied Consent Refusal Impact* (1991).

to threaten jail and criminal penalties for noncompliance with an unlawful search. Even if such a statute leads to acquiescence to such a search, such an acquiescence to police authority is not true constitutional consent. See *Bumper v. North Carolina*, 391 U.S. 543 (1968). Since any law criminalizing a refusal to submit to a warrantless search encourages police to run afoul of constitutional protections and eviscerates constitutional rights of citizens by coercing consent, these laws must be found unconstitutional.

CONCLUSION

For the aforementioned reasons, this Court should reverse the decision of the Fifth District Court of Appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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