IN THE SUPREME COURT OF THE STATE OF DELAWARE

FREDDIE FLONNORY, Defendant Below - Appellant, v. STATE OF DELAWARE, Plaintiff Below - Appellee.	))))))))))	No. 156, 2014 Court Below --- Superior Court of the State of Delaware in and for New Castle County ID No. 1209005937

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF DELAWARE IN AND FOR NEW CASTLE COUNTY

APPELLANT'S OPENING SUPPLEMENTAL MEMORANDUM

Appellant Freddie Flonnory, through the undersigned counsel, respectfully submits this supplemental memorandum as directed by this Court.

PROCEDURAL HISTORY

A jury convicted Mr. Flonnory of driving with a prohibited alcohol content. He appealed his conviction to this Court and after briefing, the Court heard oral argument *en banc* on November 19, 2014.

While discussing the scope of the holding in *Missouri v. McNeely*[1] as it applies to Delaware's implied consent statute during oral argument, the undersigned referenced recent state Supreme Court decisions from other

[1] 133 S.Ct. 1552 (2013).

jurisdictions. The undersigned mentioned this additional authority in an effort to support the proposition that although *McNeely* focused on exigent circumstances, the United States Supreme Court repeatedly reiterated the analytical framework for exceptions to the warrant requirement; *i.e.*, warrantless searches are *per se* unreasonable absent an exception, and to find an exception the Court must assess the totality of the circumstances on a case by case basis rather than relying on a categorical rule.

As a result, the Court requested a list of the cases to be provided to the Court and the State without any analysis. The State mentioned the other state cases during its argument as well. The undersigned submitted a list of seven cases on November 21, 2014. That same day, the Court ordered the parties to submit supplemental memoranda based on that submission.

APPLICABLE LEGAL PRECEPTS

Following the United States Supreme Court's decision in *Missouri v. McNeely,* state Supreme Courts have categorically rejected implied consent as a *per se* exception to the warrant requirement in favor of a case by case, actual consent analysis.

The *McNeely* court did not explicitly address the impact of implied consent on warrantless blood draws; indeed, its holding applied only to exigency.[2]

[2] *State v. Wulff*, 2014 WL 5462564, at *5 (Idaho 2014).

However, the repeated references by the Court in *McNeely* to the proper analysis when assessing a warrantless search – assessing reasonableness based on the totality of the circumstances – cannot be overlooked.[3]

Texas

The Texas Court of Appeals' decision in *Aviles v. State*[4] offers a glimpse of where the United States Supreme Court's decision would fall if the issue of implied consent acting as a categorical exception to the warrant requirement were presented.

In *Aviles*, the defendant refused to voluntarily provide a breath or blood sample following a DUI arrest. Relying on the Texas Transportation Code, the arresting officer made arrangements for the defendant to provide a blood sample notwithstanding his initial refusal. The defendant moved to suppress the evidence and trial court denied his motion. The Texas Court of Appeals affirmed the trial court's judgment, holding that the mandatory, warrantless blood draw was permissible under the Texas Transportation Code.[5]

[3] *Id*.
[4] 443 S.W.3d 291 Tex. Crim. App. 2014).
[5] *Id*. at 292.

The defendant subsequently appealed to the United States Supreme Court. The Supreme Court vacated the *Aviles* court judgment and remanded the case back to the court for "reconsideration in light of the Court's decision in *McNeely*."[6]

On remand, the defendant argued, relying on *McNeely*, that *per se* exceptions to the warrant requirement are impermissible.[7] The State argued that the holding in *McNeely* was narrow and only established that the natural dissipation of alcohol does not create a *per se* exigency.[8]

Analyzing its mandatory blood draw and implied consent statutes, the *Aviles* court held that neither constitute exceptions to the Fourth Amendment's warrant requirement.[9] The court reasoned that both statutes "clearly create categorical or per se [*sic*] rules the *McNeely* court held were not permissible exceptions to the Fourth Amendment's warrant requirement."[10] The court's decision in *Aviles* was based, in large part, on the fact that the statutes did allow for a totality of the circumstances analysis.[11]

Idaho

In *State v. Wulff*, the defendant was informed that he would be taken to a hospital for a blood draw as part of a DUI investigation. The defendant initially

[6] *Id*. at 292-93; *Aviles v. Texas*, 134 S.Ct. 902 (2014).
[7] *Aviles*, 443 S.W.3d at 293.
[8] *Id*.
[9] *Id*. (citing *Weems v. State*, 434 S.W.3d 655, 665-66 (Tex. App. – San Antonio 2014)).
[10] *Aviles*, 443 S.W.3d at 294 (other citations omitted).
[11] *Id*.

refused but then relented. The arresting officer did not obtain a warrant prior to the blood draw.[12] The issue on appeal was whether *McNeely* is a narrow opinion, limited to the exigency exception, or if its broader and should be applied to proscribe all *per se* exceptions to the warrant requirement.[13]

The State argued that *McNeely* was limited to exigent circumstances and that Idaho's implied consent statute was a valid exception to the Fourth Amendment's warrant requirement. The State based its reasoning on drivers providing irrevocable implied consent to a blood draw by taking advantage of driving privileges.[14]

In Idaho, a driver impliedly consents to "evidentiary testing" when he or she drives in Idaho and a police officer has "reasonable grounds to believe that person has been driving or in actual physical control of a motor vehicle in violation of [Idaho's DUI statute]."[15]

The *Wulff* court held that in order to assess the reasonableness of a warrantless blood draw, it must be analyzed on a case-by-case basis looking at the totality of the circumstances.[16] In reaching its decision, the court acknowledged that narrowly applying *McNeely* to exigency only circumstances was "plausible"

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[12] 2014 WL 5462564, at *1.
[13] *Id*. at *5.
[14] *Id*. at *1.
[15] *Id*. at *4.
[16] *Id*. at *5 (citing *McNeely*, 133 S.Ct. at 1563).

given the language related to implied consent in the opinion.[17] The court, however, rejected this notion and noted:

> *McNeely's* overall discussion suggests a broader reading: the implied consent is no longer acceptable when it operates as a [*per se*] exception to the warrant requirement because the Court repeatedly expressed disapproval for categorical rules.[18]

As such, the court in *Wulff* held that because the implied consent statute does not allow for a voluntariness analysis, it cannot "fit under" the consent exception to the warrant requirement.[19] This holding falls in line with *McNeely's* warning to avoid "overgeneralization" in favor of case-by-case, totality of the circumstances assessment.[20]

South Dakota

In *State v. Fierro*,[21] the Supreme Court of South Dakota held that "[i]mplied consent alone [ ] does not provide an exception to the search warrant requirement in South Dakota and any argument to the contrary cannot be reconciled with the United States Supreme Court and this Court's Fourth Amendment warrant

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[17] *Id*.
[18] *Id*.
[19] *Id*. at *7.
[20] *Id*. at *5 (citing *McNeely*, 133 S.Ct. at 1561). This same premise can be drawn from the holdings in *State v. Fetch*, 855 N.W.2d 389 (N.D. 2014) and *State v. Smith*, 849 N.W.2d 599 (N.D. 2014) wherein factual determinations of consent made by the trial court, as opposed to reliance on statutory implied consent, were affirmed on appeal. The Supreme Court of North Dakota noted in *Smith* that the existence of consent is a question of fact that must be analyzed under the totality of the circumstances. *Smith*, 849 N.W.2d at 602.
[21] 853 N.W.2d 235 (S.D. 2014).

requirement jurisprudence."[22] In this case, the officer advised the driver that she was required by law to give a blood sample. The driver verbally refused and pulled back from the first attempt to obtain her blood; however, a sample of her blood was eventually secured.[23]

The State of South Dakota's argument rested on the assertion that the South Dakota Legislature "may constitutionally condition the privilege to drive within the State on a driver providing irrevocable consent to the withdrawal of blood and other bodily substances following a lawful DUI arrest."[24]

Similar to the courts in Texas, Idaho, and North Dakota, the Supreme Court of South Dakota interpreted Fourth Amendment jurisprudence to require a totality of the circumstances analysis to find valid consent.[25] The court in *Fierro* went one step further and noted that a legislature cannot simply enact a statute to preempt a citizen's constitutional right to be free from unreasonable searches and seizures.[26] Reining in the unchecked power of a state's legislative body is nothing new, as the Supreme Court has warned:

> [A]s a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose.

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[22] *Id*. at 243.
[23] *Id*. at 237.
[24] *Id*. at 239. Delaware's implied consent statute also makes consent irrevocable unless the driver is notified of the penalties associated with refusal.
[25] *Id*. at 241. The *Fierro* court also noted that whether the driver knew of his or her right to refuse to consent is relevant in a voluntariness determination.
[26] *Id*. at 243.

> But the power of the state in that respect is not unlimited, and one of the limitations is that it may not impose conditions which require relinquishment of constitutional rights. If the State may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence.[27]

Nevada

The Supreme Court of Nevada recently held in *Byars v. State*[28] that Nevada's implied consent law violated the Fourth Amendment because the statutory scheme made consent irrevocable, and a "necessary element" of consent is the ability to revoke or limit consent.[29]

ARGUMENT

Interpreting Delaware's Implied Consent Statute to Act as a Per Se Exception to the Warrant Requirement Violates the Fourth Amendment.

The *McNeely* court decided a very narrow issue. But in reaching its decision, the Court reiterated and discussed years of Fourth Amendment jurisprudence. *McNeely* left courts around the country with a clear and concise framework for analyzing exceptions to the warrant requirement.

As it stands, there is no other way to satisfy the Fourth Amendment for the purposes of analyzing an exception to the warrant requirement than by assessing

[27] *Id*. at 241, n. 4 (citing *Frost v. R.R. Comm'n of State of Cal.*, 271 U.S. 583, 593-94 (1926)).
[28] 536 P.3d 939 (Nev. 2014).
[29] *Id*. at 945 (citing *Florida v. Jimeno*, 500 U.S. 248, 252 (1991)). Under Nevada's implied consent statute, an officer can use reasonable force to take a driver's blood if the officer has a reasonable belief that the driver was under the influence of alcohol or a controlled substance. 536 P.3d at 945.

the totality of the circumstances. The United States Supreme Court has yet to approve categorical exceptions. The Supreme Court has routinely looked to the totality of the circumstances to ascertain whether the State proved an exception to the warrant requirement. And when faced with a mandatory blood draw in *Aviles*, the United States Supreme Court remanded the case back to the Texas Court of Appeals with instructions to reassess its holding in light of *McNeely*. This, more than anything, confirms that even if the *McNeely* holding is narrow, it is not so narrow that the warrant exception analysis only applies to exigency. The remand in *Aviles* suggests that the United States Supreme Court disproves of all *per se* exceptions to obtaining a warrant.

Delaware's implied consent statute,[30] at least as it is applied in this case, does not provide for a voluntariness analysis to determine consent. By operation of the statute, much like the statutes in Idaho[31] and South Dakota, once Corporal Pietlock determined that he had probable cause to arrest Mr. Flonnory for DUI, he was permitted to conduct chemical testing.[32] As Corporal Pietlock put it, Mr. Flonnory did not have a choice or the option to refuse.[33]

[30] 21 *Del. C.* § 2740 *et seq.*
[31] The language in Idaho's implied consent statute basically tracks the language in Delaware's statute; rather that use the legal term "probable cause," the phrase "reasonable grounds" is utilized.
[32] 21 *Del. C.* § 2740(b).
[33] A105.

By relying solely on the implied consent statute to reach its decision, the trial court skipped the constitutionally mandated case-by-case, totality of the circumstances analysis required by the Fourth Amendment to find an exception to the warrant requirement. As written, standing by itself without a finding of actual consent or some other exception, Delaware's implied consent statute does not comport with the Fourth Amendment to the United States Constitution, and therefore the results of Mr. Flonnory's blood test should have been suppressed.

CONCLUSION

For the foregoing reasons, Freddie Flonnory respectfully requests that this Court reverse the trial court's decision to deny Mr. Flonnory's motion to suppress and remand for a new trial.

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