

>> ALL RISE.
HEAR YE, HEAR YEAH, HEAR YE,
SUPREME COURT OF FLORIDA'S NOW
IN SESSION.
ALL WHO HAVE CAUSE TO PLEA, DRAW
NEAR.
GIVE ATTENTION, YOU SHALL BE
HEARD.
GOD SAVE THESE UNITED STATES,
THE GREAT STATE OF FLORIDA AND
THIS HONORABLE COURT.
>> LADIES AND GENTLEMEN, THE
SUPREME COURT OF FLORIDA.
PLEASE BE SEATED.
>> GOOD MORNING AND WELCOME TO
THE FLORIDA SUPREME COURT.
BEFORE WE TURN TO THE CASE ON
THE DOCKET TODAY, I WANT TO
WELCOME TO TODAY'S SESSION SOME
SPECIAL GUESTS WE HAVE.
WE ARE HONORED TO HAVE FLORIDA
EDUCATORS WITH US TODAY WHO ARE
AT THE COURT TO LEARN ABOUT THE
JUDICIAL BRANCH AND THE
APPELLATE PROCESS.
THEY ARE HERE AS PART OF OUR
ANNUAL FLORIDA SUPREME COURT
TEACHER INSTITUTE.
THIS IS A PROGRAM IN WHICH WE
SELECT TEACHERS FROM MIDDLE AND
HIGH SCHOOLS THROUGHOUT FLORIDA
TO JOIN OUR JUSTICES HERE AT THE
COURT IN A WEEKLONG PROFESSIONAL
DEVELOPMENT OPPORTUNITY.
TODAY WE HAVE ABOUT 25 MIDDLE
AND HIGH SCHOOL CIVICS,
GOVERNMENT AND LAW TEACHERS AND
THEIR MENTORS.
OUR JUSTICES SERVE AS FACULTY
THROUGHOUT THE WEEK, AND I WANT
TO SAY FOR MYSELF AND FOR ALL MY
COLLEAGUES, WE ARE VERY
DELIGHTED THAT YOU ARE HERE FOR
THIS SESSION OF COURT AND THAT
YOU ARE HERE THIS WEEK FOR THE
FLORIDA SUPREME COURT TEACHER
INSTITUTE.
WE THANK YOU FOR YOUR SERVICE TO
OUR STATE AND TO THE CHILDREN OF
OUR STATE.

NOW WE TURN TO THE BUSINESS AT HAND, McGRAW V. THE STATE OF FLORIDA.

>> YOUR HONORS, BENJAMIN EISENBERG ON BEHALF OF THE PETITIONER, BYRON McGRAW. I RESERVE FOUR MINUTES OF MY TIME FOR REBUTTAL.

WE'RE HERE TODAY ON THE CERTIFIED QUESTION RELATED TO THE CONSTITUTIONALITY OF FLORIDA'S IMPLIED CONSENT STATUTE WHICH PERMITS OFFICERS TO PERFORM WARRANTLESS BLOOD DRAWS.

BEFORE I GET INTO THE MERITS OF MY ARGUMENT, I WILL NOTE THE STATE FILED A SUPPLEMENTAL AUTHORITY THAT, AS OF LAST MONTH, THE UNITED STATES SUPREME COURT ACCEPTED A CASE OF THE SAME ISSUE.

IT HAS BEEN SET FOR THE OCTOBER SESSION.

I AM REQUESTING THIS COURT RULE ON THIS ISSUE, BUT OTHERWISE IF IT DOES NOT, AT LEAST HOLD IT UNTIL THE UNITED STATES SUPREME COURT HAS RULED.

NOW, ON THE MERITS, THE UNITED STATES SUPREME COURT HAS TWICE ADDRESSED THE CONSTITUTIONALITY OF WARRANTLESS BLOOD DRAWS.

IN BOTH INSTANCES--

>> COUNSEL, COULD I ASK YOU FOR A WHY TO THAT QUESTION?

GIVEN THE GENERAL PRINCIPLES OF JUDICIAL CONSTRAINT AND THE FACT THAT WE HAVE A CONFORMITY CLAUSE IN THE CONSTITUTION WITH RESPECT TO FOURTH AMENDMENT ISSUES, WHY WOULDN'T WE RECOGNIZING THAT WHATEVER THE SUPREME COURT OF THE UNITED STATES RULES WILL BE THE LAW, OF COURSE, THROUGHOUT THE COUNTRY, BUT IN FLORIDA? WHY WOULD WE KEEP THIS?

>> OH, OF COURSE, JUSTICE LAWSON.

FOR RIGHT NOW THERE ARE TWO

INTERESTS AT PLAY WITH THAT.
ONE IS THAT THIS COURT WANTS TO
PROVIDE ITS VOICE TO THE UNITED
STATES SUPREME COURT.

THEY ONLY RECENTLY ACCEPTED
REVIEW OF THE CASE.

THAT IS ONE ISSUE.

BUT CURRENTLY, AS FOR
MR. MCGRAW, HE IS IN THE
PIPELINE.

SO IF HE IS ENTITLED TO RELIEF,
THEN HE SHOULD OBTAIN IT.

AND FURTHERMORE, AS SIMILAR TO
THIS CASE THIS COURT'S DECISION
IN CARPENTER.

RIGHT NOW WE ARE SITTING HERE,
THE FOURTH DISTRICT COURT OF
APPEALS HAS AUTHORIZED THIS TYPE
OF SEARCH.

HOWEVER, IT'S CERTIFIED A
QUESTION OF GREAT PUBLIC
IMPORTANCE.

PEOPLE WITHIN THE INTERIM
BETWEEN THIS COURT'S DISCHARGE
OF JURISDICTION AND THE UNITED
STATES SUPREME COURT RULING MAY
NOT BE ABLE TO TAKE ADVANTAGE OF
THE EXCLUSIONARY RULE BECAUSE
THE CASE IS NO LONGER PENDING.
SO THAT'S WHY I'M ASKING YOUR
HONORS TO EITHER RULE ON THE
ISSUE OR TO HOLD IT UNTIL THE
UNITED STATES SUPREME COURT HAS
RULED.

>> WOULD THAT MAKE THE GOOD
FAITH EXCEPTION ISSUE TO THE
WARRANT THE MOST IMPORTANT ISSUE
FOR YOU TODAY?

BECAUSE IF WE AGREED WITH THE
FOURTH DISTRICT IN THEIR RULING
ON THE GOOD FAITH EXCEPTION,
THEN IT WOULD NOT MATTER HOW
THIS CAME OUT AT THE U.S.
SUPREME COURT, CORRECT?

>> WELL, THAT IS IN SOME
CAPACITY EXCEPTIONAL, THAT THE
GOOD FAITH EXCEPTION AS IT
APPLIES SPECIFICALLY TO MY
CLIENT IS A VERY IMPORTANT
ISSUE.

BUT AT THE SAME TIME, THERE ARE OTHER PEOPLE THAT A MAY BE IN THE PIPELINE THAT THIS ISSUE HAS COME UP FOR WHICH IN YOU WERE TO DENY RELIEF RIGHT NOW--

>> YES.

BUT THE QUESTION, I THINK, WAS ALL THAT BEING TRUE, WE ACCEPT WHAT YOU SAY, IN THE REAL ISSUE THAT WE'VE GOT TO DECIDE IN THIS CASE THE GOOD FAITH ISSUE.

BECAUSE THE SUPREME COURT'S GOING TO DECIDE THE OTHER ISSUE.

>> THAT IS TRUE, THAT IS TRUE. BUT THAT IS ALSO ASSUMING THAT THIS COURT DOES NOT RULE ON IT BEFORE THE UNITED STATES SUPREME COURT HAS DONE SO.

AND IF THAT IS THE DECISION THIS COURT MAKES, IF IT DECIDES TO HOLD IT, YES.

AS APPLIED TO THIS SPECIFIC CASE, THE GOOD FAITH EXCEPTION WOULD BE THE MOST IMPORTANT ISSUE.

BECAUSE, AS JUSTICE CANADY JUST STATED, THE UNITED STATES SUPREME COURT WILL RULE ON THE ISSUE.

IF YOU WANT TO JUMP FOR THE TIME BEING TO THE GOOD FAITH EXCEPTION, I WILL NOTE THE STATE'S ANSWER BRIEF HAS REFERRED SEVERAL TIMES TO THE GOOD FAITH EXCEPTIONS OF THE WARRANT REQUIREMENT.

BUT, ACTUALLY, IT'S TO THE EXCLUSIONARY RULE.

WE DO NOT GET TO THE GOOD FAITH EXCEPTION UNLESS THERE'S A FOURTH AMENDMENT VIOLATION.

THAT IS THE POINT THAT WAS MADE IN UNITED STATES V. LEON.

IT WAS ALSO REITERATED IN FLORIDA V. KROLL AND MOST RECENTLY BY CHIEF JUSTICE ROBERTS.

>> WE'RE NOT REQUIRED TO REACH THE FOURTH AMENDMENT ISSUE IF WE DECIDE ON GOOD FAITH, ARE WE?

>> NO.

THE PROBLEM WITH THAT TYPE OF THEORY IS THEN IT BECOMES SELF-DEFEATING.

IF YOU SIMPLY SAY THIS IS GOOD FAITH, THEN THERE COMES NO RULING FROM THIS COURT OR OTHERS--

>> HASN'T THE U.S. SUPREME COURT ADDRESSED THAT EXACT ARGUMENT IN THE SOVEREIGN IMMUNITY CONTEXT WHERE THERE'S A TWO-PART ANALYSIS?

IS THERE A CONSTITUTIONAL VIOLATION, AND SECOND, WAS IT CLEARLY ESTABLISHED AT THE TIME THAT IT HAPPENED VERY SIMILAR TO THE GOOD FAITH CONCEPT.

AND THE SUPREME COURT HAS SAID THAT THE LOWER COURTS ARE FREE AND CLEAR TO DECIDE IT HOWEVER THEY WANT TO, WHICHEVER ORDER. EVEN WHEN FACED WITH THE ARGUMENT THERE WILL NOT BE, QUOTE-UNQUOTE, CONSTITUTIONAL DEVELOPMENT LIKE YOU'RE ARGUING HERE.

>> WELL--

>> LET ME ASK IT THIS WAY.

IS THERE ANY CASE LAW, IS THERE ANY STATUTE COMPELLING US TO RULE ON THE CONSTITUTIONAL VIOLATION FIRST BEFORE WE DECIDE ON GOOD FAITH?

>> YES.

AS I WROTE-- OR AS I QUOTED FROM UNITED STATES V. LEON, THE UNITED STATES SUPREME COURT HAS REJECTED THE ARGUMENT THAT GOOD FAITH--

[INAUDIBLE]

DENYING THE GUIDANCE OF THE COURT OR FOURTH AMENDMENT LAW IN ITS PRESENT STATE.

AND THAT'S BECAUSE, AND I'M QUOTING FROM THE UNITED STATES SUPREME COURT, THERE'S NO NEED FOR COURTS TO ADOPT INFLEXIBLE PRACTICE ALWAYS DECIDING WHETHER THE OFFICER'S CONDUCT MANIFESTED

OBJECTIVE GOOD FAITH BEFORE
TURNING TO THE QUESTION OF
WHETHER THE FOURTH AMENDMENT HAS
BEEN VIOLATED.

>> THERE'S NO CONSTITUTIONAL OR
COMPELLING REQUIREMENT TO DO
THAT, IS THERE?

>> WELL, THERE'S NO COMPELLING
REQUIREMENT.

A CASE CAN BE DECIDED ON GOOD
FAITH, BUT THAT-- THE PROBLEM
WITH DOING SO IS THAT GUIDANCE
SHOULD BE PROVIDED TO THE
PARTIES.

ESPECIALLY IN A CASE LIKE THIS
WHERE WE'RE CURRENTLY PENDING.

>> BUT HERE YOU'VE ALREADY
RECOGNIZED THE GUIDANCE IS GOING
TO COME FROM THE UNITED STATES
SUPREME COURT.

>> IT WILL COME FROM THE UNITED
STATES SUPREME COURT.

HOWEVER, PEOPLE WITHIN THE
INTERIM MIGHT BE ABLE TO TAKE
ADVANTAGE OF THE EXCLUSIONARY
RULE MAY NOT APPLY TO THEM
BECAUSE IF THIS COURT DISCHARGES
JURISDICTION, FOR EXAMPLE, THEN
PEOPLE WHO ARE CURRENTLY IN THE
PIPELINE--

>> LET'S ASSUME WE'RE NOT GOING
TO DISCHARGE JURISDICTION.

>> OKAY.

>> LET'S ASSUME THAT WE'RE GOING
TO HOLD IT IN ADVANCE.

THE QUESTION IS SHOULD WE
ADDRESS, AND CAN WE ADDRESS THE
GOOD FAITH EXCEPTION SOLELY.

>> WELL, FIRST, I WOULD SAY NO
BECAUSE THE FIRST THING THAT YOU
HAVE TO DO IS YOU HAVE TO DECIDE
THE FOURTH AMENDMENT ISSUE
WHICH, AS YOUR HONORS HAVE
RECOGNIZED, IS CURRENTLY BEFORE
THE UNITED STATES SUPREME COURT.
SO, FOR EXAMPLE, IN THE DECISION
BELOW THE MAJORITY NEVER HAD TO
GET TO THE GOOD FAITH EXCEPTION
BECAUSE THEY FOUND THERE WASN'T
A FOURTH AMENDMENT VIOLATION.

WE ONLY GET TO THE EXCEPTION IF THERE'S A FOURTH AMENDMENT VIOLATION.

THAT WILL DEPEND ON WHAT YOUR HONORS RULE ON THE MERITS OF THIS CASE OR DEPENDING ON WHAT THE UNITED STATES SUPREME COURT DOES EVENTUALLY.

BUT GETTING TO THE MERITS OF THAT ARGUMENT, THE WHOLE POINT OF THE GOOD FAITH EXCEPTION IS THE, THE WHOLE PORTION IS TO DETER FUTURE FOURTH AMENDMENT VIOLATIONS.

AND THIS COURT'S RECENT DECISION FROM 2017, CARPENTER V. STATE, PROVIDES A GOOD ANALYSIS FOR DETERMINING THE CASE, THIS CASE AT ISSUE.

IN CARPENTER YOU HAD A DECISION TO AUTHORIZE A TYPE OF WARRANTLESS SEARCH.

BEFORE THIS COURT DECIDED SMALLWOOD, THE OFFICERS IN THAT CASE THAT WERE WITHIN THAT JURISDICTION PERFORMED A WARRANTLESS SEARCH PURSUANT TO SMALLWOOD, WON AND THEN LATER THAT DECISION WAS INVALIDATED.

>> BUT THAT'S A CASE LAW EXCEPTION OR A CASE LAW GRANT OF AUTHORITY CREATING AN EXCEPTION TO THE WARRANT REQUIREMENT. HERE THERE'S A STATUTE DIRECTLY ON POINT.

WOULD YOU AGREE IT'S ON POINT, YOU JUST BELIEVE THAT IT'S UNCONSTITUTIONAL AS APPLIED TO THE CIRCUMSTANCES OF THIS CASE. IF A POLICE OFFICER IS ACTING TO A STATUTE WHICH HAS NOT BEEN HELD TO BE UNCONSTITUTIONAL-- WHICH NO ONE IS SUGGESTING, WHICH NO CASE HAS SUGGESTED IS UNCONSTITUTIONAL RIGHT NOW-- HOW COULD THAT POSSIBLY BE IN ABSENCE OF GOOD FAITH?

>> I BELIEVE THAT THE FIFTH DISTRICT'S DECISIONS IN WILLIAMS AND LYLES, BOTH OF WHICH WERE IN

EXISTENCE--

>> WEREN'T THOSE SEPARATE PROVISIONS OF THE STATUTE APPLIED TO 1C THAT APPLIES HERE?

>> THAT IS CORRECT.

>> SO IF THAT'S THE CASE, HOW CAN IT POSSIBLY BE THAT FOLLOWING 1C IS ANYTHING OTHER THAN A GOOD-- ANYTHING OTHER THAN ACTING IN GOOD FAITH ON A STATUTE THAT HAS NOT BEEN HELD BY ANY COURT IN THE ENTIRE STATE TO BE UNCONSTITUTIONAL?

>> BECAUSE, BECAUSE THE STATUTE AT PLAY IN WILLIAMS WAS 3161932 WHICH IS THE SAME PROVISION AT ISSUE HERE?

I KNOW IT'S A DIFFERENT SUBSECTION, BUT THE HOLDING OF WILLIAMS WAS NOT SPECIFIC TO 1A WHICH WAS AT ISSUE IN WILLIAMS. THEY SPECIFICALLY SAID, AND I'M QUOTING, STATUTORY IMPLIED CONSENT IS NOT EQUIVALENT TO FOURTH AMENDMENT CONSENT. THEY ALSO SAID WITHIN WILLIAMS THAT THE DEFENDANT DID NOT NECESSARILY CONSENT TO A BREATH TEST WHEN HE GOT BEHIND THE WHEEL OF HIS CAR.

SO WE HAVE A HOLDING THAT SAYS STATUTORY IMPLIED CONSENT AS A WHOLE WITHIN FLORIDA IS PART OF A TRILOGY, PROVISIONS TO 316.19323, 32 THROUGH 34. THEY'RE ALL PART OF A TRILOGY. AND THEY HAVE HELD THAT IT IS NOT THE FUNCTIONAL EQUIVALENT. THAT WAS THE ONLY CASE ON POINT AT THE TIME--

>> LET ME ASK YOU THIS.

BUT IF WE DISAGREE AND BELIEVE THAT NO COURT HAD DECLARED THIS PORTION OF THE STATUTE THAT'S AT ISSUE IN THIS CASE UNCONSTITUTIONAL, UNDER ILLINOIS V. KROLL YOU WOULD AGREE THAT THE GOOD FAITH EXCEPTION WOULD APPLY BECAUSE THE OFFICER RELIED ON THE PRESUMPTIVELY

CONSTITUTIONAL STATUTE, CORRECT?

>> I DISAGREE, JUSTICE LAWSON,
ONLY BECAUSE THERE ARE
EXCEPTIONS WITHIN ILLINOIS V.
KROLL.

THE POSTURE WAS DIFFERENT
BECAUSE THERE WAS A STATUTE THAT
HAD NEVER BEEN CHALLENGED IN ANY
CAPACITY.

I UNDERSTAND THIS SPECIFIC
SUBDIVISION WAS NOT CHALLENGED.
HOWEVER, IN THERE THERE'S NO
REASON AT ALL FOR THE OFFICER TO
CHALLENGE THE STATUTE OTHER THAN
IT WENT, IT RELIED ON THE
STATUTE.

IT WAS CHALLENGED AND OVERTURNED
ON APPEAL.

BUT THE OFFICER, HAVING NO
GUIDANCE IN THAT REGARD, WOULD
HAVE NO IDEA.

AND OFFICER DeSANTIS' POSITION
IN THIS CASE AT THE TIME OF THE
SEARCH HAS SAID THAT CASE LAW
SAID STATUTORY IMPLIED CONSENT
IS NOT EQUIVALENT.

THE ACCIDENT OCCURS, AND THE
TRIAL JUDGE IN THIS CASE DID A
GREAT JOB OF OUTLINING THE
FACTUAL POSTURE AND HOW EASY IT
WOULD HAVE BEEN IN PALM BEACH
COUNTY TO OBTAIN A WARRANT.

THIS IS AN ACCIDENT THAT
OCCURRED AT 8 A.M.

>> CAN I ASK YOU ON THE FOURTH
AMENDMENT ISSUE.

>> SURE.

>> SO WOULD YOU AGREE WITH ME AT
LEAST UNDER CURRENT CASE LAW
THAT IF I TAKE LUGGAGE INTO AN
AIRPORT AND HAND IT OVER TO THE
SECURITY GUARD TO PUT IT THROUGH
AN X-RAY MACHINE, THAT I'VE
CONSENTED TO THAT LUGGAGE BEING
CONSENTED-- I CONSENT TO THAT
LUGGAGE BEING SEARCHED.

>> THAT IS THE CASE LAW
ESTABLISHED IN SHAPIRO.

>> YOU JUST WOULD AGREE WITH
THAT PRINCIPLE OF LAW.

>> WITH QUALIFICATION.

>> OKAY.

DO YOU AGREE, DO YOU AGREE THAT IF I'M A PRISON GUARD AND I WALK INTO A PRISON, THAT I HAVE CONSENTED TO A PATDOWN SEARCH OF MYSELF AND ANYTHING THAT'S IN MY POCKETS OR SHOES OR ANYTHING LIKE THAT?

>> AGAIN, I WOULD SAY WITH QUALIFICATION.

>> OKAY.

>> BECAUSE, YOU KNOW, THE STATE HAS CITED THESE CASES, SHAPIRO, DURAN, CLARK AND MORGAN. AND NONE OF THEM SAY BY VIRTUE OF WALKING INTO AN AIRPORT YOU'RE SUBJECTING YOURSELF TO DEEPLY PERSONAL SEARCHES--

>> AGREED.

BUT IN THE AIRPORT CONTEXT IN LARGE PART, IT'S BECAUSE YOU KNEW THAT YOU WERE SUBJECT TO A SEARCH BY GOING IN THERE.

IN OTHER WORDS, THE EVIDENCE SHOWED THAT BY GOING INTO THE AIRPORT, YOU KNEW THAT SOMEONE WOULD BE SUBJECT TO SEARCH.

TWENTY TIMES BEFORE THIS PARTICULAR INDIVIDUAL HAD BEEN SUBJECT TO A SEARCH, AND THEREFORE, HE KNEW THAT WAS GOING TO BE THE CASE, CORRECT?

>> YES, YOUR HONOR.

THAT'S WHERE I WAS SAYING WITH DISTINCTION, IS THERE WAS A RECORD IN THAT CASE TO SHOW THAT THE IMPLIED CONSENT THAT WAS DONE THROUGH CONDUCT WAS SUPPORTED BY THE TOTALITY--

>> IF THE EVIDENCE HERE SUGGESTED, LET'S ASSUME THAT THE RECORD EVIDENCE HERE WAS THAT THE DEFENDANT REMEMBERED SIGNING WHEN HE GOT HIS DRIVER'S LICENSE THE STATUTE THAT GAVE INFORMED CONSENT, HAD ACTUALLY LOOKED AT HIS DRIVER'S LICENSE AND READ THE BOTTOM, I AM GIVING INFORMED CONSENT.

KNEW OF THE INFORMED CONSENT STATUTE, I HAVE EVEN READ IT RECENTLY, AND I STILL DROVE, I STILL DRANK, I STILL GOT IN AN ACCIDENT THAT RESULTED IN ME BEING UNCONSCIOUS.

WOULD THAT RECORD BE SUFFICIENT TO GIVE, TO SHOW CONSENT BY CONDUCT?

>> I DON'T BELIEVE SO.

I BELIEVE THAT--

>> EVEN THAT ACTION, WHICH WOULD BE EQUIVALENT TO WHAT HAPPENED IN CLARK AND IN SHAPIRO, WOULD NOT BE THE CASE?

HOW DO WE DISTINGUISH THOSE?

>> WELL, I THINK THERE'S A SUBSTANTIAL DISTINCTION.

FIRST OFF, IN THE FACT THAT THE SEARCH IN SHAPIRO WAS OF LUGGAGE.

IT WAS NOT PIERCING THE SKIN, WHICH THE UNITED STATES SUPREME COURT HAS REJECTED-- HAS REPEATEDLY STATED IS A SUBSTANTIAL INVASION OF A PERSON'S PRIVACY--

>> THAT'S TRUE THAT IT'S AN INVASION OF A PERSON, BUT THE QUESTION IS IF YOU CONSENT AND YOU UNDERSTAND THAT THAT IS SOMETHING THAT YOU'RE CONSENTING TO, HOW IS THAT A VIOLATION?

>> WELL, THE UNITED STATES SUPREME COURT IN BIRCHFIELD INDICATED THAT THERE ARE LIMITS TO WHAT A PERSON CONSENT TO. UNDER THAT REASONING, WHAT THE STATE IS ARGUING HERE IS THEY COULD CONSENT TO ANYTHING SO LONG AS IT'S DONE BY LEGISLATIVE PROCLAMATION.

>> HOW DO YOU SQUARE THAT WITH SKINNER?

WE SAID ALSO THAT THE INTRUSION OCCASIONED BY A BLOOD TEST IS NOT SIGNIFICANT SINCE SUCH TESTS ARE COMMONPLACE IN THESE DAYS OF PERIODICAL EXAMINATIONS AND EXPERIENCE TEACHES THAT THE

QUANTITY EXTRACTED IS MINIMAL AND THAT FOR MOST PEOPLE THE PROCEDURE INVOLVES VIRTUALLY NO RISK, TRAUMA OR PAIN.

FURTHER, SOCIETY'S JUDGMENT OF BLOOD TESTS DO NOT POSE AN UNDULY EXTENSIVE IMPOSITION ON INDIVIDUALS' PRIVACY AND BODILY INTEGRITY.

HOW DO YOU SQUARE THAT WITH WHAT YOU JUST SAID ABOUT HOW IT'S SO MUCH MORE INVASIVE THAN RIFLING THROUGH SOMEONE'S PRIVATE BELONGINGS IN THE MIDDLE OF AN AIRPORT OR PATTING SOMEONE'S ENTIRE BODY DOWN PHYSICALLY WHEN THEY ENTER INTO A JAIL?

>> WELL, JUSTICE, THE MOST RECENT DECISION ON THE CASE WAS BIRCHFIELD, AND THAT WAS THE EXACT DISTINCTION THEY MADE--

>> NO.

THE DISTINCTION THEY MADE IS IT'S MORE INVASIVE THAN A BREATH TEST.

BUT REGARDING HOW SPECIFICALLY INVASIVE IT IS, THE COURT-- AND AS I UNDERSTAND IT, SKINNER IS STILL GOOD LAW-- HAS SAID IT IS NOT SIGNIFICANT.

HOW CAN YOU SAY AN INTRUSION THAT IS NOT SIGNIFICANT IS SO MUCH MORE SIGNIFICANT THAN PATTING DOWN SOMEONE'S PERSONAL BODY SPACE, TOUCHING SOMEONE'S BODY OR RIFLING THROUGH THEIR PRIVATE BELONGINGS IN THE MIDDLE OF AN AIRPORT IN FRONT OF EVERYBODY?

>> WELL, PATTING DOWN SOMEONE'S PERSONAL SPACE IS NOT ENTERING A PORTION OF THEIR--

>> TOUCHING SOMEONE'S BODY PARTS IS NOT MORE SIGNIFICANT THAN, IN A MEDICAL SETTING, PUTTING A LITTLE NEEDLE AND EXTRACTING A LITTLE BIT OF BLOOD?

>> I DISAGREE, YOUR HONOR, BECAUSE IT'S DECADES OF CHANGES IN TECHNOLOGY HAS SHOWN AND

RECOGNIZED IN BIRCHFIELD,
OBTAINING SOMEONE'S BLOOD CAN BE
USED FOR PURPOSES OTHER THAN
MERELY ADMINISTERING BLOOD
ALCOHOL TESTING.

IN FACT, IT CAN SHOW A LOT ABOUT
A PERSON'S HISTORY, A LOT ABOUT
ANCESTRY OR CAN BE USED--

>> THAT'S THE EXTENT OF THE TEST
THOUGH.

HERE THERE'S NOTHING INDICATING
THAT THE--

>> COUNSEL--

>> SORRY.

>> ISN'T THE MORE FUNDAMENTAL
DIFFERENCE WITH SKINNER THAT THE
COURT IN THAT CASE CHARACTERIZED
THE CONTEXT WHERE BECAUSE OF THE
PERVASIVE REGULATION OF THE
RAILROADS AND BECAUSE THESE
TESTS WERE BEING DONE NOT
NECESSARILY BASED ON
INDIVIDUALIZED SUSPICION AND NOT
NECESSARILY IN CONNECTION WITH
LAW ENFORCEMENT THAT THE COURT
BASICALLY SAID WE'RE NOT EVEN
LOOKING AT THIS IN TERMS OF A
WARRANT?

>> JUSTICE, I AGREE COMPLETELY.
THE SKINNER DECISION WAS BASED
ON THE SPECIAL NEEDS DOCTRINE,
AND THE SPECIAL NEEDS DOCTRINE
ONLY COMES FOR GOVERNMENT
REGULATION WHEN THERE'S A
SPECIAL NEED FOR PROGRAMS, AND
ITS PRIMARY PURPOSE IS NOT
GENERAL INTEREST IN CRIME
CONTROL.

>> ISN'T THAT, ARGUABLY, THE
SAME THING THAT'S GOING ON IN
AIRPORTS?

>> CAN YOU REPEAT THE QUESTION?

>> ISN'T THAT, ARGUABLY THE SAME
THING THAT'S GOING ON IN
AIRPORTS WHERE IT'S, AGAIN, NOT
NECESSARILY FOR CRIME DETECTION,
BUT MORE IN TERMS OF, YOU KNOW,
NOT TARGETING PEOPLE
INDIVIDUALLY AND NOT-- SORT OF
A POST-HOC LAW ENFORCEMENT

PURPOSE.

>> WELL, I PUT A FOOTNOTE IN MY
REPLY BRIEF.

NO CASE HAS SAID PURSUANT TO DUI
HAS BEEN UPHeld AS A SPECIAL
NEED.

BUT I ALSO PUT A FOOTNOTE THAT
ALTHOUGH COURTS DECADES AGO
RELIED ON CONSENT IN THE AIRPORT
CONTEXT, MOST HAVE RELIED ON THE
SPECIAL NEEDS DOCTRINE.

>> HOW IS A POST-TEST, A
POST-RAILROAD ACCIDENT TEST ANY
MORE FOR INVESTIGATIVE OR
REGULATORY PURPOSES THAN A
POST-ACCIDENT BLOOD TEST FOR
SOMEONE WHOSE DRIVER'S LICENSE,
WHEN THE EVIDENCE IS TO BE USED
AT AN ADMINISTRATIVE HEARING TO
REVOKE SOMEONE'S DRIVER'S
LICENSE?

ISN'T IT EXACTLY THE SAME THING
TO INVESTIGATE CAUSE AND HAVE
ADMINISTRATIVE HEARINGS WHICH
WAS EXACTLY THE ISSUE IN
SKINNER?

>> WELL, THERE'S A DIFFERENCE
BETWEEN ADMINISTRATIVE AND
CRIMINAL PROCEEDINGS, BUT THEY
DISCUSS IN SKINNER WHEN THERE IS
A RAILROAD ACCIDENT, IT IS A
CATASTROPHIC IF EVENT.

IT'S MORE THAN JUST AN
INVESTIGATION FOR POLICE
PURPOSES.

THE RAILROADS THEMSELVES NEED TO
KNOW WHO IS-- YOU'RE REQUIRING
RAILROAD EMPLOYEES TO BASICALLY
DETERMINE PROBABLE CAUSE AND WHO
WAS POTENTIALLY DRINKING, MAKING
THOSE LINES.

INSTEAD, THEY INSTITUTED-- THE
FEDERAL GOVERNMENT INSTITUTED
BRIGHT LINE RULES TO GO INTO
EFFECT, BECAUSE IT WAS GOING TO
BE RAILROAD EMPLOYEES THAT ARE
MAKING THE DETERMINATION OF WHO
WAS DRINKING AND DRIVING, WHO
HAD THEIR BLOOD DRAWN.

INSTEAD OF THE APPLIED RIGID

RULES BECAUSE THERE WAS A
SPECIALTY FOR INSURING THE
SAFETY OF RAILROADS.

ONCE AGAIN--

>> HOW IS A POST-ACCIDENT
TEST-- I UNDERSTAND
PRE-ACCIDENT MEANING EVERYONE
WHO WALKS INTO A RAILROAD AS AN
EMPLOYEE GETS TESTED BEFOREHAND.
I UNDERSTAND EXACTLY THAT.
THESE WERE AUTHORIZED
POST-ACCIDENT TESTS TO
INVESTIGATE.

HOW IS THAT ANY DIFFERENT AND
ANY MORE OF A HARM FOR SOMEONE
DRIVING DRUNK AND CAUSING ISSUE
OFFENSE THE ROAD TO ALL OF OUR
PEOPLE DRIVING ON THE ROADS TO
HAVE A POST-ACCIDENT TEST TO
DETERMINE WHAT THE CAUSE OF THE
ACCIDENT WAS, WHY IT HAPPENED
AND TO HAVE ADMINISTRATIVE
HEARINGS SO THAT PERSON SHOULD
STILL BE AUTHORIZED FOR THE
PRIVILEGE OF DRIVING IN THE
STATE?

>> BECAUSE IN A CRIMINAL
PROCEEDING IN THIS CASE, AND
THIS IS NOT BEING BROUGHT IN FOR
AN ADMINISTRATIVE PURPOSE.
THE PURPOSE IN SKINNER WAS
SPECIFICALLY TO HELP THE
RAILROAD COMPANIES TO ADMINISTER
AND INSURE SAFETY.
IT WAS NOT PURELY FOR
PROSECUTORIAL PURPOSES, WHICH IS
WHAT WE HAVE HERE.

>> HOW IS THAT-- YOU ASSUME
THAT IT'S HERE, BUT WHY IS
THERE-- WE HAVE A STRONG
REGULATORY FRAMEWORK FOR
REVOKING SOMEONE'S LICENSE AS A
RESULT OF THAT AS A COLLATERAL
CONSEQUENCE OF DRINKING AND
REFUSING CONSENT.

HOW CAN WE SAY THIS IS PURELY
CRIMINAL WHEN THAT IS EXACTLY
WHAT'S GOING ON HERE?

>> WELL, THERE'S A DIFFERENCE
BETWEEN ADMINISTRATIVE PENALTY,

AND THAT'S WHAT THE SUPREME COURT RECOGNIZED IN BIRCHFIELD. THERE'S A DIFFERENCE BETWEEN ADMINISTRATIVE AND CIVIL PENALTIES AND CRIMINAL PENALTIES.

AND IT'S FOR THAT REASON THAT WHEN YOU IMPLIED THE CONSENT-- LET ME JUST RETURN TO THAT POINT.

WHEN THEY DISCUSS IMPLIED CONSENT STATUTES BOTH IN McNEALY AND BIRCHFIELD, THEY'RE TALKING ABOUT IMPLIED CONSENT STATUTES THAT PROVIDE A BIT OF COERCION TO PARTIES SO THEY WILL PROVIDE ACTUAL CONSENT.

SO IN THAT REGARD, AND THIS HAS BEEN DECIDED THAT YOU CAN PLACE CERTAIN CONDITIONS IN IMPLIED CONSENT TO COERCE SOMEONE TO PROVIDE THE CONSENT-- AND THOSE CAN BE CIVIL PUNISHMENTS; LOSING THEIR LICENSE, THINGS ALONG THOSE LINES.

BUT THE UNITED STATES SUPREME COURT IN BIRCHFIELD RECOGNIZED THAT THERE MUST BE LIMITS TO WHAT YOU CONSENT TO.

IT'S FOR THAT REASON THEY CANNOT HAVE IMPLIED CONSENT THAT'S TIED TO CRIMINAL PENALTIES.

THE FOURTH AMENDMENT IS ONE THAT DATES BACK TO OUR COUNTRY'S FOUNDING.

AND I SEE THAT I'M ALMOST OUT OF TIME, SO I'LL--

>> COUNSELOR, YOU HAVE CONSUMED VIRTUALLY ALL YOUR TIME.

>> YES.

>> I WILL, NONETHELESS, AFFORD YOU TWO MINUTES FOR REBUTTAL.

>> THANK YOU, YOUR HONOR.

>> GOOD MORNING.

MAY IT PLEASE THE COURT, MY NAME IS RICHARD VALUNTAS, AND I REPRESENT THE STATE OF FLORIDA. JUSTICE LAWSON, I AGREE WITH YOU 100%.

THIS IS A SITUATION WHERE IN A COUPLE MONTHS-- I BELIEVE, THE ORAL ARGUMENT IS SET FOR APRIL 23RD-- THE UNITED STATES SUPREME COURT IS GOING TO HEAR THIS, AND IT IS GOING TO BE CONTROLLING AS FAR AS THE FOURTH AMENDMENT ISSUE.

HOWEVER, I DON'T BELIEVE THE COURT SHOULD EVEN GET TO THE FOURTH AMENDMENT ISSUE, BECAUSE AS YOUR HONORS POINTED OUT, IN SINGLETON THIS COURT HAS SAID COURTS SHALL NOT PASS UPON THE CONSTITUTIONALITY OF STATUTES IN THE CASE WHERE THE QUESTION ARISES MAY BE EFFECTIVELY DISPOSED OF ON OTHER GROUNDS.

WE HAVE A CASE HERE THAT, REGARDLESS OF WHICH WAY EITHER IF THIS COURT WANTED TO ADDRESS THE MERITS OR THE UNITED STATES SUPREME COURT, WHICHEVER WAY THEY GO, IF THEY SAY IT'S OKAY, IT'S NOT OKAY, WE STILL HAVE A SITUATION WHERE EVERY JUDGE HAS LOOKED AT THIS CASE AND SAID THE GOOD FAITH EXCEPTION APPLIES. BECAUSE AS JUSTICE LUCK POINTED OUT, WE HAVE A STATUTE THAT IS SPECIFICALLY ON POINT.

THE STATUTE'S BEEN AROUND FOR, AT LEAST ACCORDING TO MY RESEARCH, OVER 50 YEARS NOW. AND I DON'T KNOW WHAT A POLICE OFFICER IS SUPPOSED TO DO WHEN HE KNOWS OF A STATUTE THAT'S BEEN IN EXISTENCE FOR SO LONG COMES UP ON A SCENE-- I MEAN, IT WAS A PRETTY SPECTACULAR CRASH AT 7:30 IN THE MORNING ON A WEEKDAY.

HE COMES IN, ASSESSES THE SITUATION, SMELLS THE ALCOHOL FROM THE DEFENDANT, FROM HIS BREATH, FROM HIS BODY AND FROM THE VEHICLE--

>> WHY IS YOUR OPPOSING COUNSEL, THOUGH, NOT RIGHT AS A MATTER OF POLICY THAT IF WE AND OTHER

COURTS OF THE STATE CONTINUE TO DUCK THE CONSTITUTIONALITY ISSUE-- BECAUSE THESE ARE ALMOST ALWAYS GOING TO COME UP IN THE CRIMINAL CONTEXT. I GUESS IT COULD COME UP IN THE CIVIL CONTEXT, BUT MUCH LESS LIKELY.

IF WE CONTINUE TO FIND ON GOOD FAITH, HOW ARE WE EVER GOING TO DECIDE THAT ISSUE?

AT SOME POINT, SOMEONE'S GOT TO DECIDE IT, RIGHT?

>> WELL, YOU HAVE TO DECIDE IT, YOUR HONOR.

BUT AS I JUST SAID FROM SINGLETARY, THERE ARE ISSUES THAT COME UP.

THERE'S NOT A SPECIFIC-- LIKE IN THIS CASE, THERE'S A SPECIFIC STATUTE THAT ADDRESSED THE OFFICER'S CONDUCT.

A LOT OF THESE FOURTH AMENDMENT ISSUES AREN'T NECESSARILY BASED UPON A SPECIFIC STATUTE.

YOU HAVE SEARCHES, INCIDENTAL ARREST, THERE'S A WHOLE PANOPLY OF FOURTH AMENDMENT ISSUES THAT COME BEFORE THE COURT THAT ARE NOT JUST ADDRESSING OR ATTACKING THE CONSTITUTIONALITY OF THE STATUTE.

AND I GUESS--

>> LET ME ASK YOU, LET ME ASK IT THIS WAY.

CAN YOU CITE A SINGLE CASE FROM THIS COURT WHERE WE SAID WE ASSUME THERE IS A FOURTH AMENDMENT VIOLATION BUT FIND IT THAT THERE'S GOOD FAITH HERE? OR DO WE ALMOST ALWAYS IN EVERY SINGLE INSTANCE THAT YOU CAN REMEMBER GO THROUGH THE FOURTH AMENDMENT ANALYSIS AND THEN SAY, DESPITE THE VIOLATION, WE FIND THAT THERE'S-- THE OFFICER ACTED IN GOOD FAITH?

>> WELL, THE ONLY CASE I HAVE OFF THE TOP OF MY HEAD IS SINGLETARY, AND I DON'T KNOW

THAT IT WAS A FOURTH AMENDMENT
CONTEXT.

BUT IT WAS, YOU KNOW, WE HAVE A
WELFARE FRAUD STATUTE, IT'S
UNCONSTITUTIONAL, AND THIS COURT
DID NOT ADDRESS WHETHER THE
WELFARE STATUTE WAS
UNCONSTITUTIONAL.

THEY SAID, HEY, LOOK, THERE WAS
A PROBLEM WITH SPEEDING HERE.
EVEN THOUGH IT'S BEFORE US, EVEN
THOUGH WE CAN DECIDE IT, WE ARE
NOT DECIDING THAT ISSUE WE HAVE
BEFORE US WHICH GAVE US
JURISDICTION.

WE'RE GOING TO SAY THERE WAS NO
SPEEDING IN THIS CASE.

AND THAT'S JUST A PARTICULAR
TENET OF LAW BECAUSE THE COURT
NEEDS TO DEFER TO THE
LEGISLATURE.

IF THE LEGISLATURE GOES OUT AND
PASSES A LAW THAT IS BLATANTLY
UNCONSTITUTIONAL, OBVIOUSLY, THE
COURT STEPS IN AND DOES ITS JOB
AND DOES WHAT IT HAS TO DO.

BUT IN THIS CASE WHERE YOU HAVE
SOMETHING THAT'S BEEN AROUND AND
ACCEPTED FOR SO LONG AND
ESPECIALLY WHEN IN BIRCHFIELD
THE PARTICULAR LANGUAGE TO ME IN
BIRCHFIELD THAT'S CONTROLLING--
BECAUSE THEY GO THROUGH, AND IT
WAS ALL BASED UPON INCIDENTAL
ARREST.

THEY SAID SEARCH INCIDENT TO
ARREST, BREATH TEST IS OKAY,
BLOOD TEST IS NOT ON PENALTY OF
BEING A CRIME IF YOU REFUSE.

NOW, RIGHT AFTER THAT THEY SAID
OUR PRIOR OPINIONS HAVE REFERRED
APPROVINGLY TO THE GENERAL
CONCEPT OF IMPLIED CONSENT LAWS
THAT IMPOSE CIVIL PENALTIES AND
EVIDENTIARY CONSEQUENCES ON
MOTORISTS WHO REFUSE TO COMPLY,
WHICH IS WHAT FLORIDA DOES.

AND THEN IT SAYS PETITIONERS DO
NOT QUESTION THE
CONSTITUTIONALITY OF THOSE LAWS,

AND NOTHING WE SAY HERE SHOULD BE READ TO CAST DOUBT ON THEM. SO IN MY OPINION, NOTHING WHATSOEVER IN BIRCHFIELD SAYS THAT BECAUSE THERE'S MORE THAN HALF THE STATES HAVE SIMILAR LAWS TO FLORIDA, AND I THINK THAT'S WHY--

>> BUT ISN'T, BUT ISN'T THE ISSUE IF YOU READ McNEALY, McNEALY BASICALLY SAYS YOU CAN'T HAVE A PER SE LAW THAT SAYS THAT A BLOOD DRAW IS IMPROPER.

>> I DON'T THINK THAT'S WHAT THEY SAID, JUSTICE LAGOA. WHAT THEY SAID WAS IT'S NOT A PER SE-- BASICALLY, A PER SE EXIGENCY.

BECAUSE THERE'S ALL DIFFERENT KINDS OF EXCEPTIONS TO THE FOURTH AMENDMENT--

>> WELL, IN McNEALY THEY SAID WHETHER A WARRANTLESS BLOOD TEST OF A DRUNK DRIVING SUSPECT IS REASONABLE MUST BE DETERMINED ON A CASE-BY-CASE BASIS BASED ON THE TOTALITY OF THE CIRCUMSTANCES.

SO YOU CAN'T HAVE A PER SE RULE. AND IN ESSENCE, ISN'T THE STATE ASKING US TO MAKE A PER SE RULE BASED ON THE IMPLIED CONSENT STATUTE?

>> I DON'T KNOW THAT IT'S NECESSARILY SAYING IT CAN'T BE A PER SE RULE IN GENERAL BECAUSE IN BIRCHFIELD THEY TURNED AROUND AND DID CREATE A PER SE RULE. THEY SAID SEARCH INCIDENT TO ARREST, PER SE YOU GET THE BREATH TEST.

SO IF WE WANT TO SAY THAT BIRCHFIELD OVERRULED McNEALY AT THAT POINT, I WOULD HAVE TO SAY IT DID.

THEY TURNED AROUND AND ESTABLISHED A PER SE RULE IN BIRCHFIELD.

>> PLAY OUT FOR ME, SORRY, ON

THE GOOD FAITH ISSUE.

IF WE, AGAIN, ASSUME AWAY THE VIOLATION AND DECIDE HE ACTED IN GOOD FAITH HERE, HOW IS THE ISSUE EVER GOING TO BE DECIDED?

>> WELL, I THINK THE ISSUE'S GOING TO BE DECIDED BY THE U.S. SUPREME COURT IN TWO MONTHS--

>> OKAY.

WHAT IF THE U.S. SUPREME COURT SAYS, YOU KNOW, THIS IS A TOUGH CASE, AND WE'RE DIVIDED.

IT'S 4-1-4, BUT WE ALL AGREE ON GOOD FAITH HERE.

IN OTHER WORDS, YOU HAVE A FRACTURED PLURALITY ON ONE ISSUE.

IN OTHER WORDS, ONE HOLDING, AND YOU HAVE GOOD FAITH THERE.

PLAY IT OUT FOR ME.

HOW IS THIS EVER GOING TO BE DECIDED?

>> EVENTUALLY IT'S GOING TO HAVE TO BE DECIDED HEAD ON.

>> WHY?

IF YOU CAN ALWAYS RULE ON GOOD FAITH BECAUSE THE STATUTE IS THERE.

>> WELL, BECAUSE YOU'RE GOING TO HAVE A SITUATION, YOUR HONOR.

IN THIS CASE THE FACTS ARE BORNE OUT, EVEN THE DISSENTING JUDGE FOUND IT.

WE HAD GOOD FAITH HERE.

THERE'S GOING TO BE A CASE, BELIEVE IT OR NOT, WHERE THERE ISN'T GOOD FAITH.

>> BUT WHY?

BECAUSE IF THE STATUTE IS AS CLEAR AND LONGSTANDING AS YOU'VE ARTICULATED TO US-- AND I TEND TO AGREE WITH YOU-- IF EVERYONE SAYS WE'RE ASSUMING AWAY THE VIOLATION AND NEVER RULES ON IT, THEN NO POLICE OFFICER WOULD KNOW THAT THAT STATUTE IS UNCONSTITUTIONAL.

>> WELL, WE'RE GOING TO HAVE TO LOOK AT THE FACT THAT THE U.S. SUPREME COURT IS TAKING THIS UP,

OKAY?

AND THERE IS, ACCORDING TO MY RESEARCH AND LOOKING INTO THE MITCHELL CASE, YOU KNOW, THIS ISN'T SOMETHING THAT IS UNIFORM NATIONWIDE.

ACCORDING TO THE MITCHELL BRIEFS, THERE'S 29 STATES-- WHICH IS A MAJORITY-- THAT HAVE STATUTES SIMILAR TO FLORIDA'S. WELL, GUESS WHAT? THAT MEANS THERE'S 21 THAT DON'T.

SO THERE IS A CONSIDERABLE PERCENTAGE OF THE STATES ACROSS THE COUNTRY THAT, I MEAN-- FOR EXAMPLE, PENNSYLVANIA.

PENNSYLVANIA'S ONE OF THE CASES CITED BY THE DEFENDANT THAT SAYS, HEY, LOOK, YOU HAVE A SITUATION WHERE YOU'VE GOT THE UNCONSCIOUS DRIVER.

BUT IN PENNSYLVANIA LAW THEY HAVE THE EXPRESSED RIGHT TO REFUSE.

AND BECAUSE THE DEFENDANT IN THAT CASE WAS UNCONSCIOUS AND COULD NOT EXERCISE HIS EXPRESS RIGHT TO REFUSE, THAT'S A SITUATION WHERE THE--

>> WELL, IN THE STATE OF FLORIDA WHERE WE HAVE THE LAW THAT WE DO, I'M INTERESTED IN JUSTICE LUCK'S QUESTION AND WONDER IF, IF THE U.S. SUPREME COURT DOES NOT DECIDE THAT THE STATUTE IS UNCONSTITUTIONAL EITHER BECAUSE THEY RULE THAT IT'S CONSTITUTIONAL OR BECAUSE THEY CAN'T PUT TOGETHER A MAJORITY, WOULDN'T THE GOOD FAITH EXCEPTION STILL APPLY BECAUSE THE STATUTE IS VALID AND THEY'RE, I MEAN, WE HAVE A CONFORMITY CLAUSE?

WE CAN'T DO ANYTHING DIFFERENT. IF THE U.S. SUPREME COURT DOES NOT HOLD IT UNCONSTITUTIONAL, WOULDN'T THAT BE THE ANSWER THAT LAW ENFORCEMENT CAN RELY ON IT

IN GOOD FAITH?

>> WELL, I BELIEVE THEY CAN, AS I CITED IN MY BRIEF.

THE LAW ENFORCEMENT CAN RELY ON IT UNTIL IT IS DEEMED UNCONSTITUTIONAL JUDICIALLY.

>> LET ME ASK YOU THIS.

IN CARPENTER THERE WAS, I THINK, A THREE-PERSON DISSENTING OPINION THAT EXPRESSED THE VIEW THAT THE MAJORITY OPINION IN CARPENTER NARROWED THE GOOD FAITH EXCEPTION SIGNIFICANTLY AND IN VERY PROBLEMATIC WAYS THAT THE MINORITY, THAT I DIDN'T AND SOME OTHERS THINK WAS APPROPRIATE.

IS THERE ANYTHING IN THE MAJORITY OPINION IN CARPENTER THAT WOULD MAKE IT PROBLEMATIC FOR US TO FIND GOOD FAITH HERE WITHOUT ADDRESSING?

>> NO.

AS A MATTER OF FACT, I BELIEVE AND I PUT IN THE BRIEF, I THINK CARPENTER ACTUALLY SUPPORTS APPLYING THE GOOD FAITH EXCEPTION IN THIS CASE BECAUSE THE CASES THE DEFENDANT RELIES ON, ONE OF WHICH WAS WILLIAMS. WELL, WILLIAMS WAS SOMETHING THAT NOT ONLY DIDN'T ADDRESS THE SPECIFIC STATUTE, BUT IN WILLIAMS THEY DID WHAT THEY DID, AND THEN THEY TOOK AN APPEAL. SO JUST LIKE THE CARPENTER CASE, WE HAD A SITUATION WHERE THERE WAS UNSETTLED LAW IN FLORIDA. NOW, YOU'VE GOT A DIRECT STATUTE SAYING I'M ALLOWED TO DO THIS. YOU HAVE UNSETTLED LAW--

>> LET ME, AND MAYBE I'M NOT REMEMBERING THIS CORRECTLY, BUT I THINK CARPENTER, COULD I BE FAIRLY READ TO SAY THAT IF THE LAW'S UNSETTLED, LAW ENFORCEMENT HAS TO ALWAYS GET A WARRANT?

>> I DIDN'T INTERPRET IT THAT WAY, YOUR HONOR.

>>OKAY.

>> ESPECIALLY WHEN YOU'VE GOT SOMETHING THAT IS DIRECTLY--
>> IN CARPENTER WHAT YOU HAD WAS A DCA OPINION THAT WAS THE ONLY COURT THAT ADDRESSED IT, SO IT WAS CONTROLLING THROUGHOUT THE STATE.

>> CORRECT.

>> WHICH, AND THE ARGUMENT WAS THAT LAW ENFORCEMENT OUGHT TO BE ABLE TO RELY ON THAT.

>> RIGHT.

>> BUT THE MAJORITY SAID NO BECAUSE THE QUESTION WAS PENDING HERE, THAT THAT CREATED SOME UNCERTAINTY, AND THAT-- JUST THAT MERE FACT OF UNCERTAINTY ACCORDING TO CARPENTER MEANS THAT GOOD FAITH CANNOT APPLY.

>> RIGHT.

>> I MEAN, HOW WOULD YOU APPLY THAT ANALYSIS TO THIS CONTEXT, THE MAJORITY--

>> WELL, I APPLY THE ANALYSIS BECAUSE AT LEAST IN THE CARPENTER CONTEXT, THE DCA OPINION THAT THEY RELIED ON WAS, TO MY RECOLLECTION, DIRECTLY ON POINT, OKAY?

WE DON'T HAVE THE DIRECTLY--

>> RIGHT, BUT IT WAS DIRECTLY ON POINT IN SAYING LAW ENFORCEMENT COULD--

>> THEY COULD.

>> YEAH.

>> BUT WHEN CARPENTER WENT ON, DIDN'T THEY DO AN ANALYSIS OF, WELL, DON'T KNOW THAT I AGREE WITH THE ANALYSIS, BUT THE THING WAS IT'S PENDING REVIEW, AND THIS IS, AS YOUR HONORS SAID--

>> CREATED UNCERTAINTY.

>> BUT THIS WAS NEW CASE LAW THAT THE COPS USED TO RELY ON FOR GOOD FAITH, OKAY?

WE DON'T HAVE A SITUATION, AND I THINK THIS WAS A MENTION TO IT--

>> WOULDN'T LYLES HAVE CREATED AS MUCH UNCERTAINTY WITH RESPECT

TO THIS ISSUE AS THE MERE FACT THAT SOMEONE HAD FILED A NOTICE OF APPEAL AND SOUGHT REVIEW IN OUR COURT IN THE CASE THAT WAS CONTROLLING THE ENTIRE STATE OF FLORIDA?

>> IT CAME OUT ABOUT A WEEK--

>> NO.

THE QUESTION IS UNDER CARPENTER ISN'T THE QUESTION WHETHER LYLES WOULD CREATE ENOUGH UNCERTAINTY THAT A LAW ENFORCEMENT OFFICER OUGHT TO KNOW THAT THIS IS A QUESTION THAT THE COURTS HAVEN'T REALLY DECIDED YET WHICH, ACCORDING TO THE CARPENTER MAJORITY, AS I UNDERSTAND IT, WOULD MEAN THAT YOU CAN'T RELY IN GOOD FAITH ON--

>> WELL, MY UNDERSTANDING OF CARPENTER WAS, LOOK, YOU HAVE A BRAND NEW DCA CASE, AND IT'S IN FLUX.

IT'S PENDING BEFORE THE FLORIDA SUPREME COURT.

AND THEY SAID WE CAN'T REASONABLY RELY ON IT.

WHERE WE HAVE A SITUATION WHERE-- AND IT'S NOT A STATE, IN MY OPINION, WHERE ANYTHING IS IN FLUX.

WE HAVE A LAW ON THE BOOKS FOR 50 YEARS, AND THAT WAS ONE OF THE THINGS IN THE ANALYSIS. HOW COULD A COP ON THE STREET SAY, OKAY, I'VE GOT THIS LAW FOR 50 YEARS.

BUT THE FIFTH DCA COMES OUT WITH THIS OPINION ON A DIFFERENT ISSUE, A DIFFERENT STATUTE.

BUT WE AS A POLICE OFFICER, I'M GOING TO GO OUT AND INTERPRET THAT TO SAY, OH, NO, I CAN'T COMPLY WITH THE FLORIDA LAW I'VE BEEN USING FOR THE LAST 50 YEARS EVEN THOUGH NO COURT OF COMPETENT JURISDICTION HAS SAID THAT'S NOT GOOD ANYMORE.

IT REALLY WOULD BE PUTTING LAW ENFORCEMENT IN AN UNTENABLE

POSITION.

>> CAN I ASK YOU A QUESTION ON THE MERITS?

>> YES, YOUR HONOR.

>> SO IS YOUR POSITION THAT WHEN STATES GIVE PEOPLE THE OPPORTUNITY, STATES WITH AN IMPLIED CONSENT LAW AND WHEN THEY GIVE PEOPLE AN OPPORTUNITY TO REVOKE THEIR CONSENT AND REFUSE THE TEST ONCE PROBABLE CAUSE HAS BEEN FOUND AND THE OFFICER ACTUALLY TRIES TO INITIATE THE TEST, IS IT YOUR VIEW THAT'S BASICALLY A MATTER OF GRACE?

BECAUSE BY ACCEPTING A LICENSE AND DRIVING ON THE ROADS, THE PERSON-- AT THAT POINT THE CONSENT HAS ALREADY BEEN AFFECTED.

AND IF INSTEAD A STATE WANTED TO HAVE A POLICY WHERE THEY JUST SAID, HEY, SORRY, YOU ALREADY CONSENTED, AND WE'RE GOING TO DO THE BLOOD TEST WHETHER YOU AT THE TIME SAY THAT IT'S OKAY OR NOT, THAT'S, YOU KNOW, THE CONSENT HAS ALREADY HAPPENED?

>> ARE WE TALKING IN THE CONTEXT OF THIS CASE--

>> I'M JUST ASKING IN GENERAL WITH IMPLIED CONSENT LAWS.

>> IN GENERAL, IT'S PRETTY CLEAR.

YOU SIGN YOUR LICENSE, HEY, I'M CONSENTING TO ALL THESE TESTS THAT ARE REQUIRED BY LAW.

BUT THE LAW IS ALSO PRETTY CLEAR THAT, YOU KNOW, JUST LIKE A FOURTH AMENDMENT SEARCH THE COPS COME TO YOUR HOUSE, THEY KNOCK ON THE DOOR.

CAN I SEARCH?

SURE YOU CAN.

THEY GET INTO MY FOYER, I SAID, HUH-UH, GET OUT.

I DON'T WANT YOU ANYMORE.

>> YOU CAN DO THAT.

>> THE STATUTE ALLOWS YOU TO,

BUT IS THAT A MATTER OF CHOICE
THAT THE STATE MADE THAT THEY
DIDN'T HAVE TO MAKE?

WOULD IT BE CONSTITUTIONAL FOR A
STATE TO SAY, LOOK, WE'RE ONLY
GOING TO LOOK AT THE CONSENT
QUESTION AT ONE POINT, AND THAT
IS WHEN YOU LOOK AT YOUR LICENSE
AND ACCEPT IT, AND IF WE DECIDE
WE WANT TO GIVE YOU A BLOOD TEST
WHERE THERE'S PROBABLE CAUSE,
THEN WE CAN DO THAT.

AS AN-- AND INVOKE THE CONSENT
EXCEPTION.

>> I'M NOT SURE, AGAIN, BECAUSE
I JUST COMMENTED SEEMS THE CASE
LAW'S PRETTY CLEAR THAT CONSENT
CAN BE REVOKED.

SO YOU'RE SAYING--

[INAUDIBLE]

>> ISN'T THAT THE POSITION THAT
THE UNCONSCIOUS PERSON IS IN,
BASICALLY?

>> NO.

THE UNCONSCIOUS PERSON IS IN THE
POSITION OF, LOOK, I'M SIGNING
THE LICENSE.

I'M DRIVING, I AM DRIVING A
DANGEROUS INSTRUMENTALITY ON THE
STATES OF FLORIDA.

AND GUESS WHAT?

I'VE GOT TO PLAY BY THE RULES OF
THE GAME.

ONE OF THE RULES OF THE GAME IS
BEFOREHAND I CONSENT TO THESE
TESTS.

>> BUT HOW CAN A PERSON WHO IS
UNCONSCIOUS HAVE FEWER RIGHTS
THAN A PERSON WHO IS CONSCIOUS?

>> ACTUALLY, I DON'T SEE HOW
THEY HAVE FEWER RIGHTS.

IT SEEMS LIKE THEY COULD END UP
WITH MORE RIGHTS, BECAUSE IN
COURT--

>> BUT YOU'RE SAYING THAT THE
PERSON WHO'S CONSCIOUS HAS THE
RIGHT TO REVOKE, CORRECT?

>> I SAY EVERYONE.

BUT, YES.

>> WELL, YOU'RE SAYING THE

PERSON WHO'S UNCONSCIOUS HAS THE RIGHT TO REVOKE?

>> IF IT'S POSSIBLE--

>> THAT SEEMS TO BE SOMEWHAT FICTITIOUS.

[LAUGHTER]

AM I MISSING SOMETHING THERE?

>> IT'S, I WOULD THINK FOR AN UNCONSCIOUS PERSON IT WOULD BE VERY DIFFICULT TO REVOKE.

BUT THE THING IS IT'S DEEMED--

>> I APPRECIATE THE CONSIDERATION.

[LAUGHTER]

>> BUT THAT'S WHY THE QUESTION IS DON'T THEY THEN HAVE FEWER RIGHTS?

BECAUSE AT THAT POINT IF A PERSON IS UNCONSCIOUS, WHY THEN COULD THE OFFICER DeSANTIS NOT GO AND GET A WARRANT OR APPLY FOR A WARRANT?

AND IF HE WAS CONCERNED THAT, YOU KNOW, THE DEFENDANT WAS GOING TO WALK OUT, BECOME AWAKE AND WALK OUT THE DOOR, YOU CAN HAVE AN OFFICER THERE AND SAY WE'RE GOING TO PLACE HIM UNDER ARREST UNDER PROBABLE CAUSE. AND HE IS DETAINED, HE IS NOT FREE TO LEAVE, AND I'M GOING TO APPLY FOR A WARRANT.

>> WELL, IT'S NOT A MATTER OF IF HE COULD, YOUR HONOR.

HIS CONDUCT IN THIS CASE WAS SPECIFICALLY AUTHORIZED BY LAW. AND, AGAIN--

>> I UNDERSTAND THAT.

>> OKAY.

>> BUT MY QUESTION IS THERE IS NO-- HE COULD HAVE DONE THAT, THE OFFICER.

>> CORRECT.

>> CORRECT.

BUT HE WAS RELYING ON THE APPLIED CONSENT STATUTE.

>> A VALID STATUTE AT THE TIME THIS EVENT INCURRED.

IT SEEMS THE DEFENSE IS TRYING TO FLIP THE STATUTE ON ITS HEAD.

IT'S NOT YOU SIGN YOUR LICENSE
AND, YEAH, YOU AGREE TO ABIDE BY
THE RULES OF THE ROAD, BUT,
YEAH, I'M REALLY GOING TO IGNORE
THEM.

AND THAT'S WHY IT'S CALLED
IMPLIED CONSENT.

YOU HAVE ALREADY--

>> COUNSEL, LET'S BACK UP A
LITTLE BIT.

IN THE FOURTH AMENDMENT CONTEXT,
IS CONSENT SOMETHING WE LOOK AT
ON A CATEGORICAL BASIS, OR DO WE
LOOK AT THE FACTS AND
CIRCUMSTANCES OF EACH CASE?

>> TYPICALLY, ON THE
CASE-BY-CASE BASIS.

>> RIGHT.

>> BUT THEY DO SOME--

>> REALLY?

WHICH CASE LOOKS AT CONSENT
ON--

>> I DON'T KNOW.

I WALKED INTO THE BUILDING THIS
MORNING, AND I WAS SEARCHED, AND
THEY TOOK MY PROPERTY FROM ME,
AND I'M ASSUMING THAT WAS BASED
ON IMPLIED CONSENT.

>> OKAY, GREAT POINT.

SO IF WE HAD AN EVIDENTIARY
HEARING AND YOU SAID I'VE BEEN
TO THE COURTHOUSE A BUNCH OF
TIMES, I KNOW THEY SEARCH ME, I
KNOW THERE'S A POLICY TO DO
THAT, THAT WOULD BE EVIDENCE
FROM WHICH A JUDGE COULD FIND
THAT THROUGH YOUR CONDUCT YOU
CONSENTED TO A SEARCH IN THIS
CASE, CORRECT?

>> I HONESTLY DON'T KNOW IF
THERE'S A CONTEXT.

I JUST COMPLY.

>> LET'S LOOK AT CLARK.

WHAT EVIDENCE WAS THERE FOR THE
COURT TO FIND THAT THERE WAS
CONSENT?

BASED ON THE TOTALITY OF--

>> SHAPIRO.

>> YOU'VE RELIED ON BOTH OF
THOSE.

THE AIRPORT CASE AND THE PRISON
GUARD CASE.

>> IT'S JUST A MATTER OF
ENGAGING IN A COURSE OF CONDUCT.
AS YOUR HONOR POINTED OUT IN
SKINNER--

>> BUT THERE WAS EVIDENCE OF
THAT IN CLARK AND SHAPIRO, WAS
THERE NOT?

IN OTHER WORDS, THERE WAS A
SUPPRESSION HEARING, AND AT THE
SUPPRESSION HEARING, THE
DEFENDANT TESTIFIED.

>> CORRECT.

>> AND THE DEFENDANT SAID I'VE
BEEN TO THE AIRPORT 20 TIMES,
THIS WAS ON CROSS-EXAMINATION--

>> OKAY.

I UNDERSTAND NOW, YOUR HONOR.
THEN I WOULD GO--

>> DO YOU NEED-- MY QUESTION IS
DO YOU NEED THAT SORT OF
EVIDENCE HERE?

IN OTHER WORDS, EVEN IF I ACCEPT
THE PROPOSITION THAT THE
STATUTE'S NOT UNCONSTITUTIONAL
ASSUMING THERE IS EVIDENCE THAT
SOMEBODY KNEW ABOUT IT, SIGNED
THEIR LICENSE, LOOKED AT THEIR
DRIVE'S LICENSE, UNDERSTOOD THAT
DRIVING ON THE ROAD WOULD
SUBJECT THEMSELVES TO THIS,
MAYBE IT'S NOT THEIR FIRST TIME,
THEIR FIRST RODEO.

LIKE IN THE CASE OF MR. SHAPIRO.
JUAN THAT, THE EVIDENCE
INDICATIVE OF CONSENT?

>> YES, I BELIEVE, YOUR HONOR,
IT COULD--

>> IS THERE, ARE WE LACKING SOME
OF THAT HERE?

>> AS FAR AS THOSE PARTS OF
THINGS?

>> AS FAR AS ANY EVIDENCE AT ALL
TO INDICATE THE TOTALITY OF THE
CIRCUMSTANCES CAN WHICH WOULD
ALLOW CONSENT HERE.

OTHER THAN I DROVE ON THE ROAD.

>> OTHER THAN HE DROVE ON THE
ROAD AND AGREED TO THE RULES OF

THE GAME--

>> DO WE KNOW HE AGREED TO THE RULES OF THE GAME?

DO WE KNOW HE EVEN HAD A LICENSE HERE?

>> WE DO KNOW HE HAD A LICENSE. I BELIEVE IT WAS IN THE CITATIONS--

>> OKAY.

>> BUT A COPY OF THE LICENSE, YOUR HONOR, I DON'T BELIEVE IS IN THE RECORD ON APPEAL--

>> ASSUME THAT IT'S NOT FOR PURPOSES OF ANSWERING THE QUESTION.

>> OKAY.

I WOULD GO EXACTLY TO YOUR HONOR'S--

>> THE STATUTE, AS I UNDERSTAND IT, APPLIES TO OUT-OF-STATE DRIVERS.

>> DRIVERS PERIOD.

YES, YOUR HONOR.

>> HOW CAN WE EVEN ASSUME WHAT THEY WOULD KNOW WHAT FLORIDA LAW IS ON THIS?

>> I DON'T THINK IGNORANCE OF THE LAW IS--

[LAUGHTER]

IS A DEFENSE.

I WOULD POINT IT TO THE CONTEXT OF, YOU KNOW WHAT, WE HAVE A CONCEALED WEAPONS--

>> BUT EVEN MORE FUNDAMENTALLY THOUGH, I MEAN, HOW CAN YOU UTILIZE FROM THE TIMING PERSPECTIVE THE CONSENT THAT YOU SAY HAPPENS WHEN YOU GET A LICENSE AND YOU DRIVE ON THE ROADS?

HOW CAN YOU COMPARE THAT TO THE REALTIME CONSENT THAT'S ALWAYS PRESENT WHEN I'M WALKING THROUGH A METAL DETECTOR OR, YOU KNOW, CHOOSING TO GO TO AN AIRPORT OR, YOU KNOW, WHATEVER?

IT JUST SEEMS LIKE COMPLETELY DIFFERENT CIRCUMSTANCES.

THE BOTTOM LINE IS IN THIS CASE THE PERSON'S UNCONSCIOUS.

AND BY DEFINITION, THERE'S NO REALTIME CONSENT.

>> BUT, YOUR HONORS, ASSUMING THAT BECAUSE I INITIALLY CONSENTED AND GOT ON THE ROADWAYS AND THEN PUT MYSELF IN THE CONDITION, AGAIN, THESE ARE EXTREMELY NARROW CIRCUMSTANCES WHERE NOT ONLY DO THEY HAVE TO HAVE PROBABLE CAUSE THAT YOU WERE DUI--

>> BUT IT SEEMS EVEN UNDER THE IMPLIED CONSENT STATUTE, YOU STILL HAVE ONE MORE SAFE HAVEN, WHICH IS YOU STILL HAVE THE ABILITY IF YOU'RE CONSCIOUS TO SAY I AM REFUSING--

>> CORRECT.

>>-- FOR YOU TO DO, DRAW A BLOOD TEST, CORRECT?

>> CORRECT.

>> IF YOU'RE CONSCIOUS--

>> SO YOU HAVE THE ABILITY TO DO THAT.

TO ME, IT'S SORT OF PROBLEMATIC BECAUSE IT ALMOST SEEMS AS THOUGH WITHIN THE IMPLIED CONSENT STATUTE, YOU HAVE THE ORIGINAL CONSENT THAT YOU'RE GIVING, AND YOU STILL HAVE THE ABILITY TO SAY NO IF YOU'RE STOPPED.

BUT IF YOU'RE UNCONSCIOUS, YOU DON'T HAVE THAT SECOND ABILITY.

>> WELL, AND TO RESPOND TO YOUR QUESTION, YOUR HONOR, I GUESS IT WOULD BE-- I WOULD DIRECT YOUR CASE TO MITCHELL WHICH IS PENDING BEFORE THE U.S. SUPREME COURT.

AND ONE OF THE PARTS OF THEIR ANALYSIS WAS, LOOK, YOU ALL CONSENTED, AND THAT'S FINE. AND YOU RECOGNIZE THE SITUATION THAT YOU POINTED OUT, BUT THEY SAY, BASICALLY, YOU PUT YOURSELF IN THAT SITUATION.

YOU'RE THE ONE WHO GOT ON THE ROAD.

YOU'RE THE ONE WHO DROVE DRUNK,

KNOCKED YOURSELF OUT OR PUT
YOURSELF IN A CONDITION.
AND THEN IN FLORIDA WE HAVE AN
EVEN FURTHER STEP WHICH I THINK
MAKES IT MUCH MORE REASONABLE
WHICH IS THAT YOU HAVE TO
PRESENT TO A HOSPITAL.

>> COUNSEL, YOU HAVE, YOU HAVE
EXHAUSTED YOUR TIME.

>> THANK YOU.

YOUR HONORS.

I APPRECIATE IT, AND I WOULD
RESPECT THE COURT TO AFFIRM.
THANK YOU.

>> YOUR HONORS, I'D LIKE TO
ADDRESS THE REMAINDER OF MY
FINAL TO THE GOOD FAITH
EXCEPTION.

AS JUSTICE LAWSON TOUCHED UPON,
THE HOLDING IN CARPENTER WAS
PRETTY CLEAR.

QUOTE: THE RULE ON SEARCHES IN
QUESTIONABLE AREAS OF LAW IS
SIMPLE AND UNEQUIVOCAL, GET A
WARRANT.

THE STATE ASSUMES TOO LITTLE OF
OUR POLICE OFFICERS.

THAT'S THE UNITED STATES SUPREME
COURT RECOGNIZED IN DAVIS
RESPONSIBLE LAW ENFORCEMENT
OFFICERS WILL TAKE CARE TO LEARN
WHAT IS REQUIRED OF THEM UNDER
FOURTH AMENDMENT PRECEDENT AND
WILL CONFORM THEIR CONDUCT TO
THESE RULES.

FOR THAT REASON, POLICE AT
POLICE ACADEMIES, THEY'RE
INSTRUCTED ON THE LAW, AND ONE
OF THE FIRST THINGS THEY KNOW IS
THAT THE CONSTITUTION CONTROLS.
SO LOOKING AT AN OFFICER OR IN
THE POSITION OF-- AND JUST TO
ADDRESS ONE THING, FIRST OFF,
THE STATE SAYS THIS STATUTE HAS
BEEN IN EFFECT FOR 50 YEARS, AND
THAT IS BECAUSE PRIOR TO
McNEALY'S ISSUANCE IN 2013
THIS COURT'S PRECEDENCE HELD
THERE WAS NO CONSTITUTIONAL--
SO WE HAVE AN OFFICER IN THE

POSITION.

THEY'RE GOING TO SAY THAT
McNEALY HAS STATED THAT
EXIGENCY IS NOT A PER SE
EXCEPTION, IT'S ONE THAT HAS TO
BE DONE ON THE TOTALITY OF THE
CIRCUMSTANCES.

THE ONLY THING HE CAN RELY UPON
IS IMPLIED CONSENT.

AND FOR THE JURISPRUDENCE OF--

>> SO ARE YOU SUGGESTING THAT IN
ORDER TO FIND THE GOOD FAITH
EXCEPTION APPLICABLE HERE, WE
WOULD NEED TO RECEDE FROM
CARPENTER?

>> NO.

I'M NOT ASKING THIS COURT TO--

>> I KNOW YOU'RE NOT ASKING US
TO.

>> I'M CERTAINLY NOT ASKING THIS
COURT--

>> BUT YOU'RE ARGUING THAT THE
ANALYSIS AND HOLDING IN
CARPENTER WOULD NOT ALLOW
APPLICATION OF THE GOOD FAITH
EXCEPTION HERE, CORRECT?

>> I AM SAYING THE GOOD FAITH
EXCEPTION IN THIS CASE APPLIES
UNDER CARPENTER'S ANALYSIS
BECAUSE THE DECISIONS IN
WILLIAMS AND LYLES THROUGH THIS
AREA OF LAW AND INCLUDING
McNEALY HAVE THROWN THIS AREA
OF LAW INTO A STATE OF FLUX
WHERE RELYING ON IMPLIED CONSENT
WOULD BE VERY QUESTIONABLE.
AND AS THE UNITED STATES SUPREME
COURT SAID IN JOHNSON, 1982, LAW
ENFORCEMENT WOULD HAVE LITTLE
INCENTIVE TO ERR ON THE SIDE OF
CONSTITUTIONAL BEHAVIOR UNLESS
THERE IS THE EXCLUSIONARY RULE
APPLIED.

SO AN OFFICER, IN OFFICER
DeSANTIS' CASE AT THE TIME OF
THE SEARCH, THE ONLY THING YOU
CAN RELY ON IS IMPLIED CONSENT.
THE DEFENDANT DOES NOT
NECESSARILY CONSENT TO A BREATH
TEST WHEN HE GOT BEHIND THE

WHEEL OF HIS CAR.
IT WAS NOT REASONABLE.
KROLL SAYS AN OFFICER CANNOT
RELY ON THE STATUTE IF THEY
REASONABLY KNOW THE PRINCIPLE
CANNOT BE APPLIED.
I BELIEVE THAT THE PRINCIPLE
SHOULD BE APPLIED IN THIS CASE,
AND THE RULE SHOULD BE REVERSED.
THANK YOU VERY MUCH.
>> WE THANK YOU BOTH FOR YOUR
ARGUMENTS.
COURT IS NOW ADJOURNED.