No.

IN THE

SUPREME COURT OF THE UNITED STATES

SEAN FREDERIK FRANKE,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the Florida First District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether the Court should resolve the following question for which the state courts are split: can law enforcement officers rely on the exigent circumstance exception to the Fourth Amendment warrant requirement to justify the warrantless extraction of blood from a suspected drunk driver when the officers make *no attempt* to obtain a warrant prior to forcibly taking the blood sample and presented no evidence that a warrant judge was actually unavailable (which, in essence, would create another *per se* exigency in contravention of the Court's holding in *Missouri v. McNeely*, 569 U.S. 141 (2013)).

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, SEAN FREDERIK FRANKE, requests the Court to issue a writ of certiorari to review the opinion/judgment of the Florida First District Court of Appeal entered in this case on February 20, 2019. (A-1).[1]

D. CITATION TO ORDER BELOW

Franke v. State, 264 So. 3d 132 (Fla. 1st DCA 2019).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida First District Court of Appeal.[2]

F. CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the Constitution prohibits "unreasonable searches and seizures." U.S. Const. amend. IV.

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[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

[2] Because the state appellate court did not issue a written opinion, the Petitioner was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

The Petitioner was charged in Florida state court with one count of DUI[3] manslaughter and two counts of DUI causing serious bodily injury. The charges stemmed from a single-vehicle accident that occurred during the early morning hours of January 1, 2013. Following a jury trial in 2016, the Petitioner was convicted as charged of all three counts and sentenced to eighteen years' imprisonment. (A-25, 28). On direct appeal, the Petitioner argued that the trial court erred by denying his motion to suppress the warrantless blood draw because the prosecution failed to meet its burden of establishing that exigent circumstances justified law enforcement's failure to obtain a search warrant authorizing the withdrawal of the Petitioner's blood. The Florida First District Court of Appeal subsequently *per curiam* affirmed the Petitioner's convictions without discussion. (A-1).

2. Statement of the facts.

Prior to trial, the Petitioner filed a motion to suppress the warrantless legal blood draw that was conducted in this case. (A-17). Several witnesses testified during the subsequent suppression hearing, including Florida Highway Patrol troopers Corporal Austin Bennett and Sergeant Michael Quade.

Corporal Bennett testified that the accident in this case occurred shortly before 1 a.m. on January 1, 2013, and he said that the Petitioner's blood was drawn at the

[3] Driving under the influence.

hospital at 3:12 a.m. (A-58). Corporal Bennett stated that he advised Sergeant Quade to "get a legal blood draw" and he admitted that he "didn't ask him to get a warrant." (A-74). Corporal Bennett stated that he did not remember attempting to contact anyone in the State Attorney's Office to obtain a warrant for the Petitioner's blood. (A-74). Corporal Bennett acknowledged that in June of 2013, a policy change occurred in his agency that required an attempt to get a warrant for legal blood draws (based on a ruling from this Court). (A-73).

Sergeant Quade testified that he obtained a "forcible blood draw" from the Petitioner at the hospital on January 1, 2013. (A-94). Sergeant Quade gave the following explanation regarding the reason(s) that he drew the Petitioner's blood without first obtaining a warrant:

> Q Okay. Now, did you – after you are talking – once you determined there was probable cause for a legal blood draw, in your communications with Trooper Bennett, did you seek to have a warrant issued to draw that blood?
>
> A I didn't.
>
> Q Okay. Did you ask Trooper Bennett to have a warrant issued?
>
> A No.
>
> Q Okay.
>
> A I did not.
>
> Q All right. Now, what was the reason why you didn't request a warrant?
>
> A It was already a couple of hours into the – since the crash had occurred, now you have to call the state attorney. It's just the time,

and waking up a judge was not practical at that point.

Q Okay. When you say, "it's not practical," do you have any independent knowledge that it was not practical on that evening?

A It was already a couple of hours into it, and I don't want to lose the blood. You have dissipating blood alcohol factors and exigent circumstances.

Q Okay. So you're –

A The law at the time says that I can take the blood, and that's what I did.

Q So is it your testimony that the exigent circumstance, in regards to this, was your fear that the alcohol in the blood was going to dissipate?

A That, yes, and you wait four or five hours for a judge to sign a warrant for it, and you've lost your evidence, absolutely.

Q *All right. Were you concerned that you weren't going to be able to get it because he was in surgery*?

A *No. He wasn't in surgery*. He was right in front of me, but I don't know if he is going to surgery or what other medical procedures that they had planned for him.

Q Did you – were you precluded by law or some other reason from discussing whether or not he was going – Mr. Franke was going to have any surgeries in the near future?

A No, I wasn't.

Q Okay. So it –

A It wasn't practical at the time. Like I said, it was almost two hours from the crash that I'm doing this blood draw.

Q Okay. And, again, it's because you were afraid that the alcohol level in the blood was going to dissipate?

A Right. Well, that, and it could take a couple hours just to get

a judge to sign the warrant.

Q Okay. But it was by your choice, then, that *you didn't inquire as to whether or not Mr. Franke was scheduled for any surgeries or anything of that nature, correct*?

A Right, and – yeah. *That wasn't a factor for me at the time.*

(A-113-116) (emphasis added).

Following the suppression hearing, the trial court denied the motion to suppress (A-3), stating in relevant part:

> Defense has also argued that no exigent circumstance existed to justify the forced blood draw without at least attempting to secure a warrant. No attempt was made to obtain a warrant prior to the taking of Defendant's blood. In response, the State points out that the crash occurred just after midnight and it would have been difficult and time consuming to secure a warrant in a timely fashion due to the late hour. Further, Defendant suffered serious injuries and was in the hospital and subject to surgeries, or other serious medical procedures, that would have made waiting for a warrant unreasonable. The crash was particularly violent and required an extensive on-scene crash investigation that necessitated the closure of two lanes of a major roadway. Corporal Bennett testified that he wanted to complete the crash investigation, without having to leave the scene to obtain a warrant, so that all lanes of traffic could be opened as quickly as possible. Finally, the State argues that the natural dissipation of alcohol in the bloodstream required that the blood be drawn quickly if the results were to have any relevance at all.
>
> . . . .
>
> In this case, after considering the totality of circumstances, the Court finds that sufficient exigent circumstances existed to justify a warrantless search through a nonconsensual blood draw. The Defendant had to be immediately taken to the hospital after he was extricated from the truck; he had suffered serious injuries and it was reasonable to assume that he would have to undergo lengthy surgical procedures that would have made him unavailable for a blood draw. This issue alone created a sufficient exigent circumstance to justify a forcible blood draw pursuant to Section 316.1933, Florida Statutes. The law enforcement

> officers would have also had extra difficulty securing a warrant in a timely manner as it was the middle of the night on a holiday – New Year's Eve. The Court finds that the warrantless search was reasonable under the Fourth Amendment as interpreted under both *Schmerber* and *McNeely*.

(A-13, 15).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

In *Schmerber v. California*, 384 U.S. 757 (1966), the Court found that the warrantless seizure of a driver's blood was reasonable. Adopting a totality-of-the-circumstances approach, the Court reasoned: (1) the officer had probable cause that Schmerber operated a vehicle while intoxicated; (2) alcohol in the body naturally dissipates after drinking stops; (3) the lack of time to procure a warrant because of the time taken to transport Schmerber to a hospital and investigate the accident scene; (4) the highly effective means of determining whether an individual is intoxicated; (5) a common procedure was used involving virtually no risk, trauma, or pain; and (6) the procedure was performed in a reasonable manner. *See id*. at 768-72.

In *Missouri v. McNeely*, 569 U.S. 141 (2013), the Court granted certiorari to resolve the ensuing split of authority as to whether the body's natural metabolization of alcohol creates a "*per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing in all drunk-driving cases." *Id*. at 145, 147. The Court answered the question in the negative, holding instead that the exigency must be determined based upon the totality of the circumstances, and that the metabolization of alcohol was but one of the factors to be considered in evaluating whether the circumstances were exigent. *See id*. at 149, 156. Based upon the limited record and arguments presented in *McNeely*, the Court expressly declined to address in detail the factors that might give rise to exigent

circumstances sufficient to meet the prosecution's burden for justifying a non-consensual warrantless blood draw:

> Because this case was argued on the broad proposition that drunk-driving cases present a *per se* exigency, the arguments and the record do not provide the Court with an adequate analytic framework for a detailed discussion of all the relevant factors that can be taken into account in determining the reasonableness of acting without a warrant. It suffices to say that the metabolization of alcohol in the bloodstream and the ensuing loss of evidence are among the factors that must be considered in deciding whether a warrant is required. No doubt, given the large number of arrests for this offense in different jurisdictions nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed. But that inquiry ought not to be pursued here where the question is not properly before this Court. Having rejected the sole argument presented to us challenging the Missouri Supreme Court's decision, we affirm its judgment.

Id. at 165. The Court did, however, note that "[i]n 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." *Id.* at 152.

Despite declining to discuss in detail all the relevant factors for determining the reasonableness of a warrantless blood draw, the Court did offer some guidance: "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.* at 153. "Consider, for example, a situation in which the warrant process will not significantly increase the delay before the blood test is conducted because an officer can take steps to secure a warrant while the suspect is being transported to a medical facility by another officer. In such

circumstance, there would be no plausible justification for an exception to the warrant requirement." *Id*. at 153-54.

In the six years since *McNeely*, the state courts are already issuing conflicting decisions where police officers never even attempted to secure search warrants prior to conducting warrantless non-consensual blood draws in DUI prosecutions and no other exigency was shown to justify the failure to obtain a warrant. On one side of the split are state court holdings that suppression is mandated by the Fourth Amendment upon consideration of *McNeely*. *See, e.g., State v. Reed*, 400 S.W.3d 509, 511 (Mo. Ct. App. 2013) ("We defer to the trial court's determination of the facts, including the facts that the trooper could have requested assistance and had assistance with the arrest of Reed, that the officer was trained to request a search warrant but chose not to, and that there were no other emergency circumstances."); *Bell v. State*, 485 S.W.3d 663, 667 (Tex. Ct. App. 2016) (no exigent circumstances existed to justify the warrantless blood draw where none of the officers involved attempted to determine whether a magistrate was available to sign a warrant for a blood draw); *People v. Armer*, 20 N.E.3d 521, 525 (Ill. App. Ct. 2014) ("[T]he record shows that while there may have been some delay attendant to securing the accident scene and transporting the defendant to the hospital, three officers were available to assist with the investigation. Deputy Cross . . . or one of the other officers, could have attempted to contact the State's Attorney to secure a search warrant. Nothing in the record suggests any circumstances which would have prevented one of the officers from attempting to secure a warrant. There is no evidence that the officers would have faced an

unreasonable delay in securing a warrant. In this case, Deputy Cross admitted that he did not attempt to secure a warrant."); *see also Gore v. State*, 451 S.W.3d 182, 197-98 (Tex. Ct. App. 2014) ("Other than [the prosecutor's] testimony that in his experience it would take two to three hours to 'wake up a judge' and get a warrant, there is no evidence of whether that would have been true in this particular case . . . ." "To accept [the prosecutor's] testimony that it usually takes two to three hours to get a warrant as sufficient evidence of exigency in every DWI case would be to create a *per se* exigency rule, which *McNeely* expressly prohibits.").

On the other side are the state court decisions which, after considering *McNeely*, find no Fourth Amendment violation despite law enforcement's failure to attempt to obtain a warrant prior to a blood draw, reasoning that the prosecution's burden of establishing exigent circumstances was satisfied simply upon a showing that there might have been difficulty in obtaining a warrant. *See, e.g.*, *State v. Inmon*, 409 P.3d 1138, 1144 (Wash. Ct. App. 2018) ("It would have taken at least 45 minutes to prepare and obtain judicial approval for a search warrant. Deputy Przygocki lacked reliable cell phone coverage in the rural area, so obtaining a telephonic warrant may have been a challenge. Under the circumstances, obtaining a warrant was not practical."); *Aguilar v. State*, 239 So. 3d 108, 109 (Fla. 3d DCA 2018) (another Florida case finding exigent circumstances justified a warrantless blood draw – even though "no effort was made to get a warrant" – based upon the officer's speculation that it would have taken at least four hours to obtain a warrant).

In *State v. Stavish*, 868 N.W. 2d 670 (Minn. 2015), the Minnesota Supreme

Court was itself divided on the exigency issue. The majority held that the prosecution established exigent circumstances by showing: law enforcement had reason to believe the defendant was impaired by alcohol; it was important to draw defendant's blood within 2 hours of the accident; and defendant's "medical condition and need for treatment rendered his future availability for a blood draw uncertain. . . . ." One of the several dissenters opined that the majority in effect created yet another improper *per se* exigency exception to the warrant requirement in square conflict with *McNeely*:

> [I]t is clear that the State did not meet its burden to prove exigent circumstances. No finding by the district court or evidence in the record suggests that [the officer] could not have obtained a warrant within the time remaining in the 2-hour window. While the State generally contends that the telephonic warrant process . . . is burdensome and that there is no guarantee that the on-call judge would have answered a call at that time of night, the State presented no evidence establishing approximately how long it would have taken to obtain a warrant or that a judge was actually unavailable. Without any evidence establishing such facts, the State cannot meet its burden to show that the delay necessary to obtain a warrant, under the circumstances, "significantly undermin[ed] the efficacy of the search." *McNeely*, 569 U.S. at 152. To conclude otherwise is to, in effect, create another *per se* exigency in contravention of *McNeely*. *Id*. at 152-53, 156. If the record actually established the burdensome nature of the telephonic warrant process, that would be one thing, but all we have here is the State's assertion, nothing more. If the record established that a judge was actually unavailable, that would be one thing, but all we have here are the State's speculations.

Stavish, 868 N.W.2d at 683-84 (Page, J., dissenting) (one citation omitted).

In the Petitioner's case, the Florida trial and appellate courts were similarly faced with a case where there was no evidence presented by the prosecution at the suppression hearing as to how long it would have taken any of the several available officers to obtain a warrant, or that the on-call warrant judge was actually unavailable, or that a warrant could not have been obtained within a reasonable time. Neither

Sergeant Quade nor Corporal Bennett provided any testimony regarding efforts on their behalf to obtain a search warrant, and Sergeant Quade conceded that he made no attempt to obtain a warrant in this case. (A-114) ("The law at the time says that I can take the blood, and that's what I did."). Moreover, there was no testimony elicited indicating that there was not a sufficient number of officers available to both investigate the crash and obtain a search warrant, and the record establishes that numerous law enforcement officials had responded to the scene of the accident.

The probable cause for seeking and obtaining a search warrant for the felonies of DUI manslaughter/DUI causing serious injury came into being at approximately 1:15 a.m. on January 2013, when law enforcement officials arrived at the scene, removed the Petitioner from the vehicle, and stated that they detected an odor of alcoholic beverage on his breath. The Petitioner's blood was drawn at the hospital at 3:12 a.m. Even if there had been evidence presented by the prosecution during the suppression hearing that the warrant process would have taken *2 or 3 hours* (which there was not), there still was no exigency as a warrant could have been obtained no later than 4 a.m., which is within a reasonable time for an effective blood test under Florida law. *See, e.g., State v. Banoub*, 700 So. 2d 44 (Fla. 2d DCA 1997) ("[F]our hours after being stopped, a driver's blood-alcohol level should already have peaked and be no higher than it was at the time of driving. Because of this fact, the test results obtained after four hours are probative of the blood-alcohol level at the time of driving. . . ."). But again, there was *no evidence* presented by the prosecution that a warrant could not have been obtained by 3:12 a.m. – the time when the warrantless blood draw

eventually took place.

Despite the foregoing failure of the State's proof, the trial court ruled in the Petitioner's case that the prosecution met its burden of proving exigency consistent with *McNeely*. As the law now stands in Florida (and elsewhere), the prosecution can establish exigency simply upon presenting testimony from a police officer that he did not attempt to obtain a warrant for a blood draw in a DUI case because he believed that the warrant process *might* have been time-consuming or difficult or challenging.

It is true that the Court waited until 2013 to resolve in *McNeely* the split of authority that ensued following the decision rendered in *Schmerber* some 47 years earlier. The State of Florida might argue that the Court should wait a similar period of time to allow the "percolation" of more state court decisions before stepping in to resolve the split that has ensued as a result of the conflicting attempts to address the question left unanswered in *McNeely*. The Petitioner would respond that the split of authority is already apparent and in present need of resolution before the split widens even more. The Court should therefore grant review in this case.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman

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