[J-41-2022]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

BAER, C.J., TODD, DONOHUE, DOUGHERTY, WECHT, MUNDY, BROBSON, JJ.

COMMONWEALTH OF PENNSYLVANIA, Appellant v. AKIM SHARIF JONES-WILLIAMS, Appellee	No. 27 MAP 2021 Appeal from the Order of the Superior Court dated August 11, 2020, reconsideration denied October 14, 2020, at No. 1428 MDA 2017 which Reversed/ Vacated the Judgment of Sentence of the York County Court of Common Pleas, Criminal Division, dated April 5, 2017 at No. CP-67-CR-0002824-2015 and Remanded for a new trial. ARGUED: December 8, 2021 RESUBMITTED: June 22, 2022

OPINION

JUSTICE MUNDY **DECIDED: July 20, 2022**

This appeal concerns the warrantless seizure of blood after it had already been drawn and preserved by hospital personnel. For the following reasons, we affirm the Superior Court's holding that the evidence at

issue should have been suppressed and remand for a new trial.

I. Factual Background and Procedural History

On July 5, 2014, at around 4:42 p.m., Akim Jones-Williams (Appellee) drove his car at approximately two miles per hour across train tracks. An approaching train collided with the car and pushed it nearly one-quarter mile before it stopped. Upon arriving at the scene, emergency personnel found Appellee outside the vehicle. Appellee's fiancé, Cori Sisti, and their daughter, S.J., were still inside the car. Medics declared Sisti dead at the scene, but transported Appellee and S.J. to York Hospital for medical treatment.[1]

Lieutenant Steven Lutz was the officer in charge after the accident. Several individuals told Lieutenant Lutz that they smelled burnt marijuana coming from Appellee and the car. Therefore, at approximately 6:00 p.m., Lieutenant Lutz directed Sergeant Keith Farren to interview Appellee at the hospital and obtain a "legal blood draw." Sergeant Farren explained that a "legal blood draw" refers to seeking consent or reading an implied consent form to a suspect before seizing their blood for testing. However, when Sergeant Farren arrived at the hospital, Appellee was restrained in a hospital bed fading in and out of consciousness and unable to respond to basic questions. As such, Sergeant Farren could not communicate to Appellee the consent of the

[1] S.J. survived the injuries sustained from the accident.

form. Nevertheless, Sergeant Farren later learned that hospital personnel drew Appellee's blood at 5:56 p.m. The record does not establish why that blood was drawn, but it is clear that it was drawn prior to Sergeant Farren's arrival.

At 7:30 p.m., Sergeant Farren completed paperwork requesting the hospital's lab to transfer Appellee's blood sample to the National Medical Services ("NMS") laboratory for testing to determine the presence of alcohol or controlled substances. Three days later, on July 8, 2014, the hospital laboratory transferred the blood sample to NMS, which was subsequently analyzed on July 15, 2014. The resulting toxicology report revealed that Appellee's blood contained Delta-9 THC, the active ingredient in marijuana.

Lieutenant Lutz arrested Appellee on April 2, 2015. Following a preliminary hearing, Appellee was held for trial on charges of homicide by vehicle while driving under the influence ("DUI"); homicide by vehicle; endangering the welfare of a child ("EWOC"); recklessly endangering another person ("REAP"); DUI: controlled substance – schedule I; DUI: controlled substance – schedule I, II, or III metabolite; DUI: general impairment; careless driving; careless driving – unintentional death; aggravated assault while DUI; and aggravated assault by vehicle.[2]

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[2] Respectively, 75 Pa.C.S. § 3735(a); 75 Pa.C.S. § 3732; 18 Pa.C.S. § 4304(a)(1); 18 Pa.C.S. § 2705; 75 Pa.C.S. § 3802(d)(1)(i); 75 Pa.C.S. § 3802(d)(1)(iii); 75 Pa.C.S. § 3802(d)(2); 75 Pa.C.S.

On October 26, 2015, Appellee filed an omnibus pre-trial motion, in which he moved to suppress the blood test results. He argued that police lacked probable cause that he was driving under the influence, that his blood was seized without a warrant and without satisfying the exigency exception, and that 75 Pa.C.S. § 3755 did not justify the seizure in the absence of exigent circumstances.[3] A suppression hearing was held on December 21, 2015 at which Lieutenant Lutz explained that he believed the blood could be obtained through a "legal blood draw." However, different from Sergeant Farren's definition, Lieutenant Lutz testified

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§ 3714(a); 75 Pa.C.S. § 3714(b); 75 Pa.C.S. § 3735.1(a); and 75 Pa.C.S. 3732.1(a).

[3] Section 3755 reads:

> § 3755. Reports by emergency room personnel
>
> **General rule.** – If, as a result of a motor vehicle accident, the person who drove, operated or was in actual physical control of the movement of any involved motor vehicle requires medical treatment in an emergency room of a hospital and if probable cause exists to believe a violation of section 3802 (relating to driving under influence of alcohol or controlled substance) was involved, the emergency room physician or his designee shall promptly take blood samples from those persons and transmit them within 24 hours for testing to the Department of Health or a clinical laboratory licensed and approved by the Department of Health and specifically designated for this purpose. This section shall be applicable to all injured occupants who were capable of motor vehicle operation if the operator or person in actual physical control of the movement of the motor vehicle cannot be determined. Test results shall be released upon request of the person tested, his attorney, his physician or governmental officials or agencies.

that the legal blood draw theory was supported by Section 3755 rather than through obtaining consent:

> [Lieutenant Lutz]: I believe the vehicle code allows you to have a legal blood drawn [sic]. I believe it's underneath 3755. I'm not quite sure. But it allows the Commonwealth to, if they have probable cause, to have a legal blood drawn. . . . That was the section that I was using for Officer Farren to have legal blood drawn.

N.T., 12/21/15, at 84. Lieutenant Lutz acknowledged that he could have requested a warrant:

> Q: Now, prior to you requesting I believe it was Officer Farren to seek a legal blood draw from York Hospital, you did not request him to obtain a search warrant before doing so?
>
> [Lieutenant Lutz]: That's correct.
>
> Q: You could have?
>
> A: If it was needed.
>
> Q: You could have?
>
> A: Yes, I could have.

Id. at 83. Sergeant Farren's testimony made no mention of Section 3755. Instead, as mentioned *supra*, he sought to obtain Appellee's blood by reading him an implied consent form. In fact, the paperwork he completed to request that the hospital transfer the previously drawn blood sample to NMS also made no mention of 3755, but rather stated underneath his signature: "I am requesting this test in accordance with

75 Pa.S.C.A. 1547."[4] Commonwealth's Exhibit 18. Sergeant Farren also testified that he could have obtained a warrant:

> Q: It was possible to obtain a search warrant though before you went to York Hospital?
>
> [Sergeant Farren]: It could be, yes.

Id. at 66.

Following the hearing, the court requested briefing on the issues from both parties. Appellee argued that Officer Farren's seizure of his blood sample was illegal and unsupported by the exigency exception or Section 3755. With respect to exigency, he directed the court's attention to *Missouri v. McNeely*, 569 U.S. 141 (2013), which held that there is no *per se* rule that alcohol dissipation in the blood stream creates exigent circumstances. *McNeely* also emphasized that the Fourth Amendment requires police to obtain a warrant where it can be done so reasonably without significantly undermining the efficacy of the search. With respect to Section 3755, Appellee argued that the statute alone could not overcome the warrant requirement and protections of the Fourth Amendment; but, to the extent the statute was valid, Appellee argued that Section 3755 was not satisfied here because there was not probable cause to believe he violated the motor vehicle code at the time hospital personnel took his blood. In response, the Commonwealth argued that *McNeely* did

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[4] Section 1547 is commonly referred to as Pennsylvania's implied consent law. As discussed *infra*, Section 1547 and Section 3755 are interrelated, but distinct statutes.

not cast doubt on the constitutionality of Section 3755, as *McNeely* dealt exclusively with exigent circumstances. The Commonwealth's briefing did not assert that exigent circumstances justified this blood draw, but instead argued that the statutory implied consent scheme was valid and therefore the blood draw was permissible under Section 3755:

> All binding precedent preserves our implied consent scheme under Sections 1547 and 3755 as an exception to the warrant requirement. *McNeely* offers nothing to disturb this case law, as that case solely involved the exigent circumstances exception. Blood from a defendant obtained pursuant to probable cause under § 3755 is constitutionally valid as an exception to the warrant requirement of the Fourth Amendment and Article I, Section 8. The police here did legally obtain [Appellee's] blood pursuant to § 3755. Accordingly, [Appellee's] motion to suppress evidence obtained from his blood draw at York Hospital should be denied.

Commonwealth's Memorandum, 1/29/16, at 27.

On April 27, 2016, the trial court denied Appellee's motion to suppress. The court reasoned that the blood test results were admissible under the exigent circumstances exception based on the totality of the circumstances, regardless of Section 3755 or implied consent:

> The exigency Officer Lutz felt is evident from his testimony when he stated, "I instructed Officer Farren, who was reporting on duty,

> that *as soon as he came on duty* to *jump* in his car and respond to the York Hospital and request a legal blood [draw], a BAC, for Mr. Akim." (N.T. 4.29.15, at 47) (emphasis added). Though Officer Lutz's subjective feeling of exigency carries no weight, we agree that the circumstances warranted it.
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> Metabolization of alcohol is not, in and of itself, enough to find exigency; however, we believe that investigators' fears vis-à-vis metabolization are enough to find exigency when the officers were delayed by needs more pressing tha[n] obtaining [Appellee's] BAC—namely, attending to victims and processing the scene of a death. In short, to whatever extent *McNeely* calls our implied consent scheme into question, **under the totality of the circumstances *sub judice*, this is a case of exigency that is sufficient to overcome any warrant requirement not dispensed with through our implied consent laws**.

Trial Ct. Order, 4/27/16, at 10 (emphasis added).

Appellee was thereafter tried by a jury between January 9 through January 13, 2017, during which the Commonwealth introduced his blood test results. The jury found him guilty of various DUI offenses, homicide by vehicle, EWOC, REAP, aggravated assault while DUI, aggravated assault by vehicle, and careless driving. The trial court subsequently sentenced him to four to eight years of imprisonment followed by one year of probation. After Appellee's post-sentence motion challenging the weight of the evidence and his

sentence was denied, he appealed to the Superior Court.

In his appeal to the Superior Court, Appellee argued that the trial court erred in denying his motion to suppress for three reasons: 1) because the Commonwealth failed to comply with 75 Pa.C.S. § 3755(a) of the Motor Vehicle Code; 2) even if the Commonwealth did comply with that statute, statutory compliance alone is insufficient to overcome the warrant requirement; and 3) there were no exigent circumstances here to justify a warrantless search.

Notably, in its Rule 1925(a) opinion, the trial court determined that its original finding of exigency was incorrect.

> The trial court based its denial of suppression of the blood test results upon a finding of exigent circumstances. Upon further review, the trial court believes it erred in finding exigent circumstances. While the Newberry Township Police Department was pre-occupied with the hectic nature of a train wreck, Sgt. Farren arrived at York Hospital to request a blood test. When he arrived, York Hospital had already conducted a test. All Sgt. Farren did was [] follow the procedure under §3755 and instruct the hospital staff to transfer the blood samples to NMS labs in Willow Grove.
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> When the trial court denied suppression, it incorrectly viewed the totality of the circumstances and gave too much weight to the pre-occupied police force. The trial court now

> believes that there was no urgent and compelling reason for Sgt. Farren to not leave the hospital and attempt to secure a warrant before returning to have the blood samples transferred to NMS labs. Because of this, exigent circumstances did not exist[.]

Trial Ct. Rule 1925(a) Op., 4/13/18, at 12-13. The trial court noted that the constitutionality of Section 3755 was uncertain but asked the Superior Court to find it unconstitutional and suppress Appellee's blood test results. *Id*. at 13, 32.

In a published decision, a panel of the Superior Court unanimously agreed with the trial court's Rule 1925(a) opinion that there were no exigent circumstances because the blood evidence was preserved and no longer dissipating at the time it was seized. *Commonwealth v. Jones-Williams*, 237 A.3d 528, 544, 546 (Pa. Super. 2020). Important to its holding was a recognition that the seizure occurred when Sergeant Farren intervened, not when hospital personnel drew the blood. *Id* at n. 18 ("Sergeant Farren's request to test [Appellee's] blood sample constitutes the relevant search for purposes of our constitutional analysis."). The panel also held that although the Commonwealth complied with Section 3755(a) of the Vehicle Code, statutory compliance no longer independently dispenses with the need to obtain a warrant in light of this Court's decision in *Commonwealth v. Myers*, 164 A.3d 1162 (Pa. 2017). *Id*. at 543. Therefore, the Superior Court concluded that the trial court should have granted Appellee's motion to suppress, reasoning that the drawn

blood was seized without a warrant and absent an exception to the warrant requirement. As such, the court vacated Appellee's judgment of sentence and remanded for a new trial. *Id*. at 546.

The Commonwealth filed a petition for allowance of appeal with this Court, which we granted to address the following issues:

> a. Whether the Superior Court issued a decision in conflict with and failed to properly apply and follow the binding legal precedent of the United States Supreme Court and this Court, in holding that 75 Pa.C.S. § 3755 does not independently support implied consent on the part of [a] driver suspected or arrested for DUI, rendering the implied-consent statute unconstitutional?
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> b. Whether the Superior Court issued a decision in conflict with and failed to properly apply and follow the binding legal precedent of the United States Supreme Court in *Mitchell v. Wisconsin*, ___ U.S. ___, 139 S.Ct. 2525 (2019), by finding that exigent circumstances did not exist to support a warrantless request to test [Appellee's] blood?

Commonwealth v. Jones-Williams, 252 A.3d 1087, (Table) (Pa. 2021) (per curiam).

II. Analysis

A. Standard/Scope of Review

Our standard of review of a suppression motion is well-settled, it "is limited to determining whether the suppression court's factual findings are supported from the record and whether the legal conclusions drawn from those facts are correct." *Commonwealth v. Shaffer*, 209 A.3d 957, 968-69 (Pa. 2019). Our review of questions of law is *de novo*. *Id*. The scope of review for the denial of a motion to suppress "is to consider only the evidence of the Commonwealth and so much of the evidence for the defense as remains uncontradicted when read in the context of the suppression record as a whole." *Id*.

It is well-settled that the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution prohibit unreasonable searches and seizures. *Int. of T.W.*, 261 A.3d 409, 416 (Pa. 2021). The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, paper, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularity describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. Similarly, Article I, Section 8 of the Pennsylvania Constitution provides:

> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizure, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

PA. CONST. art. I, § 8.

A search or seizure conducted without a warrant "is presumptively unreasonable . . . subject to a few specifically established, well-delineated exceptions." *Commonwealth v. Chase*, 960 A.2d 108, 113 (Pa. 2008). As a preliminary matter, the Superior Court correctly recognized that "[t]he blood draw by hospital personnel did not trigger protections under either the Fourth Amendment or Article I, Section 8 because there is no evidence that hospital personnel acted at the direction of the police or as an agent of the police." *Jones-Williams*, 237 A.3d at n. 18. Instead, it was Sergeant Farren's request to transfer Appellee's blood sample to NMS that constitutes the relevant seizure for purposes of our constitutional analysis. *See generally*, *Commonwealth v. Shaw*, 770 A.2d 295, 299 (Pa. 2001) (recognizing a privacy right associated with patients' medical records). With that in mind, we turn to the questions presented here, which ask us to review two asserted warrant exceptions, implied consent and exigent circumstances, and whether they justified the warrantless seizure of Appellee's blood.

B. Exigency

The trial court denied Appellee's suppression motion in the first instance based on the exigency exception to the warrant requirement, so we begin our discussion with the applicability of that exception. Due to the nature of the question presented, both parties focus heavily on *Mitchell v. Wisconsin*, 139 S.Ct. 2525 (2019), which is the most recent case from the United States Supreme Court to assess the exigency exception with respect to a DUI blood draw. This Court previously summarized that "the holding of *Mitchell* . . . is that where a driver is unconscious and therefore cannot be given a breath test, the exigent-circumstances rule almost always permits a blood test without a warrant." *Commonwealth v. Trahey*, 228 A.3d 520, 534, n.11 (Pa. 2020) (quoting *Mitchell*, 139 S.Ct. at 2531) (internal quotation marks omitted). More specifically, *Mitchell* held that "exigency exists when (1) BAC evidence is dissipating and (2) some other factor creates pressing health, safety, or law enforcement needs that would take priority over a warrant application. Both conditions are met when a drunk-driving suspect is unconscious. . . ." *Mitchell*, 139 S.Ct. at 2357. The Commonwealth notes that the Supreme Court also allowed an exception to its rule in *Mitchell* for an "unusual case" where a defendant is able to show that "his blood would not have been drawn if police had not been seeking BAC information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id*. at 2359.

The Commonwealth argues that applying *Mitchell* to this case, exigency was established because there was probable cause to believe that Appellee operated his vehicle under the influence of marijuana, he needed to be transported to the hospital for treatment, was only intermittently conscious, and due to his mental state, was unable to communicate with Sergeant Farren at the hospital. According to the Commonwealth, "[f]ollowing *Mitchell*, police request for a warrantless blood test from the injured and uncommunicative [Appellee] while he was being treated for his injuries was constitutional under the exigent circumstances exception." Appellant's Brief, at 37. The Commonwealth also argues that this is not the type of "unusual case" referred to in *Mitchell*, where the exigency exception would not apply. Namely, Appellee cannot establish that his blood would not have been drawn if police had not been seeking intoxicant information because the blood was drawn prior to any police intervention. Also, the Commonwealth suggests that police could not have reasonably applied for a search warrant at the time of the blood test request without interfering with their other duties surrounding the crash and resulting emergencies.

According to the Commonwealth, the Superior Court erred in concluding that any exigency ended once Appellee's blood was drawn and therefore preserved. The Commonwealth argues that *Mitchell* contemplated the instant scenario and would allow a warrantless test of blood already drawn by hospital personnel, so long as the other *Mitchell* factors were

present. In *Mitchell*, the Supreme Court explained that the unconsciousness of a DUI suspect is itself a medical emergency for which that suspect will need to go to a hospital "not just for the blood test itself but for urgent medical care." *Mitchell*, 139 S.Ct. 2537-38. In such circumstances:

> Police can reasonably anticipate that such a driver might require monitoring, positioning, and support on the way to the hospital; **that his blood may be drawn anyway, for diagnostic purposes, immediately on arrival**; and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing evidentiary value.

Id. (emphasis added). The Supreme Court also noted that "unconscious suspects will often have their skin pierced and blood drawn for diagnostic purposes," and so a warrantless blood test "could lessen the [bodily] intrusion" by preventing a second blood draw. *Id*. n.8. The Commonwealth claims that the Superior Court's opinion conflicts with these principles of *Mitchell* and we should therefore reverse its decision. Thus, the Commonwealth concludes that, "[p]ursuant to *Mitchell*, police possessed the required probable cause and exigent circumstances to have a warrantless blood test be performed on the blood from an unconscious or stuporous [Appellee] that was drawn by hospital personnel while undergoing medical treatment." Appellant's Brief, at 40.

Appellee also focuses on *Mitchell* but emphasizes that *Mitchell* did not establish a *per se* exigency exception for all blood draws. Instead, Appellee explains that the exigent circumstances exception is limited, and it only permits a warrantless search when "there is compelling need for official action and no time to secure a warrant." *Mitchell*, at 2534 (quoting *Missouri v. McNeely*, 569 U.S. 141, 149 (2013)). Appellee argues that there were no such exigent circumstances here preventing police from obtaining a warrant, as they testified at the suppression hearing that they could have secured a warrant. N.T., 12/21/15, at 66, 83. According to Appellee, the lack of exigency is obvious because the seizure occurred after the blood was drawn, but the relevant testing did not occur until over three days later. Therefore, Appellee requests we affirm the Superior Court's decision, which determined that "[a]s of [the time the blood was drawn], then, [Appellee's] blood sample, including all of the intoxicant contained therein, was preserved. Thus, the extraction . . . literally stopped the clock on any concern that the further passage of time could result in dissipation of evidence[.]" *Commonwealth v. Jones-Williams*, 237 A.3d 528, 544, 544 (Pa. Super. 2020).

It is helpful at the outset to review the foundational principles of the exigency exception. It cannot be overlooked that "the ultimate touchstone of the Fourth Amendment is reasonableness." *Riley v. California*, 134 S.Ct. 2473, 2482 (2014) (quotations omitted). The very reason the exigency exception exists is to allow prompt action by law enforcement when the totality of the

circumstances establish that it was reasonable to act without a warrant. Thus, the exigency exception applies "when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment." *Missouri v. McNeely*, 133 S.Ct. 1552, 1558 (2013) (quoting *Kentucky v. King*, 131 S.Ct. 1859 (2011)).

Although exigency arises in various circumstances, relevant to the issue today is exigent circumstances based upon "a likelihood that evidence will be destroyed if police take the time to obtain a warrant[.]" *Commonwealth v. Wright*, 961 A.2d 119, 138 (Pa. 2008). For example, in *Wright*, this Court held that exigent circumstances justified the seizure of Wright's bloody clothes and swabs of blood from his hands without a warrant. Given the nature of the evidence and the fact that Wright had been taken to the hospital, this Court affirmed the trial court's holding that the time required to obtain a warrant would have certainly risked destruction of the evidence on Wright's hands and clothing:

> It is hard to imagine evidence more readily destroyed than blood on a person's hands. Further, in a hospital situation it is similarly hard to imagine a hospital admission which would have not removed [Wright's] clothes and subjected them to . . . storing, laundering, relatives taking, etc. . . . The one to two hours necessary to obtain a warrant would have risked all of this.

Id (cleaned up).

With those basic principles in mind, it is clear exigent circumstances did not exist to justify the warrantless seizure of Appellee's blood. Exigency in the context of blood draws has become a recurring issue for our courts. This is unsurprising for the simple fact that such evidence inherently is steadily destroyed through the body's metabolic processes. In turn, an extensive body of case law has developed regarding this issue. *Schmerber v California*, 384 U.S. 757, 770 (1966) (warrantless blood draw was constitutional because the 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."); *Missouri v. McNeely*, 569 U.S. 141 (2013) (following *Schmerber*, the metabolization of drugs or alcohol in the blood stream does not per se establish exigency, but must be considered among other factors on a case by case basis under the totality of the circumstances); *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2185 (2016) (assessing the constitutionality of breath and blood tests as well as implied consent statutes); *Mitchell, supra* (holding that exigent circumstances will almost always support a warrantless blood draw in the context of an unconscious DUI suspect, and noting that a less intrusive breath test is not available under the circumstances); *Commonwealth v. Trahey*, 228 A.3d 520 (Pa. 2020) (applying *Mitchell* and *Birchfield* to hold that there were no exigent circumstances for a warrantless seizure of blood where a breath test could have been taken to test for the presence of alcohol and there was time to secure a warrant to test blood for controlled substances).

However, this case does not present the same inherent exigency concerns as other blood draw cases because the evidence in this case was no longer being actively metabolized. Indeed, as recognized in *Mitchell*, the first factor necessary to establish exigency is that the evidence within the blood was dissipating. *Mitchell*, 139 S.Ct. at 2537. Starkly different here, the seizure did not occur until Sergeant Farren filled out paperwork requesting the blood to be tested. At the time of that seizure, the blood was already drawn, preserved, and the evidence therein no longer dissipating. Therefore, in the absence of any other evidence that the drawn and preserved blood would be lost or destroyed within the time it would take to obtain a warrant, there were no exigent circumstances to justify the warrantless seizure. No such alternative theory of exigency exists here, as both Sergeant Farren and Lieutenant Lutz conceded that they could have obtained a warrant.[5] Therefore, we agree with the Superior Court that the trial court erred in denying Appellee's suppression motion based on exigent circumstances.[6]

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[5] The officers' testimony is not dispositive of the issue, as any Fourth Amendment inquiry requires an objective assessment of the evidence. *Commonwealth v. Trahey*, 228 A.3d, at 539; *McNeely*, 133 S.Ct. at 1558. However, the record undeniably supports the officers' judgment that they could have obtained a warrant, particularly the fact that nearly two hours lapsed after the blood was drawn before Sergeant Farren requested for the blood to be tested, and the actual test did not occur until over a week later.

[6] Justice Wecht's Concurring and Dissenting Opinion ("CDO") analyzes this issue beyond the simple fact that the blood was preserved and suggests that the exigency exception was also unavailing because the intoxicant at issue was marijuana. According to

C. Implied Consent/§ 3755

Having concluded that the exigency exception does not support the warrantless seizure of Appellee's blood, the only remaining issue is the Commonwealth's contention that the Superior Court erred in deeming Section 3755 unconstitutional. In reaching that conclusion, the Superior Court conducted a two-part analysis. First, it assessed whether the Commonwealth complied with Section 3755. Then, after concluding that the Commonwealth proved adherence with the requirements of Section 3755, the Superior Court held that compliance with the statute does not satisfy the warrant requirement under this Court's decision in *Commonwealth v. Myers*, 164 A.3d 1162 (Pa. 2017). The Commonwealth argues the latter analysis was error because the portion of *Myers* upon which the Superior Court relied was a non-precedential plurality.

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the CDO, "where the sole basis for probable cause is evidence demonstrating that the suspect drove under the influence of *marijuana*, as it was here, I seriously doubt that law enforcement will be unable to obtain a search warrant for a blood test before the pertinent evidence dissipates from the suspect's blood." CDO at 8. To support this position, the CDO notes that THC's inactive metabolite can take days or weeks to dissipate from one's body. It is worth reiterating that the suppression of evidence must be assessed on a case-by-case basis under the totality of the circumstances. While it may be more difficult to establish exigency for a blood draw where the suspicion is driving under the influence of marijuana rather than alcohol, that alone does not foreclose the possibility. In fact, *Mitchell* suggested such a scenario: where a suspect's pressing medical treatment or some other imminent intervening factor could alter the evidence contained within his or her blood. In such a situation, exigency may exist notwithstanding the slower metabolization of controlled substances.

Putting aside whether the Superior Court's application of the *Myers* plurality was appropriate, the Superior Court could only reach that constitutional assessment having first concluded that the Commonwealth complied with Section 3755. *See Commonwealth v. Ludwig*, 874 A.2d 623, 634 n 9 (Pa. 2005) (declining to assess whether a statute was unconstitutional as applied because the Commonwealth failed to establish a preliminary *prima facie* case under the statute); *Barasch v. Bell Telephone Co. of Pennsylvania*, 605 A.2d 1198, 1203 (Pa. 1992) ("[W]e have long held that our courts should not decide constitutional issues in cases which can properly be decided on non-constitutional grounds."). Section 3755 is titled "Reports by emergency room personnel" and reads:

> **(a) General rule.** – If, as a result of a motor vehicle accident, the person who drove, operated or was in actual physical control of the movement of any involved motor vehicle requires medical treatment in an emergency room of a hospital and if probable cause exists to believe a violation of section 3802 (relating to driving under influence of alcohol or controlled substance) was involved, the emergency room physician or his designee shall promptly take blood samples from those persons and transmit them within 24 hours for testing to the Department of Health or a clinical laboratory licensed and approved by the Department of Health and specifically designated for this purpose. This section shall be applicable to all injured

> occupants who were capable of motor vehicle operation if the operator or person in actual physical control of the movement of the motor vehicle cannot be determined. Test results shall be released upon request of the person tested, his attorney, his physician or governmental officials or agencies.

75 Pa.C.S. § 3755. According to the Superior Court, "the officers had probable cause to believe that [Appellee] was DUI when they asked the hospital to conduct chemical testing. . . . this is sufficient to show that the Commonwealth complied with the requirements of Section 3755(a)." *Commonwealth v. Jones-Williams*, 237 A.3d 528, 537 (Pa. Super. 2020).

However, Sergeant Farren's testimony made no mention of Section 3755. Instead, the record reflects that Sergeant Farren went to the hospital with the intention of seeking Appellee's consent. The paperwork Sergeant Farren filled out to request that the hospital transfer the blood sample to NMS specifically stated underneath his signature: "I am requesting this test in accordance with 75 Pa.S.C.A. 1547." Commonwealth's Exhibit 18.[7] Although Lieutenant Lutz testified that he

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[7] This Court has recognized that "Section 3755 and the implied consent law, 75 Pa.C.S. § 1547, comprise a statutory scheme[.]" *Commonwealth v. Shaw*, 770 A.2d 295, 298 (Pa. 2001). However, while Section 1547 "implies the consent of a driver to undergo blood testing in certain circumstances," Section 3755 "requires hospital personnel to release the blood test results at the request of, among others, a police officer." *Id*. This Court noted in *Myers* that the authority of these statutes are not interchangeable:

believed Sergeant Farren could obtain the blood under Section 3755, that subjective assessment alone does not establish compliance with the statute. *See*, *Trahey*, *supra* n.5. Most importantly, an objective analysis of the evidence reveals that the record is silent as to why the hospital drew Appellee's blood prior to Sergeant Farren's arrival. In the absence of any facts that the blood was taken pursuant to Section 3755, it cannot be said that the Commonwealth proved adherence with the requirements of the statute. *See Shaw*, 770 A.2d, at 298 (finding, consistent with Justice Zappala's concurring opinion in *Riedel*, Section 3755 inapplicable because hospital personnel drew and tested blood for independent medical purposes and therefore it was "not a case where a blood sample has been taken pursuant to Section 3755."); *Commonwealth v. Riedel*, 651 A.2d 135, 142-43 (Pa. 1994) (Zappala, J., Concurring) (explaining Section 3755 and concluding that the statutory procedure was not satisfied where "the trooper testified that he went to the hospital with the intention of requesting [Riedel] submit to a blood test, but did not do so when he learned that samples had been taken for medical purposes.").

Because the record does not establish that Section 3755 applied under these circumstances, the subsequent analysis of the statute's constitutionality should

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"[T]he blood test in *Riedel* was not effectuated pursuant to Section 1547 . . . The police officer requested the results of that test under the authority of a different statute[, Section 3755]." *Myers*, 164 A.3d at 670 n. 14.

not be addressed. Moreover, the trial court only provided a *post hoc* assessment of Section 3755 in its Rule 1925(a) opinion, long after the suppression motion had been denied based upon its finding of exigent circumstances. Trial Ct. Order, 4/27/16, *supra*. Thus, because that basis was legally incorrect, the Superior Court could have reversed the denial of suppression for that reason alone without its further assessment of Section 3755. *Barasch*, *supra*; *Ludwig*, *supra* (citing *Shuman v. Bernie's Drug Concessions*, 187 A.2d 660, 664 (1963) (constitutional questions should not be passed upon unless absolutely necessary to resolve the controversy)).[8]

III. Conclusion

Accordingly, while we affirm the Superior Court's ultimate disposition reversing the trial court's order denying suppression, vacating Appellee's judgment of sentence, and remanding for a new trial; we vacate the portion of the Superior Court's holding deeming Section 3755 unconstitutional.

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[8] These long-standing appellate standards emphasize that it was inappropriate for the Superior Court to assess the statute's constitutionality where it was not absolutely necessary to do so. Notwithstanding the parties' arguments or the Rule 1925(a) opinion, the trial court denied suppression based on its initial determination of exigent circumstances. That ruling shaped the scope of appellate review. We cannot say that "the constitutionality of these procedures is squarely before us" (CDO at 23) when the denial of the underlying suppression order was not based on those very procedures.

Chief Justice Baer and Justices Todd and Brobson join the opinion.

Justice Wecht files a concurring and dissenting opinion in which Justices Donohue and Dougherty join.

[J-41-2022] [MO: Mundy, J.]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA, Appellant v. AKIM SHARIF JONES-WILLIAMS, Appellee	No. 27 MAP 2021 Appeal from the Order of the Superior Court dated August 11, 2020, reconsideration denied October 14, 2020, at No. 1428 MDA 2017 which Reversed/ Vacated the Judgment of Sentence of the York County Court of Common Pleas, Criminal Division, dated April 5, 2017, at No. CP-67-CR-0002824-2015 and Remanded for a new trial. ARGUED: December 8, 2021 RESUBMITTED: June 22, 2022

CONCURRING AND DISSENTING OPINION

JUSTICE WECHT **DECIDED: July 20, 2022**

By the investigating officers' own admissions, exigent circumstances plainly were absent in this case. Accordingly, I join the Court's opinion to the extent that it rejects the Commonwealth's invocation of that constitutional exception to justify the warrantless search and seizure of Akim Jones-Williams' blood-test

results in its pursuit of evidence to prove that he drove under the influence ("DUI") of a controlled substance. I write separately to offer additional reasons why resort to exigency would be unavailing here in light of the particular treatment of controlled substances under Pennsylvania's DUI laws.

Furthermore, I respectfully dissent from the Majority's resolution of the principal legal question presented in this appeal. We granted review to determine whether the Superior Court erred in concluding that Section 3755 of the Vehicle Code facially is unconstitutional. That statute—which operates in conjunction with Section 1547(a) of the Vehicle Code, the so-called "implied-consent" provision[1]—obliges hospital emergency room personnel: (1) to "promptly take blood samples" of any person who "requires medical treatment in an emergency room of a hospital" resulting from "a

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[1] Section 1547(a) provides:

> **(a) General rule.**—Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath or blood for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3082 (relating to driving under the influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition lock).

75 Pa.C.S. § 1547(a).

motor vehicle accident" in which the person "drove, operated or was in actual physical control of any involved motor vehicle . . . if probable cause exists to believe a violation of [75 Pa.C.S. §]3802 (relating to driving under the influence of alcohol or controlled substance) was involved"; (2) to transfer the sample "within 24 hours for testing to the Department of Health or a clinical laboratory licensed and approved by the Department of Health and specifically designated for this purpose"; and (3) to release the test results "upon request of the person tested, his attorney, his physician or governmental officials or agencies." 75 Pa.C.S. § 3755(a). *See Commonwealth v. Shaw*, 770 A.2d 295, 298 (Pa. 2001) ("Section 3755 and the implied consent law, 75 Pa.C.S. § 1547, comprise a statutory scheme which both implies the consent of a driver to undergo blood testing in certain circumstances and requires hospital personnel to release the blood test results at the request of, among others, a police officer.").

Relying upon the expressions of a plurality of Justices in *Commonwealth v. Myers*, 164 A.3d 1162 (Pa. 2017), the Superior Court held that implied consent does not serve as an independent exception to the warrant requirement under the Fourth Amendment to the United States Constitution[2] or under Article I,

[2] "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend. IV.

Section 8 of the Pennsylvania Constitution.[3] Accordingly, it reasoned that implied consent cannot support the warrantless seizure of a DUI suspect's blood or the warrantless disclosure to law enforcement of the results of any blood tests under Section 3755(a). The Majority vacates that portion of the lower court's decision on the grounds that "the record does not establish that Section 3755 applied under these circumstances." Majority Op. at 17. I disagree. The record amply supports the Commonwealth's claim that investigators obtained the results of Jones-Williams' blood test pursuant to Section 3755(a) and sought to have those results admitted at trial (over Jones-Williams' objections) on the independent grounds that Jones-Williams impliedly consented to having them turned over to investigators. Therefore, I would reach the question of the statute's constitutionality. Because the lower court correctly concluded that statutorily implied consent is not a valid exception to the warrant requirement—and thus a DUI suspect does not impliedly consent to having his blood drawn and tested, or to having those results turned over to law enforcement, simply by virtue of having driven a motor vehicle in Pennsylvania—I would affirm the Superior Court's judgment *in toto*.

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[3] "The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant." PA. CONST. art. I, § 8.

I.

The Commonwealth initially relies upon the doctrine of exigent circumstances to defend the manner in which the Newberry Township Police Department obtained the results of Jones-Williams' blood test without a warrant. The Majority correctly finds that the Commonwealth's reliance is misplaced. "Exigent circumstances are defined by a 'compelling need for official action and no time to secure a warrant.'" *Commonwealth v. Trahey*, 228 A.3d 520, 537-38 (Pa. 2020) (quoting *Missouri v. McNeely*, 569 U.S. 141, 149 (2013)). In assessing the presence or absence of exigency, a court must consider the totality of the circumstances. *See id.* at 530.

The basis for the investigators' probable cause assertion here was circumstantial evidence that Jones-Williams drove his car into the path of an oncoming train while under the influence of tetrahydrocannabinol ("THC"), the main psychoactive compound in marijuana.[4] Thus, this case does not align factually with

[4] Whether the police had probable cause to believe that Jones-Williams had driven under the influence of a controlled substance is not reasonably in dispute. Two eyewitnesses, including the paramedic who rendered aid to Jones-Williams at the crash site, told investigators that they smelled burnt marijuana emanating from both his SUV and his person after he was ejected, or otherwise extricated himself, from the wreck that he caused by driving across a set of train tracks in front of an oncoming train. Another witness, the conductor, also informed an investigating officer that he saw Jones-Williams' fiancée sitting in the front passenger seat, from which we can reasonably conclude that Jones-Williams (rather than his young daughter) was driving. The lead detective, Sergeant Steven D. Lutz, gathered all of this information

the circumstances presented in either *Myers* or *Mitchell v. Wisconsin*, ___ U.S. ___, 139 S.Ct. 2525 (2019) (plurality), both of which involved suspicions that an unconscious driver drove under the influence of alcohol. That is significant, as we recognized in *Trahey*, because although a blood test "may be necessary" to prove DUI offenses involving controlled substances under Section 3802 of the Vehicle Code beyond a reasonable doubt, unlike alcohol-related offenses, "there is no pressing need to conduct the test" for controlled substances "within a specified time, and thus no exigency." 228 A.3d at 538.

Moreover, as the Supreme Court explained in *McNeely*, "the natural dissipation of alcohol in the bloodstream does not constitute" an exigency *per se* justifying a warrantless blood draw. 569 U.S. at 165. The same necessarily must be true of controlled substances; in fact, it may be more so with regard to certain controlled substances, like cannabinoids, given the human body's naturally slower rates of metabolism when compared with alcohol. In either scenario, some other factor must be present that demonstrates a "compelling need for official action and no time to secure a warrant." *Id.* at 149 (quoting *Michigan v. Tyler*, 436 U.S. 499, 509 (1978)). In the *Mitchell* plurality's view,

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at the scene. Sergeant Lutz then dispatched Sergeant Keith A. Farren to York Hospital in order to obtain Jones-Williams' blood for chemical testing. See Notes of Testimony ("N.T."), Suppression Hearing, 12/21/2015, at 68-79.

unconsciousness does not just create pressing needs; it is *itself* a medical emergency. It means that the suspect will have to be rushed to the hospital or similar facility not just for the blood test itself but for urgent medical care. Police can reasonably anticipate that such a driver might require monitoring, positioning, and support on the way to the hospital; that his blood may be drawn anyway, for diagnostic purposes, immediately upon arrival; and that immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value. . . .

Indeed, in many unconscious-driver cases, the exigency will be *more* acute. . . . A driver so drunk as to lose consciousness is quite likely to crash, especially if he passes out before managing to park. And then the accident might give officers a slew of urgent tasks beyond that of securing (and working around) medical care for the suspect. Police may have to ensure that others who are injured receive prompt medical attention; they may have to provide first aid themselves until medical personnel arrive at the scene. In some cases, they may have to deal with fatalities. They may have to preserve evidence at the scene and block or redirect traffic to prevent further accidents. These pressing matters, too, would require responsible officers to put off applying for a warrant, and that would only exacerbate the delay—and imprecision—of any subsequent BAC test.

> In sum, all these rival priorities would put officers, who must often engage in a form of triage, to a dilemma. It would force them to choose between prioritizing a warrant application, to the detriment of critical health and safety needs, and delaying the warrant application, and thus the BAC test, to the detriment of its evidentiary value and all the compelling interests served by BAC limits. This is just the kind of scenario for which the exigency rule was born—just the kind of grim dilemma it lives to dissolve.

Mitchell, 139 S.Ct. at 2537-38 (cleaned up; emphasis in original). But the *Mitchell* plurality stopped short of issuing a categorical rule. Consequently, a driver's unconsciousness alone remains an insufficient basis upon which to justify a warrantless blood draw under the totality of the circumstances. Something more is needed.

Here, the Commonwealth asserts that the other factor supporting its exigency justification was the "chaotic situation" at the crash site. Commonwealth's Br. at 38 (quoting N.T., Suppression Hearing, 12/21/2015, at 77). Specifically, Jones-Williams' fiancée had died at the scene, there was evidence to collect and witnesses to interview, and traffic had to be diverted since the train was stuck at the level crossing that serves as a thruway for motor vehicles. However, as the Majority highlights, both Sergeant Farren and Sergeant Lutz conceded at the suppression hearing that, those factors notwithstanding, they could have obtained a search warrant before proceeding to York Hospital. *See* N.T., Suppression Hearing, 12/21/2015, at

64-66 (Testimony of Sergeant Farren); *id.* at 83-84 (Testimony of then-Lieutenant Lutz). Those admissions are fatal to the Commonwealth's assertion of exigent circumstances.

But the absence of exigency is even more pronounced in situations, like this one, where a member of the hospital's emergency room staff preemptively draws a sample of a DUI suspect's blood without being asked to do so by law enforcement, thereby preserving any evidence of drugs or alcohol that might be in the blood at the time of extraction. *See Commonwealth v. Riedel*, 651 A.2d 135, 141 (Pa. 1994) (explaining that the exigent circumstances exception does not apply where there is "no danger that [a suspect's] blood alcohol content would evanesce because it was preserved by [a] medical purposes blood test"). Although the *Mitchell* plurality spoke favorably of permitting warrantless blood *draws* based upon the fact that unconscious patients often will have their blood taken for diagnostic purposes upon their arrival at a hospital in any event, that acknowledgement concerned only the necessity of extracting a blood sample in order to preserve evidence when there is no time to apply for a warrant. It did not speak to any subsequent testing or disclosure of the results of such testing to law enforcement without a warrant, when the exigency likely will have diminished entirely. In fact, under Section 3755(a), Pennsylvania hospitals have twenty-four hours to transfer blood samples to an accredited facility for testing, and it may take an additional day or

more for results to come back.[5] The Commonwealth's sole purpose in obtaining the test results at that point will be to determine whether criminal charges are warranted. That interest is not an independent exigency that justifies demanding a suspect's medical test results without first obtaining a warrant.

Even in circumstances where hospital personnel have not preemptively drawn and preserved a DUI suspect's blood, where the sole basis for probable cause is evidence demonstrating that the suspect drove under the influence of *marijuana*, as it was here, I seriously doubt that law enforcement will be unable to obtain a search warrant for a blood test before the pertinent evidence dissipates from the suspect's blood. Section 3802 of the Vehicle Code prohibits an individual from driving, operating, or being in actual physical control of the movement of a vehicle if "[t]here is in the individual's blood any amount of a: (i) Schedule I controlled substance, as defined in . . . The Controlled Substance, Drug, Device and Cosmetic Act; (ii) Schedule II or Schedule III controlled substance, as defined in" the Drug Act, "which has not been medically prescribed for the individual; or (iii) metabolite of a substance under subparagraph (i) or (ii)." *Id.* § 3802(d)(1)(i)-(iii). The Drug Act, in turn, classifies "Marihuana" as a Schedule I controlled substance. 35 P.S. § 780-104(1)(iv).

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[5] It took three days for NMS Labs to receive the sealed blood chain-of-custody kit that York Hospital mailed on July 5, 2014. NMS released the results of its toxicology analysis ten days later. *See* NMS Labs Toxicology Report, 7/15/2014, at 1 (Commonwealth's Suppression Hearing Ex. 2).

Because it is unlawful to drive under the influence of *any amount* of marijuana,[6] and because it potentially can take days or weeks for THC's inactive metabolite to naturally dissipate from one's body,[7] I find it difficult

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[6] *See Commonwealth v. Barr*, 266 A.3d 25, 47 (Pa. 2021) (Dougherty, J., concurring and dissenting) (identifying a potential point of conflict between the Medical Marijuana Act, which legalized, among other things, certain methods of marijuana consumption for medicinal purposes, and the Vehicle Code, which prohibits driving with any amount of THC or its metabolite in one's system).

[7] *See* NMS Labs Toxicology Report, 7/15/2014, at 2-3 ¶¶ 3-4 (explaining that, "[w]hile THC disappears from the blood rapidly, THCC [the inactive metabolite] may persist for several hours, and in heavy chronic use may be present at low concentrations for several days"). Of course, blood testing is not the exclusive means of confirming the presence of THC or its metabolite in a suspect's system. Evidence of marijuana use may persist in an individual's urine for anywhere from a week to several months, depending on the frequency of use. *See* Ken Kulig, *Interpretation of Workplace Tests for Cannabinoids*, 13 J. MED. TOXICOL. 106, 109 (2017) ("The current regulatory testing for cannabinoids uses as the target analyte in urine an inactive THC metabolite that may persist for weeks or even months in chronic users after the last use.") (citing George M. Ellis, Jr., *et al.*, *Excretion patterns of cannabinoid metabolites after last use in a group of chronic users*, 38 CLINICAL PHARMACOLOGY & THERAPEUTICS 572, 527 (1985) (summarizing findings of controlled study demonstrating that the mean excretion time for chronic marijuana users under strict supervised abstinence was 27 days, while some participants took as many as 77 days for positive test results to drop below screening parameters)); Anne Smith-Kielland, *et al.*, *Urinary Excretion of 11-Nor-9-Carboxy-Δ^9-Tetrahydrocannabinol and Cannabinoids in Frequent and Infrequent Drug Users*, 23 J. ANAL. TOXICOL. 323, 323 (1999) (for self-reported infrequent users, "low but detectable concentrations of" THC metabolite were observed more than five days beyond last documented use of marijuana "in most of the [urine] specimens analyzed"). Likewise, some studies have shown that cannabinoids may be detected in hair follicles up to two or

to imagine a scenario in which exigency would justify a warrantless blood draw, much less warrantless chemical testing of a preserved sample, based solely upon suspicions that a person drove a vehicle while under the influence of marijuana in violation of Pennsylvania DUI law.[8]

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three months after consumption. *See* Michelle Taylor, *et al.*, *Comparison of cannabinoids in hair with self-reported cannabis consumption in heavy, light and non-cannabis users*, 36 DRUG & ALCOHOL REV. 220, 225 (2017).

[8] To be clear, I do not suggest a *per se* rule for all marijuana DUI cases. I grant the possibility that "imminent medical treatment" may be rendered in such a way that DUI evidence potentially present within a suspect's blood may be affected other than by natural metabolic processes, *Mitchell*, 139 S.Ct. at 2538 (plurality) (opining that "immediate medical treatment could delay (or otherwise distort the results of) a blood draw conducted later, upon receipt of a warrant, thus reducing its evidentiary value"), the circumstances of which, of course, would need to be assessed on a case-by-case basis. But like the other justifications offered by the *Mitchell* plurality in favor of its preferred "almost always" (but not quite) exigency rule for warrantless blood draws of unconscious drivers, *id.* at 2531—which it supported with references to medical treatises, federal agency reports, clinical and law enforcement guidance, and other sources, *id.* at 2537-38 nn.5-8—the plurality's "distortion" rationale was raised in the context of *alcohol*-related DUI investigations. Indeed, the lone authority cited by the plurality with respect to distortion was a brief passage in *McNeely* in which the Supreme Court identified the "countervailing concerns" that DUI experts face *in drunk driving cases* when delays in obtaining blood draws complicate efforts to "work backwards from the [Blood Alcohol Content ("BAC")] at the time the sample was taken to determine the BAC at the time of the alleged offense," thereby "rais[ing] questions about the accuracy of the calculation." *McNeely*, 569 U.S. at 156. Notwithstanding those concerns, the Court rejected calls for a *per se* exigency rule in DUI cases, reasoning that the half-century of technological

"advances . . . that allow for the more expeditious processing of warrant applications" necessarily "are relevant to an assessment of exigency," "particularly" in drunk-driving investigations, "where the evidence offered to establish probable cause is simple," and given that "BAC evidence is lost gradually and relatively predictably." *Id.* at 154-55.

As indicated, *Mitchell* and *McNeely* both involved individuals suspected of driving under the influence of alcohol. In Pennsylvania, as in virtually every State, heightened tiers of punishment are available in alcohol-related DUI cases based upon proof that a DUI suspect's BAC level exceeded a particular measurement at a specific moment in time—so medical treatments that demonstrably distort BAC levels in unnatural ways may take on legal significance when look-back periods are at issue. When it comes to driving under the influence of marijuana (and other controlled substances) under Section 3802, however, there are no such tiers; proof that a person drove with "any amount" of such substances in his or her blood will suffice for a conviction. In that vein, I am not aware of any instances from DUI case law or clinical studies in which the kinds of emergency medical treatment typically provided to individuals rendered unconscious from car accidents have been shown to cause the complete dissipation of controlled substances from one's blood within the time that a warrant generally can be obtained with the advent of modern technologies. But even in that seemingly remote event, blood-draw evidence is not a prerequisite to conviction. The Commonwealth may still attempt to prove DUI-general impairment resulting from the use of controlled substances at trial with the same kind of relevant direct or circumstantial evidence that could have supported the blood-draw warrant application in the first place. All of this is to say that rank speculation about the effects that "imminent medical treatment" *might* have on the levels of THC or its metabolite in an unconscious DUI suspect's blood is not an exception that swallows the general rule requiring warrants for blood draws in these circumstances. In any case, here the Commonwealth has never suggested that the medical treatment Jones-Williams received upon his arrival at York Hospital's emergency room was likely to accelerate the natural dissipation of, or otherwise "distort," evidence pertaining to marijuana use that investigators

Lastly, the Commonwealth and the Pennsylvania District Attorneys Association ("PDAA") suggest that the specific concentration of THC in Jones-Williams' bloodstream is necessary to substantiate the charge of homicide by vehicle while DUI. Commonwealth's Br. at 36 n.143 (noting "the great evidentiary need for detecting the active impairing ingredient of the drug beyond a mere metabolite in order to establish criminal negligence and the DUI caused the crash"); PDAA's Br. as *Amicus Curiae* at 11 (asserting that "the degree of dissipation of marijuana in the blood stream is crucial to any prosecution for Homicide by Vehicle While DUI," because the Commonwealth must prove not only that the driver was under the influence of alcohol or a controlled substance, "but that this consumption was the cause of the fatality"). A person is guilty of homicide by vehicle while DUI if he "unintentionally causes the death of another person as the result of a violation of [75 Pa.C.S. §]3802 (relating to driving under the influence of alcohol or controlled substance) and . . . is convicted of violating section 3802." 75 Pa.C.S. § 3735(a)(1). Though it may be the case that the sufficiency of the evidence needed to prove the causation element of that offense might turn upon the quantum of a controlled substance in one's system, the Commonwealth's "significant interest in obtaining [that] evidence" before its natural dissipation by itself simply does not constitute an exigent circumstance justifying the warrantless seizure or search of a person's blood or

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suspected was in his bloodstream, so the point largely is academic.

blood-test results. *Trahey*, 228 A.3d at 536; *cf. McNeely*, 569 U.S. at 165. Thus, any assertions of necessity due to natural dissipation in the particular context of a homicide-by-vehicle-while-DUI investigation or prosecution are unavailing.

II.

A.

Although this Court has spilled much ink over the last thirty years on the subject of implied consent, we have yet to definitively resolve its validity as a purported exception to the warrant requirement under the Fourth Amendment or Article I, Section 8 of our federal and state Constitutions, respectively.[9] We took this

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[9] *See*, *e.g.*, *Commonwealth v. Bell*, 211 A.3d 761, 763-64 (Pa. 2019) (upholding the "evidentiary consequence" of a DUI defendant's refusal to submit to a blood test set forth in Section 1547(e)—*i.e.*, that evidence of the refusal itself can be admitted at trial to suggest consciousness of guilt); *Myers*, 164 A.3d at 1172-81 (plurality) (opining that implied consent is not an independent exception to the warrant requirement*); Shaw*, 770 A.2d at 298-99 (holding that, where hospital personnel conduct BAC testing for "independent medical purposes"—*i.e.*, not at the request of law enforcement—investigators are not statutorily authorized to obtain those results under Section 3755, and therefore violate Article I, Section 8 when they do so without a warrant); *Riedel*, 651 A.2d at 139 (holding that "where an officer has probable cause to request a blood test pursuant to 75 Pa.C.S. § 3755(a), the failure to verbalize the request shall not bar the officer from obtaining the results of a medical purposes blood test without a warrant"); *id.* at 140 ("[B]ecause the police had probable cause to request the blood test, they were entitled to obtain the results without a search warrant, regardless of who actually drew the blood."); *Commonwealth v. Kohl & Danforth*, 615 A.2d 308, 313-16 (Pa.

case to review the propriety of the lower court's determination that Section 3755 of the Vehicle Code constitutionally is deficient because it does not require actual, knowing, and voluntary consent before law enforcement agents may compel a person to submit to a blood draw or may obtain the results of a blood test without first obtaining a warrant for the same. Sidestepping those issues, however, the Majority contends that the lower court "could only reach that constitutional assessment having first concluded that the Commonwealth complied with Section 3755." Majority Op. at 15.

The Court reasons that we ought not address the statute's constitutionality "[b]ecause the record does not establish that Section 3755 applied under" the circumstances presented here. *Id.* at 17. In particular, the Majority highlights the fact that

> Sergeant Farren's testimony made no mention of Section 3755. Instead, the record reflects that Sergeant Farren went to the hospital with the intention of seeking [Jones-Williams'] consent. The paperwork Sergeant

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1992) (holding that warrantless blood draws and chemical tests undertaken pursuant to the implied-consent provision of the now-repealed Section 1547(a)(2) of the Vehicle Code violate state and federal constitutional provisions against unreasonable searches and seizures because the statute did not require investigators to establish probable cause that the driver had been driving under the influence); *Commonwealth v. Eisenhart*, 611 A.2d 681, 683-84 (Pa. 1992) (holding that a conscious driver has a statutory right to revoke his implied consent under Section 1547(b) of the Vehicle Code).

> Farren filled out to request that the hospital transfer the blood sample to NMS specifically stated underneath his signature: "I am requesting this test in accordance with 75 Pa.S.C.A. 1547." Commonwealth's Exhibit 18. Although Lieutenant Lutz testified that he believed Sergeant Farren could obtain the blood under Section 3755, that subjective assessment alone does not establish compliance with the statute. *See*, *Trahey*, *supra* n.5. Most importantly, an objective analysis of the evidence reveals that the record is silent as to why the hospital drew [Jones-Williams'] blood prior to Sergeant Farren's arrival. In the absence of any facts that the blood was taken pursuant to Section 3755, it cannot be said that the Commonwealth proved adherence with the requirements of the statute. *See Shaw*, 770 A.2d, at 623 (finding Section 3755 inapplicable because it "is not a case where a blood sample has been taken pursuant to Section 3755.").

Id. at 16-17 (footnote omitted). The Majority further explains that "the trial court only provided a *post hoc* assessment of Section 3755 in its Rule 1925(a) opinion, long after the suppression motion had been denied based upon its finding of exigent circumstances." *Id.* at 17. Because that finding "was legally incorrect, the Superior Court could have reversed the denial of suppression for that reason alone without its further assessment of Section 3755." *Id.* I respectfully disagree.

As a threshold matter, this Court long has regarded Section 1547 and Section 3755 as coordinate

components of a unitary implied-consent "scheme." *See Shaw*, 770 A.2d at 298; *Riedel*, 615 A.2d at 139-40 ("Together, these sections comprise a statutory scheme that implies the consent of a driver to undergo chemical blood testing under particular circumstances."); *id.* at 139 (referring to Section 3755(a) as the "emergency room counterpart" of Section 1547). Indeed, we have highlighted the fact that the two provisions "were originally part of the same section, which was subsequently amended to the current scheme." *Riedel*, 615 A.2d at 140 n.2 (citing Law of June 17, 1976, P. L. 162, No. 81, § 1, *amended by* Law of Dec. 15, 1982, P. L. 1268, No. 289, §§ 5 and 11).

We also have clarified that "the failure to verbalize [a] request" for a blood test under Section 3755(a) "shall not bar [an] officer from obtaining the results of a medical purposes blood test without a warrant." *Id.* at 141. That is because "the litmus test under section 3755 is *probable cause* to request a blood test, not the request itself." *Id.* at 140 (emphasis in original). Thus, so long as police have "probable cause to request the blood test" based upon a suspected violation of the DUI laws, we have held that they statutorily are "entitled to obtain the results [of that test] without a search warrant, *regardless of who actually withdrew the blood*" or for what purpose. *Id.* (emphasis added).

The Majority acknowledges that Sections 1547 and 3755 are part of the same statutory scheme, but it implies that the *Myers* Court somehow abrogated the foregoing passages from *Riedel* by noting "that the authority of these statutes are not interchangeable."

Majority Op. at 16 n.6 (citing *Myers*, 164 A.3d at 670 n.14). I differ with that assessment. Footnote fourteen in *Myers* was prompted by the Commonwealth's assertion that an unconscious driver has no right to refuse a blood test under Section 1547, which hung upon a statement in *Riedel* that the Court "w[ould] not reformulate the law to grant an unconscious driver or driver whose blood was removed for medical purposes the right to refuse to consent to blood testing." *Riedel*, 651 A.2d at 142. The footnote went on to distinguish Myers' case from Riedel's, and in so doing laid bare the Commonwealth's "selective reliance upon [that] decontextualized sentence." *Myers*, 164 A.3d at 670 n.14.

Notably, Myers sought to vindicate his statutory right of refusal under Section 1547(b)(1) because, although unconscious, he was under arrest when his blood was drawn by hospital personnel, his blood was not drawn for medical purposes, and he believed it would not have been drawn at all but for investigators' intercession. Riedel, by contrast, was neither unconscious nor under arrest when his blood was drawn, and his blood was taken and tested by the hospital for medical purposes before investigators submitted their request for the test results. The Court rejected Riedel's claim that the statutory right of refusal in Section 1547 should apply to blood draws taken for medical purposes or under Section 3755, reasoning that Riedel wasn't under arrest. While the Court just as easily could have reached the same result on statutory construction grounds given that Section 3755 does not contain a right-to-refuse component, in *Myers* we

found *Riedel*'s holding to be "entirely consistent with" Section 1547(b)(1)'s plain language, as "the critical fact" under that provision "is not whether the motorist is conscious, but whether the motorist is under arrest." *Id.* Because Myers was denied an opportunity to refuse blood testing while under arrest, albeit in an unconscious state, the Commonwealth's resort to *Riedel* was misplaced.

Significantly, the constitutionality of Section 3755 was not before us in *Myers*, and our brief discussion of its mechanics vis-à-vis Section 1547, whose construction was directly under consideration, in no way resolved the present dispute. At issue here is whether the same facts that give law enforcement agents probable cause to believe that a suspect has driven under the influence of drugs or alcohol, thus enabling them to seek a blood draw under the latter provision, also authorize investigators to request that hospital personnel transfer blood samples for testing under the former, regardless of the samples' provenance. *Riedel* and *Shaw* make clear that facts giving rise to probable cause under Section 1547 suffice without more under Section 3755. In that sense, the probable cause determination *is* interchangeable, and such a showing by investigators is a prerequisite common to both provisions, which present alternative pathways for obtaining blood test results. *Myers* did not upset that understanding.

The Majority also makes hay of the bare fact that "Sergeant Farren's testimony made no mention of Section 3755," and infers from that omission an intent to

seek Jones-Williams' actual consent for a blood draw. Majority Op. at 16. In drawing that inference, the Majority neglects the fact that Sergeant Farren's supervisor explicitly testified that he sent Sergeant Farren to the hospital to obtain a legal blood draw in accordance with that very provision:

Commonwealth:	In terms of obtaining a search warrant in this particular matter, when you said that you were proceeding to request a legal blood draw was obtained [*sic*], what was the theory behind requesting that blood under a legal blood draw theory?
Sergeant Lutz:	I believe the vehicle code allows you to have a legal blood drawn [*sic*]. I believe it's underneath 3755. I'm not quite sure. But it allows the Commonwealth to, if they have probable cause, to have a legal blood drawn [*sic*].
Commonwealth:	And was that specifically the section you were proceeding under?
Sergeant Lutz:	That was the section that I was using for Officer Farren to have legal blood drawn.

Commonwealth:	And you never pursued any other theories such as a search warrant; correct?
Sergeant Lutz:	I did apply for a search warrant after the fact for medical records.

N.T., Suppression Hearing, 12/21/2015, at 84. This line of testimony undermines the foundation upon which the Majority elects not to address the critical question of which we granted review. The Majority deems this portion of Sergeant Lutz's testimony a "subjective assessment" that "alone does not establish compliance with" Section 3755 in the face of "an objective analysis" that the record is silent as to York Hospital's rationale for drawing Jones-Williams' blood. Majority Op. at 16-17. But as noted above, the effect of investigators' probable cause determinations upon their authority to obtain blood test results under either statutory provision is the same, never mind why they were drawn. And here the evidence objectively establishes that investigators had probable cause to believe Jones-Williams had driven under the influence of marijuana when Sergeant Farren requested that the blood samples be transferred for testing.

Additionally, in likening this case to *Shaw*, the Majority misapprehends the relevant portion of that Court's analysis, suggesting that Section 3755 was "inapplicable" in *Shaw* because the blood sample was not *taken* pursuant to the dictates of that provision. *Id.* at 17. But *Shaw* makes clear that the statute was inapplicable because the hospital already had *tested* the

blood for independent medical purposes. *See Shaw*, 770 A.2d at 299 ("[As Shaw's] BAC *test* was not *conducted* pursuant to Section 3755(a), the release of the result of the BAC test at the request of Trooper Hershey was not authorized by Section 3755(a), nor is there any other statutory basis for releasing the result.") (emphases added). In the absence of an alternative "statutory basis" for obtaining the *test results* without a warrant, "the release of the result of [Shaw's] BAC test . . . to Trooper Hershey without a warrant and in the absence of exigent circumstances, violated Article I, Section 8 of the Pennsylvania Constitution." *Id.* at 299.

In light of these pronouncements, I reiterate that whether York Hospital drew Jones-Williams' blood for "independent medical purposes" or in adherence to "the abstract requirement that 'probable cause exists to believe'" that he violated the DUI laws, *id.* at 298, is irrelevant as far as Section 3755 is concerned.[10] The presence or absence of the hospital's reasons for

[10] The *Shaw* Court shrewdly observed that "Section 3755(a) is, to say the least, inartfully drafted. For some vague and curious reason, the legislature has required a probable cause determination without specifying who is to make such determination, or how such an abstract requirement is to be met." *Shaw*, 770 A.2d at 298 n.3. While the statute is clear that "[t]est results shall be released upon request of . . . government officials or agencies," it doesn't expressly authorize law enforcement to *request* anything else. 75 Pa.C.S. § 3755(a). To the extent Section 3755 provides any basis for law enforcement agents to direct hospital personnel to "promptly" draw a person's blood and timely transmit it for testing, those powers are not clearly delineated in the statute, but instead have been inferred by the courts. *See Shaw*, 770 A.2d at 298 n.3 (outlining alternative means by which Section 3755(a) might be satisfied).

drawing his blood on this record is of no moment. What matters is that, after drawing and preserving the blood samples, the hospital did not transfer them for testing until Sergeant Farren went to the hospital's laboratory, requested that Jones-Williams' blood be tested for criminal investigative purposes, and completed the required paperwork to effectuate the samples' transfer to an accredited lab. *See* N.T., Suppression Hearing, 12/21/2015, at 59 ("I actually responded up to the laboratory and filled out the proper form for the NMS Labs and made the request there because the blood was already drawn.").

Moreover, it is immaterial that the standard form that Sergeant Farren submitted included the pretyped statement, "I am requesting this test in accordance with 75 Pa.C.S.A. § 1547," NMS Labs Analysis Requisition and Property Receipt / Chain of Custody, 7/5/2014 (Commonwealth's Suppression Hearing Ex. 1), which apparently is a requirement that the lab itself mandates. *See* N.T., Suppression Hearing, 12/21/2015, at 60 ("Q. In terms of doing this, filling out those forms, does the lab reporting also require you as part of their paperwork to go ahead and specifically express to them that you are requesting this pursuant to a police investigation? A. Correct."). Notwithstanding whatever extraneous declarations the lab may have added to the standard form, per *Shaw*, all that Section 3755 evidently required of Sergeant Farren when he submitted his request for a toxicology analysis of the preserved blood sample was that he possess probable cause to believe that Jones-Williams had violated the

DUI law. *See Shaw*, 770 A.2d at 298 n.3; n. 10, *supra*. The record inarguably supports that probable cause determination.

For that reason, I agree with the Superior Court's conclusion that the Commonwealth complied with Section 3755 regardless of whether the hospital had extracted Jones-Williams' blood without being asked to do so by law enforcement. *Commonwealth v. Jones-Williams*, 237 A.3d 528, 536 n.13 (Pa. Super. 2020) (citing *Commonwealth v. Seibert*, 799 A.2d 54, 64 (Pa. Super. 2002) (explaining that an "officer is entitled to the release of [chemical] test results" if he "determines there is probable cause to believe a person operated a motor vehicle under the influence . . . and requests that hospital personnel withdraw blood" even though "medical staff previously drew the blood and a request by the police . . . came after the blood was drawn")); *see also Commonwealth v. Hipp*, 551 A.2d 1086, 1091 (Pa. Super. 1988) (*en banc*) (holding that a police officer had probable cause under Section 1547(a) to request a blood draw, and that hospital personnel complied with Section 3755(a) when they volunteered the results of a blood test that had been performed for medical purposes); *accord Commonwealth v. Barton*, 690 A.2d 293, 298 (Pa. Super. 1997).

B.

With all of these considerations in mind, it is plain to me from this record that the investigators complied with the bare requirements of Section 3755, and that

the Commonwealth has, at all stages of this case, proceeded under the belief that the Vehicle Code's bipartite implied-consent scheme provides an independent basis for excusing the investigators' failure to obtain a search warrant for the results of Jones-Williams' blood test, separate and apart from any claim of exigency.

That the "the trial court only provided a *post hoc* assessment of Section 3755 in its Rule 1925(a) opinion, long after the suppression motion had been denied," Majority Op. at 17, is another irrelevancy that the Majority offers up to avoid addressing the statute's constitutionality. The Commonwealth invoked both implied consent and exigency as alternative grounds for defeating Jones-Williams' suppression motion. The trial court chose to address only the latter. I would not fault that court for taking that approach in the interest of judicial economy and to avoid the thornier constitutional question—though, as the court candidly admitted later, it erroneously excused the warrantless seizure on exigency grounds (a concession with which this Court agrees today), so its self-restraint was for naught. Nor would I punish the Commonwealth for the trial court's miscalculation by declining to address the merits of its other preserved claim at this stage.

For the sake of completeness, I note the following relevant events. Jones-Williams challenged the constitutionality of Section 1547 and Section 3755, both facially and as-applied, in his pre-trial suppression motion. Omnibus Pre-Trial Motion, 10/26/2015, ¶¶ 25-54; Brief in Support of Omnibus Pre-Trial Motion, 1/29/2016, at 29-39. The Commonwealth defended the

constitutionality of that scheme from both avenues of attack. Commonwealth's Mem. of Law in Opposition to Defendant's Omnibus Pretrial Motion, 1/29/2016, at 24-27. Jones-Williams then supplemented his challenge to the statutes' constitutionality with more than twenty pages of additional argument. Supp. Br. in Support of Omnibus Pre-Trial Motion, 2/29/2016, at 1-21. The Commonwealth responded in kind. Commonwealth's Supp. Mem. of Law in Opposition to Defendant's Omnibus Pretrial Motion, 4/20/2016. In its opinion rejecting Jones-Williams' suppression motion, the trial court summarized the preserved constitutional challenges to the implied-consent scheme, but only addressed the merits of the exigency issue. Opinion, Bortner, J., 4/27/2016, at 7-11.

Following his conviction, Jones-Williams sought post-sentence relief, which was denied. He then appealed and filed a Rule 1925(b) statement reiterating his facial and as-applied constitutional challenges to Section 3755, among other claims. Statement of Matters Complained of on Appeal in Accordance with Pa.R.A.P. 1925(b), 10/5/2017, at ¶¶ 5.1-5.2. He supplemented that filing the next day to bring to the court's attention our *per curiam* Order in *Commonwealth v. March*, 172 A.3d 582 (Pa. 2017), issued just three days earlier, in which we vacated a published Superior Court decision rejecting a constitutional challenge to Section 1547 and remanded for reconsideration in light

of *Myers*.[11] Supp. to Rule 1925(b) Statement, 10/6/2017. In its Rule 1925(a) opinion, the trial court conceded that it had erred in finding exigent circumstances and it asked the Superior Court to vacate Jones-Williams' homicide-by-vehicle-while-DUI conviction while affirming the remainder of his judgment of sentence. Opinion, Bortner, J., 4/13/2018, at 12-13. As for the constitutional challenge to Section 3755, the court once again summarized but failed to resolve the preserved facial challenge on its merits, *id.* at 13-17; however, it rejected Jones-Williams' as-applied challenge, concluding that the Commonwealth met its burden of proving that Sergeant Farren had probable cause to request the blood draw "and that York Hospital operated under a perceived duty of § 3755." *Id.* at 20. The Superior Court agreed with the trial court that exigency was lacking and that the Commonwealth had complied with its statutory obligations in obtaining Jones-Williams' blood test results. *Jones-Williams*, 237 A.3d at 536-37, 544- 46. The panel then reached the preserved issue that Jones-Williams had pursued in vain in the trial court and found Section 3755 facially unconstitutional. *Id.* at 542.

The Majority concludes that the Superior Court's exigency analysis was enough to resolve the case and that it never should have reached the constitutional issue. Majority Op. at 17. The Majority is wrong. Because the Commonwealth possessed probable cause to

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[11] The Superior Court was unable to reconsider that issue on remand in *March* because the Commonwealth ultimately withdrew its appeal of the suppression court's grant of relief.

believe that Jones-Williams had driven under the influence of marijuana when Sergeant Farren requested his blood test results pursuant to Section 3755, both parties were, are, and always have been entitled to a merits resolution of Section 3755's facial constitutionality. That issue has been preserved and briefed at every stage of this case going back to Jones-Williams' October 26, 2015 omnibus pretrial motion. Exigency and consent are constitutionally distinct exceptions to the warrant requirement. The resolution of one does not *ipso facto* resolve the other. Likewise, the trial court's resolution of the as-applied challenge in the Commonwealth's favor did not also resolve the facial challenge. If the meticulous procedural survey presented above isn't enough to demonstrate that the constitutionality of Section 3755 is a live issue, I frankly don't know what would be. But if the Majority is unwilling to reach that purely legal question without some initial consideration by the trial court, then, at the very least, the Commonwealth deserves the opportunity to make its case to that court that Jones-Williams' homicide-by-vehicle-while-DUI conviction need not be vacated because consent constitutionally can be implied by statute and was in this case. After all, were it not for the trial court's confessed error and repeated sidestepping of the preserved facial constitutional question, we may have avoided this impasse altogether.

Because the constitutionality of these procedures is squarely before us, I would resolve that question now in unmistakable terms: For all the reasons expressed

by the *Myers* plurality, statutorily implied consent cannot serve as an independent exception to the warrant requirement, and any criminal statutory scheme purporting to authorize searches or seizures upon that basis runs afoul of both state and federal constitutional protections. *See Myers*, 164 A.3d at 1172-81.

To be sure, neither this Court nor the United States Supreme Court ever has held that statutorily implied consent justifies a warrantless search or seizure that otherwise would violate the United States or Pennsylvania Constitutions. Although the Supreme Court in *Birchfield v. North Dakota*, 579 U.S. 438 (2016), noted that its "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"—and admonished that nothing it said in that case "should be read to cast doubt on them," *id.* at 476-77 (citations omitted; emphasis added)—the Court cautioned that "[t]here must be a limit to the consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads." *Id.* at 477. Among the things that exceed those limits are "a State['s] . . . insist[ence] upon an intrusive blood test," and the "impos[ition] of criminal penalties on the refusal to submit to such a test." *Id.*; *see also Bell*, 211 A.3d at 792 (Wecht, J., dissenting) ("[E]very time that the *Birchfield* Court spoke of 'implied consent,' it referred to these statutory *consequences* of refusal, not to an exception to the Fourth Amendment's warrant requirement. In this regard, statutorily implied consent

provisions should be regarded as mandates that a motorist cooperate with a *valid* search, not as mechanisms to allow circumvention of the requirements of the Fourth Amendment.") (emphasis in original).

Perhaps signaling its growing discomfort with more expansive notions of implied consent than those referred to favorably in *Birchfield*, the *Mitchell* plurality intimated that there is *less* to the Court's past references of approval regarding "the general concept of implied-consent laws" than meets the eye. *See Mitchell*, 139 S.Ct. at 2552 (plurality) (quoting *Birchfield*, 579 U.S. at 476). It explained that the Court's previous "decisions have *not* rested on the idea that these [implied-consent] laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize." *Id.* at 2551 (emphasis added). Rather, those decisions were based upon "the precedent regarding the specific constitutional claims in each case, while keeping in mind the wider regulatory scheme developed over the years to combat drunk driving. That scheme is centered on legally specified BAC limits for drivers—limits enforced by the BAC tests promoted by implied-consent laws." *Id.*

The *Mitchell* plurality then went out of its way to avoid discussing the question that it had accepted for review, namely, whether a provision of Wisconsin's DUI law that expressly "deemed" unconscious motorists to have consented to warrantless blood testing complied with the requirements of the Fourth Amendment. Instead, in resolving the case, the plurality focused exclusively upon exigent circumstances, even though

Wisconsin prosecutors hadn't relied upon that exception, the state courts hadn't addressed it, and the parties hadn't briefed its applicability before the Court. *See Mitchell*, 139 S.Ct. at 2551 (Gorsuch, J., dissenting) ("We took this case to decide whether Wisconsin drivers impliedly consent to blood and alcohol tests thanks to a state statute. That law says that anyone driving in Wisconsin agrees—by the very act of driving—to testing under certain circumstances. But the Court today declines to answer the question presented. Instead, it upholds Wisconsin's law on an entirely different ground—citing the exigent circumstances doctrine," which "neither the parties nor the courts below discussed."). As far as implied consent's continuing viability is concerned, I find the *Mitchell* plurality's bait-and-switch in this regard to be telling.

Oddly enough, the Commonwealth suggests here that *Mitchell* actually supports the constitutionality of Section 3755 "as an implied-consent statute that codifies the exigent circumstances test." Commonwealth's Br. at 44; *see also id.* at 46 ("Section 3755(a) is 'codified exigency' and as such is facially constitutional."). The Wisconsin Supreme Court rejected this very argument just last year in *State v. Prado*, 960 N.W.2d 869 (Wis. 2021). In that case, the Court resolved the issue that the *Mitchell* Court had ducked, holding that the Wisconsin DUI statute's "incapacitated driver provision cannot be constitutionally enforced under any circumstance and is unconstitutional beyond a reasonable doubt." *Id.* at 878. Addressing the unstable legal foundation upon which the statute's implied-consent

provision stood, the *Prado* Court offered a compelling rationale equally applicable to our present circumstances. It reasoned:

> The State's essential argument in this case boils down to an assertion that the incapacitated driver provision is constitutional because exigent circumstances may have been present. This argument conflates the consent and exigent circumstances exceptions to the warrant requirement. The incapacitated driver provision of the implied consent statute is not focused on exigent circumstances. As the moniker "implied consent" connotes, the statute addresses consent, which is an exception to the warrant requirement separate and apart from exigent circumstances.
>
> Thus, the determination of whether there were exigent circumstances does not involve any application of the incapacitated driver provision. In other words, if the State relies on exigent circumstances to justify a search, it is not relying on the statute. Searches of unconscious drivers may almost always be permissible as the State contends, but then they are almost always permissible under the exigent circumstances exception to the warrant requirement pursuant to the *Mitchell* plurality, not under the statute.
>
> In the context of warrantless blood draws, consent "deemed" by statute is not the same as actual consent, and in the case of an incapacitated driver the former is incompatible with the Fourth Amendment. Generally, in

determining whether constitutionally sufficient consent is present, a court will review whether consent was given in fact by words, gestures, or conduct. This inquiry is fundamentally at odds with the concept of "deemed" consent in the case of an incapacitated driver because an unconscious person can exhibit no words, gestures, or conduct to manifest consent.

Under the incapacitated driver provision, we ask "whether the driver drove his car" and nothing more. The statute thus reduces a multifaceted constitutional inquiry to a single question in a manner inconsistent with this court's precedent regarding what is constitutionally required to establish consent.

The constitution requires actual consent, not "deemed" consent. Indeed, consent for purposes of a Fourth Amendment search must be "unequivocal and specific." Consent that is "deemed" by the legislature through the incapacitated driver provision is neither of these things. It cannot be unequivocal because an incapacitated person can evince no words, gestures, or conduct to demonstrate such an intent, and it is generalized, not specific.

Further, a person has a constitutional right to refuse a search absent a warrant or an applicable exception to the warrant requirement. The incapacitated driver provision does not even afford a driver the opportunity to exercise the right to refuse such a search. Under the statute, the constitutional right to refuse

> a warrantless search is transformed into simply a matter of legislative grace. Such a transformation is incompatible with the Fourth Amendment.

Id. at 879-80 (citations, footnote, and paragraph designations omitted). Added to the bevy of decisions from other state courts of last resort cited by the *Myers* plurality, implied consent's prospects as an independent exception to the warrant requirement simply are untenable.

As the *Prado* Court cogently explained, "[a] statutory *per se* exception is antithetical to the case by case determination *McNeely* mandates." *Id.* at 880. Consent and exigency are two distinct exceptions to the warrant requirement, and there is no authority for the proposition that Pennsylvania's implied-consent statutory scheme codified the exigent circumstances exception. If the Commonwealth wishes to rely upon the statute to justify its warrantless seizure of Jones-Williams' blood-test results, then it is relying upon consent, not exigency. Nor is it relevant, as the Commonwealth suggests in contrasting this case with *Myers*, that Jones-Williams wasn't formally under arrest when his blood was drawn. Commonwealth's Br. at 47. It cannot be the case that police officers can do an end-run around the statutory right-of-refusal simply by declining to arrest a suspect *before* asking hospital staff to draw and test his blood, and then attempt to justify the warrantless seizure and search on the grounds that the suspect was not under arrest at the time his blood was drawn and tested. In grasping at whatever

argument it can in hopes of saving the statute, the Commonwealth protests too much.

That said, *Myers* did not go as far as the Defender Association *amici* suggest it did either. *See* Phila. Defender Assoc. & Pa. Assoc. of Criminal Defense Lawyers' Br. as *Amici Curiae* at 19 (asserting that "*Myers* correctly decided the constitutional issue, rejecting an implied consent statute as a basis for sustaining a warrantless search"). It is true that five Justices in *Myers* agreed that Section 1547 was unconstitutional, but the two camps relied upon very different rationales. While the plurality would have held that the statute's implied-consent provision did not constitute an independent exception to the warrant requirement and, in the absence of such an exception, that the warrantless blood-draw performed upon Myers without his actual consent was unconstitutional, Chief Justice Saylor and then-Justice, now Chief Justice, Baer found the statute facially unconstitutional because the "consent" that it "implied" was predicated upon enhanced penalties for refusal, which *Birchfield* expressly prohibited. *See Bell*, 211 A.3d at 773 (acknowledging that a majority of the *Myers* Court "also held, albeit without complete agreement as to reasoning, that a warrantless blood draw from an unconscious DUI suspect violates the Fourth Amendment") (citing *Myers*, 164 A.3d at 1173-82 (plurality); *id.* at 1183-84 (Saylor, C.J., concurring)).

Unlike Section 1547, however, Section 3755 neither expressly contemplates a right to refuse a blood draw or a toxicology test, nor does it contain a penalty enhancement. Nor does it merely *authorize*

warrantless blood draws, as Section 1547 does. Rather, Section 3755 *mandates* that an "emergency room physician or his designee *shall* promptly take blood samples . . . and transmit them . . . for testing" in every case where "the person who drove, operated or was in actual physical control of the movement of any" motor vehicle involved in an accident presents in the emergency room for medical treatment for injuries resulting from that accident—so long as "probable cause exists to believe" that Pennsylvania's DUI laws were violated. 75 Pa.C.S. § 3755(a) (emphasis added). In putting the onus on hospital personnel to draw a DUI suspect's blood, transfer it for testing, and release the test results to law enforcement upon request—no matter the circumstances and without regard to even a *conscious* patient's objections—Section 3755 is a different beast entirely.

Among the statute's other problematic features—and notwithstanding the *Shaw* Court's supposition on this point, *see Shaw*, 770 A.2d at 298 n.3; n. 10, *supra*—it is not clear *who* is responsible for making the probable cause determination that triggers the hospital's obligations under the statute. Nor is there any mechanism for an independent assessment of that determination by a neutral and detached magistrate, as there would be if a warrant had been sought. Additionally, the statute fails meaningfully to cabin the authority of "emergency room physician[s] or [their] designee[s]" to subject an individual to a warrantless blood draw against his will—whether or not at the direction of law enforcement—or to disclose the results of a blood test

to "governmental officials or agencies" who lack a warrant for the same. 75 Pa.C.S. § 3755(a). As far as I am aware, medical and nursing schools generally do not instruct their students on the finer points of search-and-seizure law.

Nonetheless, given Section 3755's "abstract" probable-cause trigger, if the requisite cause "exists to believe" a DUI offense "was involved," someone in that emergency room must "promptly" subject *any* driver who requires emergency medical treatment as a result of a motor vehicle accident to a blood draw and submit that blood sample to the Department of Health or a Department-approved clinical lab for chemical testing, even if such a test is not medically necessary. *Id.* And if the person(s) who drove the vehicle(s) involved in the accident "cannot be determined," then "all injured occupants who were capable of" driving must be tested, *id.*, effectively extending the Vehicle Code's implied-consent regime to unwitting passengers as well as drivers. While the extent to which emergency room personnel across the Commonwealth are undertaking these sorts of probable cause determinations of their own volition remains unclear, the sheer breadth of the statute's potential reach is staggering. As the late Justice Scalia might have quipped, "I doubt that the proud men who wrote the charter of our liberties would have been so eager to open their" veins "for royal inspection." *Maryland v. King*, 569 U.S. 435, 482 (2013) (Scalia, J., dissenting).

But Section 3755's breathtaking novelty should make no difference in how this Court ultimately

resolves the question of its constitutionality. As noted above, this Court has made clear that Section 3755 and Section 1547 operate hand in glove. In other words, with regard to the statutory scheme's implied-consent function, as goes one provision, so goes the other. Because neither provision requires actual, knowing, and voluntary consent before law enforcement agents may obtain a blood draw or chemical test results, *any* blood sample drawn, tested, or released to agents of law enforcement at their request and without a warrant under the statutes' auspices is patently unreasonable. As such, each of these statutes is unconstitutional on its face. *See Myers*, 164 A.3d at 1180 (plurality) ("Like any other search premised upon the subject's consent, a chemical test conducted under the implied consent statute is exempt from the warrant requirement only if consent is given voluntarily under the totality of the circumstances.").

Pennsylvanians have a reasonable expectation of privacy in their medical records, one that protects those records from warrantless governmental inspection. That right is safeguarded not only by the Fourth Amendment to the United States Constitution but also by Article I, Section 8 of the Pennsylvania Constitution. *Riedel*, 651 A.2d at 138; *Shaw*, 770 A.2d at 299. To be considered reasonable, any search or seizure of those records must be supported by probable cause and either accompanied by a warrant or the circumstances must be such that the search falls within an exception to the warrant requirement. *Bell*, 211 A.3d at 769-70. One such exception is proof that the individual whose

person or property is to be searched or seized by law enforcement voluntarily has acceded to those requests. Section 3755 is part and parcel of a statutory scheme that deems drivers to have consented to both chemical testing and the disclosure of test results to law enforcement simply by virtue of having driven on the Commonwealth's roads. But statutorily "implied consent" contravenes the time-honored constitutional principles that protect individual liberty by ensuring any waiver of one's rights is done knowingly and voluntarily. It therefore cannot serve as an independent exception to state or federal constitutional commands. Rather than address Section 3755's apparent deficiencies head-on, the Majority kicks the proverbial can a little further down the road by opting instead to vacate the Superior Court's holding, which turned upon the views expressed by the *Myers* plurality. Because I would reach the principal constitutional question before us and resolve it once and for all by affirming the lower court's eminently correct determination, I respectfully dissent.

Justice Donohue and Justice Dougherty join this concurring and dissenting opinion.

COMMONWEALTH OF PENNSYLVANIA	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
AKIM SHARIF JONES-WILLIAMS,	:	
Appellant	:	No. 1428 MDA 2017

Appeal from the Judgment of Sentence April 5, 2017
In the Court of Common Pleas of York County
Criminal Division at No(s): CP-67-CR-0002824-2015

BEFORE: BOWES, J., OLSON, J., and STABILE, J.

OPINION BY OLSON, J.: **FILED AUGUST 11, 2020**

Appellant, Akim Sharif Jones-Williams, appeals from the judgment of sentence entered on April 5, 2017, as made final by the denial of his post-sentence motion on September 11, 2017, following his jury and bench trial convictions for various crimes arising from a motor vehicle accident. After careful review, we vacate Appellant's judgment of sentence, reverse the order denying suppression, and remand for a new trial.

The facts and procedural history of this case are as follows. On July 5, 2014, Appellant was driving a red 2014 Mitsubishi Outlander accompanied by his fiancé, Cori Sisti, and their daughter, S.J. At approximately 4:42 p.m., Appellant's vehicle collided with a train at Slonnekers Landing, near the 1100 block of Cly Road, York Haven, Pennsylvania.

Officer Michael Briar and two paramedics, Leslie Garner and Lisa Gottschall, were first to arrive at the scene. Upon arrival, they found Appellant outside of the vehicle, but Sisti and S.J. still inside. Garner and Gottschall immediately began treating Appellant, while Officer Briar attempted to assist Sisti and S.J. Ultimately, emergency personnel declared Sisti dead at the scene, but transported Appellant and S.J. to the hospital for medical treatment.[1] Subsequently, various individuals informed the officer in charge, Lieutenant Steven Lutz, that they detected an odor of burnt marijuana emanating from Appellant. Therefore, at approximately 6:00 p.m., Lieutenant Lutz directed Sergeant Keith Farren to go to the hospital to interview Appellant and obtain a blood sample.

When Sergeant Farren arrived at York Hospital, he discovered Appellant lying in a hospital bed, restrained, and fading in and out of consciousness. As such, Sergeant Farren could not interview Appellant or request that he consent to a blood draw. Later, however, Sergeant Farren learned that hospital personnel drew Appellant's blood at 5:56 p.m., before his arrival.[2] This prompted Sergeant Farren to request that the hospital's laboratory transfer Appellant's blood sample to National Medical Services ("NMS") laboratory for testing to determine the presence of alcohol or controlled

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[1] S.J. survived the injuries she sustained in the accident.

[2] The record does not establish why hospital personnel collected a blood sample from Appellant. It is clear, however, that hospital personnel performed the blood draw before receiving a request from Sergeant Farren.

substances. Sergeant Farren filled out the requisite forms at 7:30 p.m. He did not obtain a warrant prior to submitting the request to test Appellant's blood sample. The hospital laboratory transferred Appellant's blood sample on July 8, 2014 (three days after the collision) and NMS laboratory issued its toxicology report analyzing Appellant's blood sample on July 15, 2014. The results revealed that Appellant's blood contained Delta-9 THC, the active ingredient in marijuana, at a concentration of 1.8 ng/ml and Delta-9 Carboxy THC, a marijuana metabolite, at 15 ng/ml.

Thereafter, on June 9, 2015, the Commonwealth filed a bill of information against Appellant. Specifically, the Commonwealth charged Appellant with one count each of the following offenses: homicide by vehicle while driving under the influence ("DUI"); homicide by vehicle; endangering the welfare of a child ("EWOC"); recklessly endangering another person ("REAP"); DUI: controlled substance – schedule I; DUI: controlled substance – schedule I, II, or III; DUI: general impairment; careless driving; careless driving – unintentional death; aggravated assault while DUI; and aggravated assault by vehicle. Bill of Information, 6/9/15, at *1-3 (un-paginated).

On October 26, 2015, Appellant filed an omnibus pre-trial motion. In his motion, Appellant moved to suppress the blood test results obtained by police. Appellant's Omnibus Pre-Trial Motion, 10/26/15, at *1-14 (un-paginated). Appellant argued that the police violated his constitutional rights by requesting to test his blood sample without a warrant. ***Id.*** at *9-14

(un-paginated); ***see also*** Appellant's Brief in Support of Omnibus Pre-Trial Motion, 1/29/16, at 29-39. Appellant also asserted that, notwithstanding the statutory provisions set forth at 75 Pa.C.S.A. § 3755(a) (Reports by Emergency Room Personnel), if the police "can obtain a warrant . . . without affecting the efficacy of the investigation," the Fourth Amendment of the United States' Constitution and Article I, Section 8 of Pennsylvania's Constitution require them to do so. Appellant's Omnibus Pre-Trial Motion, 10/26/15, at *11 (un-paginated).

The trial court held a suppression hearing on December 21, 2015, and subsequently denied Appellant's motion to suppress on April 27, 2016. Trial Court Order, 4/27/16, at 1. In doing so, the trial court held that Appellant's blood test results were admissible because exigent circumstances existed and, as such, the warrantless search did not violate Appellant's constitutional rights. Trial Court Opinion, 4/27/16, at 7-11.

Appellant's jury trial commenced January 9, 2017. The Commonwealth admitted at trial the report documenting the presence of Delta-9 THC and Delta-9 Carboxy THC in Appellant's bloodstream. N.T. Trial, 1/10/17, at 261. On January 13, 2017, Appellant was found guilty of homicide by vehicle while DUI,[3] homicide by vehicle,[4] EWOC,[5] REAP,[6] DUI: controlled substance

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[3] 75 Pa.C.S.A. § 3735(a).

[4] 75 Pa.C.S.A. § 3732(a).

[5] 18 Pa.C.S.A. § 4304(a)(1).

[6] 18 Pa.C.S.A. § 2705.

– schedule 1,[7] DUI: controlled substance – metabolite,[8] aggravated assault while DUI,[9] aggravated assault by vehicle,[10] and careless driving.[11] On April 5, 2017, the trial court sentenced Appellant to four to eight years' imprisonment followed by 12 months' probation.

"On April 17, 2017, Appellant filed a post-sentence motion alleging that the trial court erred in denying suppression of Appellant's blood test results and that the trial court erred in finding that the weight of the evidence was met in [five] of the [nine] counts. [Through oversight, the trial court] granted the motion on May 10, 2017. On May 19, 2017, the trial court vacated its [May 10, 2017] order [ ] and ordered the parties to schedule a hearing [on] the post-sentence motion. [Thereafter, t]he trial court allowed Appellant to file a supplemental post-sentence motion on June 21, 2017[, and] held a hearing on the post-sentence motion on July 25, 2017. The trial court then denied [Appellant's] post-sentence motion [by] operation of [ ] law on September 11, 2017." Trial Court Opinion, 4/13/18, at 3.

On September 14, 2017, Appellant filed a notice of appeal to this Court. Appellant's Notice of Appeal, 9/14/17, at 1-2. On October 5, 2017, the trial court entered an order directing Appellant to file a concise statement of matters complained of on appeal pursuant to

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[7] 75 Pa.C.S.A. § 3802(d)(1)(i).

[8] 75 Pa.C.S.A. § 3802(d)(1)(iii).

[9] 75 Pa.C.S.A. § 3735.1(a).

[10] 75 Pa.C.S.A. § 3732.1(a).

[11] 75 Pa.C.S.A. § 3714(a).

Pa.R.A.P. 1925(b)(1). Trial Court Order, 10/5/17, at 1. Appellant timely complied.

The trial court issued an opinion pursuant to Pa.R.A.P. 1925(a) on April 13, 2018. Trial Court Opinion, 4/13/18, at 1-32. In its Rule 1925(a) opinion, the trial court stated that it incorrectly determined that exigent circumstances existed to permit the warrantless search. ***Id.*** at 12. In view of its error, the trial court asked this Court to "suppress Appellant's blood test results" and "affirm [Appellant's convictions for EWOC and REAP] based upon the circumstantial evidence." ***Id.*** at 32.

On appeal, Appellant raises the following issues for our review:[12]

I. [Did the trial court err in denying Appellant's motion to suppress when the Commonwealth failed to comply with 75 Pa.C.S.A. § 3755(a) of the Motor Vehicle Code?]

II. [If the Commonwealth did comply with Section 3755(a)'s requirements, did the trial court still err in denying Appellant's motion to suppress because statutory compliance is insufficient to overcome the warrant requirement of the Fourth Amendment of the United States Constitution or Article I, Section 8 of the Pennsylvania Constitution in light of the recent decisions in ***Birchfield v. North Dakota***, 136 S.Ct. 2160 (2016), ***Missouri v. McNeely***, 569 U.S. 141 (2013), ***Commonwealth v. Myers***,

[12] We have altered the order of Appellant's issues for clarity and ease of discussion. ***See*** Appellant's Brief at 1-2.

164 A.3d 1162 (Pa. 2017), and ***Commonwealth v. March***, 172 A.3d 582 (Pa. 2017)?]

III. Did the trial court err in denying [Appellant's] [m]otion for [s]uppression of [e]vidence [when] there were not exigent circumstances [and] the police officers could have reasonably obtained a search warrant before [requesting the transfer of Appellant's blood sample to NMS laboratory for testing] without significantly undermining the efficacy of the search?

IV. Did the trial court err in finding that, as a matter of law, the Commonwealth provided sufficient evidence to meet its burden of proof regarding [the following convictions: homicide by vehicle while DUI, aggravated assault by vehicle while DUI, EWOC, and REAP?]

V. Did the trial court abuse its discretion in denying [Appellant's] [p]ost-[s]entence [m]otion where the jury's verdict [was against the weight of the evidence for the following convictions: homicide by vehicle while DUI, aggravated assault by vehicle while DUI, EWOC and REAP?]

Appellant's Brief at 1-2.

In Appellant's first three issues, he argues that the trial court erred in denying his motion to suppress. Appellant's Brief at 45-58. "Once a motion to suppress evidence has been filed, it is the Commonwealth's burden to prove, by a preponderance of the evidence, that the challenged evidence was not obtained in violation of the defendant's rights." ***Commonwealth v. Wallace***,

42 A.3d 1040, 1047-1048 (Pa. 2012); ***see also*** Pa.R.Crim.P. 581(H). With respect to an appeal from the denial of a motion to suppress, this Court has declared:

> An appellate court's standard of review in addressing a challenge to a trial court's denial of a suppression motion is limited to determining whether the factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. Since the prosecution prevailed in the suppression court, we may consider only the evidence of the prosecution and so much of the evidence for the defense as remains un[-]contradicted when read in the context of the record as a whole. Where the record supports the factual findings of the trial court, we are bound by those facts and may reverse only if the legal conclusions drawn therefrom are in error.
>
> ***Commonwealth v. Stevenson***, 894 A.2d 759, 769 (Pa. Super. 2006) (citation omitted). Although we are bound by the factual and the credibility determinations of the trial court which have support in the record, we review any legal conclusions *de novo*. ***Commonwealth v. George***, 878 A.2d 881, 883 (Pa. Super. 2005), *appeal denied*, [] 891 A.2d 730 (Pa. 2005).

Commonwealth v. Wells, 916 A.2d 1192, 1194–1195 (Pa. Super. 2007) (parallel citations omitted).

First, Appellant argues that the trial court erred in denying his motion to suppress because the Commonwealth did not comply with the requirements of

75 Pa.C.S.A. § 3755(a) of the Motor Vehicle Code when Sergeant Farren requested chemical testing of Appellant's blood. Relying solely on this Court's decision in ***Commonwealth v. Shaffer***, 714 A.2d 1035 (Pa. Super. 1999), Appellant claims that a valid blood draw occurs pursuant to Section 3755(a) **only** when hospital personnel make a probable cause determination that a driver was DUI. Here, Appellant argues that the Commonwealth did not adhere to Section 3755(a)'s requirements because it did not show that, at the time hospital personnel drew Appellant's blood, they "made an independent finding of probable case" or that they were "privy to any determinations of probable cause made by any of the police officers." Appellant's Brief at 55. Thus, Appellant argues that the Commonwealth failed to demonstrate compliance with Section 3755(a). We disagree.

Section 3755(a) of the Motor Vehicle Code reads as follows:

> **§ 3755. Reports by emergency room personnel**
>
> (a) General rule. – If, as a result of a motor vehicle accident, the person who drove, operated or was in actual physical control of the movement of any involved motor vehicle requires medical treatment in an emergency room of a hospital and if probable cause exists to believe a violation of section 3802 (relating to driving under influence of alcohol or controlled substance) was involved, the emergency room physician or his designee shall

> promptly take blood samples from those persons and transmit them within 24 hours for testing to the Department of Health or a clinical laboratory licensed and approved by the Department of Health and specifically designated for this purpose. This section shall be applicable to all injured occupants who were capable of motor vehicle operation if the operator or person in actual physical control of the movement of the motor vehicle cannot be determined. Test results shall be released upon request of the person tested, his attorney, his physician or governmental officials or agencies.

75 Pa.C.S.A. § 3755(a). Thus, pursuant to the language of the statute, governmental officials may obtain an individual's blood test results if, after a motor vehicle accident, the driver requires emergency medical treatment and there is probable cause to believe that a DUI violation occurred.

Setting aside, for a moment, the issue of whether statutory compliance, by itself, continues to support an independent basis for obtaining blood test results without a warrant and consistent with constitutional concerns, we conclude that the Commonwealth, in this case, proved adherence with the requirements of Section 3755(a). In ***Commonwealth v. Riedel***, 651 A.2d 135, 139 (Pa. 1994), the appellant was involved in a single vehicle accident and sustained injuries. ***Id.*** at 137. Subsequently, emergency personnel arrived and began treating the appellant in an ambulance. ***Id.*** A Pennsylvania State Trooper later arrived and observed

that the appellant exhibited signs of intoxication. ***Id.*** As such, the trooper followed medical personnel to the hospital to request a blood draw from the appellant for chemical analysis. ***Id.*** The trooper, however, learned that medical personnel already drew the appellant's blood for medical purposes and, as such, did not request a blood draw. ***Id.*** The trooper later wrote to the hospital requesting the results of the appellant's blood test. ***Id.*** "Based on this information, [the] appellant was charged with [DUI], 75 Pa.C.S.[A.] §§ 3731(a)(1) and (a)(4), [and later] convicted in a non-jury trial." ***Id.*** After this Court affirmed the appellant's judgment of sentence, he appealed to our Supreme Court. ***See Commonwealth v. Riedel***, 620 A.2d 541 (Pa. Super. 1992) (unpublished memorandum).

On appeal, the appellant argued that "the police violated his Fourth Amendment rights against unreasonable searches and seizures when, in the absence of exigent circumstances, they obtained the results of his medical purposes blood test without a warrant." ***Riedel***, ***supra*** at 137. In response, the Commonwealth argued that the trooper properly obtained the appellant's blood test results because he complied with Section 3755(a). ***Id.*** at 139. Agreeing with the Commonwealth, our Supreme Court in ***Riedel*** explained that the facts established that the appellant was in a motor vehicle accident, was transported to the hospital for emergency medical treatment, and that the officer had probable cause to believe he was DUI. ***Id.*** at 140. Accordingly, the Court concluded that, even though the officer "chose to wait[ ] and obtain [the] appellant's test

results by mailing a request to the director of the hospital's laboratory," he still complied with the terms of Section 3755(a). ***Id.***

This Court reached a similar conclusion in ***Commonwealth v. Keller***, 823 A.2d 1004 (Pa. Super. 2003). Like ***Riedel***, ***Keller*** involved a motor vehicle accident, emergency medical treatment, and the existence of probable cause to believe that the appellant was DUI. As such, an officer went to the hospital where the appellant was transported and "filled out a Toxicology Request form." ***Id.*** at 1007. The hospital then "mailed a report of the blood test results to the State Police." ***Id.*** Prior to trial, the appellant moved to suppress his blood test results and the trial court granted suppression. ***Id.*** at 1008.

On appeal, the Commonwealth argued that the trial court erred in suppressing the appellant's blood test results. ***Id.*** This Court agreed. In reaching this conclusion, we noted that the "police officer specifically requested that a BAC test be performed at [the hospital]" and the appellant "never disputed that [the trooper] had probable cause to believe that [he] was [operating a motor vehicle under the influence] of alcohol." ***Id.*** at 1010. As such, this Court concluded that hospital personnel "were required to withdraw blood from [the appellant] and release the test results" pursuant to Section 3755(a). ***Id.*** Accordingly, per ***Riedel*** and ***Keller***, the Commonwealth demonstrates compliance with Section 3755(a) if, following a motor vehicle accident, a driver seeks emergency medical treatment, an officer has probable cause to believe that the driver

operated his or her vehicle under the influence of alcohol or a controlled substance, and the officer subsequently requests the driver's blood test results from the hospital.

The facts of the instant case are nearly identical to both ***Riedel*** and ***Keller***. Indeed, after Appellant's vehicle collided with the train, emergency personnel transported Appellant to the hospital for emergency medical treatment, during which, the hospital extracted a sample of Appellant's blood. Following Appellant's transport, the officers at the scene of the accident developed probable cause to believe that Appellant was DUI after multiple emergency personnel who responded to the accident reported to Lieutenant Lutz that they detected an odor of marijuana about Appellant's person. Thereafter, at the request of Lieutenant Lutz, Sergeant Farren responded to the hospital and requested Appellant's blood test results.[13] Based upon the foregoing, we conclude that the Commonwealth complied with Section 3755(a).

Appellant's position, which asserts that there was non-compliance with Section 3755(a) because hospital

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[13] The procedure followed by law enforcement personnel complied with Section 3755(a) even though the hospital extracted Appellant's blood sample prior to Sergeant Farren's request. ***See Commonwealth v. Seibert***, 799 A.2d 54, 64 (Pa. Super. 2002) (explaining that an "officer is entitled to the release of [chemical] test results" if "an officer determines there is probable cause to believe a person operated a motor vehicle under the influence . . . and requests that hospital personnel withdraw blood" regardless of the fact that "medical staff previously drew the blood and a request by the police . . . came after the blood was drawn.")

personnel lacked probable cause, is unavailing because he recognizes only one of the possible ways the Commonwealth may adhere to Section 3755(a) in seeking blood test results for an individual who requires emergency medical treatment following a motor vehicle accident. Indeed, our Supreme Court previously recognized at least two pathways for achieving compliance with Section 3755(a):

> Section 3755(a) is, to say the least, inartfully drafted. For some vague and curious reason, the legislature has required a probable cause determination without specifying who is to make such determination, or how such an abstract requirement is to be met. The request of a police officer, based on probable cause to believe a violation of Section 3731, would seem to satisfy the probable cause requirement and therefore mandate that hospital personnel conduct BAC testing. Likewise, a determination by hospital personnel familiar with Section 3755(a), that probable cause existed to believe that a person requiring treatment had violated Section 3731, would also seem to mandate that hospital personnel conduct BAC testing.

Commonwealth v. Shaw, 770 A.2d 295, 299 n.3 (Pa. 2001).[14] Herein, the officers had probable cause to

[14] Based upon this language, it would appear that either law enforcement officers or hospital personnel may make the probable cause determination. Thus, the key inquiry is whether the individual who requested chemical testing did, in fact, have probable cause to believe that the individual who operated the vehicle was under the influence of alcohol or a controlled substance.

believe that Appellant was DUI when they asked the hospital to conduct chemical testing. As we have stated, this is sufficient to show that the Commonwealth complied with the requirements of Section 3755(a).

Next, Appellant argues that, even if the Commonwealth established compliance with Section 3755(a), the trial court erred in denying his motion to suppress because Section 3755(a) is unconstitutional. Upon review, we conclude that, in light of the United States Supreme Court's decision in ***Birchfield, supra***, and our Supreme Court's decision in ***Myers***, ***supra***, Section 3755(a) and its counterpart, Section 1547(a), no longer serve as independent exceptions to the warrant requirement. As such, the search of Appellant's blood test results violated the Fourth Amendment of the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution.

The Fourth Amendment and Article I, Section 8 prohibit unreasonable searches and seizures. ***Commonwealth v. McAdoo***, 46 A.3d 781, 784 (Pa. Super. 2012). "A search conducted without a warrant is deemed to be unreasonable and therefore constitutionally impermissible, unless an established exception applies." ***Commonwealth v. Strickler***, 757 A.2d 884, 888 (Pa. 2000). Established exceptions include actual consent, implied consent, search incident to lawful arrest, and exigent circumstances. ***Commonwealth v. Livingstone***, 174 A.3d 609, 625 (Pa. 2017) (citation omitted).

At issue in the present case is the implied consent scheme set forth in Sections 1547 and 3755 of the Motor Vehicle Code. Previously, Pennsylvania courts concluded that the aforementioned statutes obviated "the need to obtain a warrant in DUI cases." ***March, supra*** at 808; ***see Riedel, supra*** at 143; ***Keller, supra*** at 1009; ***Commonwealth v. Barton***, 690 A.2d 293, 296 (Pa. Super. 1997). Indeed, both this Court and our Supreme Court have explained that,

> "[t]ogether, [S]ections 1547 and 3755 comprise a statutory scheme which, under particular circumstances, not only imply the consent of a driver to undergo chemical or blood tests, but also require hospital personnel to withdraw blood from a person, and release the test results, at the request of a police officer who has probable cause to believe the person was operating a vehicle while under the influence.

Barton, ***supra*** at 296, *citing* ***Riedel***, ***supra*** at 180. Thus, our courts previously held that compliance with the aforementioned statutory scheme independently negated the need to obtain a warrant because a "driver's implied consent under the statute satisfie[d] the consent exception to the warrant requirement." ***March***, ***supra*** at 808. In recent years, however, Pennsylvania's so-called implied consent scheme has undergone judicial scrutiny, especially in the wake of decisions by the United States Supreme Court and the Pennsylvania Supreme Court that suggest that consent, as an exception to the warrant requirement, can only be inferred consistent with constitutional imperatives where it is

voluntarily given under the totality of the circumstances.

We begin by looking at Section 1547 of the Motor Vehicle Code, which our Supreme Court recently examined, and which states, in relevant part, as follows:

> **§ 1547. Chemical testing to determine amount of alcohol or controlled substance**
>
> (a) General rule. – Any person who drives, operates or is in actual physical control of the movement of a vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purpose of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a vehicle:
>
> > (1) in violation of section 1543(b)(1.1) (relating to driving while operating privilege is suspended or revoked), 3802 (relating to driving under influence of alcohol or controlled substance) or 3808(a)(2) (relating to illegally operating a motor vehicle not equipped with ignition interlock)[.]

75 Pa.C.S.A. § 1547(a)(1).

Until our Supreme Court's decision in ***Myers***, ***supra*** "[t]he [i]mplied [c]onsent [l]aw, 75 Pa.C.S.[A.] § 1547(a), assume[d] acquiescence to blood testing

'absent an affirmative showing of the subject's refusal to consent to the test at the time that the testing is administered.'" ***Riedel***, ***supra*** at 141, *citing* ***Commonwealth v. Eisenhart***, 611 A.2d 681, 683 (Pa. 1992). This view seems to have emerged from the language of Section 1547(b), which was said to "grant[ ] an explicit right to a driver who is under arrest for [DUI] to refuse to consent to chemical testing." ***Riedel***, ***supra*** at 141. Section 1547(b) states, in pertinent part:

> (b) Suspension for refusal. –
>
> (1) If any person placed under arrest for a violation of section 3802 is requested to submit to chemical testing and refuses to do so, the testing shall not be conducted but upon notice by the police officer[.]

75 Pa.C.S.A. §1547(b)(1). Pennsylvania courts interpreting this provision traditionally limited the right to refuse blood testing to those individuals who were both conscious and under arrest for a violation of Section 3802.

Our Supreme Court addressed this issue in ***Eisenhart***, ***supra***. In ***Eisenhart***, after a "vehicle crashed into the cement wall of a residence," a police officer arrived and observed that the appellant, Eisenhart, displayed signs of intoxication, including pupil dilation, difficulty maintaining balance, and a general dazed demeanor. ***Id.*** at 681-682. Eisenhart also failed two field sobriety tests. ***Id.*** at 682. As such, the officer placed him under arrest. ***Id.*** While the officer transported Eisenhart to the hospital for a blood test, he

"alternatively agreed and refused to submit to a blood test." ***Id.*** "At the hospital, [Eisenhart] refused to consent to a blood alcohol test." ***Id.*** Nonetheless, hospital personnel conducted a blood test, which revealed an alcohol level over the legal limit. ***Id.***

The Commonwealth ultimately charged Eisenhart with various crimes, including DUI. ***Id.*** Thereafter, Eisenhart attempted to suppress the blood test results. He argued "that once the operator of a vehicle refuses to submit to a blood test . . . 75 Pa.C.S.[A.] § 1547[ ] prohibits the testing of blood for alcohol level and the subsequent evidentiary use of such test results." ***Id.*** at 682. Eventually, our Supreme Court granted *allocatur* to consider "whether the appellant has the right to refuse to submit to blood alcohol testing under the Motor Vehicle Code." ***Id.***

Ultimately, the Court concluded that "[t]he statute grants an explicit right to a driver who is **under arrest** for [DUI] to refuse to consent to chemical testing." ***Id.*** at 683 (emphasis added); ***see also*** 75 Pa.C.S. § 1547. Notably, the Court limited its holding to "conscious driver[s]." ***Id.*** at 684. Indeed, it declined to opine on an unconscious driver's statutory right to refuse consent and stated that the "conscious driver has the right under 1547(b) to revoke that consent and once that is done, 'the testing shall not be conducted.'" ***Id.*** (citation omitted).

The Supreme Court later reaffirmed ***Eisenhart***'s holding in ***Riedel***, the facts of which we explained above. The ***Riedel*** Court not only addressed the

Commonwealth's compliance with Section 3755(a), but also discussed whether the appellant in ***Riedel*** "was denied the right to refuse blood alcohol testing under 75 Pa.C.S.A. §1547, the [i]mplied [c]onsent [l]aw." ***Riedel***, ***supra*** at 138. Indeed, Riedel claimed that he possessed "an absolute right to refuse testing" and "any other interpretation would result in an impermissible distinction between drivers under arrest and those, like [Riedel], who are not requested to consent because they are unconscious or are receiving emergency medical treatment." ***Id.*** at 141.

The Supreme Court disagreed. Instead, the Court held that because Riedel was "not under arrest at the time the blood test was administered[, he could not] claim the explicitly statutory protection of [S]ection 1547(b)." ***Id.*** Moreover, the Court explained that it would "not reformulate the law to grant an unconscious driver or [a] driver whose blood was removed for medical purposes the right to refuse to consent to blood testing" because the "decision to distinguish between classes of drivers in the implied consent scheme is within the province of the legislature." ***Id.*** Thus, pursuant to ***Eisenhart*** and ***Riedel***, the implied consent statute found at Section 1547 operated as an independent exception to the warrant requirement. At this time, however, the right to refuse consent to a blood draw or chemical testing did not extend to unconscious drivers who may have been under suspicion for DUI but who had not yet been arrested.

Recently, however, our Supreme Court altered the reading of the implied consent statute in ***Myers***,

supra. In ***Myers***, the Philadelphia Police responded to a call stating that an individual was "screaming" in a vehicle. ***Id.*** at 1165. An officer arrived at the scene and observed a vehicle matching the call description with an individual, Myers, in the driver seat. ***Id.*** The officer pulled up behind the vehicle and activated his siren and emergency lights. ***Id.*** Myers subsequently exited the vehicle and "stagger[ed]" toward the officer. ***Id.*** Myers tried to speak "but his speech was so slurred that [the officer] could not understand [him]." ***Id.*** The officer detected alcohol about Myers' person and observed a bottle of brandy in the vehicle's front seat, as the driver's door was open. ***Id.*** Because the officer believed that Myers needed medical attention due to his state of inebriation, the officer placed Myers under arrest and called for a wagon to transport him to the hospital. ***Id.***

Thereafter, another Philadelphia police officer arrived at the hospital where Myers was taken. ***Id.*** "A few minutes before [the officer] arrived, however, the hospital staff administered four milligrams of Haldol" to Myers, rendering him unconscious. ***Id.*** As such, Myers was unresponsive when the officer attempted to communicate with him. ***Id.*** Nonetheless, the officer read the ***O'Connell***[15] warnings to Myers, who did not

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[15] The ***O'Connell*** warnings were first pronounced in ***Commonwealth, Department of Transportation, Bureau of Traffic Safety v. O'Connell***, 555 A.2d 873 (Pa. 1989). In a later opinion, our Supreme Court explained both the ***O'Connell*** warnings and the reasoning behind the warnings:

> in order to guarantee that a motorist makes a knowing and conscious decision on whether to submit to testing

respond, and then directed a nurse to draw Myers's blood. ***Id.*** The officer did not have a warrant. ***Id.*** The Commonwealth later charged Myers with DUI. Myers then moved to suppress his blood test results, which the trial court subsequently granted. The Commonwealth appealed.

After agreeing to review the case, our Supreme Court first addressed whether an unconscious arrestee possesses the statutory right to refuse blood testing pursuant to Section 1547(b) of the Motor Vehicle Code. Ultimately, the Court explained that "the statute [contains] unambiguous language [that] indicates that the right of refusal applies without regard to the motorist's state of consciousness." ***Id.*** at 1172. Thus, the Court held that Section 1547(b)'s right of refusal applies to all arrestees, conscious or unconscious. ***Id.***

Next, the Court addressed whether "75 Pa.C.S.[A.] § 1547(a) [which] provid[es] that a DUI suspect 'shall

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> or refuse and accept the consequence of losing his driving privileges, the police must advise the motorist that in making this decision, he does not have the right to speak with counsel, or anyone else, before submitting to chemical testing, and further, if the motorist exercises his right to remain silent as a basis for refusing to submit to testing, it will be considered a refusal and he will suffer the loss of his driving privileges[. T]he duty of the officer to provide the ***O'Connell*** warnings as described herein is triggered by the officer's request that the motorist submit to chemical sobriety testing, whether or not the motorist has first been advised of his [***Miranda v. Arizona***, 384 U.S. 436 (1966)] rights.

Commonwealth, Dep't of Transp., Bureau of Driver Licensing v. Scott, 684 A.2d 539, 545 (Pa. 1996).

be deemed to have given consent' to a chemical test [constitutes] an independent exception to the warrant requirement of the Fourth Amendment to the United States Constitution and Article I, Section 8 of the Pennsylvania Constitution." ***Id.*** at 1180 (citation omitted). Although unable to garner majority approval,[16] the Court concluded that "the language of 75 Pa.C.S.[A.] § 1547(a) . . . does not constitute an independent exception to the warrant requirement." ***Id.***

In reaching this conclusion, the Court recognized that consent, as an exception to the warrant requirement, must be voluntary. ***Id.*** at 1176-1177. Per the Court, this is true even if consent is implied. ***Id.*** Indeed, the ***Myers*** Court concluded that, "despite the existence of an implied consent provision, an individual must give actual, voluntary consent at the time that testing is requested." ***Id.*** at 1178. In reaching this conclusion, the ***Myers*** Court relied upon the United States Supreme Court's decision in ***Birchfield v. United States***, 136 S.Ct. 2160 (2016). It stated:

> Of particular salience for today's case, the ***Birchfield*** Court addressed the circumstance in which a DUI suspect is unconscious when a chemical test is sought. The [United States Supreme] Court explained:
>
> > It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps

[16] Only Justices Donohue and Dougherty joined this portion of Justice Wecht's opinion. ***See Myers***, 164 A.3d 1180, n. 15.

> as a result of a crash) or who is unable to do what is needed to take a breath test due to profound intoxication or injuries. But we have no reason to believe that such situations are common in drunk-driving arrests, and when they arise, the police may apply for a warrant if need be.

Id. at 2184–85. Lest anyone doubt what the Supreme Court meant when it stated that police officers in such circumstances "may apply for a warrant if need be," the Court emphasized that "[n]othing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not." ***Id.*** at 2184. Noting that all fifty states have enacted implied consent laws, ***id.*** at 2169, the Court nowhere gave approval to any suggestion that a warrantless blood draw may be conducted upon an unconscious motorist simply because such a motorist has provided deemed consent by operation of a statutory implied consent provision. Rather, the Supreme Court indicated that a warrant would be required in such situations unless a warrantless search is necessitated by the presence of a true exigency.

Id. at 1178–1179. Based upon the foregoing, the ***Myers*** Court concluded that, "[l]ike any other searches based upon the subject's consent, a chemical test conducted under the implied consent statute is exempt from the

warrant requirement only if consent is given voluntarily under the totality of the circumstances." ***Id.*** at 1180. As such, the Court held that because the appellant in ***Myers*** was unconscious, he did not have the opportunity to "make a 'knowing and conscious choice' regarding whether to undergo chemical testing or to exercise his right of refusal." ***Id.*** at 1181 (citation omitted). Thus, the totality of the circumstances demonstrated that he did not voluntarily consent to the blood draw. ***Id.***

In ***Myers***, a majority of our Supreme Court held that an individual arrested for DUI, whether conscious or unconscious, possessed a statutory right to refuse chemical testing. A mere plurality of the ***Myers*** court held, however, that Section 1547(a), by itself, does not establish an independent exception to the warrant requirement. Following ***Myers***, the issue of whether compliance with Section 1547(a) or Section 3755(a), standing alone, serves as an independent exception to the warrant requirement remains unsettled, especially for individuals who are unconscious and not under arrest at the time of a blood draw.

Despite this uncertainty, the subsequent history of a recently-published decision by a panel of this Court offers insight as to how our Supreme Court would address these issues in future cases. The facts in ***Commonwealth v. March***, 154 A3d 803 (Pa. Super. 2017) are nearly identical to the facts of the instant case. On July 14, 2015, a single vehicle accident occurred. ***Id.*** at 805. When police arrived at the scene, emergency medical personnel were treating March, the driver, who

was unresponsive and subsequently transferred to the hospital for treatment. ***Id.*** After investigating the scene of the accident, the officer learned information that provided probable cause to believe that March was under the influence of a controlled substance at the time of the accident. ***Id.*** The officer then traveled to Reading Hospital to request a sample of March's blood. ***Id.*** A request was made, without a warrant, and a blood draw was subsequently taken which later revealed the "presence of several Schedule I controlled substances in March's blood." ***Id.*** at 806. Notably, at the time of the blood draw, March was unconscious but not under arrest. ***Id.*** at 805. Thereafter, the Commonwealth charged March with various crimes, including DUI (controlled substance). ***Id.*** at 806. March filed an omnibus pre-trial motion seeking to suppress the blood evidence based upon an allegedly illegal blood draw. ***Id.*** The trial court granted March's motion. ***Id.*** The Commonwealth then appealed to this Court.

On appeal, this Court concluded that the "interplay" between Section 1547(a) and Section 3755(a) "allowed for [March's] warrantless blood draw and release of the results." ***Id.*** at 813. In reaching this conclusion, this Court in ***March*** made the distinction that, unlike the appellant in ***Myers***,[17] March was not under arrest at the time of the blood draw. ***Id.*** As such, this

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[17] This Court issued its decision in ***March*** prior to our Supreme Court's decision in ***Myers***, ***supra***. Thus, the panel relied upon this Court's previous decision in ***Commonwealth v. Myers***, 118 A.3d 1122 (Pa. Super. 2015), *appeal granted*, 131 A.3d 480 (2016).

Court concluded that he did not possess the statutory right to refuse consent pursuant to Section 1547(b). ***Id.*** In making this distinction, the ***March*** Court relied on the Pennsylvania Supreme Court's previous decisions in ***Riedel*** and ***Eisenhart***. ***Id.*** Furthermore, the Court, relying on ***Riedel***, concluded that because March "was unconscious and unresponsive," he did not have the right to refuse to consent to blood testing. ***Id.*** Accordingly, we concluded that the "warrantless blood draw was permissible" because March "was involved in a motor vehicle accident, was unconscious at the scene and required immediate medical treatment, was not under arrest, and remained unconscious when the blood tests were administered." ***Id.*** Ultimately, however, the Supreme Court vacated and remanded our decision in ***March***. ***See Commonwealth v. March***, 172 A.3d 582 (Pa. 2017). In doing so, the Supreme Court expressly instructed this Court to reconsider our disposition in ***March*** in light of the decision in ***Myers***, ***supra*** and the United States Supreme Court's decision in ***Birchfield***, ***supra***. ***See id.***

Based upon the foregoing, we conclude that Section 1547(a) and its counterpart, Section 3755(a), no longer independently support implied consent on the part of a driver suspected of or arrested for a DUI violation and, in turn, dispense with the need to obtain a warrant. "Simply put, statutorily implied consent cannot take the place of voluntary consent." ***Myers***, ***supra*** at 1178. Thus, in order for the Commonwealth to request a driver's blood test results, it must obtain a warrant or it must proceed within a valid exception to the

warrant requirement. If government officials rely upon a driver's consent to request his blood test results, the Commonwealth must demonstrate that the driver's consent is voluntary, which means the driver had a meaningful opportunity to "make a 'knowing and conscious choice' of whether to undergo chemical testing or exercise his right of refusal." ***Id.*** at 1181 (citation omitted).

In this case, the Commonwealth cannot simply rely upon its compliance with Section 3755(a) to justify the warrantless request to test Appellant's blood sample. As stated above, by the time Sergeant Farren arrived at York Hospital, Appellant was fading in and out of consciousness. N.T. Suppression Hearing, 12/21/15, at 59. Appellant, therefore, did not have the "opportunity to choose whether to exercise [the right of refusal] or to provide actual consent to the blood draw." ***Myers***, ***supra*** at 1181. "Because [Appellant] was deprived of this choice, the totality of the circumstances unquestionably demonstrate[] that he did not voluntarily consent to the blood draw." ***Id.*** Thus, the Commonwealth's warrantless request to test Appellant's blood sample violated Appellant's constitutional rights and the trial court erred in denying his motion to suppress.

Lastly, we must address whether exigent circumstances existed in this case to permit the warrantless request to test Appellant's blood sample. Herein, Appellant argues that the Commonwealth failed to prove that exigent circumstances existed to permit

the warrantless search. Appellant's Brief at 57-58. We are constrained to agree.

Exigent circumstances comprise one of the "well-recognized exception[s]" to the Fourth Amendment's and Article I, Section 8's warrant requirements. ***McNeely***, ***supra*** at 148. Exigent circumstances "[exist] when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable." ***Id.*** at 148-149. In ***Schmerber v. California***, 384 U.S. 757 (1966), the United States Supreme Court considered the constitutionality of a warrantless blood draw under circumstances analogous to those present here. The ***Schmerber*** Court concluded that an exigency may arise if an officer "reasonably [ ] believe[s he is] confronted with an emergency, in which the delay necessary to obtain a warrant, under the circumstances, threaten[s] the destruction of evidence." ***Id.*** at 770. The existence of an exigency that overcomes the warrant requirement is determined on a case-by-case basis after an examination of the totality of the circumstances. ***McNeely***, ***supra*** at 145 (determination of whether an exigency supports a warrantless blood draw in drunk-driving investigation is done "case by case[,] based on the totality of the circumstances").

The United States Supreme Court recently revisited the issue of exigent circumstances in the context of intoxicated driving investigations. In ***Mitchell v. Wisconsin***, 139 S.Ct. 2525 (2019), the Court explained that, in general, exigent circumstances may exist to

permit the police to pursue a warrantless blood draw if the driver's BAC is dissipating and the driver is unconscious. ***Mitchell*** 139 S.Ct. at 2537. In ***McNeely***, however, the Supreme Court cautioned that the natural metabolization of BAC, alone, does not present "a *per se* exigency that justifies an exception to the [warrant requirement]." ***McNeely***, ***supra*** at 145. Instead, ***McNeely*** clarified that the "the metabolization of alcohol [or a controlled substance] in the bloodstream and the ensuing loss of evidence are among the factors" to consider when determining whether exigent circumstances justify a warrantless blood draw. ***Id.*** at 165. ***McNeely*** also highlighted additional factors, such as the "need for the police to attend to a related car accident," "the procedures in place for obtaining a warrant, the availability of a magistrate judge," and "the practical problems of obtaining a warrant within a timeframe that still preserves the opportunity to obtain reliable evidence." ***Id.*** at 164. Notably, this Court previously utilized the aforementioned factors to determine whether an exigency existed in a drunk-driving investigation. ***See Commonwealth v. Trahey***, 183 A.3d 444, 450-452 (Pa. Super. 2018) (applying the factors listed in ***McNeely*** to determine whether, under the totality of the circumstances, an exigency permitted a warrantless blood draw).

Based upon the totality of circumstances present in this case, we conclude that the Commonwealth failed to prove that an exigency permitted the police to request, without a warrant, the chemical testing of

Appellant's blood sample. At the suppression hearing, the Commonwealth established that the police were "dealing with a chaotic situation" and that they had probable cause to believe that Appellant was driving under the influence of marijuana. N.T. Suppression Hearing, 12/21/15, at 77. Specifically, Officer Briar explained that the scene involved a collision between a train and a vehicle where one person (Sisti) was declared dead, and two others (Appellant and S.J.) required emergency treatment. ***Id.*** at 7-39. In addition, Officer Kevin Romine testified that he interviewed the train's conductor, Virgil Weaver, on the day of the accident and Weaver informed him that he "detected an odor of marijuana around the vehicle" after attempting to render aid. ***Id.*** at 46. In addition, Officer Romine testified that he interviewed Leslie Garner, the paramedic who assisted Appellant, and she confirmed that "she detected an odor of marijuana about [Appellant's] person." ***Id.*** at 47.

While these circumstances undoubtedly confirm the existence of a tragic and unfolding emergency, other factors compellingly undermine the conclusion that exigent circumstances permit us to jettison the warrant requirement. Sergeant Farren testified that when he arrived at York Hospital, he learned that hospital personnel already obtained a blood sample from Appellant. ***Id.*** at 59. The blood draw occurred at 5:56 p.m., approximately one hour and 20 minutes after the accident. As of 5:56 p.m., then, Appellant's blood sample, including all of the intoxicants contained therein,

was preserved. Thus, the extraction of Appellant's blood shortly before 6:00 p.m. on the date of the accident literally stopped the clock on any concern that the further passage of time could result in dissipation of evidence since the withdrawal of Appellant's blood by hospital personnel ceased all metabolic activity that might influence a toxicological assessment of the sample. As a result, any argument that an exigency existed at the time Sergeant Farren submitted his request to test Appellant's blood sample was no longer viable.[18] Sergeant Farren and Lieutenant Lutz's testimony at the suppression hearing bolsters this conclusion as both officers admitted that the police could have obtained a warrant before asking that chemical tests be performed on Appellant's blood. ***See*** N.T. Suppression Hearing, 12/21/15, at 65-66 and 83. Therefore, in view of the foregoing circumstances, we conclude that no exigency permitted the warrantless search in this case

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[18] Sergeant Farren's request to test Appellant's blood sample constitutes the relevant search for purposes of our constitutional analysis. That is, we look to the circumstances that existed at the time of his request to determine whether an exigency was present. The blood draw by hospital personnel did not trigger protections under either the Fourth Amendment or Article I, Section 8 because there is no evidence that hospital personnel acted at the direction of the police or as an agent of the police. ***Seibert***, ***supra*** at 63 (explaining that, "because the hospital did not withdraw [the appellant's] blood at the direction of [the police] the search did not implicate [the appellant's] Fourth Amendment rights." Instead, "the hospital withdraw [the appellant's] blood on its own initiative for its own purposes."). As such, in the absence of state action (or a demonstration thereof), the earliest possible governmental search occurred when Sergeant Farren requested that Appellant's blood sample be submitted for chemical testing.

and, as such, the trial court erred in denying Appellant's motion to suppress.

We note that, initially, the trial court denied suppression based upon a finding of exigent circumstances. Upon review, it is apparent that the trial court originally inferred that an exigency existed because the requirements of 75 Pa.C.S.A. § 3755(a) were met. Indeed, the court explained its reasoning as follows:

> Here, there was an accident scene involving the parties to the accident, emergency [personnel], and the investigators. As recounted above, [Lieutenant] Lutz dispatched [Sergeant] Farren to the hospital to obtain blood from [Appellant] after gathering enough information at the scene to form probable cause [that Appellant was DUI]. [T]he officers [also] had to process an accident scene and [Appellant was] transported to a hospital. The exigency [Lieutenant] Lutz felt is evident in his testimony when he stated, "I instructed [Sergeant] Farren, who was reporting on duty, that **as soon as he came on duty** to **jump** in his car and respond to [ ] York Hospital and request a legal, a BAC for [Appellant]." [ ] N.T., [Preliminary Hearing,] 4/29/15, at 47 [emphasis in original]. Though [Lieutenant] Lutz's subjective feeling of exigency carries no weight, [the court] agree[s] that the circumstances warranted it.
>
> Metabolization of alcohol is not, in and of itself, enough to find exigency; however, [the court] believe[d] that investigators' fears

> vis-à-vis metabolization are enough to find exigency when the officers were delayed by needs more pressing tha[n] obtaining [Appellant's] BAC – namely, attending to victims and processing the scene of death.
>
> ***
>
> [Thus, Appellant's] request to suppress the results from the blood draw in this case for lack of a warrant is denied.

Trial Court Opinion, 4/27/16, at 10-11.

In its 1925(a) opinion, however, the court explained:

> The trial court based its denial of suppression of the blood test results upon its finding of exigent circumstance[s]. Upon further review, the trial court believes it erred [in denying suppression.] While the Newberry Township Police Department was preoccupied with the hectic nature of a train wreck, [Sergeant] Farren arrived at York Hospital to request a blood test. When he arrived, York Hospital had already conducted a [blood draw]. All [Sergeant] Farren did was [ ] follow the procedure under [75 Pa.C.S.A. § 3755(a)] and instruct the hospital staff to transfer the blood samples to NMS [laboratory] in Willow Grove.
>
> When the trial court denied [ ] suppression, it incorrectly viewed the totality of the circumstances and gave too much weight to the preoccupied police force. The trial court

> now believes that there w[ere] not urgent and compelling reasons [that prevented Sergeant Farren from leaving the hospital to procure] a warrant before returning to have the blood samples transferred to NMS [laboratory]. Because of this, exigent circumstances did not exist[.]

Trial Court Opinion, 4/13/18, at 12-13.

As detailed above, we agree with the trial court's statement in its 1925(a) opinion that no exigency existed to justify the warrantless search. Thus, the trial court should have suppressed Appellant's blood test results. As such, we must vacate Appellant's judgment of sentence, reverse the trial court's order denying suppression, and remand for a new trial.[19] ***Commonwealth v. Krenzel***, 209 A.3d 1024, 1032 (Pa. Super. 2019) (where trial court erred in denying suppression, order denying suppression should be reversed, appellant's judgment of sentence should be vacated, and case should be remanded for a new trial); ***Commonwealth v. Boyd Chisholm***, 198 A.3d 407, 418 (Pa. Super. 2018) (same).

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[19] Due to our disposition, we need not address Appellant's remaining appellate issues.

Judgment of sentence vacated. Order denying suppression reversed. Case remanded for new trial. Jurisdiction relinquished.

Judgment Entered.

/s/ Joseph D. Seletyn
Joseph D. Seletyn, Esq.
Prothonotary

Date: 08/11/2020

IN THE COURT OF COMMON PLEAS
OF YORK COUNTY, PENNSYLVANIA

COMMONWEALTH OF PENNSYLVANIA,	:	No. CR-2824-2015
v.	:	
AKIM S. JONES-WILLIAMS, Appellant	:	

OPINION
PURSUANT TO Pa.R.A.P. 1925(a)

(Filed Apr. 13, 2018)

Appellant Akim S. Jones-Williams appeals to the Superior Court of Pennsylvania from the Order Sentencing Defendant on April 5, 2017. On September 15, 2017, Appellant filed a Notice of Appeal. Appellant then filed a Concise Statement of Errors Complained of Pursuant to Rule of Appellant Procedure 1925(b) on October 5, 2017. The trial court now issues this 1925(a) Opinion.

PROCEDURAL HISTORY

On December 21, 2015, the trial court held a suppression hearing to determine if Appellant's blood tests violated Appellant's rights under the Fourth Amendment to the United States Constitution and under Article 1 § 8 of the Constitution of the Commonwealth of Pennsylvania. On April 28, 2016, the trial court denied the motion to suppress because of the existence of

exigent circumstances as an exception to the warrant requirement.

On January 13, 2017, a jury found Appellant guilty of 9 of the 10 charges. These included 1 count under 75 Pa.C.S.A. §3735(a) for Homicide by Vehicle while Driving Under the Influence; 1 count under 75 Pa.C.S.A. §3732(a) for Homicide by Vehicle; 1 count under 18 Pa.C.S.A. §4304(a)(1) for Endangering Welfare of Child; 1 count under 18 Pa.C.S.A. §2705 for Recklessly Endangering Another Person; 1 count under 75 Pa.C.S.A. §3802(d)(1)(i) for DUI: Controlled Substance – Schedule 1; 1 count under 75 Pa.C.S.A. §3802(d)(1)(iii) for DUI: Controlled Substance – Metabolite; 1 count under 75 Pa.C.S.A. §3735.1(a) for Aggravated Assault by Vehicle while Driving Under the Influence; 1 count under 75 Pa.C.S.A. §3732.1(a) for Aggravated Assault by Vehicle; and 1 count under 75 Pa.C.S.A. §3714(a) for Careless Driving. Appellant was found not guilty of 75 Pa.C.S.A. §3802(d)(1)(ii) for DUI: Controlled Substance – Schedule 2 or 3.

The Honorable Michael E. Bortner ("trial court") held a sentencing hearing on April 5, 2017. Appellant was sentenced to serve in total for 4-8 years imprisonment and 12 months probation.

On April 17, 2017, Appellant filed a post-sentence motion alleging that the trial court erred in denying suppression of Appellant's blood test results and that the trial court erred in finding that the weight of the evidence was met in 5 of the 9 counts. The trial court by mistake, accidently granted the motion on May 10,

2017. On May 19, 2017, the trial court vacated its order of May 10, 2017 and ordered the parties to schedule a hearing for the post-sentence motion. The trial court allowed Appellant to file a supplemental post-sentence motion on June 21, 2017. The trial court held a hearing on the post-sentence motion on July 25, 2017. The trial court then denied the post-sentence motion as operation of the law on September 11, 2017.

In his statement, Appellant alleges 3 issues to be considered by this Court:

1) whether the trial court erred in denying Appellant's Motion to Suppress when police obtained a blood test results from Appellant without a warrant after the accident, when 75 Pa.C.S.A. § 3755 is unconstitutional;

2) whether the trial court erred in finding that the sufficiency of the evidence was met as to the 3 counts of DUI: Controlled Substance and Endangering the Welfare of Child; and

3) whether the trial court erred in finding that the weight of the evidence was met as to 9 all counts.

FACTUAL SUMMARY

At the suppression hearing, Officer Kevin Romine of the Newberry Township Police Department testified that on July 5, 2014, he responded to a train/car collision scene near Cly Road 2 in Newberry Township, York County. Transcript of Omnibus Pretrial Hearing, 12/21/15 at 39, 40. Officer Romine testified that he

spoke with Norfolk Southern Railway locomotive engineer Gary Hoofnagle and conductor Virgil Weaver. Id. at 43.

Officer Romine learned that the engineer and conductor witnessed a red SUV approach the Cly Road 2 grade crossing at a very slow rate of speed. Id. at 44. Officer Romine testified that he learned that the red SUV came onto the tracks without enough time for the train to stop, leading to the train hitting the SUV. Id. Officer Romine further learned from paramedic Leslie Garner of the Newberry Township Fire Department that she had detected the odor of marijuana on Appellant. Id. at 47. Officer Romine testified that he relayed this information to the affiant, Lieutenant Lutz of the Newberry Township Police Department.

Sergeant Keith Farren of the Newberry Township Police Department testified that he was directed by Lieutenant Lutz to go to York Hospital to interview Appellant and obtain a legal blood draw. Id. at 57. Sgt. Farren testified that he went to the hospital and observed the Appellant in and out of consciousness. Id. at 58. Sgt. Farren testified that he attempted to interview Appellant and communicate the implied consent form, but Appellant was unresponsive. Id. at 59.

Sgt. Farren testified that he then "responded up to the [hospital] laboratory and filled out the proper form for the NMS Labs and made the request there because the blood was already drawn." Id. Sgt. Farren testified that it could have been possible to obtain a search warrant before he went to the hospital. Id. at 66.

Lt. Lutz testified that he also could have requested a search warrant before seeking the blood samples. Id. at 83. Lt. Lutz testified that he did not have Sgt. Farren get a search warrant because Lt. Lutz believed 75 Pa.C.S.A. § 3755 applied. Id. at 84.

At trial, engineer Hoofnagle testified that he was controlling a 45-car long, Norfolk Southern freight train from Lancaster, PA to Enola, PA on July 5, 2014. Transcript of Trial at 229. The route went through Newberry Township. Id. Engineer Hoofnagle testified that the train approached Cly Road 1 before it reached Cly Road 2. Id. at 231. Engineer Hoofnagle testified that the railroad crossing on Cly Road 2 was identifiable to motorists by a wooden crosssbuck sign depicting 2 tracks. Id. at 237. Engineer Hoofnagle testified that he sounded the locomotive horn properly for both grade crossings. Id. at 230. Engineer Hoofnagle testified that the locomotive head lamp, ditch lights, and oscillating lights were operating as the train approached the crossings. Id. at 233.

Engineer Hoofnagle testified that he saw a red SUV slowly approach the crossing on Cly Road 2 and not change its steady slow speed despite the locomotive's horn and lights. Id. at 233. Engineer Hoofnagle testified that he put the automatic train brakes into the emergency position. Id. Engineer Hoofnagle testified that there was only 10 to 12 seconds from the time he noticed the red SUV approaching to when the train hit the SUV. Id. at 235. Engineer Hoofnagle testified that before he applied the brakes, the train was traveling just under 40 mph. Id. at 236. Engineer Hoofnagle

testified that he never noticed the red SUV change its slow rate of speed prior to impact. Id .at 235.

Conductor Weaver testified that the train approached the Cly Road crossings at about 4:40pm on July 5, 2014. Id. at 5. Conductor Weaver testified that the train had just passed through a curve which the maximum authorized speed was 40 mph. Id. at 17. Conductor Weaver testified that there were no obstructions blocking the view of the red SUV as the train approached Cly Road 2 from 350 feet away. Id. at 13.

Conductor Weaver testified that as the train got closer to the crossing, he saw a Caucasian person with long hair in the passenger seat of the SUV. Id. at 14. Conductor Weaver testified that the passenger was motioning Appellant to drive faster. Id. at 15. Conductor Weaver testified that the train impacted the SUV's passenger side. Id. at 16.

Conductor Weaver testified that after the train stopped, he saw that the SUV had ended up in the tree line besides the tracks and that the SUV was laying on its passenger side. Id. at 18. Conductor Weaver testified that he saw Appellant along with a Caucasian female, and a toddler in the SUV. Id. at 20. Conductor Weaver testified that he smelled the odor of marijuana coming from the SUV. Id. at 22.

Susan Curry testified that she was nearby at her parents cottage when the crash occurred. Id. at 251. Curry testified that she responded to the crash because she is a registered nurse. Id. at 252. Curry testified that she stabilized the child's head until the

paramedics got to the scene. Id. at 256. Curry testified that there was no obstruction to motorists to see the crossbuck sign at the railroad crossing on Cly Road 2. Id. at 260.

Paramedic Garner testified that she came across the child and that the child was only responsive to painful stimuli. Id. at 79. Paramedic Garner testified that the Caucasian female was deceased when she taken out of the SUV. Id. at 83. Paramedic Garner testified when Appellant was outside of the SUV, Garner noticed that "there was a strong odor of marijuana [that] almost hit you like a brick in the face." Id. at 87.

EMT Lisa Gottschall of the Newberry Township Fire Department testified that Appellant had a strong odor of marijuana on his breath and on his person. Id. at 431.

Lt. Lutz testified that the owner of the red SUV was Cori Sisti. Id. at 329.

Corporal Gary Mainzer of the Pennsylvania State Police testified that he was a collision analyst and reconstruction specialist. Id. at 367. Cpl. Mainzer testified that the knuckle coupler of the lead locomotive of the train penetrated the SUV's passenger side door. Id. at 390. Cpl. Mainzer testified that any one sitting in the passenger seat would have taken the brunt of the impact. Id. at 392. Cpl. Mainzer testified that after reviewing the DNA evidence, he concluded that Cori Sisti was seated in the passenger seat. Id. at 393.

Cpl. Mainzer testified that the Event Data Recorder, or EDR, of the SUV revealed that from 4.5 seconds before impact, the SUV was coasting at 8.1 mph with no application to the accelerator. Id. at 403. Cpl. Mainzer testified that at 3.5 seconds from impact, the SUV was coasting at 7.5 mph with no application of the accelerator. Id. at 405. At 2.5 seconds, the SUV was coasting at 6.2 mph. Id. at 407. At 1 second, the SUV was coasting at 5.6 mph. Id. at 408. At the time of impact, the SUV was going 6.2 mph and the accelerator was being applied. Id. at 410. Cpl. Mainzer testified that the SUV brakes were never applied before the impact. Id. at 412.

Amanda Gibson testified that Appellant and Cori Sisti were engaged to be married and had a child together. Id. at 441. Gibson testified that Gibson began dating Appellant 2 weeks after the accident. Id. at 442. Gibson testified that her relationship with Appellant lasted 2 months. Id. Gibson testified that during her relationship with Appellant, that Appellant told Gibson that he was driving at the time of the crash and that he had smoked "weed." Id. at 443. Gibson testified that "[hie told me that he drove 18 miles high as a kite" on the day of the crash Id. at 444.

Forensic Toxicologist Ayako Chan-Hosokawa of NMS Labs testified that NMS Labs received Appellant's blood samples for testing July 8, 2014. Id. at 139. Chan-Hosokawa testified that the blood samples had the presence of 11-Hydroxy Delta-9 THC. Id. at 162. Chan-Hosokawa testified that 11-Hydroxy Delta-9 THC has the ability to impair the mind. Id. Chan-Hosokawa

testified that because the amount was below 5 nanograms per milliliter that it was reported as unquantifiable. Id. Chan-Hosokawa testified that one can still feel the effects of marijuana even though it has dissipated from the blood stream because, unlike alcohol, THC attaches to fatty tissue. Id. at 166-168.

ISSUES FOR APPEAL

Whether the trial court erred in denying Appellant's motion to suppress blood test results and in finding Appellant guilty of the 9 counts when the Commonwealth relied solely on §3755 and when the Commonwealth met its burden beyond a reasonable doubt.

DISCUSSION

The trial court's decision in denying Appellant's motion to suppress blood tests rests on the recent remand of Commonwealth v. March and the applicability of §3755 . Furthermore, the Commonwealth proved by circumstantial evidence, without the blood tests, that Appellant committed the non-DUI related offenses.

I. *Suppression of the blood tests.*

A search or seizure is not reasonable "unless conducted pursuant to a valid search warrant upon a showing of probable cause." Commonwealth v. Riedel,

539 Pa. 172, 178-79, (1994) (citations omitted). Exceptions to the warrant requirement include: "actual consent, implied consent, search incident to lawful arrest, and exigent circumstances." Id.

A. Lack of Exigent Circumstances.

The trial court based its denial of suppression of the blood test results upon its finding of exigent circumstances. Upon further review, the trial court believes it erred in finding exigent circumstances. While the Newberry Township Police Department was preoccupied with the hectic nature of a train wreck, Sgt. Farren arrived at York Hospital to request a blood test. When he arrived, York Hospital had already conducted a test. All Sgt. Farren did was to follow the procedure under §3755 and instruct the hospital staff to transfer the blood samples to NMS labs in Willow Grove.

When the trial court denied the suppression, it incorrectly viewed the totality of the circumstances and gave too much weight to the preoccupied police force. The trial court now believes that there was no urgent and compelling reason for Sgt. Farren to not leave the hospital and attempt to secure a warrant before returning to have the blood samples transferred to NMS labs. Because of this, exigent circumstances did not exist, and so the Commonwealth has to rely upon 75 Pa.C.S.A. § 3755 as its own independent exception to the warrant requirement.

B) Uncertain Constitutionality of §3755: "Reports by Emergency Room Personnel."

§3755 together with §1547 create the implied consent statutory scheme. Commonwealth v. Riedel, 651 A.2d 135, 140 (1994).

> Sections 3755 and 1547:
>
> were originally part of the same section, which was subsequently amended to the current scheme. Law of June 17, 1976, P.L. 162, No. 81, § 1, amended by Law of Dec. 15, 1982, P.L. 1268, No. 289, §§ 5 and 11.

Id. at fn. 2.

After the trial court denied the suppression motion on April 28 2016, the law became uncertain with the advent of Birchfield v. North Dakota, 136 S. Ct. 2160 (2016), Commonwealth v. Myers, 164 A.3d 1162 (Pa. 2017), and Commonwealth v. March, 172 A.3d 582 (Pa. 2017).

It is well-settled that "[i]ssues not raised in the lower court are waived and cannot be raised for the first time on appeal." Pa.R.A.P. 302(a). Commonwealth v. Napold, 170 A.3d 1165, 1168 (Pa. 2017).

A new rule from the United States Supreme Court applies to all criminal cases still pending on direct appeal. Id. (quoting Schriro v. Summerlin, 542 U.S. 348, 351 (2004) (quoting Griffith v. Kentucky, 479 U.S. 314, 328 (1987))).

To apply retroactively to a case on direct appeal, the issue has to be preserved at all stages of adjudication. Id. (quoting Commonwealth v. Tilley, 566 Pa. 312, 780 A.2d 649, 652 (2001)). The exception is when "the challenge is one implicating the legality of the appellant's sentence." Id. at fn.5 (quoting Commonwealth v. Barnes, 151 A.3d 121, 124 (Pa. 2016)).

Appellant argues that §3755 is no longer constitutional.

The instant case is factually similar to March. In March, the defendant was involved in a motor vehicle accident in Berks County and was sent to Reading Hospital. Commonwealth v. March, 154 A.3d 803, 805, (Pa. Super. 2017). A police officer was sent:

> directly to Reading Hospital, where she requested a sample of [defendant's] blood. Although police now had probable cause, [defendant] was not yet under arrest. [Defendant] was unconscious, and Sergeant Brown could not read the Implied Consent DL26 form to [defendant]. [Defendant's] blood was drawn at 7:59 p.m.; the results indicated the presence of several Schedule I controlled substances in [defendant's] blood.

Id.

The trial court in March had granted suppression of the blood test results. Id. at 806. The Superior Court reversed the trial court, distinguishing the Myers case. The Superior Court held the defendant "was not under arrest, so he had no right to refuse the blood test under

Pennsylvania's Implied Consent Statute." Id. at 812. The Superior Court further held:

> Because [defendant] was involved in a motor vehicle accident, was unconscious at the scene and required immediate medical treatment, was not under arrest, and remained unconscious when the blood tests were administered, the warrantless blood draw was permissible.

Id. at 813.

The facts of March are very similar to the instant case. Appellant was involved in a motor vehicle accident and was unconscious when he received immediate medical treatment. Appellant was not under arrest when Sgt. Farren came to York Hospital for the blood test results.

However, the Supreme Court reversed the Superior Court in March, vacating the order, stating:

> The Superior Court's order is VACATED and this matter is REMANDED to the Superior Court for reconsideration in light of this Court's decision in Commonwealth v. Myers, ___ Pa. ___, 164 A.3d 1162 (2017) and the United States Supreme Court's decision in Birchfield v. North Dakota, ___ U.S. ___, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016).

Commonwealth v. March, 172 A.3d 582 (Pa. 2017).

March has since been closed by the Commonwealth's withdrawal of its appeal.

While Myers did not discuss the constitutionality of §3755, Myers discussed the constitutionality of § 1547. Commonwealth v. Myers, 164 A.3d 1162, 1172 (Pa. 2017). The Myers court held that a driver has the statutory right to refuse consent to a blood test under §1547, even if they are unconscious. Id. The plurality opinion in Myers suggested that implied consent is not, on its own, an exception to the warrant requirement:

> Implied consent, standing alone, does not satisfy the constitutional requirements for the searches that the statute contemplates. If neither voluntary consent nor some other valid exception to the warrant requirement is established, then a chemical test may be conducted only pursuant to a search warrant.

Id. at 1181.

Because Myers did not involve a motor vehicle accident, §3755 did not apply. Despite this, §3755 has long been considered part of §1547 overall implied consent scheme, even though they are separate statutes. Commonwealth v. Riedel, 651 A.2d 135, 140 (1994). Thus, this Court has the authority to decide if §3755 is to remain constitutional and if it applies to the instant case.

C) Applicability of §3755.

Alternatively, if this Court finds §3755 to remain constitutionally firm, then the instant case rests on the Commonwealth's compliance with § 3755.

§3755 states:

> (a) General rule. – **If, as a result of a motor vehicle accident**, the person who drove, operated or was in actual physical control of the movement of any involved motor vehicle requires medical treatment in an emergency room of a hospital and **if probable cause exists to believe a violation of section 3802 (relating to driving under influence of alcohol or controlled substance)** was involved, the emergency room physician or his designee **shall promptly take blood samples** from those persons and transmit them within 24 hours for testing to the Department of Health or a clinical laboratory licensed and approved by the Department of Health and specifically designated for this purpose. This section shall be applicable to all injured occupants who were capable of motor vehicle operation if the operator or person in actual physical control of the movement of the motor vehicle cannot be determined. **Test results shall be released upon request of the person tested, his attorney, his physician or governmental officials or agencies.**

75 Pa.C.S.A. § 3755(a). (emphasis added).

Once a police officer:

> establishes probable cause to believe that a person operated a motor vehicle under the influence, and subsequently requests that hospital personnel withdraw blood samples for testing of alcohol content, the officer is

> entitled to obtain the results of such tests, regardless of whether the test was performed for medical purposes or legal purposes.

Commonwealth v. Barton, 690 A.2d 293, 298 (Pa. Super. 1997).

When there is no dispute that blood was drawn for independent medical purposes, the blood test results must be suppressed in the absence of a warrant or exigent circumstances. Commonwealth v. Shaw 770 A.2d 295, 298-99 (Pa. 2001). A blood test conducted prior to the request of a police officer does not affect the compliance of § 3755 or the officer's entitlement to obtain the results. Commonwealth v. Seibert, 799 A.2d 54, 64 (Pa. Super. 2002). If the Commonwealth does not prove whether a blood test was taken for independent medical purposes or for a perceived duty under § 3755, the blood test results must be suppressed. Commonwealth v. West, 2003 834 A.2d 625, 637 (Pa. Super. 2003).

Shaw did not explicitly overrule Barton, which simply requires that probable cause exist in order for a request to be made under § 3755. The Shaw court did not hold that if a dispute existed as to why a blood test was taken that such a dispute results in the need for a suppression. The Seibert court reaffirmed the principles of Barton after Shaw was decided.

In this instant case, neither Appellant nor Appellee argued that West was controlling or was at issue. West does not control because probable cause existed when Sgt. Farren arrived to request a blood test. Sgt. Farren was informed by the affiant, Lt. Lutz, that the

circumstances of the motor vehicle accident with the freight train showed that probable cause of a DUI related offense did exist.

Furthermore, the circumstances of Sgt. Farren's request shows that the blood tests were conducted under York Hospital's perceived duty of § 3755. The blood test was taken at 5:56 pm and Sgt. Farren did not request the results until 7:30pm. The blood samples were waiting for Sgt. Farren to make the request. Upon his request, Sgt. Farren filled out the necessary paperwork to transfer the blood samples to NMS labs. The blood samples were immediately packaged for delivery upon this request. Therefore, the Commonwealth proved its burden of showing that Sgt. Farren had probable cause to request the blood samples under § 3755 and that York Hospital operated under a perceived duty of § 3755.

II. *Distinctions between Appellant's Post-Sentence Motion and Appellant's Concise Statement.*

In his post-sentence motion, Appellant only challenged the weight of the evidence as to 5 of the 9 convicted counts: 1 count under 75 Pa.C.S.A. §3735(a) for Homicide by Vehicle while Driving Under the Influence; 1 count under 18 Pa.C.S.A. §4304(a)(1) for Endangering Welfare of Child; 1 count under 75 Pa.C.S.A. §3802(d)(1)(i) for DUI: Controlled Substance – Schedule 1; 1 count under 75 Pa.C.S.A. §3802(d)(1)(iii) for DUI: Controlled Substance – Metabolite; and 1 count

under 75 Pa.C.S.A. §3732.1(a) for Aggravated Assault by Vehicle.

At the time of the post-sentence motion, Appellant did not challenge the remaining counts and did not challenge any counts as to the sufficiency of the evidence.

In his concise statement, Appellant challenged all 9 convicted counts as to the weight and challenged 3 counts for insufficiency. These 3 counts are 1 count under 75 Pa.C.S.A. §3802(d)(1)(i) for DUI: Controlled Substance – Schedule 1; 1 count under 75 Pa.C.S.A. §3802(d)(1)(iii) for DUI: Controlled Substance – Metabolite; and 1 count under 18 Pa.C.S.A. §4304(a)(1) for Endangering Welfare of Child.

A true weight of the evidence challenge " 'concedes that sufficient evidence exists to sustain the verdict' but questions which evidence is to be believed." Commonwealth v. Galindes, 786 A.2d 1004, 1013 (Pa. Super. 2001) (quoting Armbruster v. Horowitz, 744 A.2d 285, 286 (Pa. Super. 1999)).

Each error "identified in the [concise statement] will be deemed to include every subsidiary issue contained therein which was raised in the trial court." Pa.R.A.P. 1925. (b)(4)(v).

The Appellant must satisfy all of the following:

> (1) the appellant preserved the issue either by raising it at the time of sentencing or in a post[-]sentence motion; (2) the appellant filed a timely notice of appeal; (3) the appellant set

> forth a concise statement of reasons relied upon for the allowance of his appeal pursuant to Pa.R.A.P. 2119(f); and (4) the appellant raises a substantial question for our review.

Commonwealth v. Tejada, 107 A.3d 788, 797-98 (Pa. Super. 2015) (citations omitted).

Issues must be raised "prior to trial, during trial, or in a timely post-sentence motion to be preserved for appeal." Id. at 799.

Appellant only properly preserved some issues as to challenge the weight of the evidence. Appellant did not preserve the issues as to the other counts or as to the sufficiency to any of the counts. Because Appellant extends the weight of the evidence to all the convicted counts, and challenges 3 counts as to the sufficiency of the evidence for the first time on appeal, these additional issues are not subject to this Court's review.

III. *Weight and Sufficiency of the Evidence.*

If this Court believes that these issues are subject to its review, and if this Court believes that the denial of the blood test results were proper, then alternatively, the Commonwealth met the weight and the sufficiency of the evidence as to all challenges.

A) Weight of the Evidence.

Allegations that a verdict is against the weight of the evidence are decided based upon the discretion of the trial court. Commonwealth v. Chine, 40 A.3d

1239, 1243 (Pa. Super. 2012) (citing Commonwealth v. Dupre, 866 A.2d 1089, 1101 (Pa. Super. 2005)). The weight of the evidence "is exclusively for the finder of fact who is free to believe all, part, or none of the evidence and to determine the credibility of the witnesses." Commonwealth v. Champney, 832 A.2d 403, 408 (Pa. 2003) (citations omitted).

Moreover, the trial court should not disturb a jury's verdict unless the verdict is "so contrary to the evidence as to shock one's sense of justice."[1] Id. Further, "unless the evidence is so unreliable and/or contradictory as to make any verdict based thereon pure conjecture, these types of claims are not cognizable on appellate review." Commonwealth v. Gibbs, 981 A.2d 274, 282 (Pa. Super. 2009) (citing Commonwealth v. Rossetti, 863 A.2d 1185, 1191 (Pa. Super. 2004)).

Appellate review will not overrule a trial court's determination as to weight of the evidence unless "the facts and inferences of record disclose a palpable abuse of discretion." Id. To this end, "the trial court's denial

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[1] In prior unpublished decisions, the Superior Court has informed this Court that what "shocks one's sense of justice" is defined as follows:

> When the figure of the Justice totters on her pedestal, or when the jury's verdict, at the time of its rendition, causes the trial judge to lose his breath, temporarily, and causes him to almost fall from the bench, then it is truly shocking to the judicial conscience.

Commonwealth v. Davidson, 860 A.2d 575, 581 (Pa. Super. 2004) (internal citations and quotations omitted).

of a motion for a new trial based on a weight of the evidence claim is the least assailable of its rulings." Id.

The test is not whether there is any evidence that goes against the Commonwealth's assertions. Rather, this Court is to examine whether the verdict was "so contrary to the evidence as to shock one's sense of justice." Commonwealth v. Ramtahal, 33 A.3d 602, 609 (Pa. 2011).

The trial court's, sense of justice was not shocked, and so it did not disturb the jury's verdict.

B) Sufficiency of the Evidence.

The standard for reviewing the sufficiency of the evidence is:

> "whether viewing all the evidence admitted at trial in the light most favorable to the verdict winner, there is sufficient evidence to enable the fact-finder to find every element of the crime beyond a reasonable doubt."

Commonwealth v. Charlton, 902 A.2d 554, 563 (Pa. Super. 2006) (citations omitted).

The Commonwealth may sustain its burden of proving every element of the crime "beyond a reasonable doubt by means of wholly circumstantial evidence." Id.

1) Sufficiency of the DM-Controlled Substance Counts

75 Pa.C.S.A. §3802(d) states:

> An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances:
>
> > (1) There is in the individual's blood any amount of a:
> >
> > > (i) Schedule I controlled substance, as defined in the act of April 14, 1972 (P.L. 233, No. 64), known as The Controlled Substance, Drug, Device and Cosmetic Act . . .
> >
> > > (iii) metabolite of a substance under subparagraph (i) . . .

75 Pa.C.S.A. §3802(d)(1)(i) and (iii).

Under the Controlled Substance, Drug, Device and Cosmetic Act, "marihuana," also known as marijuana, is defined as a Schedule I controlled substance. 35 P.S. § 780-104(1)(iv).

Both counts under subsection (i) and (iii) require that the substance is in the Appellant's blood. 75 Pa.C.S.A. §3802(d)(1). So long as "any amount of the substance is within the individual's blood, the evidence is sufficient to establish that element of the crime." Commonwealth v. Hutchins, A.3d 302, 311 (Pa. Super. 2012).

The blood test results from NMS Labs showed that marijuana was in Appellant's blood stream and that Appellant likely had a higher amount in his blood stream while driving.

The engineer and the conductor of the locomotive both saw that the red SUV and that Cori Sisti was in the passenger seat. Appellant's statement that he "drove as high as a kite for 18 miles" further indicated that Appellant was driving the SUV at the time of the crash and when marijuana was in his blood stream.

Therefore, the trial court found Appellant was guilty of both counts of DUI – Controlled Substance with sufficient evidence beyond a reasonable doubt.

2) Sufficiency of the Endangering Welfare of Child Count.

The last count, 18 Pa.C.S.A. §4304(a)(1) states:

> A parent, guardian or other person supervising the welfare of a child under 18 years of age, or a person that employs or supervises such a person, commits an offense if he knowingly endangers the welfare of the child by violating a duty of care, protection or support.

18 Pa.C.S.A. §4304(a)(1).

"[t]he common sense of the community should be considered when interpreting the language of the statute." Commonwealth v. Trippett, 932 A.2d 188, 194 (Pa. Super. 2007) (citations omitted). Any 'other person' who supervises the child is eligible to be charged and

convicted under the statute." Id. at 195 (citations omitted). The intent element requires:

> (1) the accused is aware of his/her duty to protect the child; (2) the accused is aware that the child is in circumstances that could threaten the child's physical or psychological welfare; and (3) the accused has either failed to act or has taken action so lame or meager that such actions cannot reasonably be expected to protect the child's welfare.

Commonwealth v. Schley, 136 A.3d 511, 520 (Pa. Super. 2016) (citations omitted).

Appellant is the parent of child who was in the back seat of the SUV at the time of the crash. Appellant, along with Cori Sisti were supervising the toddler. Appellant violated his duty of care, protection, or support of the child when he drove the SUV under the influence of marijuana. Appellant's statement that he "drove 18 miles high as a kite" provides direct evidence of this violation. This is supported by the scent of marijuana coming from the SUV at the scene of the crash and the scent from Appellant's breath and person.

Furthermore, Appellant's driving behavior indicated that he was impaired while driving. Both the engineer and the conductor noticed the SUV slowly coast over the tracks in front of the locomotive despite the engineer sounding the horn and flashing the locomotive ditch lights. Appellant's inattentiveness to the approaching freight train is supported by the SUV's recorded data. The SUV traveled at such a low speed

to show that it was coasting down Cly Road 2 and across the railroad tracks. It was not until the point of the impact with the train that Appellant significantly applied the accelerator of the SUV.

Because of Appellant's statement, the odor of marijuana, and the driving behavior, Appellant breached his duty of care, protection and support.

Appellant breached his duty knowingly and therefore endangered the welfare of the child. Appellant's mens rea is supported by his own statement of driving for miles under the influence and because Appellant ultimately did not yield to the freight train when the circumstances called for it.

At the railroad crossing with Cly Road 2 was the wooden crossbuck sign. 75 Pa.C.S.A. § 3341 states:

> (a) General rule. – Whenever any person driving a vehicle approaches a railroad grade crossing under any of the circumstances stated in this section, **the driver of the vehicle shall stop within 50 feet but not less than 15 feet from the nearest rail of the railroad and shall not proceed until it can be done safely**. The foregoing requirements shall apply upon the occurrence of any of the following circumstances:
>
> > (1) A clearly visible electric or mechanical signal device gives warning of the immediate approach of a railroad train.
> >
> > (2) A crossing gate is lowered or a flagman gives or continues to give a signal of

> the approach or passage of a railroad train.
>
> (3) **A railroad train approaching within approximately 1,500 feet of the highway crossing emits a signal audible from that distance and the railroad train, by reason of its speed or nearness to the crossing, is a hazard.**
>
> (4) **An approaching railroad train is plainly visible and is in hazardous proximity to the crossing.**

75 Pa.C.S.A. § 3341(a) (emphasis added).

The Driver's Manual for the Department of Transportation defines a Railroad Crossbuck as a sign:

> placed at a railroad crossing where the tracks cross the roadway. [The driver] should treat the crossbuck sign as a **YIELD** sign; slow down and prepare to stop, if [the driver] see or hear a train approaching.

Pa Driver's Manual, Chapter 2 – Signals, Signs and Pavement Markings, 10.

The Driver's Manual states that a yield sign requires a driver to:

> Slow down and check for traffic and give the right-of-way to pedestrians and approaching cross traffic. [The driver] should stop only when it is necessary. Proceed when [the driver] can do so safely without interfering with normal traffic flow.

Id.

The statute for yield signs, 75 Pa.C.S.A. § 3323, states:

> The driver of a vehicle approaching a yield sign shall in obedience to the sign slow down to a speed reasonable for the existing conditions and, if required for safety to stop, shall stop before entering a crosswalk on the near side of the intersection or, if none, then at the point nearest the intersecting roadway where the driver has a view of approaching traffic on the intersecting roadway before entering. After slowing down or stopping, the driver shall yield the right-of-way to any vehicle in the intersection or approaching on another roadway so closely as to constitute a hazard during the time the driver is moving across or within the intersection of roadways. If a driver is involved in a collision with a vehicle in the intersection or junction of roadways after driving past a yield sign, the collision shall be deemed prima facie evidence of failure of the driver to yield the right-of-way.

75 Pa.C.S.A. § 3323(c).

Appellant argued that his view of the train was obstructed by bushes and parked cars. The Commonwealth argued that the view of the train was not obstructed, and instead the view was so clear that the engineer could see the SUV and that the conductor could see Cori Sisti in the passenger seat. The conductor could even see Sisti trying to get Appellant's attention of the oncoming train.

Even if Appellant's view of the train of was obstructed, § 3341, the Driver's Manual, and § 3323 altogether require that Appellant not proceed across the railroad tracks until Appellant was certain it was safe to do so. The conductor testified that he saw the SUV approaching the grade crossing and proceeding to coast onto the tracks slowly without stopping or yielding.

Appellant disregarded the crossbuck sign and did not take corrective action until immediately prior to the point of impact with the locomotive. By crossing the tracks unsafely, ignoring the crossbuck sign, and the circumstantial evidence of driving the SUV impaired, Appellant knowingly endangered the welfare of the child. Furthermore, Appellant placed the child in danger during the entirety of his trip driving the SUV, let alone crossing the tracks.

Therefore, the trial court found Appellant was guilty of this count with sufficient evidence beyond a reasonable doubt.

CONCLUSION

In conclusion, the trial court respectfully requests that this Court find 75 Pa.C.S.A. § 3755 unconstitutional in light of the Supreme Court's remand order in Commonwealth v. March; suppress Appellant's blood test results; and affirm the non-DUI convictions based

upon the circumstantial evidence and the lack of preservation for appeal.

/s/ Michael E. Bortner
Michael E. Bortner
Judge of the Court of
Common Pleas

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA CRIMINAL DIVISION

COMMONWEALTH	:	**No. CP-67-CR-**
	:	**0002824-2015**
v.	:	
AKIM S. JONES-WILLIAMS,	:	
Defendant	:	

APPEARANCES:

Timothy J. Barker, Esquire Counsel for the Commonwealth	Shawn M. Dorward, Esquire Counsel for the Defendant

ORDER

AND NOW, this 27th day of April 2016, the Court hereby ORDERS that the Defendant's Omnibus Pre-Trial Motion that was docketed on October 26, 2015 is **Denied**.

Copies of this Order to York County Clerk of Courts, Timothy J. Barker, Esquire, Shawn M. Dorward, Esquire, and the Defendant, Akim S. Jones-Williams.

BY THE COURT:

/s/ Michael E. Bortner
MICHAEL E. BORTNER, JUDGE

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA CRIMINAL DIVISION

COMMONWEALTH OF PENNSYLVANIA	:	**No. CP-67-CR-0002824-2015**
v.	:	
AKIM S. JONES-WILLIAMS, Defendant	:	

COUNSEL OF RECORD:

Timothy J. Barker, Esquire Counsel for the Commonwealth	Shawn M. Dorward, Esquire Counsel for the Defendant

OPINION IN SUPPORT OF ORDER

(Filed Apr. 27, 2016)

Defendant Akim S. Jones-Williams, by and through his counsel, filed an Omnibus Pre-Trial Motion that was docketed on October 26, 2015. A Hearing was held on that Motion on December 21, 2015 and at the conclusion of that Hearing we took the matter under advisement. Parties were ordered to file briefs in support of their positions. After consideration of all relevant testimony, evidence, and case law, this Court has **Denied** Defendant Jones-Williams' Motion and we now issue this Opinion in Support of that Order.

I. Facts

In their various filings, the attorneys for both parties have provided in-depth accountings of the relevant facts. Since the parties have adequately summarized the facts, it is our belief that a third narrative would be superfluous. Therefore, we omit this customary step and simply refer to facts as necessary.

II. Habeas Corpus Petition

A. Habeas

The Defendant has withdrawn the *habeas corpus* portion of his motions. We therefore move on to the Defendant's remaining suppression issues.

B. Probable Cause for Blood Draw

The Defendant's second averment is that the investigators lacked probable cause to take and perform toxicological screening of his blood. In *Commonwealth v. Barton*, our Superior Court provided an excellent synopsis of applicable law. 690 A.2d 293 (Pa. Super. Ct. 1997).

In *Barton*, we are reminded that, "'a search or seizure is not reasonable unless it is conducted pursuant to a search warrant issued by a magistrate upon a showing of probable cause.'" *Id.*, at 295 (quoting *Commonwealth v. Kohl*, 615 A.2d 308, 315 (Pa. 1992)). However, there is a carve-out for "implied consent" that is applicable to cases such as the one *sub judice*. *Id.*

(citing 75 Pa.C.S.A. § 1547(a)(1)). 75 Pa.C.S.A. § 1547(a)(1) states:

> **(a) General Rule.**—Any person who drives, operates or is in actual physical control of the movement of a motor vehicle in this Commonwealth shall be deemed to have given consent to one or more chemical tests of breath, blood or urine for the purposes of determining the alcoholic content of blood or the presence of a controlled substance if a police officer has reasonable grounds to believe the person to have been driving, operating or in actual physical control of the movement of a motor vehicle:
>
> > **(1)** while under the influence of alcohol or a controlled substance or both. . . .

Id. "The 'reasonable grounds' requirement of this provision has been interpreted to require probable cause." *Id.* (citing *Kohl*, 615 A.2d at 315). The *Barton* court goes on to indicate that we should read § 1547(a)(1) in conjunction with 75 Pa.C.S.A. § 3755(a), which states that:

> If, as a result of a motor vehicle accident, the person who drove, operated or was in actual physical control of the movement of any involved motor vehicle requires medical treatment in an emergency room of a hospital and if probable cause exists to believe a violation of section 3731 (relating to driving under the influence of alcohol or controlled substance) was involved, the emergency room physician or his designee shall promptly take blood

> samples from those persons and transmit them within 24 hours for testing. . . .

Id. These test results, " . . . shall be released upon request of the person tested, his attorney, his physician or governmental officials or agencies." 75 Pa.C.S.A. § 3755(a). Thereafter, it is stated in *Barton* that,

> [o]ur courts have found that, together, sections 1547 and 3755 comprise a statutory scheme which, under particular circumstances, not only imply the consent of a driver to undergo chemical or blood tests, but also require hospital personnel to withdraw blood from a person, and release the test results, at the request of a police officer who has probable cause to believe the person was operating a vehicle while under the influence.

Id., at 296 (citing *Commonwealth v. Riedel*, 651 A.2d 135, 139-40 (Pa. 1994) (citation omitted)).

In addition to the case law already cited, we note the following:

> [U]nder the statutory scheme developed through sections 1547 and 3755, once an officer establishes probable cause to believe that a person operated a motor vehicle under the influence, and subsequently requests that hospital personnel withdraw blood samples for testing of alcohol content, the officer is entitled to obtain the results of such tests, regardless of whether the test was performed for medical purposes or legal purposes.

Barton, 690 A.2d at 298. Put simply, the investigators were entitled to receive the results of the blood draw if they possessed probable cause for their request. With the foregoing in mind, we turn to what constitutes probable cause.

"'Probable cause exists where the facts and circumstances within the officer's knowledge are sufficient to warrant a prudent individual in believing that an offense was committed and that the defendant has committed it.'" *Commonwealth v. Griffin*, 24 A.3d 1037, 1042 (Pa. Super. Ct. 2011) (quoting *Commonwealth v. Stewart*, 740 A.2d 712, 718 (Pa. Super. Ct. 1999) (citations omitted)). And, "[i]n determining whether probable cause exists, we must 'consider the totality of the circumstances *as they appeared to the arresting officer*.'" *Id.* (emphasis added). Specifically, "[p]robable cause exists where the officer has knowledge of sufficient facts and circumstances to warrant a prudent person to believe that the driver had been driving under the influence of alcohol." *Commonwealth v. Kohl*, 576 A.2d 1049, 1052 (Pa. Super. Ct. 1990). Here, rather than alcohol, marijuana was indicated. Under 75 Pa.C.S.A. § 3802(d)(1)(i)(iii), it is illegal for an individual to operate a vehicle with any trace of marijuana in their system. Therefore, a belief that the Defendant operated the red SUV in question with *any* marijuana within his system would constitute probable cause.

The weather conditions on the day of the incident were clear and there would have been nothing obstructing the view of drivers approaching the train tracks. (Notes of Testimony, 4/29/15, at 36.) A Norfolk

Southern train, per procedure, announced its approach of the fateful juncture. *Id.*, at 9-10. The train conductor, Virgil Weaver, noticed a red SUV travelling approximately two miles per hour across the railroad tracks. *Id.*, at 8-9. Weaver observed a Caucasian occupant of the red SUV to be flailing their arms as if willing the SUV to pass the tracks and avert the impending accident. *Id.*, at 9-10. Despite the train crew's efforts at braking, the accident was not averted and the train impacted the red SUV. *Id.*, at 9.

Following the accident, Weaver approached the SUV. *Id.*, at 11. The SUV occupants were observed to be a Caucasian female, an African-American male, and a toddler. *Id.*, at 13. Weaver testified that he smelled the odor of marijuana within the SUV. *Id.*, at 14. At the scene of the accident, an Officer Steven Lutz was made aware that his officers had received information from train crew and first responders that they smelled marijuana. *Id.*, at 45.

Paramedic Leslie Garner encountered the Defendant lying on the ground in front of the SUV. *Id.*, at 25. Garner is familiar with the odor of marijuana and she testified that she was confronted by "a very strong odor of marijuana" *emanating from the Defendant*. *Id.*, at 27. Garner did not smell the marijuana inside of the vehicle where she had found the Caucasian female and toddler. *Id.*, at 28. Garner informed Officer Romine that she smelled marijuana *on the Defendant's person*. (Notes of Testimony, 12/21/15, at 47.) Based upon the information received at the scene, Officer Lutz ordered an Officer Farren to proceed to York Hospital and

request a legal blood pull, which was accomplished. (N.T., 4/29/15, at 47-48.)

The defense is correct that not all of the witnesses testified to smelling marijuana emanating from the Defendant; however, Weaver smelled marijuana in the vehicle while the Defendant was still in the SUV and Garner detected the smell of marijuana on the Defendant when neither of the other SUV passengers was near the Defendant. Crucially, Garner smelled no marijuana inside of the vehicle when the Defendant was not inside it but the other two occupants were. It is more than a reasonable inference that the Defendant was the source of the marijuana odor.

The Commonwealth raises the applicability of the fairly recent decision in *Commonwealth v. Jones*. 121 A.3d 524 (Pa. Super. Ct. 2015). As the Commonwealth maintains, the *Jones* decision does seem to stand for the proposition that where an officer smells the odor of burnt marijuana in a vehicle in which the operator is the only occupant, this fact alone allows an officer to reasonably believe that an individual has operated the vehicle after consuming marijuana and the officer is thereby authorized to request a blood draw. *Id.*, at 529. Admittedly, the *Jones* decision is factually different from the case at hand with respect to the number of passengers in the vehicle. However, we are persuaded that the analysis set forth in *Jones* justifies a broader reading of the legal framework set forth in that case. Thus, *Jones* stands for the principle that a whiff of marijuana detected in a vehicle with a single occupant is sufficient to form probable cause for a blood draw. If

that is the case, then surely isolation of the driver as the sole source of the smell of marijuana would be sufficient to form probable cause as well. Fleshed out, we believe that where, as here, officers determined that it is the driver who actually smells of marijuana, that is the functional equivalent of the driver in *Jones* who was the sole occupant of the vehicle.

Even if our interpretation of the *Jones* decision is incorrect, or is an impermissibly expansive reading of the holding therein, the investigators possessed more than the mere presence of the odor of marijuana on the Defendant as a basis for probable cause. Such factors as the manner in which the Defendant's vehicle approached the train tracks and the way in which the driver reacted to, or failed to react to, the impending accident were so seemingly inexplicable that, when coupled with the smell of marijuana, we believe the probable cause standard has been met. Furthermore, the speed of the SUV was irreconcilable with weather and visibility conditions attending the accident and, not to mention, the efforts of the train crew to signal their presence and avoid the accident through braking.

We do note that it was Weaver and Garner, rather than the investigating officers, who smelled marijuana on the Defendant. Although *Jones* involved officers who may have had specialized training on the odor of marijuana, we do not see this as a significant matter and we did not come across any case law indicating it should be. Under the probable cause standard, as we interpret it, it is the totality of the circumstances *known* to the officer that matter. Here, the officers had

probable cause to request the results of the blood draw and suppression on this motion is therefore denied.

C. Applicability of Search Warrants to Blood Draws

The Defendant's second motion for suppression alleges that a search warrant was necessary to obtain the defendant's blood. This argument is based on recent case law that undermines and invalidates Pennsylvania's implied consent law. We are especially cautious when dealing with matters of constitutionality and believe that is an area better left to the appellate courts. Put differently, as a trial court, we presume legislation is constitutional and do not substitute our views for those in the legislature who are constitutionally mandated to make law. Rather, we apply the law unless there is an egregious violation and we are constrained to act in the interest of justice. With that said, we recognize that the Defendant must preserve all issues for appeal. Therefore, we will proceed with our analysis of Defendant's constitutional arguments.

Counsel for the defense brings *Missouri v. McNeely* to our attention. ___ U.S. ___, 133 S.Ct. 1552 (2013). Defense counsel does an admirable job of extrapolating from *McNeely*; however, we believe the Commonwealth gets the better of the defense in rejoining that *McNeely* does not touch upon the constitutionality of implied consent statutes. Rather, in . *McNeely*, "[t]he question presented . . . is whether the natural metabolization of alcohol in the bloodstream presents

a *per se* exigency that justifies an exception to the Fourth Amendment warrant requirement for nonconsensual blood testing in all drunk-driving cases."[1] *Id.*, at 1556. In other words, should there be a bright line rule, for all DUIs, that the warrant requirement is *always* waived based upon the exigency created by the metabolization of alcohol, or, in our case, marijuana? The Supreme Court of the United States answered that, no, a bright line rule is inappropriate and questions of exigency are to be determined on a case by case basis that considers the totality of the circumstances. *Id.*

Turning to the totality of the circumstances, *McNeely* speaks to a different factual scenario than the one we have before us in which the blood draw was effectuated pursuant to a request that was premised upon Pennsylvania's implied consent scheme following an accident involving injuries. The defendant in *McNeely* was not involved in an accident that, either along with alcohol or without it, rendered him insensible and unable to consent as with the instant defendant. (N.T., 12/21/15, at 58-59.) The defendant in *McNeely* was pulled over following erratic driving and, exhibiting classic signs of impairment, was requested to submit to chemical testing, which he refused. *Id.*, at 1556-57. McNeely was then transported to a hospital and following the reading of an implied consent form

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[1] We note that the instant case involves marijuana and not alcohol. However, as we do not believe this detail changes our calculus, we continue to entertain Defendant's raising of *Missouri v. McNeely*.

he again refused to submit to chemical testing. *Id.*, at 1557. The officer then requested that the hospital staff perform a blood draw, which indicated McNeely was well above the legal limit. *Id.* It was under these facts that the Court affirmed the lower court's determination that the dissipation of alcohol within the bloodstream does not *on its own* establish exigency sufficient to obviate the warrant requirement. *Id.*, at 1558.

The facts in the instant matter are far more akin to those of the seminal case of *Schmerber v. California*. 384 U.S. 757 (1966). Therein, exigency to perform a blood draw sans warrant was found to exist because of the metabolization of the alcohol and the time needed to both transport the defendant to the hospital and process the accident scene. *Id.*, at 771. *McNeely* upheld *Schmerber* because the totality of the circumstances in *Schmerber* amounted to exigency. *McNeely supra*, at 1560. Here, there was an accident scene involving the parties to the accident, emergency personal, and the investigators. As recounted above, Officer Lutz dispatched Officer Farren to the hospital to obtain blood from the defendant after gathering enough information at the scene to form probable cause. As in *Schmerber*, the officers had to process an accident scene and the Defendant had been transported to a hospital. The exigency Officer Lutz felt is evident in his testimony when he stated, "I instructed Officer Farren, who was reporting on duty, that *as soon as he came on duty* to *jump* in his car and respond to the York Hospital and request a legal blood, a BAC, for Mr. Akim."

(N.T., 4/29/15, at 47) (emphasis added). Though Officer Lutz's subjective feeling of exigency carries no weight, we agree that the circumstances warranted it.

Metabolization of alcohol is not, in and of itself, enough to find exigency; however, we believe that investigators' fears vis-à-vis metabolization are enough to find exigency when the officers were delayed by needs more pressing that obtaining the Defendant's BAC—namely, attending to victims and processing the scene of a death. In short, to whatever extent *McNeely* calls our implied consent scheme into question, under the totality of the circumstances *sub judice*, this is a case of exigency that is sufficient to overcome any warrant requirement not dispensed with through our implied consent laws.

Finally, we do not fail to address the Defendant's contention, raised in the alternative, that, even if the implied consent statute remains intact, the Commonwealth did not comply with the procedures necessary to effectuate it. Defense counsel is correct in that the record appears devoid of the *reason* why hospital staff drew blood from the Defendant. In other words, was this a medical blood draw for treatment purposes or a legal blood draw based upon probable cause? The blood was drawn July 5, 2014 at 5:56 p.m. (N.T., 4/29/15, at 51.) However, Officer Farren submitted a request for a legal blood draw for July 5, 2014 at 7:30 p.m. Our reading of the law indicates that the purpose for a blood draw is immaterial and that the only matters of importance are if the officer made a request for a blood

draw that is based upon adequate probable cause. Again:

> [U]nder the statutory scheme developed through sections 1547 and 3755, once an officer establishes probable cause to believe that a person operated a motor vehicle under the influence, and subsequently requests that hospital personnel withdraw blood samples for testing of alcohol content, the officer is entitled to obtain the results of such tests, *regardless of whether the test was performed for medical purposes or legal purposes*.

Commonwealth v. Barton, 690 A.2d 293, 298 (Pa. Super. Ct. 1997) (emphasis added). The Defendant's request to suppress the results from the blood draw in this case for lack of a warrant is denied.

III. Conclusion

Based upon the reasons stated above, this Court **Denies** those motions of the Defendant, in his Omnibus Pre-Trial Motion, that have not already been voluntarily withdrawn.

BY THE COURT,

/s/ Michael E. Bortner
MICHAEL E. BORTNER,
JUDGE

DATED:
April 27th, 2016