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27 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

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27 MAP 2021

COMMONWEALTH OF PENNSYLVANIA,
Appellant

v.

AKIM SHARIF JONES-WILLIAMS
Appellee

APPELLANT'S BRIEF

Brief in response to the Appeal from the Opinion of the Superior Court dated August 11, 2020, reconsideration denied October 14, 2020, at No. 1428 MDA 2017 which Reversed/Vacated/Remanded the Judgment of Sentence issued by the Honorable Michael E. Bortner of the York County Court of Common Pleas, Criminal Division, dated April 5, 2017 docketed at CP-67-CR-0002824-2015.

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TABLE OF CONTENTS

TABLE OF CITATIONS

Statutes

STATEMENT OF JURISDICTION

The Supreme Court of Pennsylvania is conferred Jurisdiction pursuant to 42 Pa. C.S. § 724, which states:

> Except as provided by section 9781(f) (relating to limitation on additional appellate review), final orders of the Superior Court and final orders of the Commonwealth Court not appealable under section 723 (relating to appeals from Commonwealth Court) may be reviewed by the Supreme Court upon allowance of appeal by any two justices of the Supreme Court upon petition of any party to the matter. If the petition shall be granted, the Supreme Court shall have jurisdiction to review the order in the manner provided by section 5105(d)(1) (relating to scope of appeal).

On April 28, 2021, this Honorable Court granted *allocatur*. A copy of the Order granting *allocatur* is appended as Appendix A.

ORDER IN QUESTION

The Commonwealth of Pennsylvania, by and on behalf of the York County District Attorney's Office, appeals from the Pennsylvania Superior Court decision docketed at 1428 MDA 2017 and at *Commonwealth v. Jones-Williams*, 237 A.3d 528 (Pa.Super. 2020), vacating the Judgment of Sentence and reversing the denial of the Motion to Suppress against Akim Jones- Williams (hereinafter "Defendant"). A copy of the Opinion is attached as Exhibit B. A copy of the Trial Court's 1925(a) Opinion is attached as Exhibit C.

SCOPE AND STANDARD OF REVIEW

An appellate court's standard of reviewing the denial of a suppression motion is limited to determining whether the suppression court's factual findings are supported by the record and whether the legal conclusions drawn from those facts are correct. *Commonwealth v. Shaffer*, 209 A.3d 957, 968-69 (Pa. 2019). Thus, review of questions of law is *de novo*. *Id.* The scope of review 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.* When reviewing the denial of a suppression motion, the appellate court reviews only the suppression hearing record, and not the evidence elicited at trial. *Commonwealth v. Frein*, 206 A.3d 1049, 1064 (2019).

STATEMENT OF QUESTIONS INVOLVED

The questions presented, as accepted by this Court, are as follows:

I. 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?

Suggested Answer in the Affirmative.

II. 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 Defendant's blood?

Suggested Answer in the Affirmative.

STATEMENT OF THE CASE[1]

Factual History

At approximately 4:48 p.m. on July 5, 2014, emergency personnel were dispatched to Slonnekers Landing in the area of the 1100 block of Cly Road, York Haven, Pennsylvania, for a collision between a red 2014 Mitsubishi Outlander (hereafter "SUV") and a Norfolk Southern train (hereafter "Train") at approximately 4:42 p.m. [2,3] Defendant was driving his fiancée, Cori Sisti (hereafter "Cori"), and their two-year-old daughter, S.J., so they could spend time with Cori's mother, who was at a bungalow by the Susquehanna River, for Cori's birthday.[4] Defendant caused this crash, killing Cori and seriously injuring S.J. While crossing the railroad tracks, Defendant caused SUV to be struck by Train, killing Cori and seriously injuring S.J.[5]

Slonnekers Landing, also referred to as the West Cly Road railroad crossing or Cly Road 2, runs perpendicular from Cly Road, across railroad tracks, and toward a public boat launch at the Susquehanna River.[6] East of the railroad tracks by the

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[1] For ease of readability, all citations to the Reproduced Record ("RR") will be cited as footnotes.
[2]Consistent with this Court's holding in *In re L.J.*, 79 A.3d 1973 (Pa. 2013), we cite in the text of the Statement of the Case notes of testimony from two proceedings for purposes of this appeal: the Suppression Hearing, held December 21, 2015); and Preliminary Hearing, held April 29, 2015, the transcript and exhibits of which the Commonwealth entered of record at the Suppression Hearing for consideration of the suppression issue.
[3]RR 43a, 64a, 95a, 99a, 125-126a ,141-142a, 147-148a.
[4] Commonwealth Exhibit 4; RR 198a.
[5]RR 79-80a, 134a.
[6]RR 34-35a, 64-65a.

river are bungalows and campgrounds, which were occupied during the crash.[7] A tree line separates the railroad tracks from the recreational areas and river to the east, and another from Cly Road to the west.[8]

Virgil Weaver was Train conductor; Train was heading west from Lancaster to Enola on the westbound track, referred to as Main 2.[9] Gary Hoofnagle, the engineer, and Bruce Crockett, the road foreman, were working with Weaver in Train engine.[10,11] Weaver and Hoofnagle had unobstructed frontward views through the engine.[12]

Norfolk Southern protocols require trains to make audible and visual signals when approaching a railroad crossing.[13] These signals begin upon approaching a "whistle board," at which point operators sound a bell fifteen seconds before the approach of a railroad crossing.[14] Following the bell, the train's horn is activated in the following manner: two long horns, followed by one short horn then one more long horn.[15] Train followed these standard operating procedures as it approached

[7]RR 14-1a5,44-45a.
[8]RR 78a, 126a, 129-130a
[9]RR 25-27a, 607a, 650a
[10] RR 26-27a.
[11]The Preliminary Hearing transcript incorrectly refers to these individuals as "Hufnagle" and Bruce "Croggen."
[12]RR 27a.
[13]RR 29a.
[14]RR 29-30a.
[15]RR 29-30a.

the East Cly Road, also known as Cly Road 1, and West Cly Road, or Cly Road 2, railroad crossings; 590 feet separate these roads.[16]

The weather conditions were sunny and clear at the time of the crash.[17] Defendant did not have visual obstructions travelling east on Slonnekers Landing approaching the railroad tracks.[18] Occupants of a vehicle approaching the railroad tracks could see as far south as the bend in the railroad tracks beyond the East Cly Road railroad crossing.[19] Additionally, there is an "X" railroad crossing sign at Slonnekers Landing, prior to the railroad tracks on Cly Road 2, which indicates that there are two tracks to cross,.[20]

While Train approached Slonnekers Landing travelling approximately 40 M.P.H., Weaver observed SUV crossing the Cly Road 2 railroad tracks towards the river at approximately 2 M.P.H.[21] Weaver first saw SUV from a distance of approximately 250 feet. [22] Weaver had a full view of SUV without obstructions.[23] While on approach from approximately 100 feet away, Weaver observed a Caucasian passenger with long hair in the passenger seat flailing their arms, as if

[16]RR 29-30a, 34-35a 40-41a.
[17]RR 153a
[18]RR 152-154a
[19]RR 34-35a 100a, 152-154a
[20]RR 99-100a, Exhibits7-8.
[21]RR 28-29a, 36a, 145a
[22]At trial, Weaver estimated about 350 feet was the distance at which he first saw SUV. RR 614a
[23]RR30-31a.

indicating to SUV driver "to get by the track before the vehicle got struck"; the SUV driver had no reaction or response to passenger.[24]

Prior to colliding with SUV, Hoofnagle and Crockett engaged Train's emergency brakes.[25] The snow plow shaped front of the engine compartment, impacted the passenger side of the SUV where the Caucasian individual was waving her arms.[26] Train dragged SUV before stopping approximately ¼ mile after impact.[27] SUV also struck an approximately 4x4 wooden post crossbuck base that was in place prior to the collision.[28] SUV finally came to rest on its passenger side approximately 250 feet from the tracks in the tree line closest to the river.[29]

Weaver exited Train and approached SUV to see if it was leaking gasoline.[30] Weaver observed SUV's occupants.[31] Weaver saw Defendant, S.J., and Cori, whose hair and complexion were consistent with the Caucasian individual with long hair Weaver previously observed flailing their arms in the passenger seat.[32] Defendant, Cori, and S.J. were all on the passenger side of SUV.[33]

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[24]RR 29-30a, 6-38a.
[25]RR 29a, 31a.
[26]RR 29a, 66a75-76a, 191-192a
[27]RR 74-76a, Commonwealth Exhibit3.
[28]RR 74-76a, 107a, Commonwealth Exhibit3.
[29]RR 22a, 66a.
[30]RR 31a.
[31]RR32a.
[32]RR 33a, 36-38a.
[33]RR 33a, 36-38a.

Weaver smelled a very strong odor of burnt marijuana coming from inside SUV as he approached it and inspected the occupants.[34] Weaver noted this very strong odor was not outside of SUV and did not come from any bystanders who subsequently gathered.[35] Weaver provided his information, including the very strong odor of burnt marijuana, to Officer Kevin Romine of the Newberry Township Police Department at the crash scene.[36]

The first police officer to arrive at the collision site was Officer Michael Briar of the Newberry Township Police Department.[37] Officer Briar observed Train stopped on the Slonnekers Landing railroad crossing.[38] Officer Briar and other emergency personnel climbed over Train to approach SUV after being directed to SUV by the many individuals who were present from the adjacent campground.[39] Officer Briar observed SUV lying on its passenger side facing north on the east side of the railroad tracks, with its undercarriage facing toward the railroad tracks and roof resting against trees and brush.[40]

Officer Briar observed Defendant lying on the ground as he approached SUV.[41] Paramedic Leslie Garner with the Newberry Township Fire Department and

[34]RR 34a, 39a.
[35]RR.39a.
[36]RR162-164a.
[37]RR 125-126a.
[38]RR 127a.
[39]RR 127-129a.
[40]RR 129-130a
[41]RR 130-131a.

her partner, EMT Lisa Gottschall, also arrived at this area and triaged the three SUV occupants.[42] Officer Briar and Garner observed Cori on the passenger side toward the front of SUV with S.J. positioned face down by Cori's head at the back of the passenger side.[43] Officer Briar specifically noted Cori was lying with her back against the passenger side door and her feet under the front passenger side dashboard toward the front of SUV, where a seated front passenger would place their legs.[44]

Officer Briar observed firefighters, police officers, and other emergency personnel around the collision site, in addition to the numerous amount of individuals present at the campground.[45] Officer Briar described the crash scene in general as "a lot of chaos going on."[46] Officer Briar briefed eventual lead investigator Lieutenant Steven Lutz with updates on the telephone prior to arrival and while at the scene, wherein he also assisted Lieutenant Lutz with crash reconstruction.[47]

Concerning medical attention, Garner first examined S.J. as part of occupant triage[48] S.J. was unresponsive to anything other than painful stimuli.[49] Garner next

[42]RR 44a, 46a, 50a.
[43]RR 45a,79-80a, 132-133a.
[44]RR132-133a, 135-137a.
[45]RR 127-129a,149-150a, 155-156a
[46]RR 155-156a
[47]RR 138a, 140-42a
[48]RR 46a.
[49]RR 46a.

reached by S.J. to obtain a pulse from Cori, but could not find one; Cori was not breathing and appeared cyanotic.[50] Cori was declared dead at the scene.[51]

Garner next turned her attention to Defendant, who was lying outside the vehicle approximately five feet away.[52] Garner previously saw Defendant lying on the ground in front of SUV prior to beginning occupant triage.[53] Although Defendant initially was not responsive to verbal stimuli, he was breathing without life-threatening injuries.[54]

After returning to S.J. and Cori and seeing others were attempting to render aid to them, Garner returned to Defendant.[55] At this point, Defendant was combative, not responding to any verbal commands or questions, flailing his arms, and "basically just hollering."[56] Defendant was ultimately transported to York Hospital for medical attention.[57]

Garner did not notice any odor of marijuana inside SUV when she was rendering medical assistance to S.J. and Cori; Defendant was not an occupant of SUV at that time.[58] Garner began to notice an odor of marijuana upon exiting SUV

[50]RR 46-47a.
[51]RR 59-60a, 134a.
[52]RR 46a.
[53]RR 45a.
[54]RR 46a.
[55]RR 46a.
[56]RR 51a.
[57]RR 93-94a,174a-175a,182a, 197a.
[58]RR 47a.

and approaching Defendant.[59] There was a strong odor of marijuana in the general area near the front exterior of SUV, where Defendant was lying on the ground, and was especially strong around Defendant's person.[60] Garner identified the smell emanating from Defendant as burnt marijuana.[61] Garner discussed the strong odor of marijuana emanating from Defendant with Gotschall due to the smell being so potent.[62] Garner informed Officer Romine of the strong odor of marijuana emanating from Defendant prior to leaving the crash scene.[63]

At approximately 6:15 p.m., Officer Romine responded with Lieutenant Steven Lutz and Officer Keith Farren to the crash site and assist officers on scene.[64] Officer Romine initially assisted with covering the area surrounding the SUV and set up barriers to prevent people who gathered from seeing Cori's body.[65]

Officer Romine then spoke with numerous individuals at the scene, including Weaver, Hoofnagle, Crockett, Garner, and various police officers.[66] Weaver told Officer Romine that he smelled the odor of marijuana around the front of the

[59]RR 47a.
[60]RR 47-48a.
[61]RR47-48a.
[62]RR 49a.
[63]RR 49a, 165-166a.
[64]RR 158-160a,168a.
[65]RR 159a.
[66]RR 161-162a, 165a, 166a, 168a.

vehicle.[67] Additionally, Garner informed Officer Romine that she detected an odor of marijuana coming from Defendant.[68]

As lead investigator, Lieutenant Lutz received information at the scene from various emergency personnel.[69] Officer Romine provided Lieutenant Lutz the information he received from Garner regarding the odor of marijuana around Defendant's person.[70] As part of his evaluation of the crash scene, Lieutenant Lutz specifically observed SUV in its post-crash position.[71]

Based upon Lieutenant Lutz's personal observations and the information provided by individuals at the scene, including Officers Briar and Romine, Lieutenant Lutz determined that Defendant was the driver and Cori the front seat passenger of SUV.[72] Additionally, based upon his analysis from personal observation and provided information, which included collision dynamics, Defendant being the driver, and the odor of marijuana around Defendant's person, Lieutenant Lutz directed Officer Farren to respond to York Hospital to interview Defendant and obtain a blood draw from him.[73]

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[67]RR 164a.
[68]RR 165a.
[69]RR 191-192a
[70]RR 165-167a, 194-197a, 202-203a.
[71]RR 189a
[72]RR 191-192a
[73]RR 67a,174-176a, 182a, 197-198a, 84-85.

Per Lieutenant Lutz's instruction, Officer Farren went to York Hospital; he was only aware of Defendant's first name being Akim and did not know Defendant's last name.[74] Officer Farren did possess information regarding Defendant being the driver and the odor of marijuana.[75]

Once at York Hospital, Officer Farren attempted to speak with Defendant in his hospital bed, but was unable to do so; Defendant was in and out of consciousness, his eyes were closed, and he would thrash about every couple of minutes.[76] Defendant was completely unable to answer any of Officer Farren's most basic questions.[77] Officer Farren did not arrest Defendant while at the hospital; Lieutenant Lutz arrested Defendant on April 2, 2015.[78]

Officer Farren went to the York Hospital laboratory to request a blood draw from Defendant based upon probable cause to test for impairing substances, specifically marijuana.[79] York Hospital requires officers to specifically express to them that the testing is being requested pursuant to a police investigation.[80] At 7:30 p.m., Officer Farren completed the required paperwork to have Defendant's blood drawn and the blood sample sent for forensic toxicological testing to NMS Labs, an

[74]RR 175a.
[75]RR 175a.
[76]RR 175-176a.
[77]RR 176-177a.
[78]RR 177a,180a.
[79]RR 177-178a.
[80]RR 178a.

approved testing facility in Pennsylvania for drugs and alcohol toxicology.[81] York Hospital provided a blood sample drawn from Defendant by phlebotomist Tasha Byrd at 5:56 p.m. on July 5th, which she obtained prior to Officer Farren's request, instead of drawing blood from Defendant's body at that time.[82] In the presence of Officer Farren at York Hospital, phlebotomist Renee Cluck packaged Defendant's blood in a box provided by NMS Labs and sent Defendant's blood sample to NMS Labs via Fed-Ex for forensic toxicological testing.[83] Officer Farren filled out the NMS Labs paperwork, which included a request to test Defendant's blood for marijuana.[84]

Amanda Gibson, who worked with Defendant and Cori, began a physical relationship with Defendant no more than two weeks after Cori's death and lasted approximately two months.[85] During their relationship, Defendant told Gibson in her home that that he was driving when the crash occurred and "he drove 18 miles high as a kite."[86] Defendant told Gibson he smoked marijuana right before he, Cori, and S.J. left their house to take the trip to the river for Cori's birthday.[87] Defendant told Gibson several times that the crash was not his fault and did not occur because

[81] Commonwealth'sExhibit1; RR 177-180a.
[82]RR 177-178a
[83]RR 71a, 180a, Exhibit1
[84]RR 71a, 179-180a; Exhibit1
[85]RR 55a, 59a.
[86]RR 55-56a, 59-60a.
[87]RR 56a, 59-60a.

he smoked weed.[88] Defendant added that his blood was taken at the hospital, so police knew he was high and "obviously" had nothing to do with the crash.[89] Defendant was "nonchalant" about the crash, stating that "people make mistakes."[90]

On July 8, 2014, Defendant's blood arrived at NMS Labs for toxicological testing.[91] Forensic toxicologist Ayako Chan-Hosokawa authored an initial report certifying and offering her opinion and analysis regarding the toxicology results from Defendant's blood.[92] This report included that Defendant's blood contained Delta-9 THC at a concentration of 1.8 ng/ml and Delta-9 Carboxy THC at 15 ng/ml.[93] Delta-9 THC is the active psychoactive constituent of marijuana, which impairs a marijuana user.[94] Delta-9 Carboxy THC, while not an actively impairing substance, is the inactive metabolite of Delta-9 THC and occurs following the ingestion or inhalation of marijuana.[95]

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[88]RR 55-57a.
[89]RR 55-56a.
[90]RR 57a.
[91]RR 71a.
[92]RR 70-74a. Chan-Hosokawa also authored supplemental reports and extensive testimony at trial regarding Defendant's marijuana impairment from the crash and the impact of marijuana on the driving function, which included her conclusion that based upon a review of all materials regarding the crash and Defendant's statements, the concentration of Delta-9 THC contained within Defendant's blood was consistent with marijuana actively impairing Defendant's brain at the time of the crash. RR 753-799a.
[93]RR 72a.
[94]RR 73a.
[95]RR 74a. Following a thorough breakdown of the metabolization process for marijuana, Chan-Hosokawa did testify at trial that an unquantifiable amount (less than 5 ng/ml) of active metabolite 11-Hydroxy Delta-9 THC was also present in Defendant's blood, which was consistent with Defendant's statement of ingesting marijuana immediately before driving and travelling 18 miles while high. RR 771-782a, 790a

In this initial report, Chan-Hosokawa elaborated that marijuana can cause relaxation, distorted perception, euphoria, feeling of well-being, confusion, dizziness, somnolence, ataxia, speech difficulties, lethargy, and muscular weakness.[96] She further explained that effects of marijuana on driving ability include weaving, inattention, poor coordination, and slowed reaction time with increased error rates while performing complex tasks.[97]

On July 7, 2014, Dr. Rameen Starling-Roney, an expert in forensic pathology, performed an autopsy on Cori.[98] Dr. Starling-Roney determined that Cori's cause of death was multiple blunt force injuries.[99] He documented numerous internal and external injuries to Cori's head, spine, and torso areas.[100] As part of the autopsy, Dr. Starling-Roney submitted a blood sample from Cori for toxicological examination by Health Network Laboratories, who detected no drugs or ethanol in Cori's blood.[101]

Following the crash, S.J. received medical attention at the Penn State Hershey Milton S. Hershey Medical Center.[102] S.J. was treated for multiple injuries caused by the motor vehicle collision, including: a Grade 3-4 liver laceration; a collection

[96]RR 73a.
[97]RR73-74a.
[98]RR 79-80a.
[99]RR 81a.
[100]RR 81-82a.
[101]RR 82a.
[102]RR 77-79a, 82a.

of blood in the space between the chest wall and the lung; a collapsed lung; multiple rib fractures; multiple C2 and C3 fractures, which refers to fractures at the second and third vertebrae in the spinal column at the neck; and a nondisplaced distal clavicle fracture.[103] S.J. required intubation, the placement of bilateral chest tubes, spinal immobilizations, and extensive physical therapy as part of her treatment.[104]

Corporal Gary Mainzer, a collision reconstructionist and occupant kinematics expert formerly with the Pennsylvania State Police, assisted Lieutenant Lutz with collision reconstruction analysis.[105] Lieutenant Lutz requested Corporal Mainzer to assist with obtaining and downloading the event data recorder (EDR) contained within SUV.[106] Corporal Mainzer performed a vehicle inspection on SUV.[107]

Corporal Mainzer also removed the Electronic Control Unit ("ECU") containing the EDR from SUV to ship to Mitsubishi in order to download the data from the EDR.[108] On October 6, 2014, Katsuhiko Emori from Mitsubishi Corporation downloaded the data from the EDR and converted the raw data into a

[103]RR 78a.
[104]RR 78-79a.
[105]RR 78a. While Corporal Mainzer testified extensively at trial regarding his conclusions concerning the EDR data from SUV, the collision dynamics, and occupant kinematics, the Commonwealth limited the scope of Corporal Mainzer's testimony at the preliminary hearing given the scope of the proceeding.
[106]RR 102-103a.
[107]RR 103-104a.
[108]RR 104-105a.

readable format and provided the report to Lieutenant Lutz via email, who in turn provided it to Corporal Mainzer for expert interpretation.[109]

Corporal Mainzer analyzed the data, and noted that the EDR recorded data from two impact events.[110] The first impact event was from the collision between Train and SUV, followed one-third of one second later by SUV striking the crossbuck at the north side of the railroad crossing.[111] The EDR recorded approximately four and one-half seconds of the vehicle's operational status prior to impact with the train.[112]

Corporal Mainzer concluded from the EDR data that SUV was only traveling 8.1 M.P.H. at 4.5 seconds before impact with no accelerator or brake input.[113] Over the next 3.5 seconds, SUV coasted down to five miles per hour, the speed at which the vehicle would have been traveling while at the railroad crossing.[114] At the time of impact, SUV only accelerated to 6.2 miles per hour, which occurred between 1 and 0.5 seconds prior to impact.[115]

Corporal Mainzer determined from the EDR data that the average steering input of SUV was thirty degrees, which is only a slight turn of the steering wheel, or

[109]RR 105-106a.
[110]RR 105-106a
[111]RR 107a.
[112]RR 107a
[113]RR 107-108a.
[114]RR 108a, 113a.
[115]RR 108a.

approximately 11 o'clock.[116] At one second prior to impact, there was a brief spike to the left of the turning wheel angle to 48 degrees, which is approximately between 10 and 11 o'clock position.[117] The steering angle, however, next reverted back toward the center, moving toward Train instead of away from Train.[118]

Corporal Mainzer did not locate any evidence in the EDR data that SUV undertook any evasive, hard steering or acceleration actions to avoid the train.[119] The accelerator was never fully engaged to the floor during the measured time frame; the only point of accelerator pedal engagement on the EDR data was 70% between 1 and 0.5 seconds prior to the crash.[120] Other than the slight acceleration from 5 to 6.2 miles per hour between 1 and 0.5 seconds prior to the crash, no EDR evidence of acceleration to avoid the collision existed.[121] Additionally, the brake pedal switch was off during the entire duration of the crash, indicating that the brakes were not employed for the entirety of the pre-crash through crash sequence.[122]

Corporal Mainzer excluded SUV mechanical issues as a causal factor in the collision, specifically noting SUV was not even a year old and showed no evidence of malfunction prior to the crash.[123] Additionally, Corporal Mainzer concluded that

[116]RR 109a.
[117]RR 110a.
[118]RR110a, 114a.
[119]RR109a-110a.
[120]RR108a,114.
[121]RR110a-111a.
[122]RR108a, 110a.
[123]RR103-104a.

Defendant took no evasive action and engaged in no emergency maneuvering, such as hard acceleration, hard steering, or braking, leading up to this crash.[124] As previously noted, Defendant exhibited by his lack of response to an obvious and extreme hazard of an oncoming train that his impairment from marijuana while driving is what caused Cori's death and seriously injured S.J.

Procedural History

Lieutenant Lutz arrested Defendant on April 2, 2015. On April 29, 2015, a Preliminary Hearing was held, after which charges were bound over to the Court of Common Pleas. On June 9, 2015, the Commonwealth filed a criminal information against Defendant, wherein it charged Defendant 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.[125]

[124]RR 108, 110a.
[125] RR 1-3a.

On October 26, 2015, Defendant filed an omnibus pretrial motion, which included a motion to suppress his blood test results.[126] On December 21, 2015, the trial court held a hearing on Defendant's omnibus pretrial motion, denying Defendant's motion on April 27, 2016.[127]

Defendant proceeded to a jury trial, which commenced January 9, 2017. On January 13, 2017, the jury convicted Defendant of homicide by vehicle while DUI, homicide by vehicle, EWOC, REAP, DUI: controlled substance - schedule 1, DUI: controlled substance – metabolite, aggravated assault while DUI, aggravated assault by vehicle. On April 5, 2017, the trial court sentenced Defendant to an aggregate sentence of four to eight years' imprisonment followed by twelve months' probation.[128]

On April 17, 2017, Defendant filed a post-sentence motion alleging that the trial court erred in denying suppression of his blood test results and that the weight of the evidence did not support conviction for five of the counts.[129] Through oversight, the trial court granted the motion on May 10, 2017.[130] On May 19, 2017, the trial court vacated its May 10, 2017 order and ordered the parties to schedule a hearing regarding the post-sentence motion.

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[126] RR 14-19a, 253-263a.
[127] RR 324a.
[128] RR 336a.
[129] RR 338-350a.
[130] RR 337a.

A hearing on Defendant's petition occurred on June 16, 2017.[131] At that time, the trial court allowed Defendant to file a supplemental post-sentence motion.[132] A subsequent hearing on the post-sentence motions occurred on July 25, 2017.[133] Defendant's post-sentence motion was denied by operation of law on September 11, 2017.[134]

On September 14, 2017, Defendant filed a Notice of Appeal to the Superior Court.[135] On October 5, 2017, the trial court entered an order directing Defendant to file a Concise Statement of Matters Complained of on Appeal pursuant to PA.R.A.P. 1925(b)(1). The defendant timely complied.[136] The trial court issued an opinion pursuant to PA.R.A.P. 1925(a) on April 13, 2018.[137]

On August 11, 2020, the Superior Court issued its opinion vacating Defendant's judgment of sentence, reversing the trial court's order denying suppression, and remanding the case for a new trial.[138] On August 24, 2020, the Commonwealth filed its Petition for Reargument with the Superior Court; the application was subsequently denied on October 14, 2020. The Commonwealth petitioned the Supreme Court of Pennsylvania (hereafter "SCOPA") for *allocatur*

[131] RR 353a.
[132] RR 364a.
[133] RR 380a.
[134] RR 389a.
[135] RR 390a
[136] RR 396a.
[137] RR 430a.
[138] RR 462a.

on November 13, 2020, and *allocatur* was granted on April 28, 2021.[139] This brief timely follows.

[139] RR 494a.

SUMMARY OF ARGUMENT

The Superior Court's suppression of Defendant's blood test is contrary to the most recent decision of the United States Supreme Court (SCOTUS) in this area: *Mitchell v. Wisconsin*, ___ U.S. ___, 139 S.Ct. 2525 (2019). Pursuant 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 Defendant that was drawn by hospital personnel while undergoing medical treatment. The Superior Court's determination that the hospital's drawing of Defendant's blood prior to the request for a blood draw and test by police negated the exigent circumstances is in direct and absolute conflict with the *Mitchell* holding. This matter falls squarely into the "narrow but important category of cases" governed by *Mitchell* and the warrantless draw and test of Defendant's blood was constitutional.

The Superior Court also erred in finding 75 Pa.C.S. § 3755 unconstitutional. Section 3755(a) is facially constitutional as an implied-consent statute. Even if the validity of implied-consent statutes as an independent basis for constitutionality is in doubt, Section 3755(a) is also facially constitutional as a codification of the exigency rule in *Mitchell*. As police followed the statutory dictates of Section 3755(a), this Court should reverse the decision of the Superior Court vacating the judgment of sentence and suppressing Defendant's blood test results.

ARGUMENT

The Superior Court issued a decision in conflict with and failed to properly apply and follow binding legal precedent in reversing the trial court's denial of Defendant's motion to suppress evidence. The Superior Court correctly held that the police possessed probable cause of Defendant causing a fatal motor vehicle crash due to marijuana impairment and that the blood draw and test met the statutory requirements of 75 Pa.C.S. §3755(a) regarding the drawing and testing of blood by medical personnel pursuant to a showing of probable cause. Contrary to precedent, however, the Superior Court held Defendant's blood test results should be suppressed because: (1) Section 3755(a) and its counterpart, Section 1547(a), are no longer independent exceptions to the warrant requirement; and (2) exigent circumstances did not exist to justify the warrantless blood test. Specifically, the Superior Court's suppression of Defendant's blood test is contrary to the most recent decision of SCOTUS in this area: *Mitchell v. Wisconsin, supra*.[140]

Prior to discussing each question and specifically analyzing *Mitchell* and Section 3755, we submit the following general discussion of the Fourth Amendment

[140]SCOTUS issued *Mitchell* while this case was pending before the Superior Court. Due to the timing of the *Mitchell* decision, neither party was able to brief or argue *Mitchell* before the lower courts. The Commonwealth did raise the potential importance and controlling nature of the then-pending *Mitchell* decision during oral argument before the Superior Court.

and exceptions to the warrant requirement.[141] The Fourth Amendment of the United States Constitution guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures", and that "no Warrants shall issue, but upon probable cause." U.S. Const. Amend. IV. The United States Supreme Court (SCOTUS) recognized that "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Kentucky v. King*, 563 U.S. 452, 459 (2011), quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

While a search warrant must usually be obtained to satisfy the Fourth Amendment, the warrant requirement is subject to a number of exceptions. *Birchfield v. North Dakota*, 136 S.Ct. 2160, 2173 (2016). Those exceptions include the exigent circumstances exception, search incident to arrest exception, and consent exception. *Birchfield*, at 2173-76, 2185-86. Regarding the consent exception, "[i]t is well established that a search is reasonable when the subject consents...and that sometimes consent to a search need not be express but may be fairly inferred from

[141] This appeal deals strictly with application of the Fourth Amendment. Defendant failed to raise and develop a theory that Article 1, § 8 offered him more protection that the Fourth Amendment or provided independent grounds for relief before either the trial court or in his brief before the Superior Court. This constitutes waiver of an Article I, § 8 claim. *Commonwealth v. Bell*, 211 A.3d 761, 768-69, n.8 (Pa. 2019). Defendant further failed to preserve any independent Article I, § 8 claims because his argument is based on interwoven application of state and federal law. *See Pennsylvania v. Labron*, 518 U.S. 938, 940-41 (1996), citing *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983) (SCOTUS had jurisdiction to review defendant's constitutional allegations where Pennsylvania law appeared "interwoven with the federal law, and... the adequacy and independence of any possible state law ground is not clear from the face of the opinion").

context." *Birchfield*, at 2185. Our Pennsylvania appellate courts have consistently recognized these same exceptions. *See, e.*g., *Commonwealth v. Evans*, 153 A.3d. 323, 327-28 (Pa.Super. 2016) ("Exceptions to the warrant requirement include the consent exception, the plain view exception, the inventory search exception, the exigent circumstances exception, the automobile exception..., the stop and frisk exception, and the search incident to arrest exception."). Regarding the consent exception to the search warrant requirement, a majority of this Court previously held that the consent can be either actual consent or implied consent. *Commonwealth v. Riedel*, 651 A.2d 135, 139 (Pa. 1994).

The taking of a blood sample is a search under the Fourth Amendment. *Birchfield*, at 2173; *see also Commonwealth v. Trahey*, 228 A.3d 520, 530 (Pa. 2020). The operative question under the Fourth Amendment when a warrantless blood draw occurs is whether the warrantless search was reasonable. *Id.*

As noted above, exigent circumstance constitute one of the exceptions to the search warrant requirement. This Court summarized the following as basic standards governing the exigent circumstances exception as articulated by SCOTUS:

> One such exception…applies where 'the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment.' Although an exigency may present itself in a variety of contexts, its defining trait is a 'compelling need for official action and no time to secure a warrant.' Such a need may arise, for instance, 'to prevent the imminent destruction of evidence.' In evaluating the presence of an exigency, we consider the totality of the circumstances.

Trahey, 228 A.3d at 530. With the foregoing in mind, we now address the questions accepted from the Commonwealth by this Court, beginning with the exigent circumstances analysis, as resolution of that issue may remove the necessity of addressing the constitutionality of Section 3755.

I. 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 Defendant's blood.

In *Mitchell v. Wisconsin*, *supra*, SCOTUS provided its most recent articulation of what constitutes exigent circumstances that constitutionally support a warrantless blood test in a DUI setting, specifically regarding the "narrow but important category of cases" involving unconscious or stuporous drivers who require medical attention at a hospital before police have a reasonable opportunity to administer standard breath evidentiary tests and have probable cause of an impaired driving offense to do so. *Mitchell*, at 2531, 2539.[142] This Court succinctly stated the *Mitchell* holding as "where a 'driver is unconscious and therefore cannot be given a breath test,' the 'exigent-circumstances rule almost always permits a blood test

[142]*Mitchell* is a four-Justice plurality decision authored by Justice Alito and Justice Thomas concurring only in the judgment. This Court noted in *Commonwealth v. Trahey*, *supra*, that the narrowest ground supporting judgment is the Mitchell plurality. *Trahey*, 228 A.2d at 534, n.11, *citing People v. Eubanks*, 160 N.E.3d 843, 861, n.6 (Ill. 2019); *see also Marks v. United States*, 430 U.S. 188 (1977)(explaining "narrowest ground of agreement" doctrine); *Commonwealth v. McClelland*, 233 A.3d 717, 730-31 (Pa. 2020)..

without a warrant.'" *Trahey*, 228 A.2d at 534, n.11. This matter falls into this "narrow but important category of cases", and a further analysis of *Mitchell* demonstrates that Defendant's blood test was constitutional under the exigent circumstances exception.

In *Mitchell*, the defendant was so impaired from alcohol that he was unable to perform a breath test at the police station and lost consciousness while being transported to the hospital and had to be wheeled inside. Police attempted to read an implied consent statement to the defendant, which would allow him to refuse, but the defendant remained unresponsive. Subsequent to losing consciousness, police requested a warrantless blood draw and test be performed pursuant to the Wisconsin implied-consent statute, which was drawn from him while he was unconscious. SCOTUS accepted the following question: "[w]hether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement." *Mitchell*, at 2532. SCOTUS decided this matter instead upon finding exigent circumstances supported the warrantless blood draw and test.

SCOTUS specifically discussed the parameters of its two leading cases regarding exigent circumstances in the warrantless blood test setting: *Schmerber v. Calif*ornia, 384 U.S. 757 (1966), and *Missouri v. McNeely*, 569 U.S. 141 (2013). SCOTUS first summarized its holdings concerning exigent circumstances in the DUI area:

> We have also reviewed BAC tests under the 'exigent circumstances" exception—which, as noted, allows warrantless searches "to prevent the imminent destruction of evidence." [*McNeely*, at 149]. In *McNeely*, we were asked tif this exception covers BAC testing of drunk-driving suspects in light of the fact that blood-alcohol evidence is always dissipating due to "natural metabolic processes." *Id.* at 152. We answered that the fleeting quality of BAC evidence alone is not enough. *Id.* at 156. But in *Schmerber* it *did* justify a blood test of a drunk driver who had gotten into a car accident that gave police other pressing duties, for then the "*further* delay" caused by a warrant application really "*would* have threatened the destruction of evidence." *McNeely*, supra, at 152 (emphasis added).

Mitchell, at 2533. SCOTUS compared *McNeely* and *Schmerber* with the unconscious driver scenario in *Mitchell*:

> Like *Schmerber*, this case sits much higher than *McNeely* on the exigency spectrum. *McNeely* was about the **minimum degree of urgency** common to all drunk-driving cases. In *Schmerber*, a car accident heightened that urgency. And here Mitchell's medical condition did just the same.

Mitchell, at 2533 (emphasis added). Rather than merely determine if the warrantless blood draw pursuant to the Wisconsin implied-consent statute was constitutional, SCOTUS sought to "address how the exception bears on the category of cases encompassed by the question on which we granted certiorari—those involving unconscious drivers." *Id.*, at 2535.

In answering this question, SCOTUS first outlined how "the importance of the needs served by BAC testing is hard to overstate." *Id.* SCOTUS next analyzed whether this compelling need justifies a warrantless search. SCOTUS again compared *McNeely* and *Schmerber*, noting that the *Schmerber* holding demonstrated

that the dissipation of BAC evidence can create an exigency when combined with other pressing needs. *Mitchell*, at 2537. Detailing the emergency scenarios created by the car crash in *Schmerber* and the driver's unconsciousness in *Mitchell*, as well as noting that better technology has not eliminated emergency scenarios, SCOTUS stated 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, so *Schmerber* controls: With such suspects, too, a warrantless blood draw is lawful.

Mitchell, at 2537.

SCOTUS concluded by establishing the following: "When police have **probable cause** to believe a person has committed a drunk-driving offense and the **driver's unconsciousness or stupor** requires him to be taken to the hospital or similar facility **before** police have a reasonable opportunity to administer a standard evidentiary breath test, they **may almost always order a warrantless blood test** to measure the driver's BAC without offending the Fourth Amendment." *Id.*, at 2539. "Thus, when a driver is unconscious, the general rule is that a warrant is not needed." *Id.*, at 2531. SCOTUS allowed an exception for the "unusual case" where a defendant could show: (1) "his blood would not have been drawn if police had not been seeking BAC information; **and** (2) "police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties." *Id.*

SCOTUS remanded the case to allow defendant an opportunity to attempt to make a showing that his was the "unusual case" as he previously did not have that chance. *Id.*

Since SCOTUS issued its Mitchell decision, courts in sister jurisdictions have evaluated how *Mitchell* applies to warrantless blood draws in DUI crash scenarios involving stupor or unconsciousness by defendant drivers. For example, in *State v. Miller*, 295 So.3d 443 (La.App.2Cir. 2020), defendant crossed a yellow dividing line and crashed into oncoming traffic, killing another individual. Police took 45-60 minutes in time to respond to the rural collision site, wherein the observed defendant was unconscious and then airlifted to the hospital. Police developed information from witnesses that led them to believe defendant was operating his vehicle while impaired. Two officers were dispatched to the hospital to obtain a blood draw pursuant to Louisiana's implied consent statute. Blood was drawn from defendant shortly before going into surgery. The Louisiana Court of Appeals for the Second Circuit held that the facts of that case established the exigency concerns that the *Mitchell* court expressed. The Court accordingly found that the warrantless blood draw was constitutional under the exigency exception and pursuant to *Mitchell*. 295 So.3d at 460-61. *See also State v. Richards*, 948 N.W.2d 359 (Wis.App. 2020)(pursuant to *Mitchell*, warrantless blood draw supported by exigent circumstances; court found state established all *Mitchell* exigency factors, including

stupor or unconsciousness requiring medical attention post-crash, and no factors presented by defendant to show "unusual case"); *State v. Gray*, 591 S.W.3d 65 (Mo.App.E.D. 2019)(warrantless blood draw was constitutional under *Mitchell*; defendant was unconscious from a single-car crash, taken to a hospital, his blood was drawn while he remained unconscious, and officer had probable cause for DWI).

In *McGraw v. State*, 289 So.3d 836 (Fla. 2019), defendant was involved in a single-car rollover crash that rendered him injured and unconscious, requiring defendant to be taken to the hospital. The officer investigating the collision smelled alcohol on defendant's skin, clothing, and car. At the hospital, the officer requested a blood draw once medical personnel finished initial treatment because the officer was investigating a DUI and defendant remained unconscious. The officer did not seek a search warrant or request assistance from other officers to obtain one. *Id.*, at 837.

On appeal, the intermediate appellate court found that the blood draw was valid pursuant to the Florida implied-consent statute and was constitutional under the Fourth Amendment. *Id.*, at 838. In reviewing that decision, the Florida Supreme Court did not base its ruling upon the implied-consent statute. It instead found the case fell squarely within the rule articulated in *Mitchell*. *Id.*, at 839. In doing so, the Florida Supreme Court found that the blood draw appeared to be legal, but pursuant to *Mitchell*, remanded the matter to the lower court for to give defendant the

opportunity to establish the "unusual case" scenario. *Id.* *See also State v. Chavez-Majors,* 454 P.3d 600 (Kan. 2019)(warrantless blood draw of defendant injured and unconscious from motorcycle crash supported by probable cause; case remanded for an evidentiary hearing pursuant to *Mitchell* so defendant may attempt to make "unusual case" showing).

In *State v. McCall,* 839 S.E.2d 91 (S.C. 2020), the South Carolina Supreme Court found the warrantless collection of blood and urine from defendant was constitutionally valid due to exigent circumstances in a felony DUI resulting in great bodily injury case. In *McCall,* defendant crossed a center turn lane and struck a pickup truck head on, causing life-threatening injuries to the driver of the pickup truck. Troopers interviewed defendant at the scene and noted that defendant appeared to be impaired by a substance other than alcohol; defendant also denied consuming alcohol. The primary investigator remained at the scene with nine other Troopers investigating the crash while defendant was transported to the hospital. Approximately two hours after the crash, the lead investigator responded to the hospital and requested blood and urine be drawn pursuant to the South Carolina implied consent law that mandated compliance. Defendant's blood and urine sample was positive for methamphetamine and benzodiazepines.

Defendant challenged the constitutionality of South Carolina's implied consent law. The South Carolina Supreme Court did not address that issue, as it

found that exigent circumstances existed to support the warrantless blood and urine collection. Citing to *Mitchell*, the Court found that, like *Schmerber*, the seriousness of the crash in this case placed this case "much higher on the 'exigency spectrum'" than the mere natural dissipation of drugs, which pursuant to *McNeely* cannot by itself qualify as exigency. *McCall*, at 95. Additionally, the unknown substances causing impairment gave rise to an increased urgency, as some drugs like cocaine and marijuana metabolize rapidly while alcohol dissipates at a steadier rate. *Id.*, at 95, n.2. Viewing the totality of circumstances, exigent circumstances justified the warrantless obtaining of blood and urine samples.

We now turn back to the case at hand in light of *Mitchell* and with guidance from our sister jurisdictions. First, both trial court and Superior Court correctly found that police had probable cause to believe Defendant operated his vehicle at the time of the fatal train crash while under the influence of marijuana.[143]

[143]The Commonwealth acknowledges that unlike *Mitchell*, this case involves marijuana rather than alcohol. As *McCall* demonstrates, this distinction is immaterial in this case. Like *McCall*, Homicide by Vehicle while DUI involving drugs produces an equal, if not more, compelling reason for a warrantless blood test, given 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. And as noted in *McCall*, THC in marijuana metabolizes rapidly, which adds a factor of urgency to the totality of circumstances analysis.

In *Trahey*, *supra*, the Commonwealth in that case did not argue that the same concerns regarding rapid dissipation of controlled substances exists as it does with alcohol, thereby decreasing the timing constraints referenced in *McNeely*, *Birchfield*, and *Mitchell*. *Trahey*, at 537. This Court emphasized that the *per se* DUI sections regarding controlled substances under 75 Pa.C.S. § 3802(d)(1) prohibit any amount of the substance and is not subject to a two-hour rule like alcohol, thereby eliminating a pressing need to conduct a blood test within a specified time and negating exigency. *Id.*, at 537-38.

Emergency personnel transported Defendant to the hospital for treatment due to his injuries suffered in the crash. Defendant was in-and-out of consciousness from the crash scene to the emergency room, and, due to his mental state, was unable to communicate with Sgt. Farren at the hospital. Following *Mitchell*, police request for a warrantless blood test from the injured and uncommunicative Defendant while he was being treated for his injuries was constitutional under the exigent circumstances exception.

Defendant cannot meet the "unusual case" exception to the general exigency rule espoused in *Mitchell*. Defendant's blood was drawn by hospital personnel **prior** to police making the warrantless blood test request. The nature of the collision being between an SUV and a train occurring over an extensive distance through a large crash scene with numerous people in and surrounding it, which killed Cori and seriously injured Defendant and S.J requiring life-saving measures, support the trial

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Unlike *Trahey*, timing in this case is critical to establish criminal negligence and the marijuana DUI caused the crash, in addition to Defendant herein being stuporous or unconscious receiving medical treatment in a hospital. This case required more than a mere presence of marijuana to establish a standard Section 3802(d)(1) DUI offense, as evidenced by the extensive trial litigation in this case regarding the impairing nature of the Delta-9 THC found within Defendant's blood and its relationship to the DUI causing the fatal crash and Defendant's criminally negligent conduct in doing so. The application of *Mitchell* and the exigent circumstances analysis regarding drug impairment was directly at issue in *McCall* and not *Trahey*, and we urge this Court to adopt the analysis of the *McCall* court on this issue.

court and Superior Court's conclusion that police were "dealing with a chaotic situation." Appendix B, at 28.

At the time Lieutenant Lutz requested Officer Farren leave for the hospital to obtain a blood draw, and Officer Farren subsequently made the warrantless blood draw request from the hospital, police could not reasonably apply for a search warrant at the time of the blood test request without interfering with their other pressing duties due to the crash and medical emergencies caused from it. This is not the "unusual case" referred to in *Mitchell* and the exception to the general rule does not apply here.

Despite being fully dispositive of this case, the Superior Court devoted only two sentences to *Mitchell* without any in-depth analysis. The Superior Court instead relied upon the minimum standards of exigency articulated in *McNeely* instead of the express dictates of the newer *Mitchell* decision that directly governs the case at hand. Appendix B, at 27-28. As established *supra*, this is legal error and should be reversed.

Additionally, the Superior Court misapplied *Mitchell* in finding the exigency police possessed for the warrantless test ended because the hospital already drew blood from Defendant prior to police making their request. SCOTUS expressly created the rule established in *Mitchell* to allow warrantless tests of blood already

drawn by hospital personnel from drivers receiving medical treatment who are unconscious or in a stupor, where probable cause of impaired driving exists.

SCOTUS directly addressed how its rule in *Mitchell* would cover situations where blood was drawn by hospital personnel prior to the police request. After noting that unconsciousness is a medical emergency requiring urgent medical care at a hospital, SCOTUS noted: "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." *Mitchell*, at 2537-38 (emphasis added). SCOTUS emphasized that the warrantless seizure of blood already drawn from the driver by medical personnel is less of a violation than performing a new blood draw for testing:

> …In this respect, the case for allowing a blood draw is stronger here than in [*Schmerber*]. In the latter, it gave us pause that blood draws involve piercing a person's skin. But since unconscious suspects will often have their skin pierced and blood drawn for diagnostic purposes, allowing for law enforcement to use blood taken from that initial piercing would not increase the bodily intrusion. In fact, dispensing with the warrant rule could lessen the intrusion. It could enable authorities to use blood obtained by hospital staff when the suspect is admitted rather than having to wait to hear back about a warrant and then order what might be a second blood draw.

Id., at 2538, n.8 (internal citation omitted)(emphasis in original).

The Superior Court's determination that the hospital's drawing of Defendant's blood prior to the request for a blood draw and test by police negated the exigent circumstances is in direct and absolute conflict with the *Mitchell* holding. The Superior Court's decision creates the absurd situation where an officer could have new blood drawn from a driver based upon exigent circumstances, creating an additional intrusion into the skin, but violate the constitution through the warrantless seizure of blood already drawn with no further intrusion into an individual. This is the exact absurdity that SCOTUS expressly rejected in adopting the warrantless blood test rule in *Mitchell*.

Pursuant 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 Defendant that was drawn by hospital personnel while undergoing medical treatment. Accordingly, this matter falls squarely into the "narrow but important category of cases" governed by *Mitchell*. The Superior Court erred in failing to follow *Mitchell*, and this Court should reverse its decision vacating the judgment of sentence and suppressing Defendant's blood test results.

II. 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.

Section 3755 of the Motor Vehicle Code provides, in relevant part:

> "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….Test results shall be released upon request of the person tested, his attorney, his physician or government officials or agencies.

75 Pa.C.S. § 3755(a).

Pennsylvania courts consistently "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." *Commonwealth v. Barton*, 690 A.2d 293, 296 (Pa.Super. 1997), *citing Riedel*, 651 A.2d at 139-40; *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.").

Moreover, and critical to this issue, this Court consistently held chemical tests conducted pursuant to implied consent statutes, including Section 3755(a), and without a warrant did not violate either the Fourth Amendment of the United States Constitution or Article I, § 8 of the Pennsylvania Constitution, as falling under the consent exception to the warrant requirement. *See Riedel*, *supra* (Section 3755 warrantless seizure of chemical test result valid under Fourth Amendment) *and* (Zappala, J., concurring)("In instances where probable cause has been established, the absence of a warrant requirement under the implied consent provision does not render a test for blood alcohol content unreasonable under Article I, § 8."); *Shaw*, *supra* (release of blood test results from medical record to officer was outside of scope of request under Section 3755 and implied consent law, thereby violating Article I, § 8; warrantless seizure of chemical test results must comply with dictates of Section 3755 in order to be constitutional under Article I, § 8); *Commonwealth v. Kohl*, 615 A.2d 308 (Pa. 1992)(blood, breath, or urine tests obtained pursuant to implied consent statutes and in the absence of a warrant where probable cause is established are not unreasonable under the Fourth Amendment and Article I, § 8; 75

Pa.C.S. § 1547(a)(2) was unconstitutional because it eliminated the probable cause requirement).

After noting that police in this case met the statutory requirements of 75 Pa.C.S. § 3755(a), the Superior Court held that the warrantless blood test results were unconstitutionally obtained because the implied-consent law in Pennsylvania "no longer serve as independent exceptions to the warrant requirement." Appendix B, at 14. In so holding, the Superior Court failed to follow binding majority decisions of this Court. *See McClelland*, 233 A.3d 717, 730-31 (Pa. 2020) (Superior Court erred by failing to apply and follow SCOPA's binding five-Justice precedent).

The Superior Court also failed to follow the plain language dictates of SCOTUS in *Birchfield* and *Mitchell* by invalidating the implied-consent statutes. The Pennsylvania Superior Court incorrectly claimed the SCOTUS decision in *Birchfield* altered the binding legal precedent of this Court. In *Birchfield*, SCOTUS actually noted general approval of implied-consent statutes and emphasized that "nothing we say here should be read to cast doubt on them." *Birchfield*, 136 S.Ct. at 2185. In fact, SCOTUS: (1) recognized implied consent as a subpart of the consent exception, i.e. consent fairly inferred from context; (2) reaffirmed its approval of implied-consent statutes; and (3) recognized a State may deem motorists to have consented to a blood test by virtue of their decision to drive on public roads. *Id.* The sole restriction placed by SCOTUS was a limit on the consequences for

exercising a statutory right to refusal: invalidating statutes that criminally penalize refusal. *Id.* at 2185-86. Nothing in *Birchfield* disturbed the well-established case law from this Court supporting the warrantless obtaining of a blood test with probable cause pursuant to Pennsylvania's statutory implied-consent scheme, and the Pennsylvania Superior Court's decision directly conflicts with the plain language of *Birchfield*.

In *Mitchell,* SCOTUS did not specifically address the constitutionality of the Wisconsin statute in favor of adopting the rule governing warrantless blood tests for unconscious or stuporous drivers. SCOTUS did also reaffirm its general approval of implied-consent statutes. *Mitchell*, at 2532. SCOTUS did clarify, however, that:

> …our decisions have not rested on the idea that these laws do what their popular name might seem to suggest—that is, create actual consent to all the searches they authorize. Instead, we have based our decisions on 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…

Id., at 2532-33. Applying this analysis to Section 3755, *Mitchell* supports its constitutionality as an implied-consent statute that codifies the exigent circumstances test in Mitchell that supports a warrantless blood test.[144]

In *People v. Eubanks*, *supra*, the Illinois Supreme Court confronted this issue concerning a constitutional challenge to its implied-consent statute, which stated:

[144]In *Birchfield*, SCOTUS found statutes criminalizing a refusal to submit to a breath test were constitutional because a warrantless breath test was permissible as a search incident to arrest.

> Notwithstanding any ability to refuse under this Code to submit to these tests or any ability to revoke the implied consent to these tests, if a law enforcement officer has probable cause to believe that a motor vehicle driven by or in actual physical control of a person under the influence of alcohol, other drug or drugs, or intoxicating compound or compounds, or any combination thereof has caused the death or personal injury to another, that person shall submit, upon the request of a law enforcement officer , to a chemical test or tests of his or her blood, breath or urine for the purpose of determining the alcohol content thereof or the presence of any other drug combination or both….

Id., at 847-48, *quoting* 625 ILCS 5/11-501.2(c)(2). Prosecution argued the statute was facially valid as setting forth the precise type of general rule SCOTUS expressly approved in *Mitchell*. *Id.*, at 862.

The Illinois Supreme Court agreed that the implied-consent statute was not facially unconstitutional, as "[t]he statute sets forth precisely the type of general rule that [SCOTUS] held will almost always support a warrantless blood test." *Id.* The Court summarized:

> …Because the statute sets forth a scenario in which warrantless testing will almost always be constitutional, the statute cannot be invalid in all its applications. In fact, it is *valid* in *almost all* its applications. There was no suggestion in *Mitchell* that [SCOTUS] believed that the Wisconsin statute allowing for warrantless searches of unconscious drivers was facially unconstitutional, and such a conclusion would have sounded absurd given everything else [SCOTUS] said in the opinion.

Id., at 863 (emphasis in original). The Court held that Section 11-501.2(c)(2) "is a codified exigency" and is facially constitutional as such. *Id.* The Court did

encourage the legislature to clarify the statute to encompass the "unusual cases" referenced in *Mitchell*.[145]

The *Eubanks* rationale applies with even greater force to 75 Pa.C.S. §3755(a). Section 3755(a) requires: (1) a motor vehicle crash; (2) the operator of an involved motor vehicle to require medical treatment in a hospital emergency room; (3) probable cause of driving under the influence of alcohol or a controlled substance; and (4) blood to be drawn promptly by the emergency room physician or a designee. These requirements fully encompass the exigency rule outlined in *Mitchell*. As the Illinois Supreme Court found with its implied-consent statute, Section 3755(a) is "codified exigency" and as such is facially constitutional. We urge this Court to follow the analysis of our sister state and uphold the constitutionality of Section 3755(a).

Instead of applying legal precedent and conducting an analysis like the *Eubanks* court, the Superior Court erroneously based its decision entirely upon speculating what this Court would hold based upon the plurality section of *Commonwealth v. Myers,* 164 A.3d 1162 (Pa. 2017), and this Court's GVR Order in *Commonwealth v. March*, 172 A.3d 582 (Pa. 2017).

[145]The Court did hold that the statute was not validly applied in *Eubanks*, as exigent circumstances were not present to justify the warrantless obtaining of samples. *Id.*, at 863-66. The facts in *Eubanks* are wholly dissimilar to those here.

Regarding *Myers*, first and foremost the decision rested upon statutory interpretation of 75 Pa.C.S § 1547 and how it applied to an unconscious individual who was under arrest. *Myers*, at 1164. SCOPA determined that Section 1547 provided a statutory right to refuse to submit to a blood test to unconscious drivers under arrest for DUI.

SCOPA expressly distinguished its factual scenario under Section 1547 from Section 3755 and its *Riedel* decision. SCOPA noted in *Riedel* the blood test results were obtained under Section 3755, wherein it held the statutory right of refusal did not apply to Section 3755. *Myers*, at 1171,n.14. Furthermore, "[t]he *Riedel* Court did not base its conclusion upon the motorist's state of consciousness, but, rather, concluded that the right of refusal did not apply to the motorist because he was not under arrest when his blood was drawn—a holding entirely consistent with the language of [§ 1547(b)(1)]." *Id.*

Myers ultimately did not factually or legal address a Section 3755(a) scenario. The key in *Myers* was the arrest of defendant for DUI, which triggered the statutory right to refuse. This Court also issued *Myers* prior to SCOTUS entering its *Mitchell* decision. Despite this, the Superior Court relegated a *Mitchell* analysis to two sentences if favor of speculating what this Court would do post-*Myers*. It was wholly improper for the Superior Court to invalidate a statute based upon such speculation.

The Superior Court further erroneously supported its constitutional invalidation of Section 3755(a) by citing this Court's Order in *Commonwealth v. March*, wherein it vacated the decision of the Superior Court and remanded the case for reconsideration in light of *Birchfield* and *Myers*. A "grant, vacate, remand" ("GVR") Order does not provide insight into how this Court will rule and is non-precedential. *See Tribune-Review Publishing Co. v. Department of Community and Economic Development*, 859 A.2d 1261 (Pa. 2004)(GVR Order is a request to reconsider the case in light of something SCOPA wants reviewed and not a direction to go in the opposite direction). The Superior Court improperly relied on the *March* GVR Order as a means to further speculate on what this Court would hold rather than follow binding precedent from this Court and SCOTUS.

In summation, Section 3755(a) is facially constitutional as an implied-consent statute. Even if the validity of implied-consent statutes as an independent basis for constitutionality is in doubt, Section 3755(a) is also facially constitutional as a codification of the exigency rule in *Mitchell*. As police followed the statutory dictates of Section 3755(a), this Court should reverse the decision of the Superior Court vacating the judgment of sentence and suppressing Defendant's blood test results.

CONCLUSION

For the above-argued reasons, it is respectfully submitted that the decision of the Superior Court be REVERSED, Defendant's convictions be AFFIRMED, and Defendant's Judgment of Sentence be RE-IMPOSED.

Respectfully Submitted:

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IN THE SUPREME COURT OF PENNSYLVANIA

MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA	**:**	**CP-67-CR-0002824-2015**
	:	
v.	**:**	
	:	**27 MAP 2021**
AKIM SHARIF JONES-WILLIAMS	**:**	

Certificate of Compliance

I hereby certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that requires filing confidential information and documents differently than non-confidential information and documents. Additionally, I hereby certify that this principle brief complies with the 14,000-word limit as the word count as calculated by Microsoft Word is 10,580.

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APPENDIX A

M.D. Appeal Dkt.
27 MAP 2021

IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 646 MAL 2020
	:	
Petitioner	:	
	:	Petition for Allowance of Appeal
	:	from the Order of the Superior Court
v.	:	
	:	
	:	
AKIM SHARIF JONES-WILLIAMS,	:	
	:	
Respondent	:	

ORDER

PER CURIAM

AND NOW, this 28th day of April, 2021, the Petition for Allowance of Appeal is **GRANTED**. The issues, as stated by the Commonwealth, are:

(1) 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 driver suspected or arrested for DUI, rendering the implied-consent statute unconstitutional?

(2) 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 Defendant's blood?

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

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 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.

[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.

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

[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.

substance - 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

[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).

court entered an order directing Appellant to file a concise statement of matters complained of on appeal pursuant to 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***, 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

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

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 personnel lacked probable cause, is unavailing because he recognizes only one of the possible ways the

[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.")

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 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

[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.

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 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

[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 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).

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 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:

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

> It is true that a blood test, unlike a breath test, may be administered to a person who is unconscious (perhaps 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 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

[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).

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]

[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

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 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.

governmental search occurred when Sergeant Farren requested that Appellant's blood sample be submitted for chemical testing.

> 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[.]

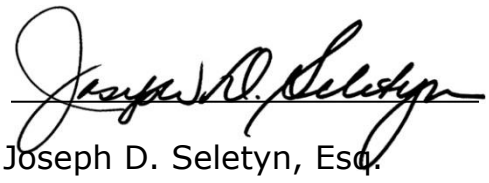
Trial Court Opinion, 4/13/18, at 12-13.

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).

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

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 08/11/2020

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

IN THE COURT OF COMMON PLEAS OF YORK COUNTY, PENNSYLVANIA

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

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

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 "[h]e 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 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 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 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, 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 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.

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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).

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 DUI-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.

Michael E. Bortner
Judge of the Court of Common Pleas