IN THE SUPREME COURT FOR THE STATE OF FLORIDA

BYRON MCGRAW

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO.: SC18-792

L.T. Case No.: 4D17-232

MOTION OF THE NATIONAL COLLEGE FOR DUI DEFENSE FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF SUPPORTING THE POSITION OF PETITIONER

The National College for DUI Defense (NCDD), by undersigned counsel, moves this Court, pursuant to Florida Rule of Appellate Procedure 9.370, for leave to file and serve an amicus curiae brief in support of the position of the petitioner, Byron McGraw.

IDENTITY AND INTEREST OF AMICUS CURIAE

The National College for DUI Defense (NCDD) is a non-profit professional organization of attorneys dedicated to the education and training of attorneys engaged in the practice of defending citizens accused of driving while under the influence. There are more than one thousand five hundred members of NCDD throughout the United States and Canada. Through its extensive educational programs, its website, and its e-mail list, the NCDD trains lawyers to more

effectively represent persons accused of driving under the influence. The NCDD is authorized by the American Bar Association to issue Board Certifications in the area of DUI/DWI Defense to qualifying attorneys.

NCDD seeks to augment the issues presented by the petitioner by addressing constitutional questions raised in this case that are of national importance. The question presented in this case is does the state legislature have the power to "deem" into existence "facts" operating to negate individual rights arising under the U.S. and Florida State constitutions.

The statute in question here does just that. Section 316.1932(1)(c), Florida Statutes, after certain other requirements, provides: "Any person who is incapable of refusal by reason of unconsciousness or other mental or physical condition is deemed not to have withdrawn his or her consent to such [blood] test."

There are a few things with which we can all agree. First, the taking of blood at the direction of the police from a person is a search and seizure under the Fourth Amendment. *State v. Liles,* 191 So.3d 484, 486 (citing *Schmerber v. California,* 384 U.S. 757, 767 (1966). If there is a search, then there must be a warrant or proof of one of the five recognized exceptions to the warrant requirement. *Missouri v. McNeely,* 569 U.S. 141 (2013). The exception at issue here is consent.

"State has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority. *Lo-Ji Sales, Inc. v. New York*, 442 U.S. 319, 329, 99 S.Ct. 2319, 2326, 60 L.Ed.2d 920 (1979); *Schneckloth v. Bustamonte*, 412 U.S. 218, 233–234, 93 S.Ct. 2041, 2050–2051, 36 L.Ed.2d 854 (1973); *Bumper v. North Carolina*, 391 U.S. 543, 548–549, 88 S.Ct. 1788, 1791–1792, 20 L.Ed.2d 797 (1968); *Johnson v. United States*, 333 U.S. 10, 13, 68 S.Ct. 367, 368, 92 L.Ed. 436 (1948); *Amos v. United States*, 255 U.S. 313, 317, 41 S.Ct. 266, 268, 65 L.Ed. 654 (1921)." *Florida v. Royer*, 460 U.S. 491, 497 (1983); *Reynolds v. State*, 592 So.2d 1082, 1086 (Fla.1992); *Smith v. State*, 904 So.2d 534 (Fla. 1st DCA 2005); *McDonnell v. State*, 981 So.2d 585 (Fla. 1st DCA 2008) (for the factors to be considered in making this determination and cases and treatise cited therein).

Section 316.1932 (1)(c) is in direct conflict with long standing United States and Florida constitutional law.

Implied consent statutes are in place in every state in one form or the other. The opinion below and briefs of the parties have cited to approximately fifteen (15) different states with decisions upholding, striking down or limiting the power these type statutes.

Because the issue presented in this case is of such importance nationally, this

Court could benefit from a complete review of the case law and arguments surrounding the issue from other states. The NCDD amicus curiae brief would address those cases and arguments.

Clarification of the law relating to whether a state can "deem" certain facts into existence sufficient to become an exception to the warrant requirement is of exceptional importance to every citizen in this state. The opinion below has upheld such a concept. The NCDD, as amicus curiae, would argue in their brief opposition to extending such power to the state.

Finally, the undersigned is one of the founding members of the NCDD and has been actively involved in the organization since its inception. Further, the undersigned is the editor of the four-volume set *Drinking Driving Litigation: Criminal and Civil* and the *Drinking/Driving Law Letter* both Thomson Reuters publications.

POSITION OF THE PARTIES

Counsel for NCDD has, pursuant to Rule 9.370(a) Florida rules of Appellate Procedure, contacted counsel for both petitioner, Benjamin Eisenbert, and respondent, Richard Valuntas, in this matter. Mr. Eisenbert has indicated that he has no objection to the NCDD filing its amicus curiae brief. Mr. Valuntas has indicated that the Attorney General's office has no position.

CONCLUSION

Wherefore, NCDD, having demonstrated good and sufficient grounds why it should be permitted to appear as amicus curiae in this case, respectfully requests this Motion be Granted.

/s/ Flem K. Whited, III
FLEM K. WHITED, III, ESQUIRE
WHITED LAW FRIM
Florida Bar #271071
150 S. Palmetto Avenue, Suite 102
Daytona Beach, Florida 32114
Telephone (386) 253-7865
E-Mail: NancyA@WhitedLawFirm.com

CERTIFICATE OF SERVICE

Undersigned Counsel, HEREBY CERTIFIES that a true and correct copy of the foregoing has been furnished this 6th day of July, 2018 by U.S. mail or e-mail to the following:

Richard Valuntas
Assistant Attorney General
Florida Bar No. 151084
1515 North Flagler Drive, 9th Floor
West Palm Beach, FL 33401
CrimAppWPB@MyFloridaLegal.com
Counsel for Respondent

Benjamin Eisenberg
Assistant Public Defender
15th Judicial Circuit
Florida Bar No. 0100538
421 Third Street
West Palm Beach, FL 33401
beisenberg@pd15.state.fl.us
BEisenberg@pd15.org
appeals@pd15.org
Counsel for Petitioner

/s/ Flem K. Whited, III
FLEM K. WHITED, III, ESQUIRE