

ORIGINAL

IN THE SUPREME COURT OF THE STATE OF FLORIDA

JOSEPHMcBRIDE,)
)
 Petitioner,)
)
 v.)
)
 STATEOFFLORIDA,)
)
 Respondent.)
 _____)

FILED
THOMAS D. HALL
DEC 15 2000

CLERK, SUPREME COURT
BY dy

CASE NO. SC00-2658

ON DISCRETIONARY REVIEW FROM THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

PETITIONER'S BRIEF OF JURISDICTION

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PRELIMINARY STATEMENT

Joseph McBride, the Defendant/Appellant below, shall be referred to herein as "Petitioner." The State of Florida, the **Plaintiff/Appellee** below, shall be referred to herein as "Respondent."

STATEMENT OF THE CASE AND OF THE FACTS

On January 2, 1998, Petitioner was arrested by the **Tampa** Police Department on charges relating to a two-vehicle crash which occurred on January 1, 1998. On January 28, 1998, Respondent filed an Information charging Petitioner as follows: **Count I - DUI Manslaughter; Count II - Vehicular Homicide; Count III - Driving While License Suspended Causing Death.**

Respondent's evidence included a "hospital blood" test, not a "legal" blood alcohol test. Petitioner objected to the lower court instructing the jury concerning the statutory presumptions of impairment within the standard jury instruction for **DUI Manslaughter**. The lower **court** overruled Petitioner's objection and instructed the jury as to the statutory presumptions of impairment for both **Count I** and the lesser included offense of **DUI**.

The jury returned a verdict of guilty of **DUT Manslaughter** as charged. On May 24, 1999, the lower **court** adjudicated Petitioner guilty of **DUI Manslaughter** and sentenced Petitioner to 17.9 years incarceration. Petitioner timely filed his Notice of Appeal.

Petitioner proceeded with his direct appeal to the District Court of Appeal of Florida, Second District, Petitioner argued that the trial court erred in instructing the jury as to the statutory presumptions of impairment within the standard jury **instruction** for **DUI Manslaughter**. The District Court of Appeal of Florida, Second District rendered its decision on November 15, 2000 [See Appendix 1]. Said decision affirmed the judgment and sentence of Petitioner, citing **State v. Townsend**,

746 So.2d 495 (Fla. 2d DCA 1997[sic]), rev. granted, No, 99-275 (Fla. March 6, 2000). On December 11, 2000, Petitioner filed a Notice to Invoke Discretionary Jurisdiction with the district court.

SUMMARY OF ARGUMENT

This Court has jurisdiction to review Petitioner's case as the First and Second District Courts of Appeal have certified the same question to this Court as one of great public importance. The question certified to the Florida Supreme Court by the First District Court of Appeal was

WHERE THE STATE LAYS THE THREE-PRONGED
PREDICATE FOR ADMISSIBILITY OF BLOOD-ALCOHOL
TEST RESULTS IN ACCORDANCE WITH THE ANALYSIS
SET FORTH *IN ROBERTSON V. STATE*, 604 SO.2D 783
(FLA. 1992), THEREBY ESTABLISHING THE SCIENTIFIC
RELIABILITY OF THE BLOOD-ALCOHOL TEST RESULTS,
IS THE STATE ENTITLED TO THE LEGISLATIVELY
CREATED PRESUMPTIONS OF IMPAIRMENT?

State v. Miles, 732 So. 2d 350 (Fla. 1st DCA 1999), rev. granted, 740 So.2d 529 (Fla. 1999), decided, 25 Fla. L. Weekly S1082a (Fla. Nov. 30, 2000).

The case from the Second District Court of Appeal which certified this question was State v. Townsend, 746 So.2d 495 (Fla. 2d DCA 1997), rev. granted, No. 99-275 (Fla. March 6, 2000). This Court accepted jurisdiction in State v. Townsend, supra, to review the certified question. State, 4 0 5 So.2d 418 (Fla. 1981), this Court has jurisdiction to review all appeals which are decided based upon district court cases which are accepted for and pending review by the Supreme Court of Florida.

Moreover, this Court should grant discretionary review in this case as this Court has recently decided this certified question in State v. Miles, 25 Fla. L. Weekly S1082a (Fla. Nov. 30, 2000). The decision of this Court in State v. Miles, supra, held that the State is not entitled to the statutory presumptions of impairment in non-"legal" blood test cases, thereby answering the certified question in a manner favorable to Petitioner.

ARGUMENT

THIS COURT HAS JURISDICTION TO
REVIEW THIS CASE BASED UPON A
QUESTION CERTIFIED AS ONE OF
GREAT PUBLIC IMPORTANCE

Article V, Section 3(b)(4) of the Florida Constitution provides that the Supreme Court of Florida has jurisdiction to review decisions of the district courts that pass upon a question certified to be of great public importance. Florida Rule of Appellate Procedure 9.030(a)(2)(A)(v) mirrors the constitutional grant concerning discretionary jurisdiction.

In State v. Miles, 732 So. 2d 350 (Fla. 1st DCA 1999), rev. granted, 740 So.2d 529 (Fla. 1999), decided, 25 Fla. L. Weekly S1082a (Fla. Nov. 30, 2000), the First District Court of Appeal certified the following question as one of great public importance:

WHERE THE STATE LAYS THE THREE-PRONGED
PREDICATE FOR ADMISSIBILITY OF BLOOD-ALCOHOL
TEST RESULTS IN ACCORDANCE WITH THE ANALYSIS
SET FORTHIN *ROBERTSON V. STATE*, 604 SO.2D 783
(FLA. 1992), THEREBY ESTABLISHING THE SCIENTIFIC
RELIABILITY OF THE BLOOD-ALCOHOL TEST RESULTS,
IS THE STATE ENTITLED TO THE LEGISLATIVELY
CREATED PRESUMPTIONS OF IMPAIRMENT?

This Court subsequently accepted review. State v. Miles, supra.

In State v. Townsend, 746 So.2d 495 (Fla. 2d DCA 1997), rev. granted, No. 99-275 (Fla. March 6, 2000), the Second District Court of Appeal, following Miles, certified the same question to this Court. This Court again accepted jurisdiction. State v. Townsend, supra.

In deciding Petitioner's direct appeal, the Second District Court of Appeal decided the case specifically and exclusively on the basis of State v. Townsend,

supra, a decision which was noted by the district court as being presently before this court.

In **Jollie v. State**, 405 So.2d 418 (Fla. 1981), this Court held

We thus conclude that a district court of appeal per **curiam** opinion which cites as controlling authority a decision that is.. **pending** review.. , by this **Court...allows** this Court to exercise its jurisdiction.

Jollie, supra, at 420.

This Court should review the decision of the district court in this case as this Court has recently answered the question as **certified** in **State v. Miles**, 25 Fla. L. Weekly S1082a (Fla. Nov. 30, 2000). Following the time permitted for a motion for rehearing herein, this Court rendered its decision in **State v. Miles, supra**. In its **decision** in **State v. Miles, supra**, this Court ruled that the State is not entitled to the statutory presumptions of impairment in non-“legal” blood test cases. Therefore, this Court has now answered the certified question at issue in a manner favorable to Petitioner.

This Court, therefore, has discretionary jurisdiction to review this case based on the question **certified** - and presently pending before this Court - in **State v. Townsend**, 746 So.2d 495 (Fla. 2d DCA 1997), **rev. granted**, No, 99-275 (Fla. March 6, 2000). The Petitioner seeks discretionary review by this Court to review the decision of the trial court to instruct the **jury** on the statutory presumptions of impairment.

CONCLUSION

This Court has, and should invoke, discretionary jurisdiction to review this case on the basis of the question certified by the Second District Court of Appeal in State v. Townsend, 746 So.2d 495 (Fla. 2d DCA 1997), rev. **granted**, No. 99-275 (Fla. March 6, 2000), to be of great public importance. The Second District Court of Appeal **specifically** noted in the decision in this case that its prior decision in State v. Townsend, supra, was pending review in this Court.

Further, this Court should review the decision of the district court in this case as this Court has recently decided the same certified question in State v. Miles, 25 Fla. L. Weekly S1082a (Fla. Nov. 30, 2000). The decision of this Court in State v. Miles, supra, answered the **certified** question in a manner favorable to the Petitioner.

CERTIFICATE OF FONT SIZE

I HEREBY CERTIFY that the foregoing brief of Appellant is in the font type Times New Roman in font size 14.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has be provided by mail delivery to: Office of the Attorney General, 2002 N. Lois Avenue, Suite 700, Tampa, Florida 33607 on this 13th day of December, 2000.

Respectfully submitted,

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit

By: 

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APPENDIX

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NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING
MOTION AND, IF FILED, DETERMINED

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA
SECOND DISTRICT

JOSEPH McBRIDE,)
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 Appellant,)
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 v.)
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 STATE OF FLORIDA,)
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 Appellee.)
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CASE NO. 2099-2629

Opinion filed November 15, 2000.

Appeal from the Circuit Court for
Hillsborough County, J. Rogers Padgett, Judge.

James Marion Moorman, Public Defender,
Bartow, and Joseph N. D'Achille, Jr., Assistant Public
Defender, Bartow, for Appellant.

Robert A. Butterworth, Attorney General,
Tallahassee, and Susan D. Dunlevy,
Assistant Attorney General, Tampa, for
Appellee.

PER CURIAM.

Affirmed. See State v. Townsend, 746 So. 2d 495 (Fla. 2d DCA 1997),
rev. granted, No. 99-275 (Fla. Mar. 6, 2000).

CAMPBELL, A.C.J., CASANUEVA end DAVIS, JJ., Concur.