IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,

vs. CASE NO.: SC11-1512

GREGORY G. GEISS,
Respondent.
_____/

AMICUS CURIAE BRIEF BY FLORIDA ASSOCIATION OF CRIMINAL DEFENSE LAWYERS (FACDL) ON BEHALF OF RESPONDENT

On Discretionary Review from the
Fifth District Court of Appeal

James T. Miller on behalf of
Florida Association of
Criminal Defense Lawyers (FACDL)

and

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STATEMENT OF THE CASE AND FACTS

FACDL accepts the statement of case and facts in Petitioner's Initial Brief.

SUMMARY OF ARGUMENT

The decision of the Fifth District Court of Appeal (hereafter 5DCA) answered the certified question correctly: Section 933.02 does not authorize warrants for a blood draw in a DUI misdemeanor case. However, the reasoning of the Fifth District Court of Appeal was incorrect and could lead to doctrinal confusion and to the violation of clear and unambiguous Legislative intent. FACDL files this Amicus Curiae Brief to address this issue.

The Fifth District Court of Appeal construed the general warrant statute because the implied consent statutes did not specifically address the question of search warrants for blood draws in DUI misdemeanor cases. This analysis was flawed for two reasons: 2) the comprehensive and specific implied consent law controls over the general warrant statute; 2) the specific failure to allow search warrants, given the rest of the comprehensive provisions as to blood tests and the collection of samples for those tests, is a clear and ambiguous intent by the Legislature to **not** permit such warrants. The fact that the implied consent statute does **not** mention such warrants is precisely because the Legislative did not want to include such warrants. The analysis by the Fifth District Court of Appeal is

a Court re-writing a statute by supplying missing terms. Although this Court should uphold the **decision** of the Fifth District Court of Appeal, it should disapprove of its reasoning - this Court should hold that there is no need to interpret the general warrant statute because the specific implied consent statute governs this question.

I.

SECTION 993.02(2)(a) FLORIDA STATUTES PRECLUDES LAW ENFORCEMENT OFFICER FROM SERVING A WARRANT FOR A BLOOD DRAW IN MISDEMEANOR CASES INVOLVING AN ALLEGATION THAT A SUSPECT HAS DRIVEN WITH AN UNLAWFUL BLOOD ALCOHOL LEVEL (ISSUE AS STATED BY RESPONDENT).

A. Standard of review.

The certified question in this case involves the interpretation of statutes. Therefore, the de novo standard of review applies to this case. Davila v. State, 36 Fla. Law Weekly S579 (Fla. October 6, 2011) FACDL respectfully submits that the decision of the Fifth District Court of Appeal employed the wrong analytical framework to decide this case. The appropriate standard of review is crucial in this case because the method used by the Fifth District Court of Appeal will 1) possibly negate or contradict Legislative intent as to the operation of the implied consent laws; 2) create doctrinal chaos and confusion because various court decisions which may interpret the implied consent statutes and other general statutes in different ways. Consequently, a decisional body of law may develop which is contrary to Legislative intent. FACDL will explain this possibility in the next section of this brief.

B. The improper analytical approach in this case.

Although FACDL agrees with the decision of the Fifth District Court of Appeal that Section 933.02(2)(a), Florida Statutes does **not** permit a warrant for a blood draw in a misdemeanor DUI case, the analysis used by the Fifth District Court of Appeal was incorrect and this Court should correct it.

The Fifth District Court of Appeal decided that Section 933.02(2)(a) does not permit a search warrant because blood in the human body is not property used as a means to commit a crime. FACDL agrees with Respondent's arguments on this issue. See State v. Dearmas, 841 A.2d 659 (R.I. 2004) While the decision of the Fifth District Court of Appeal may have been correct, the Court should not have interpreted the terms of a general statute - the implied consent law in this case exclusively cover this issue, not a statute of general applicability. A court should not apply a general statute when there is a specific statute that covers the situation. Mendenhall v. State, 48 So.3d 740 (Fla. 2010); Roberts v. Brown, 43 So.3d 673 (Fla. 2010). The main reason for this rule is that it best effectuates Legislative intent. The fact that the implied consent statutes did not authorize the issuance of a search warrant under the circumstances of this case evinces a

clear and unambiguous Legislative intent - an intent to **not** allow such warrants. The Legislature could have easily added this provision to the implied consent statutes.

Section 316.1923(1), Florida Statutes allows a blood draw when there has been fatalities. Chapter 316, in toto, is a comprehensive set of laws that govern the operation of any motor vehicles in this State, including the prosecution of DUI offenses. Section 316.1932 is a comprehensive statute on the subject of any tests (including the collection of the tested samples) and the implied consent for tests and the right to refuse such tests.

FACDL references these specific statutes because the legal analysis in this case went beyond the specific terms of these comprehensive statutes to interpret a general statute because the specific statutes did not specifically prohibit warrants for a blood draw. FACDL respectfully submits this analysis is patently incorrect: the lack of authority to obtain a warrant in the implied consent statute is a direct and unambiguous expression of Legislative intent to **not** allow such warrants. Moreover, one should not get to the stage of interpreting the general statute because the specific statute is controlling over the general statute.

A Court may not amend a statute by judicial interpretation by giving determination to an alleged omission to a law - a Court may not define this omission by interpretation of another law - especially when the law used to supply the alleged omission is a general statute. A general rule of statutory construction is that when the exclusion of particular language in one part of a statute is not in another section of the same statute (or by extension to another statute), then the exclusion is presumed to have been excluded intentionally. L.K. v. Dept. of Juvenile Justice, 917 So.2d 919 (Fla. 1st DCA 2005) Neither the implied consent statutes or the general warrant statute specifically refer to warrants to draw blood in DUI cases. Therefore, under the general rules of statutory construction, the Fifth District Court of Appeal should have decided that the specific implied consent statutes controlled over the general warrant statute. The Fifth District Court of Appeal should have decided that because the clear Legislative intent of the implied consent statute is to not allow warrants for blood draws in misdemeanor cases, there would be no need to interpret the general warrant statute.

FACDL fears that if this Court does not correct the faulty analytical approach of the Fifth District Court of Appeal, then

Florida courts will violate the general rules of statutory construction; such violations may directly violate Legislative intent. If the Fifth District Court of Appeal in this case held that the general warrant statute did allow warrants, then there would have been a direct violation of the intent expressed in the implied consent laws.

This Court should not forget the general theory of the implied consent laws: because driving is a privilege, all drivers in this State impliedly consent to the tests and regulations promulgated in the implied consent statutes. As Judge Torpy noted in his dissent in this case, the decision in Sambrine v. State, 386 So.2d 546 (Fla. 1980) permits a refusal of a blood test. The implied consent statutes provide for a comprehensive treatment of the responsibilities and rights for drivers in this area of DUI. Therefore, the decision below should have not resorted to interpretation of the general warrant statute.

The Fifth District Court of Appeal below attempted to reconcile the general warrant statute and the implied consent law by "giving full effect to all related statutory provision in harming with one another." The problem with that analysis is that the Fifth District Court of Appeal did not use the rule of

the more specific statute governs over the general statute. Therefore, the statutes are not in harmony and that reading of the two statutes does not give full effect to the obvious Legislative intent in the implied consent statutes.

CONCLUSION

This Court should answer the certified question in the affirmative and adopt the analysis of that question raised in this brief.

Respectfully submitted,

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Florida Association of
Criminal Defense Lawyers (FACDL)

and

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail on this 7th day of December, 2011 to: Ernest Chang, counsel for Respondent, 6767 N. Whickham Road, Ste. 400, Melbourne, Florida 32940; and Kristen Davenport, Assistant Attorney General, 444 Seabreeze Boulevard, Fifth Floor, Daytona Beach, Florida 32118.

James T. Miller

CERTIFICATION OF TYPEFACE COMPLIANCE

Appellant certifies the type size and font used in this brief is Courier New 12.