IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v. Case No. SC11-1512

GREGORY G. GEISS,

Respondent.

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ON DISCRETIONARY REVIEW
FROM THE FIFTH DISTRICT COURT OF APPEAL

ANSWER BRIEF OF RESPONDENT

ERNEST L. CHANG, Esq.
Florida Bar No. 867550
ANGELA MERIAH PARK, Esq.
Florida Bar No. 679542
6767 N. Wickham Rd., Suite 400
Melbourne, FL 32940
(321)255-6300

COUNSEL FOR RESPONDENT

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SUMMARY OF ARGUMENT

A search warrant cannot be issued for blood in driving under the influence cases pursuant to section 933.02, Florida Statutes. Blood flowing through the human body is neither "property" nor the "means to commit" the crime of driving under the influence. Sections 316.1932 and 316.1933 Florida Statutes (2009), provide the exclusive means for obtaining blood in driving under the influence cases. The certified question should be answered in the affirmative and it is requested that this Court consider answering the broader question of whether search warrants can be issued for blood in both misdemeanor and felony driving under the influence offenses.

ARGUMENT

Even though the district court certified the narrow question of whether search warrants can be issued for blood draws in misdemeanor cases of driving under the influence (hereinafter "DUI"), Respondent respectfully requests this Court examine the broader question of whether search warrants can be used to obtain blood in both misdemeanor and felony DUIs. This Court may examine all issues argued before the lower court. *See*, Russell v. State, 982 So.2d 642 (Fla. 2008) and Savoie v. State, 422 So.2d 308, 310 (Fla. 1982).

While concurring that a question should be certified in this case, Judge Torpy dissents as to the narrowness of the question certified by the majority and opines, "only an answer to the broader question will put an end to judicial labor on this topic," State v. Geiss, 36 Fla. L. Wkly. D1575 (Fla. 5th DCA July 22, 2011). Judge Torpy suggests the more appropriate certified question in this case be:

> Is the right to refuse a forced blood draw under the implied consent law, as recognized in Sambrine v. State, viable when the blood draw is authorized by warrant? If not, may a warrant issue to seize blood when the police only have probable cause that a misdemeanor has been committed." Id.

Should this Court choose only to address the narrow question posed by the district court, Respondent respectfully requests this Court answer it affirmatively. If as Respondent urges, this Court answers the broader question set forth by Judge Torpy, Respondent would respectfully request this Court answer the first part of

the question in the affirmative, which would render an answer to the second part of the question unnecessary.

SECTION 933.02(2)(a), FLORIDA STATUTES, PRECLUDES LAW ENFORCEMENT OFFICERS FROM SECURING A WARRANT FOR A BLOOD DRAW IN MISDEMEANOR CASES INVOLVING AN ALLEGATION THAT A SUSPECT HAS DRIVEN WITH AN UNLAWFUL BLOOD ALCOHOL LEVEL.

Petitioner argues blood is the "means to commit" the offense of DUI and therefore a warrant should be permitted to issue even where there is only probable cause to believe a misdemeanor DUI has been committed. Sections 933.02(2)(a), Florida Statutes (2009), permit issuance of a search warrant "When any property shall have been used; (a) As a means to commit any crime." Section 933.02(3), Florida Statutes (2009), permits issuance of a search warrant, "When any property constitutes evidence relevant to proving that a felony has been committed." There is no definition of "property" or "means to commit" in chapter 933. Petitioner contends blood can be the subject of a search warrant and cites a case where dicta mentions a search warrant could have been obtained for blood. Fitzpatrick v. State, 900 So.2d 495, 514 (Fla. 2005). However, in Fitzpatrick this Court was not being asked to decide whether the language of the search warrant statute would permit issuance for compelling blood. Respondent can find no previous cases in Florida where application of the search warrant statute to drawing blood has been challenged on the grounds that blood is not "property" that can be the subject of a

search warrant. The word "property" is used in sections of the search warrant statute interpreted to pertain to both felonies and misdemeanors. "[P]roperty used to commit any crime- whether felony or misdemeanor- may be seized under a warrant; while property merely constituting relevant evidence of a crime may be seized only if the suspected crime is a felony." Bordo v. State, 627 So.2d 561, 563 (Fla. 4th DCA 1993).

A court in Rhode Island has thoroughly examine the word "property" as it relates to the search warrant statute in that state and its meaning as applied to blood. "[N]o living person or people, or their constituent living parts, can be lawfully considered as property." State v. Dearmas, 841 A.2d 659, 663 (R.I. 2004)[1]. The statute at issue in Dearmas had language very similar to the search warrant statute in Florida. It provided, in relevant part, that a warrant may be issued for "property…"as a means of committing a violation of law;or…[w]hich is evidence of the commission of a crime." R.I. Gen. Laws §12-5-2(1999).

"Construing blood and other body parts seized from living human beings as 'property' would raise a host of practical and interpretative problems." Id. The

[1] The search warrant statute at issue in this case was later amended by the legislature to add language permitting issuance for blood. *See*, State v. Gomes, 881 A.2d 97 (R.I. 2005)(holding a search warrant should not have issued pursuant to the holdings in DiStefano and Dearmas, *supra*, but finding the error harmless in light of other overwhelming evidence in the case).

Court went on to reason, “were we to construe blood samples to be seized from unconsenting living people as ‘property,’ then we would soon face arguments that courts can issue even more intrusive warrants for the seizure of other body parts and biological material, and, indeed, of living persons themselves if needed to prove a criminal case.” Dearmas, 841 A.2d at 664. The Court in Dearmas discusses public policy concerns prohibiting the use of search warrants to forcibly extract blood from suspects citing “’[v]iolent confrontations’” between suspects and police and “’many dangerous and unintended consequences that should be dealt with and prevented by legislative enactment, not by judicial fiat.’” (citations omitted) Dearmas, 841 A.2d 659 at 666.

Blood, as it is pumping through a person’s veins, cannot be and is not the “means” to commit the crime of DUI, or any other crime for that matter. Statutes are to be interpreted using their plain and ordinary meaning. Holly v. Auld, 450 So.2d 217, 219 (Fla. 1984). The common understanding of the phrase “means to commit,” as applied to the crime of DUI, would be the instrumentality that is used to commit the crime of DUI- namely the vehicle. If blood were the “means to commit” any crime and could be obtained through use of a search warrant, it is foreseeable that blood might be sought in other types of misdemeanors such as disorderly intoxication or even possession of marijuana.

While the search warrant statute at issue in DiStefano and Dearmas, *supra*, was amended by the Rhode Island legislature to specify for its use for blood, Florida's legislature has never signaled its intent that the search warrant statue be used for obtaining specimens from the human body. There is a separate rule of Criminal Procedure allowing for the collection of specimens, including blood, after the filing of a charging document. Fla.R.Crim.P. 3.220(c).

The implied consent statute was intended to provide the exclusive method to obtain direct evidence of a suspect's blood alcohol content. Florida statutes expressly provide penalties for refusing to consent to a chemical sobriety test. §316.1939, Florida Statutes (2009). It is true there is no language in Florida's implied consent statute like there is in the statutes of many other states expressly stating that if a person refuses chemical testing, then no other test shall be given. *See*, State v. Adee, 241 Kan. 825, 740 P.2d 611, 614 (1987); State v. DiStefano, 764 A.2d 1156, 1161 (R.I. 2000); State v. Hitchens, 294 N.W. 2d 686, 687 (Iowa 1980). However, Florida's implied consent statute has been interpreted to give its citizens a right to refuse testing. Sambrine v. State, 386 So.2d 546 (Fla. 1980). Respondent in this case affirmatively refused to submit to a breath test. A careful reading of the implied consent statute "leads to the inescapable conclusion that a person is given the right to refuse testing. If this were not so, it is unclear why the legislature provided for a definite sanction." Id. At 548.

Until the legislature chooses to change the search warrant statute and define property to include bodily fluids, the implied consent statute, as a specific statute, controls the circumstances under which a suspect can be compelled to give blood in DUI cases. "It is a well settled rule of statutory construction, however, that a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms." Adams v. Culver, 111 So.2d 665, 667 (Fla. 1959). The legislature did not intend for blood to be drawn for DUIs pursuant to the search warrant statute. If it did, the language in sections 316.1932 and 316.1933, Florida Statutes (2009) providing for specific circumstances under which a person is deemed to have given consent or when blood may be forcibly drawn, would be utterly meaningless.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests this honorable Court answer the certified question in the affirmative.

Respectfully submitted,

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ANGELA MERIAH PARK
Fla. Bar. No. 679542

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ERNEST L. CHANG
Fla. Bar No. 867550
6767 N. Wickham Rd. , Suite 400
Melbourne, FL 32940
(321)255-6300

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above Answer Brief has been furnished by U.S. mail to Kristen Davenport, Assistant Attorney General, 444 Seabreeze Blvd., Fifth Floor, Daytona Beach, FL 32118 this 5th day of December, 2011.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that this brief was typed using Times New Roman 14 point font.

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ANGELA MERIAH PARK