

CACJ CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE

February 10, 2015

The Honorable Frank A. McGuire
Clerk, California Supreme Court
Supreme Court of California
455 Golden Gate Ave., Ground Floor
San Francisco, CA 94102

Please respond to:
JOHN T. PHILIPSBORN
Law Offices of J.T. Philipsborn
507 Polk Street, #350
San Francisco, CA 94102

Re: *People v. Toure*, S223993 (Court of Appeal Case No. E058915, opinion listed in 232 Cal.App.4th 1069; Riverside County Superior Court No. FBA1200751)

LETTER BRIEF OF CALIFORNIA ATTORNEYS FOR CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR REVIEW FILED BY MADOU TOURE, PETITIONER (CALIFORNIA RULES OF COURT, RULE 8.500(g))

Dear Mr. McGuire:

This letter, permitted by the California Rules of Court, Rule 8.500(g), is submitted by California Attorneys for Criminal Justice (hereafter 'CACJ') in support of the Petition for Review filed by Madou Toure (hereafter referred to as 'Petitioner').

Identification of *Amicus Curiae*

CACJ is a non-profit California corporation, and a statewide organization of criminal defense lawyers. CACJ is the California affiliate of the National Association of Criminal Defense Lawyers, the largest organization of criminal defense lawyers in the United States. CACJ is administered by a Board of Directors, and its by-laws state a series of specific purposes including "to defend the rights of persons as guaranteed by the United States Constitution, the Constitution of the State of California, and other applicable law," and the

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improvement of “the quality of the administration of criminal law.” (Article IV, CACJ By Laws). CACJ’s membership consists of approximately 1700 criminal defense lawyers from around the State of California and elsewhere, as well as members of affiliated professions. For more than 35 years, CACJ has appeared before this Court as an *amicus curiae* on matters of importance to the administration of justice, and to its membership.¹

Interest of CACJ in this matter

As Petitioner points out, this case is one of the first in which a California reviewing court has applied the United States Supreme Court’s recent ruling in *Missouri v. McNeely* (2013) 569 U.S. ____; 133 S.Ct. 1552, to a California case. *McNeely* is a decision in which the Court reiterated that in most instances exigent circumstances will need to be shown to avoid the warrant requirement for drawing a suspect’s blood where the detention relates to suspicion of drunk driving. CACJ’s membership includes lawyers who, in the course of their regular duties as defense counsel, will evaluate, consider, and where appropriate bring motions to suppress evidence to ensure the enforcement of the protections provided by the Fourth Amendment, and this case is of interest to CACJ for that reason.

As explained in the Petition, Petitioner’s objective is to ‘ensure that the teachings of the U.S. Supreme Court are implemented in California.’ (Petition, at p.5.) Part of Petitioner’s argument rests on what he alleges is the Court of Appeal’s failure to properly apply an exigent circumstances analysis to his case. This matter is of specific interest to CACJ and its membership because, as Petitioner notes, it is an initial application of the recently published *McNeely* analysis to a California case. As such, the Court of Appeal’s decision may resonate farther than it should given the contours of Petitioner’s case.

¹ The undersigned Chair of the CACJ *Amicus Curiae* Committee certifies by his signature as an officer of this Court that no compensation has been paid by any of the parties to this litigation, or by any interested party, other than by CACJ and/or by the undersigned, for any time spent in the research or production of this brief, or for any costs associated with it.

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CACJ joins Petitioner in urging that the Court grant review not only for the reasons urged on the Court by Petitioner, but also to make it clear that the Court of Appeal's casual recognition that there was no evidence related to the availability of a telephonic or electronic warrant deserved greater consideration, in this context, than the mere footnote that it received in the Court of Appeal's analysis. The Court of Appeal's casual reference to a process known to have existed in California at the time this case arose is of concern given the potentially wide-ranging implications of a published decision addressing the statewide issue of driving while under the influence cases.

This Court should grant review so as to address an evidently incomplete analysis of the exigent circumstances issues as they should have been considered in this case.

ARGUMENT AND AUTHORITIES

The opinion of the Court of Appeal in this matter (232 Cal.App.4th 1096 – set forth here for the convenience of the Court) remands this case for re-sentencing while leaving unresolved, and only casually discussed, a factual question that arose at oral argument. This important matter was the availability of a telephonic or 'electronic' search warrant as permitted by Penal Code section 1526(b)(2), about which the Court of Appeal states, "...no evidence was adduced at the hearing..." *Id.*, at 1105-06, fn.5.

As Petitioner has argued, this is a case in which the central Fourth Amendment question is whether the specific facts at issue support a finding of exigency sufficient to avoid the need for a warrant permitting blood to be drawn from Petitioner. As the Supreme Court pointed out in *Missouri v. McNeely*, *supra*, 133 S.Ct. 1552, there are limited circumstances in which the law permits the seizure of blood from a suspect in a drunk driving case without a warrant. *Id.*, at 1559-60. Other than legally recognized exceptions, even when there was a potential emergency, the court must make a 'fact specific' inquiry to find if the

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claim of exigency is supported. *Id.*, at 1559-60, relying in part on *Ohio v. Robinette* (1996) 519 U.S. 33, 39.

In *McNeely*, the Supreme Court reviewed its well-known decision from *Schmerber v. California* (1966) 384 U.S. 757, a case in which the Court had found that because time had to be taken "...to bring the accused to a hospital and to investigate the scene of the accident, there was no time to seek out a magistrate and secure a warrant." *Id.*, at 770-71. *McNeely*, however, reiterated that: "[i]n those drunk driving investigations where police officers can reasonably obtain a warrant before a blood sample can be drawn without significantly undermining the efficacy of the search, the Fourth Amendment mandates that they do so. [citation omitted.]" *Id.*, at 1561-62. Further, the *McNeely* court also noted that fashioning some 'per se rule' allowing warrantless searches that allow blood draws in drunk driving cases failed "to account for advances in the 47 years since *Schmerber* was decided that allow for the more expeditious processing of warrant applications, particularly in contexts like drunk-driving investigations where the evidence offered to establish probable cause is simple." *Id.*, at 1562-63. In making this observation, the Court reflected on the advent of technologies that allow departures from burdensome warrant procedures and 'streamline the warrant process.' In doing so, the Court footnoted a series of statutes including California Penal Code §1526(b). *Id.*, at 1562-63; fn. 4. Clearly, the Supreme Court was underscoring that the availability of telephonic or electronic warrants was a factor in the determination of whether exigent circumstances were sufficient for police to bypass the warrant requirement.

Regrettably, the *People v. Toure*, 232 Cal.App.4th 1026, Court of Appeal chose to avoid the implications of the existence of the 'streamlined' methods that allow warrants to be obtained well past the time of traditional closing of the branch courts. While the Court of Appeal went so far as to take judicial notice that the closing of branch courts in San Bernardino County would impact the time required to obtain a warrant, nonetheless, it puzzlingly did not address the important *McNeely*-framed issue of the availability of alternatives to the traditional warrant process as a fact that needed to be addressed. The Court of Appeal's

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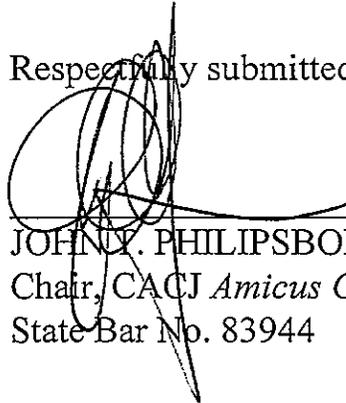
casual reference that ‘no evidence was adduced at the hearing’ does not address the availability of telephonic, telefaxed, or e-signature warrants under Penal Code Section 1526, or the failure by the trial court to address the matter.

Given that the United States Supreme Court has specifically made reference to the availability of expedited warrant application and issuance processes, including California’s telephonic, electronic, and telefaxed warrants permitted under California Penal Code §1526(b), CACJ respectfully submits that review of this matter is appropriate to consider whether the Court of Appeal conducted a legally sufficient review of the existence of exigent circumstances to satisfy the constitutional analysis set forth by the United States Supreme Court in *Missouri v. McNeely*.

CONCLUSION

For all of the reasons stated here, CACJ respectfully urges this Court to find that review should be granted to address the issues framed by Petitioner and framed by CACJ here.

Respectfully submitted,



JOHNNY. PHILIPSBORN
Chair, CACJ *Amicus Curiae* Committee
State Bar No. 83944

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PROOF OF SERVICE

I, Melissa Stern, declare:

That I am over the age of 18, employed in the County of San Francisco, California, and not a party to the within action; my business address is 507 Polk Street, Suite 350, San Francisco, California 94102.

On today's date, I served the within documents entitled:

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CRIMINAL JUSTICE IN SUPPORT OF PETITION FOR
REVIEW FILED BY MADOU TOURE (CALIFORNIA RULES
OF COURT, RULE 8.500(g))**

- (X) By placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at San Francisco, CA, addressed as set forth below;
- () By electronically transmitting a true copy thereof;

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**Counsel for Plaintiff and Respondent
The People**

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Madou Toure**

Court of Appeal
Fourth Appellate District, Division 2
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Riverside, CA 92501

Riverside County Superior Court
4100 Main Street
Riverside, CA 92501

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 10th day of February, 2015, at San Francisco, California.

Signed: _____

Melissa Stern