IN THE SUPREME COURT OF FLORIDA

CASE NO. 60,592

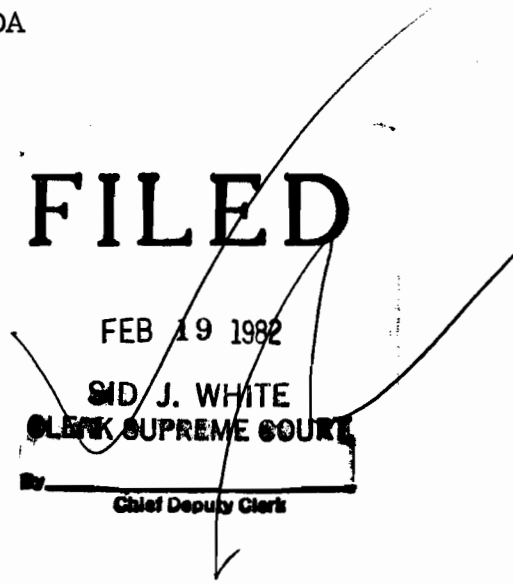
ALAN MAX JACOBSON,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.



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ON PETITION FOR DISCRETIONARY REVIEW

* *

BRIEF OF RESPONDENT ON MERITS

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TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

TABLE OF CITATIONS
CONTINUED

OTHER AUTHORITIES

INTRODUCTION

This is a petition for discretionary review on the ground of conflict between the decision sought to be reviewed, State v. Jacobson, 398 So.2d 857 (Fla. 3d DCA 1981) and two decisions of other District Courts of Appeal, Vollmer v. State, 339 So.2d 1074 (Fla. 2d DCA 1976) and Isham v. State, 369 So.2d 103 (Fla. 4th DCA 1979). The petitioner is the defendant in the trial court and the appellee in the District Court of Appeal. The respondent, the State of Florida, is the prosecution in the trial court and appellant in the District Court of Appeal. In this brief, the parties will be referred to by their proper names or as they appear before this Court.

The symbol "R" will be used to designate the record on appeal and the symbol "T" will refer to the separately bound transcript of testimony. All emphasis is supplied unless otherwise indicated.

STATEMENT OF THE CASE AND FACTS

On October 11, 1979, the petitioner was charged by Information with one count of Trafficking In Cocaine and one count of Possession With Intent To Sell Controlled Substance. (R. 3-4 A).

Petitioner filed a motion to suppress and memorandum of law, alleging that the cocaine which he was charged with having possessed was the product of an illegal search and seizure. (R. 9-9A, 33-48). A hearing was held on this motion on January 4th and January 9, 1980. (R. 51-57; T. 1-80).

At the hearing on the motion to suppress testimony was given by Detectives William Johnson and William Pearson. Pearson and Johnson stated that they were employed by the Dade County Public Safety Department, and that they were assigned to the Miami International Airport Narcotics Detail. (T. 4-5, 41). The detectives testified that they had received extensive training in the field of narcotics and had a great deal of experience investigating narcotics traffic at the Miami Airport. (T. 5-8, 41-42).

The officers testified that at approximately 12:45 p.m. on July 31, 1979, they were stationed near the National Airlines Ticket Counter when they observed Jacobson, accompanied by a male companion (Baker), approach the counter and ask if they were in time to make National's Los Angeles flight. (T. 10, 12, 4344). Baker and Jacobson carried ticket folders bearing the name Western Airline. (T. 11, 45). The airline agent advised them that National's flight for Los Angeles had just departed. (T. 12, 44). The detectives

noted that the men were traveling to a known "narcotics source" city. (T. 37, 47).

The officers noticed that each man carried a single tote bag, certainly a small amount of luggage for one traveling as far as California. (T. 13, 38, 46). Pearson knew that the airlines permitted passengers to check their luggage at the airport entrance, but only if they could produce an airline ticket. Based on his knowledge of airline procedure, Pearson concluded that since each man had Western airline tickets, it was not likely that they had taken advantage of National's curb service. (T. 46).

Other observations made by the officers which appeared to be indicative of drug trafficking included: unusual nervousness, arriving late at the airport, and belonging to an age group consistent with that observed by the officers as people who are normally involved in drug trafficking. (T. 12, 13, 47).

After the two men left the ticket counter, Johnson approached Baker (T. 14) and Pearson approached Jacobson.(T. 49). Pearson identified himself as a police officer and asked Jacobson if he had time to talk. (T. 49). Petitioner replied "yes" and stopped. (T. 49). Pearson then asked Jacobson if he had any objections to showing him a copy of

his airline ticket. Petitioner replied "no" and produced a Western airline ticket; it was one way from Miami to Los Angeles. (T. 49). Pearson returned the ticket and asked Jacobson if he would mind showing him some identification. Jacobson replied "no" and produced a Florida driver's license. (T. 51). Pearson was courteous and did not threaten the petitioner. There was also no physical contact with Jacobson up to this point. (T. 63).

During his conversation Pearson asked Jacobson if he was from Florida and Jacobson responded in the affirmative. Shortly thereafter, Detective Johnson questioned the petitioner and asked him if he was from Los Angeles. Jacobson, replied that he was, contrary to what he had told Pearson earlier. (T. 51).

Pearson then asked Jacobson if he could have permission to search his tote bag. (T. 53). He also advised petitioner that he had the right to withhold such consent. (T. 53). Jacobson responded, "go ahead and search my fucking bag." (T. 54). The officer asked Jacobson if he would like to move to a less crowded place. (T. 54). Jacobson replied "okay", picked up his tote bag and moved approximately ten to fifteen feet out of the main-stream of traffic. (T. 55, 56). He put the bag down on the floor and unzipped it. (T. 56). Pearson and Jacobson knelt on the floor as Pearson began going through the piece of luggage. (T. 56).

A search of the bag produced no contraband. However, when Pearson looked up at the petitioner, Jacobson had "the look of sheer fright" on his face. He followed petitioner's gaze and saw Detective Johnson putting handcuffs on Mr. Baker. (T. 56). Immediately, Jacobson bolted past the officer and ran through the terminal into the hotel and outside into the parking lot where he attempted to climb a wall. Pearson, by this time, had caught up with the petitioner. He reached out, took hold of Jacobson's belt and pulled him to the ground ordering him to "Hold it." Jacobson tried to break away but was subdued by two uniformed policemen who had arrived at the scene. (T. 57). Jacobson was placed under arrest and taken back inside the terminal. (T. 58).

Pearson testified at the hearing that in his years of experience at the airport, at least 99% of the subjects who have run from a police officer were later found to be in possession of some sort of controlled substance. (T. 59). He added that his suspicions about Jacobson were confirmed when the defendant attempted to flee. (T. 59, 61-62).

Once inside the terminal Pearson conducted a second search of Jacobson's tote bag but found nothing. (T. 59). Johnson conducted a pat down search of Jacobson and discovered two bags of white crystaline powder, later determined to be cocaine, attached to petitioner's legs. (T. 60).

After hearing argument of counsel (T. 78-79, R. 54), the trial court granted the motion to suppress (as to both defendants), finding that the initial stop was illegal and that, based upon the totality of the circumstances, there was no voluntary consent. (R. 53-56). In the Court's written order, rendered January 17, 1980, the trial judge found:

> 1. The observations by the police officers giving rise to the initial stop are not sufficient to constitute an articulable suspicion that the Defendants had committed, were committing, or were about to commit a crime.
>
> 2. After considering the totality of the circumstances as required by Taylor v. State, 355 So.2d 180 (1978), it most certainly does not appear that there was any voluntary consent to search which would attenuate the initial illegality.
>
> 3. The Defendants were "seized" without probable cause for the purpose of finding some evidence of a crime, thus all of which followed the illegal seizure and search is tainted. Wong Sun v. United States, 371 U.S. 471 (1963).
>
> (R. 49-50)

On February 1, 1980 the State filed its notice of appeal as to defendant Jacobson only. (R. 60). On April 28, 1981 the Third District Court of Appeal reversed the trial court's decision, one Judge dissenting. State v. Jacobson, 398 So.2d 857 (Fla. 3d DCA 1981).

Agreeing that the initial stop was illegal, the District Court of Appeal found sufficient attenuation to dissipate the taint of the initial illegality. State v. Jacobson, supra, at 858, citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963) and Nordone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939). In an opinion authored by Judge Thomas C. Barkdull, Jr., the District Court held "[t]he defendant's attempt to flee created a clear break in the causal chain of events, thereby rendering as immaterial the temporal proximity of the initial illegality to the subsequent seizure." Id. at 859. Judge Nesbitt dissented concluding that "[t]he drug courier profile features and the defendant's flight were too ambiguous to warrant a man of reasonable caution to believe that an offense had occurred or was being committed by the defendant." Id. at 859.

Rehearing in this matter was denied on June 3, 1981 and the defendant petitioned this court for discretionary review, citing conflict with Vollmer v. State, 339 So.2d 1074 (Fla. 2d DCA 1976) and Isham v. State, 369 So.2d 103 (Fla. 4th DCA 1979) on May 15, 1981. This court accepted jurisdiction by order dated January 13, 1982. This brief on the merits is filed pursuant to said order.

POINT ON APPEAL

Respondent respectfully rephrases petitioner's Point on Appeal as follows:

> WHETHER THE THIRD DISTRICT COURT OF APPEAL ERRED IN HOLDING THAT PETITIONER'S FLIGHT, NOT PROMPTED BY POLICE OFFICER'S CONDUCT DURING INVESTIGATORY STOP, WAS SUFFICIENT INTERVENING ACT TO CREATE A CLEAR BREAK IN THE CAUSAL CHAIN OF EVENTS, THEREBY PURGING THE TAINT OF PRIOR ILLEGAL STOP?

ARGUMENT

THE THIRD DISTRICT COURT OF APPEAL DID NOT ERR IN HOLDING THAT PETITIONER'S FLIGHT, NOT PROMPTED BY POLICE OFFICER'S CONDUCT DURING INVESTIGATORY STOP, WAS SUFFICIENT INTERVENING ACT TO CREATE A CLEAR BREAK IN THE CAUSUAL CHAIN OF EVENTS, THEREBY PURGING THE TAINT OF PRIOR ILLEGAL STOP.

a) Absence of conflict between Isham v. State, 369 So.2d 103 (4th DCA 1979), Vollmer v. State, 337 So.2d 1024 (2d DCA 1976) and the present case.

Agreeing that the initial stop of petitioner was illegal, the Third District Court of Appeal found that Jacobson's attempted flight, unprompted by the illegal stop, created a clear break in the causal chain of events sufficient to purge the taint of the primary illegality. State v. Jacobson, 398 So.2d 857 (Fla. 3d DCA 1981), citing Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); Nardone v. United States, 308 U.S. 338, 60 S.Ct. 266, 84 L.Ed. 307 (1939).

The decisional point of law dispositive in Isham v. State, 369 So.2d 103 (Fla. 4th DCA 1979), cited by petitioner as basis for conflict, did not in any respect involve applicability of the Wong Sun fruit of the poisonous tree doctrine. Indeed, the court upheld petitioner's stop but invalidated the frisk because the officer had been given no information that the defendant was armed. See State v. Webb, 398 So.2d 820 (Fla.

1981). The Isham court did not consider or decide the question presented by the facts of the present case. That is, whether there was sufficient attenuation to purge the taint of a prior illegal stop.

In Vollmer v. State, 337 So.2d 1024 (Fla. 2d DCA 1976), also cited as ground for conflict, the court made the following findings of law and fact:

> The identification furnished the officer by appellant was the product of the stop. Since the initial stop of the appellant by the officer was illegal, the fact that appellant produced an identification contrary to the name he had given and then fled, does not validate the policeman's actions. The appellant here was not required to explain his presence or conduct. cf., State v. Ecker, Fla. 1975, 311 So.2d 104.
>
> 377 So.2d at 1026.

The apparent difficulty with these findings is that they rest upon the "but for" test specifically rejected by the Supreme Court in Wong Sun.[1] The law is well settled that a "but for" link between illegal police conduct and the controverted evidence is not in itself sufficient to dictate

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[1] "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

suppression. The Supreme Court, in Wong Sun, made clear that the inquiry should not end with the finding of a causal link between the illegal conduct and the acquisition of the evidence. Rather, the court should determine whether the police obtained the evidence "by exploitation of the illegality." Wong Sun v. United States, supra, 371 U.S. at 488. The Vollmer court did not decide the question of "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Id. The court in Vollmer did not decide whether there were intervening acts, independent of the illegality, which contributed to the discovery of the challenged evidence. Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975). In petitioner's case, the District Court specifically found that Jacobson's flight, unprompted by the illegal stop, created a clear break in the causal chain of events sufficient to purge the taint of the primary illegality. State v. Jacobson, supra at 859.

If two cases are distinguishable in controlling factual elements or if the points of law settled by the two cases are not the same, then no conflict can arise. Kyle v. Kyle, 139 So.2d 885 (Fla. 1962); Nielsen v. City of Sarasota, 117 So.2d 731 (Fla. 1960); Florida Power & Light Co. v. Bell, 113 So.2d

697 (Fla. 1959). Applying the above standard for the determination of jurisdiction, the absence of conflict between Vollmer, Isham and the present case becomes apparent. The three cases involve different questions of law. Assuming, the questions of law had been the same, the controlling facts in the instant case dictate, or at least permit a different result. The rationale of the three cases are therefore compatible and no conflict exists.

> b) Flight not prompted by police officer's conduct during investigatory stop was sufficient intervening act to create a clear break in the causal chain of events, thereby purging taint of prior illegal stop.

We next consider the District Court's finding that petitioner's flight, not prompted by the illegal stop but by observing Officer Johnson place handcuffs on his (Jacobson's) companion, created a clear break in the causal chain of events thereby purging the taint of the primary illegality. State v. Jacobson, supra at 859. The critical inquiry is,

> whether, granting establishment of the primary illegality, the evidence to which instant objection is made has come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

Wong v. United States, supra, 371 U.S. at 488. To aid this

inquiry, several guidelines have emerged which help us in determining when the connection between the primary illegality and the discovery of the evidence has become so attenuated as to dissipate the taint and ensure the admissibility of the evidence. Among the factors to be considered are:

> (1) temporal proximity of the primary illegality and the alleged fruit,
>
> (2) the purposefulness and offensiveness of the primary illegality,
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> (3) the voluntariness of any confession,
>
> (4) the causal connection, if any, between the primary illegality and the alleged fruit, and
>
> (5) intervening events between the initial illegality and the discovery of the evidence.

Brown v. Illinois, 422 U.S. 592, 603-604, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975); United States v. Wilson, 569 F.2d 392 (5th Cir. 1978); United States v. Owen, 492 F.2d 1100 (5th Cir.), cert. denied, 419 U.S. 965, 95 S.Ct. 227, 42 L.Ed.2d 180 (1974); Phelper v. Decker, 401 F.2d 232, 237-38 (5th Cir. 1968); See also State v. Maier, 378 So.2d 1288 (Fla. 3d DCA 1980).

The absence or presence of one of the above factors is not per se indicative of attenuation. The question of whether

attenuation has occurred must be decided on the facts of each case. Brown v. Illinois, supra, 422 U.S. at 603. Applying the criteria announced in Brown, we think the District Court of Appeal correctly determined that the cocaine packets were not subject to suppression.

Officers Johnson and Pearson of the Dade County Public Safety Department Airport Narcotics Detail, while in plain clothes observed petitioner Jacobson and his companion Baker at the National Airlines Ticket Counter. Officer Johnson approached Baker and Officer Pearson approached Jacobson. Officer Pearson identified himself to Jacobson, who agreed to talk with the officer, agreed to show the officer his airline ticket and his driver's license. Jacobson also agreed to allow the officer to search his tote bag which Officer Pearson did but found nothing. After searching the bag, Pearson looked up and saw "the look of sheer fright" on Jacobson's face. He followed Jacobson's gaze and saw that Officer Johnson had placed handcuffs on Baker, Jacobson's companion. Immediately, Jacobson bolted past the officer and ran through the terminal into the parking lot where he attempted to climb a wall. Pearson, by this time, had caught up with the petitioner. He reached out, took hold of Jacobson's belt and pulled him to the ground ordering him to "Hold it." Jacobson tried to break away but was subdued by two uniformed officers who had arrived to give Pearson assistance. (T. 57).

Petitioner was placed under arrest and taken back inside the terminal. (T. 58). At the terminal, nothing further was found in the tote bag, but a pat-down of Jacobson revealed clear plastic bags, later determined to be cocaine, attached to his legs.

In the present case, three factors are of primary importance in determining whether the cocaine packets were tainted by the illegal stop and were therefore inadmissible. First, how directly did the stop lead to the discovery of the challenged evidence. In other words, was there a causal connection between the primary illegality and the alleged fruit? Second, where there intervening circumstances independent of the stop which contributed to the discovery of the evidence. Finally, did the illegal police conduct have a quality of purposefulness and offensive and to what extent would suppression of the evidence further the exclusionary rule's purpose of deterring police misconduct. Brown v. Illinois, supra, 422 U.S. at 603-04; United States v. Jones, 608 F.2d 386 (9th Cir. 1979); United States v. Wilson, 569 F.2d 392 (5th Cir. 1978); United States v. Owen, 492 F.2d 1100 (5th Cir.), cert.denied, 419 U.S. 965, 95 S.Ct. 227, 42 L.Ed.2d 180 (1974); Bretti v. Wainwright, 439 F.2d 1042, cert. denied, 404 U.S. 943, 92 S.Ct. 293, 30 L.Ed.2d 257 (1971); Phelper v. Decker, 401 F.2d 232 (5th Cir. 1968).

In the present case, there is lacking any causal connection between the initial stop and the evidence sought to be used against petitioner. No evidence was produced as a result of the initial stop and subsequent (consent) search of petitioner's baggage. (T. 53-57). The only evidence seized was that obtained as a result of the second search,[2] a search which was made after petitioner's attempted flight. (T. 56-60). The petitioner's flight was not prompted by the illegal stop, but by observing Officer Johnson place handcuffs on his companion, Baker. On these facts, petitioner's flight created a clear break in the causal chain of events, thereby purging the taint of the primary illegality.

Just what qualifies as an "intervening circumstance" is less than clear, for in Brown the Court concluded that "there was no intervening event of significance whatsoever." 422 U.S. at 604. It would appear, as Justice Powell asserted in his Brown concurring opinion, that the "clearest indication of attenuation should be required where the official conduct was flagrantly abusive of Fourth Amendment rights." 422 U.S. at 610. On the other hand, the absence of "purpose

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[2] The mere existence of a prior fruitless unlawful search does not taint a subsequent lawful one. See United States v. Haddad, 588 F.2d 968, 975 n. 6 (9th Cir. 1977). The dispositive issue in such a case is not the fact of a prior illegal search but whether the evidence sought to be introduced was obtained by exploitation of the prior illegality. Wong Sun v. United States, 371 U.S. 471, 499, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

and flagrancy" does not alone dissipate the taint, but rather requires less by way of intervening circumstances. 422 U.S. at 611-12. Illustrative of this point is Fletcher v. Wainwright, 399 F.2d 62 (5th Cir. 1968). Police, without probable cause, announced their presence outside a motel room and then proceeded to kick in the door. By the time they gained entry the occupants had escaped through the window, but they were apprehended shortly thereafter. Stolen jewelry which had been thrown out of the window when the officers began kicking down the door was later found in a search of the motel grounds. The government claimed that the discovery of the jewelry was lawful because the defendants had no expectation of privacy in the motel grounds. The court disagreed saying the throwing away of the jewelry was the direct consequence of the illegal entry, thereby rendering a strong nexus between the primary illegality and the challenged evidence.

A similar conclusion was reached by the court in United States v. Coleman, 450 F.Supp. 433 (E. D.Mich. 1978), cited by petitioner. The defendant and his companion was stopped outside the terminal by a DEA agent, Markonni. Markonni identified himself and asked the defendant to produce identification. Markonni then asked the defendant to accompany him to a more private place, intending to pursue the investigation in a room inside the terminal. Defendant responded

saying "Okay" and the two headed toward the terminal. After a short while, defendant turned abruptly and bolted off in the opposite direction. Markonni called upon him to stop and threatened to fire, whereupon defendant threw a white envelope over a guard rail, halted and placed his hands against a near-by wall. Markonni formally arrested defendant and retrieved the envelope found to contain cocaine. Id. at 436. The government argued that defendant broke the nexus between the illegal stop and search when he threw the envelope containing the cocaine away and, thus, abandoned it. Id. The court rejected this argument, saying:

> . . .the facts of this case present a strong nexus between Markonni's conduct and defendant's throwing the envelope away. The suggestion that the nexus has been broken does not in this case, survive under the penetrating light of clear statement.
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> 450 F.Supp. at 437.

Unlike Fletcher and Coleman, the facts of this case do not present a strong nexus between the illegal stop and petitioner's flight. Jacobson's flight was not the result of Officer Pearson's conduct, but by observing another officer, Johnson, place handcuffs on his companion Baker. Because petitioner's flight was not prompted by Pearson's conduct[3] the flight was an intervening act of free will

[3]Since Fourth Amendment rights are personal and cannot be asserted vicariously, Jacobson cannot claim that the

sufficient to break the causal chain of events and dissipate the taint of the prior illegal stop. cf., United States v. Pimental, 645 F.2d 85 (1st Cir. 1981).

Moreover, Jacobson's flight justified the officer's decision to take the action of chasing him for the purpose of further investigation. Flight invites pursuit and colors conduct that might otherwise appear innocent. United States v. Pope, 561 F.2d 663, 668 (6th Cir. 1977); see e.g., United States v. Bowles, 625 F.2d 526 (5th Cir. 1981); United States v. Agostino, 608 F.2d 1035 (5th Cir. 1979); United States v. Wright, 588 F.2d 189 (5th Cir. 1979); United States v. Vasquez, 534 F.2d 1142 (5th Cir.), cert. denied, 429 U.S. 979, 97 S.Ct. 489, 50 L.Ed.2d 587 (1976). Although flight alone will not provide probable cause for arrest, in appropriate circumstances it may furnish sufficient ground for a limited investigatory stop. United States v. Bowles, supra at 535; United States v. Pope, supra at 669; United States v. Vasquez, supra at 1145.

Petitioner's conduct after he fled gave the officer probable cause to make an arrest. When Jacobson struggled with the officer and tried to break away (T. 57), Pearson had probable cause to arrest petitioner for resisting an officer(with violence) in the lawful execution of his duty.

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unlawful stop and subsequent search of Baker violated his (Jacobson's) Fourth Amendment rights. Rakas v. Illinois, 439 U.S. 128, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

Section 843.01, Fla.Stat.[4]; Section 21-26 of the Code of Metropolitan Dade County.[5] Cf., Kaiser v. State, 328 So. 2d 570 (Fla. 3d DCA 1976)(resisting lawful investigatory stop gave officer probable cause to arrest defendant for resisting officer in lawful execution of his legal duty); United States v. Pope, supra at 669 (appellant's conduct of swinging briefcase at pursuing agent gave agent probable cause to arrest him for assaulting a federal officer in the performance of his duty).

Finally, applying the exclusionary rule under the facts of this case would have little value in deterring police misconduct. It is crucial in this regard that the primary illegality (i.e., the stop) was not a flagrant and abusive

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[4] 843.01 Resisting officer with violence to his person.

"Whoever knowingly and willfully resists, obstructs or opposes any sheriff, deputy sheriff, officer of the Florida highway patrol, municipal police officer, beverage enforcement agent, officer of the game and fresh water fish commission, officer of the department of natural resources, any member of the Florida parole and probation commission or any administrative aide or supervisor employed by said commission, any county probation officer or any personnel or representative of the department of law enforcement or other person legally authorized to execute process, in the execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, shall be guilty of a felony of the third degree. . .

[5] (A)(1) It shall be unlawful for any person to knowingly resist or obstruct the performance by one, who the person knows or has reason to believe is a police officer. . .of any authorized act within such officer's capacity."

act[6] which prompted the petitioner's flight. Compare, Fletcher v. Wainwright, supra. Nor was the evidence obtained by purposefully exploiting the primary illegality. Compare, United States v. Tookes, 633 F.2d 712 (5th Cir. 1980).

The standard "so attenuated as to dissipate the taint," Nardone v. United States, supra, 308 U.S. at 341, can be an extremely relevant criterion when viewed in light of the purpose underlying the exclusionary rule. Exclusion is not intended to redress a wrong to the defendant by releasing him but is designed only to curb undesirable police conduct. Amsterdam, "Search and Seizure and Section 2255: A Comment," 112 U.Pa.L.Rev. 378, 388-89 (1964). The hope is that removal of the incentive to engage in such practices will cause the practices themselves to disappear. See Maguire, Evidence of

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[6] We note that where, as here, the Fourth Amendment seizure is less intrusive than traditional arrest, determination of the reasonableness of that seizure" involves a weighing of the gravity of the public concerns served by the seizure, the degree to which the seizure advances the public interest, and the severity of the interference with individual liberty." Brown v. Texas, 443 U.S. 47, 50-51, 99 S.Ct. 2637, ___ L.Ed.2d ___ (1979); See United States v. Mendenhall, ___ U.S. ___, ___, 100 S.Ct. 1880, ___ L.Ed.2d ___ (1980)(Powell, J., concurring in part and concurring in judgment); Delaware v. Prouse, 440 U.S. 648, 654, 99 S.Ct. 1391, 1397, 59 L.Ed.2d 660 (1979). As Justice Powell noted in Mendenhall, the public interest in the apprehension of drug traffickers is "compelling", and the intrusion in the present case, a stop of a person for purposes of identification is indeed "quite modest.". ___ U.S. at ___, 100 S.Ct. at 1880-82.

Guilt, 215 (1959), McCormick, Evidence 291 (1954); Maguire, "How to Unpoison the Fruit-The Fourth Amendment and the Exclusionary Rule," 55 J. Crim.L.C. & P.S. 307 (1964). Deterrance is the object of exclusion and only such exclusion as is likely to produce deterrance is justified. Consequently, where the chain between the challenged evidence and the primary illegality is long or the linkage can be shown only be "sophisticated argument", Nardone v. United States, supra, 308 U.S. at 341, exclusion would serve no deterrant effect. In such a case, it is highly unlikely that the police officers foresaw the challenged evidence as a probable product of their conduct, therefore, it could not have been the motivating force behind it. The threat of exclusion could not possibly operate as a deterrent under such circumstances. Absent any purposeful exploitation of the primary illegality, exclusion carries with it no benefit to society and, therefore, would be inappropriately applied. Brown v. Illinois, supra, 311 U.S. at 605; Wong Sun v. United States, supra, 371 U.S. at 499.

Brown v. Illinois, signaled the emerging significance of the purposefulness of the official misconduct with respect to determining how far the taint has spread. As the Court stated "particularly, the purposes and flagrancy of the official misconduct [is] relevant." 422 U.S. at 604. Where the conduct is particularly offensive the deterrance ought

to be greater and, therefore, the scope of the exclusion broader. Comment, "Fruit of the Poisonous Tree--A Plea for Relevant Criteria," 115 U.Pa., L.Rev. 1136, 1148-51 (1967). An overview of the following cases is illustrative of this point.

The Supreme Court in Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914) took great pains to outline the "calculated" police activity. The Silverthrone Court did likewise and went further to note that "[t]he government 'planned' or at all events ratified the whole performance." Silverthrone Lumber Co. v. United States, 251 U.S. 385, 391, 40 S.Ct. 182, 64 L.Ed. 319 (1920). Later, in Brown v. Illinois, supra, 422 U.S. at 605, the Court made these observations of the police officer's conduct:

> The illegality here, moreover, had a quality of purposefulness. The impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives. . . The arrest both in design and in execution, was investigatory. The detectives embarked upon this expedition for evidence in the hope that something might turn up. The manner in which [the defendant's] arrest was effected gives the appearance of having been calculated to cause surprise, fright and confusion.

The flagrancy of the police conduct characterized by Weeks, Silverthorne and Brown is noted as well in United

States v. Edmonds, 432 F.2d 577 (2d Cir. 1970). In Edmonds more than fifty FBI agents swept a neighborhood in an effort to locate individuals who had assaulted and interfered with other agents attempting to execute an arrest warrant. The officers knew only that the suspects were "young and black", and were instructed to round up such persons on the charge of failure to have their selective service cards in their possession in the hope that the victims of the assault could identify their assailants. Five men were arrested on this pretext, four were identified and subsequently convicted. Id. at 579-81. In reversing those convictions the Court of Appeals observed:

> The arrest here violated the Fourth Amendment not because the law enforcement officers crossed the line; often a shadowy one, that separates probable cause from its lack, but because they deliberately seized the appellants on a mere pretext for the purpose of displaying them to the agents who had been present at the scene.
>
> Id. at 583.

In Edmonds the illegal arrest produced the precise results for which they were designed. The police, not knowing the perpetrators' identities, made arrests in deliberate violation of the Fourth Amendment for the express purpose of securing identifications that would not otherwise have been available to them. Id. at 584.

The intrusion in the present case, a stop of a person for purposes of identification is indeed "quite modest." See United States v. Mendenhall, ___U.S.___, 100 S.Ct. 1870, 1882, 64 L.Ed.2d 497 (1980). It is also highly unlikely that Officer Pearson foresaw that his stopping Jacobson would produce the attempted flight which lead to the discovery of the challenged evidence. Since the chain between the challenged evidence and the primary illegality has been broken, or at the very least, is demonstrable only through "sophisticated argument," exclusion would not serve as a deterrant and application of the doctrine would thus be inappropriate.

Exploitation of the illegal conduct is a significant factor in assessing the flagrancy of police conduct. United States v. Tookes, 633 F.2d 712 (5th Cir. 1980), cited by petitioner, is an interesting fact pattern which illustrates this point. In Tookes, plainclothes officers attempted to stop the defendant as he stepped out of his truck. The defendant, seeing "two men in T-shirts and other "casual" attire," gave a wild frightened look and started to run. One officer gave chase with pistol in hand. The defendant was apprehended when he slipped and fell. The two officers searched defendant thoroughly, emptying his pockets, examining his wallet and keys, and even removing his shoes and sockets. The defendant was placed in the back of the officers' vehicle

and they returned to his truck where the officer found a pistol on the front seat. The government argued that even if the arrest was invalid it did not taint the discovery of the gun on the front seat of the truck. The court rejected this argument saying the discovery of the gun was not sufficiently distinguishable from the illegal arrest to be purged of the primary taint. The court's rationale is set forth below:

> . . .The connection between the arrest and the discovery of the gun was not so attenuated as to dissipate the taint of the illegal arrest. The discovery of the gun occurred only a few minutes after the illegal arrest and only 20-25 yards away. The only intervening circumstances were that defendant was placed in the back seat of the car and driven (perhaps around the block) by the other agent while Officer Sproat walked directly back to the pickup truck looking for evidence. In considering the totality of the circumstances under which the arrest was made, "the arrest. . .amounted to a gross violation of legal processes," and was not merely "a matter of failure to comply with technical requirements." Phelper v. Decker, 401 F.2d at 237-38. Thus, the taint cannot easily be removed. While the gun was in plain view and conceivably could have been discovered even without the arrest, the temporal and spatial proximity of the arrest and the finding of the gun make it clear that the two are interrelated.
>
> 633 F.2d at 716.

Admittedly, the record in this case does show a close temporal proximity between the primary illegality and the alleged fruit. It does not necessarily follow, however, that the cocaine packets be suppressed as fruit of the poisonous tree. Unlike Tookes, there is present in this case only a de minimis intrusion into the defendant's freedom of liberity and an intervening act (i.e. flight) which creates a clear break in the causal chain of events, thereby rendering as immaterial the temporal proximity of the initial illegality to the alleged fruit. The discovery of the cocaine was sufficiently distinguishable from the illegal stop to be purged of the primary taint. The District Court of Appeal correctly ruled that evidence of the drug was not subject to suppression as fruit-of-the poisonous tree.

> c) Circuit court's decision that defendant was "seized" has no support in the record. Defendant did not meet his required initial burden to demonstrate that the had either been seized or stopped or that by objective standards, the police interdicted his freedom of movement or passage.

The basic issue in this case is whether the initial action of Officer Pearson in stopping Jacobson and requesting him to produce his airline ticket and identification (T. 49-51) constituted a seizure within the meaning of the Fourth Amendment.

William Pearson, a plainclothes police officer, approached, the petitioner in the concourse of Miami International Airport and identified himself as a police officer. Pearson requested to see Jacobson's ticket and some identification, which he produced. (T. 49-51). Based on this testimony, the trial court concluded that Officer Pearson's encounter with Jacobson was a Fourth Amendment seizure.

In analyzing the admissibility of the narcotics obtained from petitioner, our first task is to characterize the initial encounter between Jacobson and Officer Pearson in order to determine the degree of protection, if any, afforded Jacobson by the proscription of the Fourth Amendment against "unreasonable" searches and seizures. At the hearing below, the State argued that the meeting between Pearson and Jacobson was a police-citizen contact (T. 79) wholly outside the scope of the Fourth Amendment protections.

In United States v. Mendenhall, 446 U.S. 544, 100 S.Ct. 1870, 64 L.Ed.2d 497 (1980), the Supreme Court considered a factual situation closely analoguous to those presented here. Two DEA agents on duty at the Detroit Airport observed Ms. Mendenhall, the last passenger to disembark from a plane that had just arrived from Los Angeles. Her behavior attracted the attention of the agents and they followed her. After a time, they approached her on the concourse and

identified themselves as federal agents. They requested to see her ticket and some identification, which she produced, and asked her a few questions. Thereafter, the agents accompanied Ms. Mendenhall to the airport DEA office and a subsequent body search revealed that she was carrying heroin. Id. at___U.S.____, 100 S.Ct. at 1872-75.

Justice Stewart, joined by Justice Rehnquist, proposed a test for determining whether a Fourth Amendment "seizure" has occurred during a police-citizen contact. "[A] person has been'seized' within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." Id. at____, 100 S.Ct. at 1877 (footnote omitted). Applying that test to the facts of the case, Justices Stewart and Rehnquist found no seizure.[7] "The respondent was not seized simply by reason of the fact that the agents approached her, asked her if she would show them her ticket and identification, and posed to her a few questions." Id. at_____, 100 S.Ct. at 1877.

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[7] Four justices determined that there was a seizure, and three did not reach the question. Mendenhall, therefore, does not provide clear guidance for the disposition of this question. However, the contact question may soon be resolved by the Supreme Court in the case of State v. Royer, #80-2146, on petition for writ of certiorari to the District Court of Appeal of Florida, Third District.

Examples of circumstances that might indicate a seizure would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen and the use of language or tone of voice indicating that compliance with the officer's request might be compelled. Id. at _____, 100 S.Ct. at 1877 (citations omitted).

The Fifth Circuit Court of Appeals had already enunciated the same test adopted by Justices Stewart and Rehnquist --i.e., whether under the totality of the circumstances a reasonable person would have thought he was not free to leave[8] --in United States v. Elmore, 595 F.2d 1036 (5th Cir. 1979), cert. den., 447 U.S. 910, 100 S.Ct. 2998, 64 L.Ed.2d 861 (1980). See also, United States v. Fry, 622 F.2d 1218 (5th Cir. 1980). The Mendenhall-Elmore test finds further support in recent decisions of the state appellate courts. See Cavalluzzi v. State, _____So.2d_____(Fla. 3d DCA 1982)(Case No. 80-679, opinion filed February 2, 1982); State v. Login, 394 So.2d 183 (Fla. 3d DCA 1981); State v. Grant, 392 So.2d 1362 (Fla. 4th DCA 1981).

"There is nothing in the Constitution which prevents a policeman from addressing questions to anyone in the streets."

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[8] The Elmore court derived this test from United States v. Wylie, 186 U.S. App. D.C. 231, 569 F.2d 62 (1977), cert. den. 435 U.S. 944, 98 S.Ct. 1527, 55 L.Ed.2d 542 (1978).

Terry v. Ohio, 392 U.S. 1, 34, 88 S.Ct. 1868, 1886, 20 L.Ed. 2d 889 (1969)(White, J., concurring). Although courts must be vigilant in the protection of constitutional rights, they must also recognize the present day problems of law enforcement, particularly in the narcotics field. "The courts should not create artifical barriers which hobble the efforts of law enforcement to stem the ever increasing tide of drug trafficking." State v. Grant, supra at 1365. As noted by Judge Hubbart in Login v. State, supra at 188:

> To label all police encounters with the public as seizures when accompanied by questioning, no matter how cordial, would tremendously impede the police in the effective performance of both their criminal investigation and community assistance functions as each such contact would require a showing of founded suspicion, an impossible standard to meet in most cases.

In view of the foregoing we think the contact made by Pearson with Jacobson was not a seizure or a stop which would require either probable cause or a well-founded suspicion. Pearson had the same right as any other citizen to approach Jacobson. He was not in uniform and displayed no weapon. (T. 9, 47, 48). He did not summon Jacobson to his presence but instead approached him and identified himself as a police officer. (T. 49). He requested but did not demand to see petitioner's airline ticket and identification.

(T. 49, 51). Pearson's description of the incident, uncontradicted by Jacobson,[9] is not patently incredible. Thus, the circuit court's decision has no support in the record when viewed in light of Mendenhall and its progeny. State v. Grant, supra, at 1365. The petitioner did not meet his required initial burden of showing that he had either been seized or stopped or that by objective standards, the police interdicted his freedom of movement or passage. Schlanger v. State, 397 So.2d 1028, 1029 (Fla. 3d DCA 1981). Thus, the circuit court's decision granting the motion to suppress was properly reversed.

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[9] Codefendant Baker testified at the hearing on the motion to suppress and related his experience with Officer Johnson. (T. 69-77).

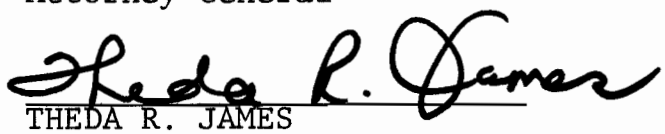
CONCLUSION

The decision of the District Court of Appeal, Third District, that petitioner seeks to have reviewed is not in direct conflict with the decisions of Vollmer v. State, 337 So.2d 1074 (Fla. 2d DCA 1976) and Isham v. State, 369 So.2d 103 (Fla. 4th DCA 1979).

Based on the foregoing argument and citation of authority, the State submits that this Court should decline to accept jurisdiction and deny the petition for review.

Respectfully submitted,

JIM SMITH
Attorney General



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing BRIEF OF RESPONDENT ON THE MERITS was furnished by mail to DANIEL W. LEVIN, Esq., 8801 S.W. 103rd Avenue, Miami, Florida 33176 and CHARLES H. SNOWDEN, Esq., 2000 So. Dixie Highway, Suite 201, Miami, Florida 33131, this 17th day of February, 1982.

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