IN THE SUPREME COURT OF THE

STATE OF FLORIDA

Case No. 65,022

JAMES WILLIAM ROCHE,)

Petitioner,)

-vs-)

STATE OF FLORIDA,)

Respondent.)

BRIEF ON THE MERITS

[Upon Certified Question from the District Court of Appeals of Florida, First District]

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PRELIMINARY STATEMENT

The Petitioner herein, JAMES WILLIAM ROCHE, shall be referred to as ROCHE.

The Respondent shall be denominated as the State, except that reference to its employees shall be by their proper name.

The Record before the Appeals Court, to be furnished this Court by 16 May 1984, is contained in five volumes; Volume 1 being the pleadings, Volumes 2, 3, and 4 being transcripts of the trial and other proceedings, while a fifth volume denominated "Supplemental Record on Appeal" is the transcript of certain Motions to Suppress and Dismiss.

Reference to the Record shall be by the letter "R" and the volume and page number where the same may be found. Reference to the "Supplemental Record" shall be by the letters "R.S." followed, again, by the appropriate page number.

The decisions of the Appellate Court are included by way of Appendix A. 1 and A. 2; the decision of the Federal Court holding the statute in question unconstitutional is attached as A. 3; and Petitioner's Points Two and Three on appeal are excerpted from their brief as A. 4.

STATEMENT OF THE CASE

On 8 July 1980, an Information was filed in the Circuit Court of Hamilton County which charged Petitioner and Robert Dandrea with Trafficking in Cannabis. Said trafficking was alleged by their possession of over one hundred but less than two thousand pounds of cannabis (R. Vol. I, pp. 1, 2).

The Information was founded upon evidence discovered in a van pursuant to a "Regulatory Inspection Search Warrant" issued upon the application of an agricultural Road Guard Inspection Officer (R. Vol. I, pp. 29-32).

The Petitioner made several Motions to Dismiss (R. Vol. I, pp. 8, 9, 11-13), as well as a Motion to Quash Search Warrant and Suppress Evidence (R. Vol. I, pp. 38-40), and a Motion to Suppress Evidence (R. Vol. I, pp. 41, 42) which, after hearing and argument (R.S., pp. 1-37), were denied. To the Petitioner's best knowledge, this was the first case to arise involving a Regulatory Search Warrant.

Motions to Suppress certain items discovered in a suitcase, which were denied prior to trial, were renewed in toto (R. Vol. I, pp. 59-60), with testimony at trial (R. Vol. II, pp. 21-27) at the time the State sought to introduce certain evidence, and the same were again denied.

Trial occurred on 17 November 1980, and the Court directed that a judgment of acquittal be entered on behalf of Dandrea (R. Vol. III, p. 25), but denied the same as to Peti-

tioner (R. Vol. III, p. 27). Thereafter, the jury empaneled to try the cause found the Petitioner guilty as charged (R. Vol. I, p. 61).

Motion for New Trial was made on 18 November 1980, and was, on 9 January 1981, denied (R. Vol. IV). Petitioner was then sentenced to three years imprisonment followed by two years probation, together with a fine of Twenty-five Thousand ($25,000.00) Dollars, said fine payable within thirty (30) days of release from prison. The failure to pay the same was recited to be a violation of probation (see: R. Vol. I, p. 64).

Petitioner then prosecuted an appeal to the First District Court of Appeals of Florida, which Court, on 8 September 1982, upheld the rulings of the trial court, including finding that Florida Statute 570.15(1)(b) [as amended 1981], which amendment deleted, inter alia, the necessity for "criminal probable cause" was constitutional [Roche v. State, Case No. ZZ-346, attached hereto]. The Petitioner then filed a lengthy Petition for Rehearing [also attached at A. 5] on 14 September 1982, and on 13 December 1982, Petitioner filed his "Notice of Additional Authority Upon Rehearing [Statute Declared Unconstitutional]", which is A. 3 hereto. Some fifteen (15) months later, 8 March 1984, the Appeals Court issued its Order adhering to its prior judgment but certifying the instant question to this Court [Roche v. State, A. 2].

Particularly troubling is the finding by the Court that, "the facts in the instant case go beyond those in the

Lake Butler decision in establishing probable cause", as the State well recognized it had no probable cause for the issuance of a search warrant [See: R.S., p. 23; R. Vol. II, pp. 24, 25].

The issue before this Court, inter alia, is the certified question:

> *"Does Section 570.15, Florida Statutes, violate the Fourth Amendment of the United States Constitution in that it allows administrative searches without a showing of probable cause and 'without an administrative plan containing specific neutral criteria?'"*

STATEMENT OF THE FACTS

On 23 June 1980, Hamilton County Deputy Sheriff Jesse Leonard Pease was on duty north of the I-75 agricultural station (R. Vol. II, pp. 2, 3). Pease stopped the Petitioner's vehicle, told ROCHE and passenger Dandrea that they had passed the agricultural station, and had them return to the same where Agricultural Inspector Clark was on duty (R. Vol. II, p. 4). At the station, ROCHE allowed Clark to enter the vehicle (R. Vol. II, p. 5). Clark discovered a compartment and asked to look inside that (R. Vol. II, pp. 5, 6). ROCHE denied permission (R. Vol. II, p. 7). Clark procured a regulatory search warrant to enter the same (R. Vol. II, p. 8), and the police then removed the pins from the rear doors and opened the compartment. Therein was discovered in excess of five hundred pounds of mari-

juana.

This particular vehicle did not emit any odor of marijuana due to the quality of the cargo area (R. Vol. II, p. 44; R.S., p. 23), nor was there any evidence thereof, or of any agricultural products. After the contraband wad discovered, the Petitioner and Dandrea were taken to the police station, along with the van (R. Vol. II, pp. 10, 11). The van was searched and a closed suitcase (or flight bag) belonging to Petitioner was seized (R. Vol. II, pp. 15, 16; R.S., pp. 20, 21). Without a warrant, the police (Pease) opened the suitcase, searched the same, and seized a calculator. In the calculator was a list of weights corresponding to the bale numbers and weights of the contraband discovered (See: R. Vol. II, pp. 15, 29; R.S., p. 20, 21). This was received in evidence.

In this posture the case went to the jury, and the Petitioner was convicted as charged.

Further elaboration of factual matters will be discussed in the presentation of argument upon the certified question.

ISSUE PRESENTED
[As Stated by Appellate Court]

DOES SECTION 570.15 FLORIDA STATUTES, VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT ALLOWS ADMINISTRATIVE SEARCHES WITHOUT A SHOWING OF "PROBABLE CAUSE" AND WITHOUT AN "ADMINISTRATIVE PLAN CONTAINING SPECIFIC NEUTRAL CRITERIA".

ARGUMENT

SECTION 570.15 FLORIDA STATUTES DOES VIOLATE THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT IT ALLOWS ADMINISTRATIVE SEARCHES WITHOUT A SHOWING OF "PROBABLE CAUSE" AND WITHOUT AN "ADMINISTRATIVE PLAN CONTAINING SPECIFIC NEUTRAL CRITERIA".

As the First District Court of Appeals noted [after numerous search warrants were ordered quashed relative to "agricultural stops"]in the original ROCHE opinion:

> *"In Pederson v. State, 373 So.2d 367 (Fla. 1 DCA 1979), this court recognized that it is 'constitutionally permissible for the Legislature to impose an administrative probable cause standard for a warrant'. Shortly thereafter, the Legislature redrafted Section 570.15(1)(b), Florida Statutes, and deleted the requirement that criminal probable cause, as enunciated in Carroll v. United States, 267 U.S. 132, 69 L.Ed. 543, 45 S.Ct. 280 (1925), and set forth in Chapter 933, Florida Statutes, be satisfied. Chapter 79-587 § 1, Laws of Florida."*

That enactment of the Legislature provided, in pertinent part:

> *" (b) If such access is refused by the owner, agent, or manager of any premises or by the driver or operator of any vehicle which an inspector or roadguard inspection special officer has reason to believe is subject to inspection under this section, such inspector or officer may apply for, obtain, and execute a search warrant for regulatory inspection after stating under oath that:*
>
> *1. He has reason to believe that the premises or vehicle is subject to inspection pursuant to paragraph (a);*
>
> *2. The vehicle sought to be inspected has had reasonable notice to stop for inspection; and*
>
> *3. The owner, agent, manager, driver, or operator of the premises or vehicle has refused access for regulatory inspection.*
>
> *Application for a search warrant shall be made in the county in which the premises are located or, in the case of a vehicle to which access is refused, in the county in which such refusal occurs. The provisions of chapter 933, relating to probable cause for the issuance of search warrants, shall not apply to this section."*

No further deliniation of standards or criteria for the issuance of a "search warrant" is attempted. Indeed, the statute sets forth nothing as to what shall constitute administrative probable cause other than, it is submitted, a refusal by the operator of a vehicle to submit to a search.

The Petitioner indulged a lengthy hearing and argument upon this matter, wherein it was established by the policeman's own testimony that he had nothing to see "to give [him] probable criminal cause for a search warrant" [R.S., p. 23].

Indeed, at the hearing upon renewal of the Motion to Suppress [R. Vol. II, pp. 24-25], the following was established:

> "Q. [*by MR. HADDAD*]: *All right, when you* [Sheriff's Deputy Leonard Pease, a former agricultural inspector] *and Mr. Clark, the Agricultural Inspector Clark, well, -let me back track that, when the vehicle was stopped and Inspector Clark looked into it, did you also look into the vehicle?*
>
> A. *Yes sir.*
>
> Q. *And you were not able to see anything that was contraband, to the naked eye?*
>
> A. *No sir, we did not.*
>
> Q. *Nor were you able to smell any contraband when you were in the back of it?*
>
> A. *No, we didn't smell anything, either.*
>
> Q. *Ok, so that, the sole contraband that you were able to see and determine came after the issuance of the search warrant - the Agricultural regulatory search warrant for the compartment area of the van?*
>
> A. *That's true.*
>
> Q. *And nothing you saw in the vehicle itself, caused you to*

believe that there was marijuana within the back of the van?

A. No, sir.

Q. Ok, thank you sir."

Thus, the Petitioner fails to comprehend the Appeals Court's pronouncement upon rehearing that, "the facts in the instant case go beyond those in Lake Butler decision in establishing probable cause", which, the Petitioner submits, is of no bearing at any rate in this matter.

The Petitioner would then, at this juncture, address the authorities and decision of the Court in Lake Butler Apparel Company v. Department of Agriculture and Consumer Services, 551 F.Supp. 901 (M.D. Fla. 1982), which contains all authorities the Petitioner would employ.

The final decree in Lake Butler holds:

> *" 1. That Florida Statute §570.15 (1981) is hereby declared to be unconstitutional and without any force or effect to the extent that such statute purports to authorize searches of motor vehicles, with or without a warrant, upon the mere showing: (1) that the searching officer has reason to believe that the vehicle is of a type described in subsection (a) of the statute; (2) that the vehicle has been given reasonable notice to stop for inspection; and (3) that the driver or operator of the vehicle has refused to consent to a search."*

[While Petitioner did attack the method and manner of his being stopped [See: ie, R. Vol. I, pp. 8, 9, 11-13] and this was also

the subject of the Lake Butler decision, the Appeals Court did not address the issue at all. However, the Petitioner is not waiving this issue].

Rather than attempting to paraphrase the raison d'etre of Judge Hodges decision in Lake Butler, the Petitioner would quote and adopt the same instantly as his argument upon the merits:

> *"The Fourth Amendment provides:*
>
> > *' The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'*
>
> *It is settled, of course, that the constraints of the Fourth Amendment are imposed upon the states by operation of the Fourteenth Amendment.* Camara v. Municipal Court, *387 U.S. 523, 87 S.Ct. 1727 (1967);* Ker v. California, *374 U.S. 23, 83 S.Ct. 1623 (1963);* Mapp v. Ohio, *367 U.S. 643, 81 S.Ct. 1684 (1961).*
>
> *It is also settled that motor vehicles are within the protection of the Fourth Amendment although, to be sure, a warrant may not be required to justify a vehicular search as*

in other cases. Carroll v. United States, *267 U.S. 132, 45 S.Ct. 280 (1925);* Delaware v. Prouse, *440 U.S. 648, 99 S.Ct. 1391 (1979). And in the case of fixed checkpoints maintained by law enforcement officers away from the border or its functional equivalent* [footnote omitted], *vehicles may be stopped for a brief period of time without probable cause or even a reasonable suspicion,* United States v. Martinez-Fuerte, *428 U.S. 543, 96 S.Ct. 3074 (1976), but they may not be searched after being stopped absent consent or the existence of probable cause.* United States v. Ortiz, *422 U.S. 891, 95 S.Ct. 2585 (1975).*

At this stage of the analysis, therefore, it would seem that the state cannot stop and search *vehicles, with or without a warrant, absent consent or "probable cause", i.e., the existence of sufficient trustworthy information to warrant a man of reasonable caution to believe that a criminal offense has been or is being committed.* Berger v. New York, *388 U.S. 41, 87 S.Ct. 1873 (1967). There is, however, another line of authority to be considered; namely, the "administrative search" cases.*

In Camara v. Municipal Court, 387 U.S. 523, 87 S.Ct. 1727 (1967) and See v. City of Seattle, 387 U.S. 541, 87 S.Ct. 1737 (1967), the Court held that the Fourth Amendment is applicable to administrative "inspections" or searches even though the object of the governmental intrusion upon private property is the enforcement of a regulatory statute (such as a minimum housing ordinance) rather than the criminal laws. Accordingly, a warrantless search of either personal or commercial property for such purposes would be per se unreasonable within the meaning of the Fourth Amendment, and a warrant supported by a showing of probable cause would be required to justify such administrative searches. However, the Court also held that in the process of applying the ultimate constitutional standard of "reasonableness," attention should be focused upon the governmental interest to be served by the search, and that a given set of circumstances might afford "probable cause" to issue an administrative search warrant when the same circumstances would not rise to the level of "probable cause" justify-

ing a criminal search warrant.

The Court has since amplified that concent in Marshall v. Barlow's, Inc., 436 U.S. 307, 98 S.Ct. 1816 (1978), involving the inspection provisions of the Occupational Safety and Health Act of 1970 (OSHA), 29 USC §657(a). The Court there applied its decisions in Camara and See, and held the OSHA statute unconstitutional to the extent that it purported to authorize administrative searches without a warrant. Again, however, with respect to the showing of probable cause necessary to secure a warrant for such a search, the Court said (436 U.S. at 320-323, 98 S.Ct. at 1824-1826):

> *'[An official's] entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of [the regulatory statute] exist . . . Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying the issuance of a warrant may be based not only on specific evidence of an existing violation, but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."' Citing Camara v. Municipal Court.*

* * * * *

> *' The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers . . . A warrant, by contrast, would provide assurances from a neutral officer that the inspection is reasonable under the constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria.' (Emphasis supplied).*

Clearly, in this case, the searches made by the Department's Road Guard Bureau are carried out in an effort to enforce the state of Florida's regulatory statutes governing agricultural commodities - - an important state interest - - and the rule of Marshall v. Barlow's, Inc., should be applied [footnote omitted]. *The level of "probable cause" justifying a search will not require evidence that a violation of a specific statute has occurred. It will be sufficient if "reasonable legislative or administrative standard for conducting an inspection are satisfied"; or the inspection is made "pursuant to an administrative plan containing specific neutral criteria." That conclusion is of little comfort to the Department in this case, however,*

because it cannot be said that the statute, Section 570.15, or any existing administrative regulation, provide "reasonable standards" or "neutral criteria" for selecting or searching those few vehicles which are actually searched. Indeed, upon the posting of a sign notifying vehicles to stop, the net effect of the statute is to authorize a full exploratory search of <u>any</u> truck, trailer or van whose owner refuses to consent."

One ought parenthetically note that the State, in the Appellate Court, never really addressed the issue of "neutral criteria" for a regulatory search, although the State, seeking to uphold the statute or other grounds, cites to <u>Camera</u>, supra, which requires, inter alia, "a suitably restricted search warrant". No such warrant was contemplated by the statute at bar.

CONCLUSION

The Petitioner submits that there was never any probable cause for the search and seizure herein, nor was the same offered as a basis for the search by the State. The State, as it in essence announced, was proceeding upon the amended statute, Florida Statute 570.15(1)(b).

On the basis of the authorities set forth herein, as set forth in the opinion of Judge Hodges in Lake Butler, supra, this Court ought find, as did the United States District Court [which Order was never, to the undersigned's best knowledge, appealed] and hold Florida Statute 570.15(1)(b) unconstitutional.

Respectfully submitted,

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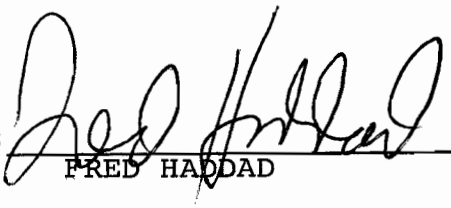
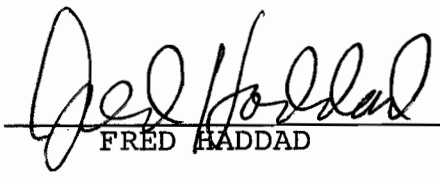
BY: 
FRED HADDAD

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Brief on the Merits has been furnished by mail to Honorable Wallace Allbritton, Assistant Attorney General, The Capitol Building, Tallahassee, FL, 32304, this 4 April 1984.

BY: 
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