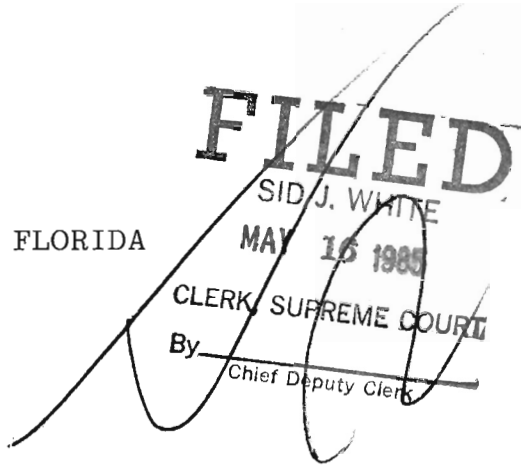


IN THE SUPREME COURT OF FLORIDA

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| STATE OF FLORIDA, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | CASE NO. 66,993 |
| | ) | |
| JAMES A. CABBAGESTALK, | ) | |
| | ) | |
| Respondent. | ) | |
| | ) | |

# INITIAL BRIEF ON THE MERITS

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## TABLE OF AUTHORITIES

## PRELIMINARY STATEMENT

The Petitioner, the State of Florida, was the Prosecution in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, Florida, and the Appellee in the Fourth District Court of Appeal. The Respondent was the Defendant and the Appellant, respectively, in the lower courts. In the brief, the parties will be referred to as they appeared in the trial court.

The symbol "R" will be used to designate the Record on Appeal.

## STATEMENT OF THE CASE AND FACTS

The Defendant, on probation for the offense of grand theft (R 57), was charged with violating the terms of his probation by carrying a concealed firearm on his person (R 59).

Through counsel, the Defendant filed a motion to suppress the evidence, i.e., the firearm (R 60-67), claiming it was seized as the result of an illegal stop and frisk. The trial court held a hearing on the motion, and at its conclusion, denied the motion as to the probation revocation proceeding, but granted it as to the new charge on the substantive offense (R 44-50). In a written order,

the trial court cited State v. Lavazzoli, 434 So.2d 321 (Fla. 1983), as authority for its decision to deny the motion to suppress as it pertained to the probation revocation (R 68). The Defendant's probation was revoked and he was sentenced to a term of three and a half years' imprisonment (R 69).

On appeal, the Fourth District Court of Appeal reversed the order revoking probation on the authority of its decision in Tamer v. State, ___ So.2d ___, 10 FLW 473 (4DCA Fla., 2/20/85).[1] It certified to this Court the same question certified in Tamer:

> Under the 1983 Amendment to Article I, Section 12, of the Florida Constitution, does the exclusionary rule apply in probation revocation hearings?

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[1]Review is pending: Tamer v. State, Fla. Sup. Ct. No. 66,711.

## SUMMARY OF THE ARGUMENT

The 1983 Amendment to Article I, Section 12, of the Florida Constitution which modified the state exclusionary rule, now permits the introduction of evidence in a probation revocation proceeding without regard to the exclusionary rule. This position advanced by the State adequately serves the deterrence purpose of the rule, for it excludes illegally seized evidence from a substantive prosecution while allowing its admission in probation revocation hearings. Thus, this Court should follow the weight of federal authority and hold the exclusionary rule is inapplicable in probation revocation proceedings.

## ARGUMENT

### THE EXCLUSIONARY RULE OF THE FOURTH AMENDMENT, UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION, AS AMENDED, IS INAPPLICABLE TO A PROBATION REVOCATION PROCEEDING, AND THE DEFENDANT'S CHALLENGE TO THE SEARCH AND SEIZURE IS PRECLUDED.

The Defendant was charged with having violated his probation on April 26, 1984. In the subsequent revocation proceedings, he moved to suppress evidence which was obtained as the result of an allegedly illegal search and seizure. Although the trial court entertained the motion, it subsequently entered an order denying it on the authority of State v. Lavazzoli, 434 So.2d 321 (Fla. 1983) (R 68). The appellate court certified the issue to this Court as being "a question of great public importance."[2]

In 1982, the voters of this state approved an amendment to Article I, Section 12, of the Florida Constitution. The amendment became effective on January 4, 1983. The purpose of the amendment was to amend the Florida constitutional Search and Seizure Clause to bring it into conformity with the United States Supreme Court's interpretation of the United States Constitution. The effect of the amendment is to eliminate the more strict

[2] A copy of the court's opinion is attached as an appendix.

construction of Florida law that has been given in previous cases. See, e.g., State v. Sarmiento, 397 So.2d 643 (Fla. 1981).

The prior language of Article I, Section 12, stated:

> The right of the people to be secure in their persons, houses, papers and effect against unreasonable searches and seizures shall not be violated--articles or information obtained in violation of this right shall not be admissible in evidence.

As amended, the provision now includes language that:

> . . . This right shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court . . . Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the Fourth Amendment to the United States Constitution.

Therefore, under the amendment, only evidence which would be inadmissible under United States constitutional principles is inadmissible in Florida.

The premise upon which this Court relied in its decisions in State v. Dodd, 419 So.2d 333 (Fla. 1982) and Grubbs v. State, 373 So.2d 905 (Fla. 1979), where it held the exclusionary rule applicable to probation revocation proceedings, was the Florida constitutional rule is more restrictive than its federal counterpart and evidence seized

in violation thereof, was inadmissible in any proceeding. The Florida constitutional rule having been modified, this restriction has now been lifted.

In State v. Lavazzoli, 434 So.2d 321 (Fla. 1983), the court implicitly recognized that under the new amendment, the exclusionary rule does not apply to probation revocation proceedings. See also, Copeland v. State, 435 So.2d 832 (2DCA Fla. 1983). However, because Lavazzoli's violations occurred prior to the amendment's effective date, this Court declined to give the amendment retroactive application and so did not explicitly decide the issue. The Defendant sub judice violated his probation on April 26, 1984, well after the effective date of the amendment, so the issue is squarely presented.

Although there is no United States Supreme Court decision which specifically holds the exclusionary rule applicable to probation revocations, the court has made it clear that a probationer in a probation revocation proceeding is not entitled to the full panoply of rights guaranteed a defendant in a criminal proceeding. Morrissey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973). Moreover, as the Fourth District observed in Tamer v. State, supra,[3] the Supreme Court has recently curtailed the Fourth Amendment's

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[3] citing United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405 (1984).

exclusionary rule and unequivocally asserted the rule is not constitutionally required, but rather is a judicial remedy designed to curtail police misconduct.

In view of the deterrence rationale underlying the rule, the State submits it is adequately served by excluding any illegally-seized evidence from the substantive criminal prosecution, while permitting its use at the probation revocation proceeding. As this Court has long recognized, a probation revocation hearing is an informal proceeding and not a criminal trial. The purpose of the hearing is to satisfy the conscience of the court as to whether the conditions of probation have been violated and to give the probationer a chance to explain the accusations. Brill v. State, 32 So.2d 607, 159 Fla. 682 (1947). The reason for the distinction between a trial and a revocation hearing is that the probationer has already been convicted of a crime and he is at liberty because of judicial grace, so he is not entitled to remain at large if he persists in criminal activity. Bernhardt v. State, 288 So.2d 496 (Fla. 1974).

The approach suggested by the State fairly balances the rights of probationers and society's interest in justice. It provides a probationer will not have evidence seized in contravention of the Fourth Amendment introduced in evidence in a substantive prosecution, while at the same time ensuring that a probationer who has been given

by judicial grace an opportunity to live at liberty, cannot continue on probation if he flouts the law. As the court below observed in the Tamer case:

> The United States Supreme Court has indicated that whether the exclusionary rule should apply in a particular type of proceeding depends on whether the likely social benefits of excluding unlawfully-seized evidence outweigh the likely costs, or more specifically, whether the likely incremental deterrent effect on police misconduct is great enough to justify the social costs attendant to the loss of probative evidence. See United States v. Janis, 428 U.S. 433, 96 S.Ct. 3021, 49 L.Ed.2d 1046 (1976). Under that balancing approach, it has found the rule inapplicable in grand jury proceedings, see United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), federal civil tax assessment proceedings, United States v. Janis, supra, and civil deportation proceedings. I.N.S. v. Lopez-Mendoza, 468 U.S. ___, 104 S.Ct. 3479, 82 L.Ed.2d 778 (1984).

The State therefore maintains, in accordance with the majority view in the Federal Circuits,[4] that the Fourth Amendment to the United States Constitution, and likewise Article I, Section 12, of the Florida Constitution (1983), do not require application of the exclusionary rule in probation revocation proceedings.

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[4] See United States v. Frederickson, 581 F.2d 711 (8th Cir. 1978); United States v. Winsett, 518 F.2d 51 (9th Cir. 1975); United States v. Farmer, 512 F.2d 160 (6th Cir.), cert. denied, 423 U.S. 987 (1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); United States v. Hill, 447 F.2d 817 (7th Cir. 1971); contra, United States v. Workman, 585 F.2d 1205 (4th Cir. 1978).

## CONCLUSION

Wherefore, based on the foregoing reasons and authorities, the Petitioner respectfully requests that this Court hold the exclusionary rule inapplicable to probation revocation proceedings, and thereby reverse the opinion of the Fourth District with directions to affirm the trial court's order of revocation.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief on the Merits has been sent by courier to Ellen Morris, Assistant Public Defender, 224 Datura Street, 13th Floor, West Palm Beach, FL 33401, this 14th day of May, 1985.

Of Counsel