IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,
Petitioner,
vs.
KEVIN RICHARD CROSS
Respondent.

CASE NO: 67,137

RESPONDENT'S ANSWER BRIEF ON THE MERITS

DISCRETIONARY REVIEW OF THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA

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OF THE TENTH CIRCUIT OF FLORIDA

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TOPICAL INDEX TO BRIEF

	PAGE NO.
PRELIMINARY STATEMENT	1
STATEMENT OF THE CASE AND FACTS	2
SUMMARY OF THE ARGUMENT	3
ARGUMENT	
WHETHER AMENDED ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION PROHIBITS ILLEGALLY OBTAINED ARTICLES AND INFORMATION FROM BEING ADMITTED INTO EVIDENCE IN PROBATION REVOCATION PROCEEDINGS (AS STATED BY THE DISTRICT COURT OF APPEALS, SECOND DISTRICT)	4-7
CONCLUSION	8
APPENDIX	
1. Decision of the Second District Court in Cross v. State, Case No. 84-2688 (Fla. 2d DCA May 24, 1985)	A-1
CERTIFICATE OF SERVICE	

PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution in the Criminal Division of the Circuit Court of the Tenth Judicial Circuit in and for Polk County, Florida, and the Appellee in the Second District Court of Appeal.

The Respondent, Kevin Richard Cross, was the Defendant in the Trial Court and the Appellant before the Second District Court.

The Record on Appeal consists of (1) volume which will be referred to by the symbol "R" followed by the appropriate page number.

TABLE OF CITATIONS

	PAGE NO.
CASES CITED	
Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1981 (1961)	6
State v. Dodd, 419 So.2d 333 (Fla. 1982)	4-5
State v. Lavazzoli, 434 So.2d 926 (Fla. 1978)	6-7
Williams v. Smith, 360 So.2d 417 (Fla. 1978)	5
OTHER AUTHORITIES	
Art. I, sec. 12, Fla. Const.	

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's Statement of the Case and Statement of the Facts per Petitioner's Initial Brief on the Merits.

SUMMARY OF THE ARGUMENT

Respondent contends that the recent amendment to Florida's constitutional exclusionary rule ties the State rule quite specifically to only the decisions of the United States Supreme Court. That court has not ruled on the issue of application of the exclusionary rule to probation revocation proceedings. This court must look for guidance to its own last stated position prior to the Amendment and rule that the exclusionary rule does so apply.

Respondent further states that rules of construction which lean in favor of criminal defendants mandate affirmatively applying the exclusionary rule to probation revocations.

The stated policy of deterrence of illegal police activity would be abridged if the rule is not applicable to probation proceedings. Police in doubt might well opt to proceed with the activity to at least "get the defendant" with probation violation.

Petitioner in its brief concedes there is no United States Supreme Court decision on point, and then submits argument in reliance on other Federal Courts.

Respondent contends that the constitutional amendment in question is quite plain and specific that it is only the decisions of one court, the United States Supreme Court, which have any relevance to this discussion. When this constitutional amendment was passed by referendum, the voters were presented with the plain words of the amendment itself for consideration.

When interpreting the intent of language contained in a constitutional amendment thus passed, this court has indicated that it is the intent of the voters and not of the amendment's draftsman that controls. See Williams v. Smith 360 So.2d 417 (Fla. 1978). Here, the amendment does not incorporate all Federal law, only the United States Supreme Court's opinions, and since there are none on point, we must look back to the last precedent of this honorable court, declared in Dodd.

Decisions of the Federal Circuit Courts, as Petitioner notes are divergent, with the majority of reporting circuits favoring Petitioner's position.[1]

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[1] 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, 96 S.Ct. 397, 46 L.Ed.2d 305 (1975); United States v. Brown, 488 F.2d 94 (5th Cir. 1973); United States v. Hill, 447 F.2d 817 (7th Cir. 1971). In contrast, the exclusionary rule was held applicable in United States v. Workman, 585 F.2d 1205 (4th Cir.1978).

ARGUMENT

ISSUE

WHETHER AMENDED ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION PROHIBITS ILLEGALLY OBTAINED ARTICLES AND INFORMATION FROM BEING ADMITTED INTO EVIDENCE IN PROBATION REVOCATION PROCEEDINGS (AS STATED BY THE DISTRICT COURT OF APPEALS, SECOND DISTRICT)

Respondent respectfully submits that the exclusionary rule is still applicable to probation revocation proceedings since the January 4, 1983 amendment to Article I, Section 12 of the Florida Constitution. Prior to the amendment, this honorable court declared in State v. Dodd 419 So.2d 333 (Fla. 1982) that the exclusionary rule applied to probation revocations.

Logic dictates that this court's precedent in Dodd will control unless the subsequent 1983 constitutional amendment affirmatively negates Dodd.

Contrary to the Federal exclusionary rule, which was a judicial enactment, Florida's exclusionary rule sprang from a constitutional mandate. Article I §12 Florida Constitution (1968) The State's constitution at the time of Dodd was unambigious,

> "Articles or information obtained in violation of this right shall not be admitted into evidence."

Id. Since Dodd this constitutional exclusionary rule has been modified. Now we have an exclusionary rule which is still constitutionally mandated, but has been made conditional:

> "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 4th Amendment to the United States Constitution."

Article I, §12, Florida Constitution (as amended 1983) [emphasis added]

The issue herein is not, however, a "majority rule" question, since the Florida Constitution has named, not Federal law, but only United States Supreme Court decisions as the controlling precedent.

Respondent has looked for guidance to this honorable court in formulating its position herein.

> When faced with constitutional amendments not clearly expressing an intent to the contrary, this court has repeatedly refused to construe the amendment to affect detrimentally the substantive rights of persons arising under the prior law.

State v.Lavazzoli 434 So.2d 321 (Fla.1983); See also Myers v. Hawkins 362 So.2d 926 (Fla.1978).

Petitioner's brief submits that State v. Lavazzoli has implicitly recognized under the new amendment, the exclusionary rule does not apply to probation revocation hearings. To the contrary, this court decided Lavazzoli on the narrow question of whether the amendment would have any retroactive effect. State v. Lavazzoli at 323.

As Petitioner has properly set forth, the underlying rationale for the exclusionary rule is to deter illegal police conduct by denying the State the benefit of improperly obtained evidence. State v. Dodd at 335; Mapp v. Ohio 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1981 (1961). Petitioner then states that the desired deterrence is adequately served by excluding the illegally seized evidence from substantive prosecution, while admitting it in probation revocation hearings. Respondent disagrees. A citizen on probation is nontheless a citizen. If the police suspect or can confirm that a person is a probationer, they will be encouraged to trample his constitutional safeguards

under the rational that even if the courts won't allow the illegal evidence for substantive prosecution, he can still be put away in the revocation hearing. Adopting Petitioner's logic would result in all probationers becoming a class of subhumans, not deserving the consideration of citizens.

By current Florida constitutional mandate, the question before this Court cannot be easily or directly answered because of the absence of United States Supreme Court precedent. That ambiguity compounded by the other analytical and policy questions heretofore discussed place Respondents and all Florida probationers in an evidentiary "no-man's land." Accordingly, Respondent urges this Court to follow its above-stated policy in Lavazzoli , and the similar statement of legislative policy found in §775.021(1) Florida Statutes: where language is succeptible of differing construction, it shall be construed most favorably to the accused.

CONCLUSION

WHEREFORE based on the foregoing reasons and authorities, Respondent respectfully requests that this Honorable Court rule the exclusionary rule is still applicable to probation revocation hearings, and thereby affirm the ruling of the District Court of Appeals of the Second District hereunder.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished to the Office of the Attorney General, Katherine V. Blanco, AAG, Park Trammell Building, Eighth Floor, 1313 North Tampa Street, Suite 804, Tampa, Florida, 33602, by mail on this 22nd day of July, 1985.

by: Ann N Radabaugh for
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