IN THE SUPREME COURT OF FLORIDA

STATE OF FLORIDA,

Petitioner,

v.

RAMON R. PINA,

Respondent.

CASE NO. 67,280

RESPONDENT'S BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Petitioner was the prosecution and Respondent the defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida.

In the brief, the parties will be referred to as they appear before this Court except that Petitioner may also be referred to as the State.

The following symbols will be used:

"R"	Transcript
"RA"	Record referring to Case No.84-1487 (VOP)
"RB"	Record referring to Case No.84-1488 (Substantive charge)
"RC"	Record referring to Case No.84-1489 (VOP)
"PB"	Refers to the pages of Petitioner's Brief

STATEMENT OF THE CASE AND FACTS

Respondent agrees with Petitioner's recitation of the history of the case and the facts, with the following notable exceptions:

1. Respondent's counsel at trial objected to the trial judge's ruling that State v. Lavazzoli, 434 So.2d 321 (Fla. 1983) permitted the introduction of the illegally obtained evidence in Respondent's two probation cases. Counsel further specifically reserved his right to appeal this ruling (R8).

2. The officers were first suspicious of Respondent because he was dropped off at the station by a black male and did not have a "wife and six kids" (R68).

3. When the officers stopped Respondent, they had no thought that they needed to look in his bags (R91).

4. When Nutt and Green questioned Respondent, they stood one to two feet away, one on each side of Respondent. The officers were standing and Respondent was sitting down (R88). A third officer, Detective Gaffney, was stationed at the only door out of the station with a pistol visible in his ankle holster (R155).

5. When Detective Nutt asked Respondent if he would consent to a "quick hand check", Respondent protested in a loud voice. According to Detective Green, Respondent repeatedly kept asking the police to stop harassing him and to leave him alone. Respondent's voice was so loud that "everybody was looking at him" (R91-94).

6. The police officers did not ever tell Respondent he could leave (R105).

7. When Respondent continued his protests to Detective Nutt's questions, Detective Green took over the interrogation from the "rookie" Nutt (R98). Green refused to leave because he felt they were not harassing Respondent and he stayed because he felt that Respondent had something to hide (R93-100).

8. Green testified that Respondent stood up from his sitting position (R100-1) while being questioned by Green. Respondent, and his witness, testified that Green ordered Respondent to sit down (R123, 146).

SUMMARY OF THE ARGUMENT

1. Petitioner has only established that there no longer is a state constitutional bar to admitting illegally obtained evidence in probation revocation hearings. Petitioner fails to address the deterrence inquiry mandated in United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405 (1984). The exclusionary rule, in a probation revocation context, serves a deterrent function to police officers because contact with probationers is a common occurrence in police experience and without the applicability of the rule in this context, police will be encouraged to make bad searches. Moreover, probationers are similar in status as ex-convicts and there can be no argument that the Fourth Amendment does not apply to ex-convicts. Moreover, a probation revocation hearing is essentially similar to a criminal trial. The cost of applying the rule in probation revocation hearings is no differrent than in a criminal trial - the government cannot prosecute a criminal. Thus, based on Leon, the exclusionary rule should be applied in probation revocation hearings.

2. Petitioner omits several crucial facts which clearly show that Respondent was seized (without any objective grounds); that Respondent's consent was involuntarily given; and that Respondent's consent was a limited one - for a "quick hand check." These omissions totally undermine Petitioner's defense of the blatant police tactics in this case.

3. Regardless of this Court's decision on the certified question, it cannot be applied to Respondent because Respondent had no notice until Leon that there was a possibility that he had no Fourth Amendment rights while on probation. Retroactive

application in this case is unfair and unconstitutional.

POINT I

THE EXCLUSIONARY RULE OF THE FOURTH AMENDMENT, UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION, AS AMENDED, IS APPLICABLE TO A PROBATION REVOCATION PROCEEDING, AND THE RESPONDENT'S CHALLENGE TO THE SEARCH AND SEIZURE IS NOT PRECLUDED AS TO HIS VIOLATION OF PROBATION CASES.

Petitioner raises a legitimate constitutional issue -whether the exclusionary rule applies in probation revocation hearings -but then fails to advance any serious analysis of the issue. Instead, Petitioner seems content to rely on certain assumptions - the "limited rights" status of probationers, Morrisey v. Brewer, 408 U.S. 471 (1972); Gagnon v. Scarpelli, 411 U.S. 778 (1973), and the recent recognition that the exclusionary rule is not required by the federal constitution, United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405 (1984) to justify this serious shift in our law. Petitioner must do more than raise the question - it must provide a reasoned basis for the change it seeks, and this it has not done.

Petitioner first attaches great significance to the recent amendment to Article I, Section 12 of the Florida Constitution,[1] which conforms Florida search and seizure law to

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[1] The state constitutional amendment, effective January 4, 1983, follows (the new language is underlined):

ARTICLE I
DECLARATION OF RIGHTS

SECTION 12. Searches and seizures--The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly

decisions of the United States Supreme Court interpreting the Fourth Amendment. Petitioner correctly notes (PB10) that this amendment undercuts this Court's earlier decisions in State v. Dodd,419 So.2d 333 (Fla. 1982) and Grubbs v. State, 373 So.2d 905 (Fla. 1979), which held that illegally obtained evidence was inadmissible in probation revocation hearings on the basis of the Florida Constitution. 419 So.2d at 335. However, removal of the Florida constitutional restriction does little to answer the federal constitutional question in this case.

Petitioner then attempts to enhance its position with this Court's decision in State v. Lavazzoli, 434 So.2d 321 (Fla. 1983). Like its earlier point, Lavazzoli offers no positive support for Petitioner's position. Lavazzoli only holds that the recent amendment to Article I, Section 12 will not be applied retroactively. Certainly, the tenor of Lavazzoli seems to suggest a trend toward Petitioner's position, but Respondent emphatically maintains that the federal constitutional issue in this case has yet to be addressed. Thus, Petitioner has only approached the threshhold of the issue.

> describing the place of places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United State Supreme Court. Article 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.

Resolution of the issue in this case requires following the relevant decisions of the United States Supreme Court concerning application of the exclusionary rule.[2] The Court's recent past decisions have narrowed the type of proceedings in which the exclusionary rule applies. Thus, in United States v. Calandra, 414 U.S. 338 (1974) the Court declined to allow grand jury witnesses to refuse to answer questions based on illegally obtained evidence. And, in United States v. Janis,428 U.S. 433 (1976) the Court permitted the use of illegally obtained evidence (by state officials)in federal civil proceedings. Similarly, in Stone v. Powell, 428 U.S. 465 (1976) the Court severely limited the circumstances in which a Fourth Amendment claim could be raised in a federal habeas corpus proceeding.

The culmination of this trend came in United States v. Leon, ___ U.S. ___, 104 S.Ct. 3405 (1984), where for the first time, the Court permitted the admission of illegally obtained evidence in an adjudicative proceeding in direct support of a charge that could subject the victim of the illegal search to imprisonment. See United States v. Workman, 585 F.2d 1205 (4th Cir. 1978). Because a probation revocation hearing is indistinguishable in essential feature to a criminal trial,[3] the Leon analysis is

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2 Thus, Respondent, here, chooses not to adopt the argument, raised in the other cases presenting this issue in this Court, Tamer v. State, Case No. 66,711 and Cabbagestalk v. State, Case No.66,993, that because there is no explicit decision by the United States Supreme Court holding that illegally obtained evidence is admissible in probation revocation hearings, the recent constitutional amendment, by its own language, does not compel a different result in Florida. Respondent instead chooses to interpret the new constitutional amendment as requiring Florida courts to follow relevant specific principles, laid down by the Court, regarding the exclusionary rule and its application.

3 The Workman court noted the following essential similarities

appropriate here. That analysis is straightforward--first, determine the deterrent effect of applying the exclusionary rule and second, weigh that effect against the costs of applying the exclusionary rule. 104 S.Ct. at 3419-3422.

Petitioner wholly ignores the deterrence inquiry and instead, summarily concludes that deterrence "is adequately served by excluding any illegally seized evidence from the substantive criminal prosecution, while permitting its use at the probation revocation proceeding." (PB11). Petitioner's approach is to leap-frog over the deterrence issue and then weigh its application, paying particular attention to limited rights of probationers (PB11-12). The result is predictable-Petitioner easily concludes that "[t]he approach suggested by the State fairly balances the rights of probationers and society's interest in justice." (PB12). Respondent maintains that Petitioner has avoided some significant concerns which compel a different result.

If deterrence is to occur "it must alter the behavior of individual law enforcement officers or the policies of their departments." United States v. Leon, 104 S.Ct. at 3419. Professor LaFave in his comprehensive work, Search and Seizure - A Treatise on the Fourth Amendment, raises a forceful argument that "revocation of conditional release is a sufficiently common consequence of a policeman's activities that a broader use of the

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between criminal trials and probation revocations hearings: they both are criminal proceedings that may result in a loss in liberty; they both require basic due process, including the right to counsel; probation revocation hearings are often used as an alternative to trial on new charges against the probationer; and in both instances the court is authorized to impose sentence up to the maximum allowed by the legislature. 585 F.2d at 1209-10.

exclusionary rule is warranted." Id. at §1.4, p.80. The point was made succintly by Justice Peters in his dissent in In re Martinez, 1 Cal.3d.6412, 83 Cal.Rptr. 382, 463 P.2d 734 (1970):

> Under today's majority decision [holding the exclusionary rule inapplicable at parole revocation proceedings], a law enforcement official is encouraged to engage in unconstitutional law enforcement methods in the hope that the evidence thereby secured may be profitably used should it subsequently appear that the victim of such conduct was a parolee.
>
> * * * Investigations of parole violations and new criminal offenses are very often cooperative efforts; police and parole officers frequently work together to reimprison the parolee suspected of criminal activity. * * *
>
> Thus the similarity of the results of conviction and parole revocation and the ongoing participation of general law enforcement officials in parole-violation cases support the conclusion that the consequences of potential parole revocation are within the general police officers' train of thought.

This point is particularly relevant in Florida. There is more than just a possibility that an officer will come into contact with a probationer - it is a probability. The Florida Department of Corrections supervises 69,538 citizens on some form of conditional release - state probation, parole and community control. Annual Report of the Department of Corrections, 1983-84, as of June 30, 1984. Add to this a significant number[4] of county probationers (including PRIDE, Inc., in Palm Beach county), and it is easy to see the magnitude of the problem. It is too simple a feat to predict that the average officer will be encouraged to make questionable searches because the evidence is likely to be used against the suspect. Despite

[4] Undersigned counsel was unable to document local probation statistics with any precision, but did obtain an estimate of 10,000 probationers in Palm Beach county from local agencies.

Petitioner's conclusory statement to the contrary, this is precisely the deterrence that the exclusionary rule is designed to promote.

Petitioner finds it easy to weigh its view of deterrence against what it deems are significant costs. Petitioner cites society's interest in incarcerating those probationers who, despite liberty conditioned on judicial grace, persist in criminal activity (PB12). Petitioner seems to be particularly concerned with the affront to the judicial system by those who continue to "flout the law." (PB12). Granted that the system has been taken advantage of, nonetheless this is not particular to probationers - it also applies to criminals concerning substantive crimes. That is, the bottom line is no different in criminal trials or probation revocation hearings - the government cannot act against criminals. See LaFave, supra §1.4, P.81. Moreover, it can't be said that society is legitimately more concerned with recidivists - society has the same interest in prosecuting ex-convicts (those who have completed their sentence) as it does probationers and it is beyond peradventure that the Fourth Amendment applies to ex-convicts. Id.

Petitioner also seeks to attach great significance to the informality of probation revocation hearings (PB11-12). As discussed earlier, the difference between criminal trials and probation revocation hearings is more a matter of form than substance. (See n.3). Where liberty is at stake, the probationer and society have an interest in adhering to our constitutional guarantees.

Conclusion

Petitioner seeks a dramatic shift in constitutional interpretation and yet, only raises the spectre of the demise of the exclusionary rule and the limited rights status of hapless probationers. Logic, and the edict of Leon, require more. An honest evaluation of the benefits (deterrence) and the costs is the only analysis that the Supreme Court has condoned to permit non-application of the exclusionary rule. Respondent submits that non-application of the exclusionary rule in probation revocation hearings poses a substantial danger to the rights of privacy (that the Fourth Amendment was designed to protect) of a significant number of citizens. This Court will open the floodgates and encourage police officers to gamble on the probation status of suspects. Such a prospect is unseemly, frightful and according to Leon, unconstitutional.

POINT II

THE TRIAL JUDGE ERRED IN DENYING RESPONDENT'S MOTION TO SUPPRESS

This case involves an increasingly common situation -an encounter by undercover narcotics agents with a citizen at a train station (a variation on airports) resulting in a "consensual search" of luggage which yields the suspected drugs. The entire transaction violated established principles regarding stops and searches in this context.

It is clear that undercover officers may approach citizens, ask questions and identify themselves as police officers without implicating the Fourth Amendment. Florida v. Royer, ___ U.S. ___, 103 S.Ct. 1319, 1324 (1983). This is nothing more than the first of three tiers of police-citizen encounters, United States v. Waksal, 709 F.2d 653, 657 (11th Cir. 1983), and has been characterized as a "voluntary citizen/police encounter." Nease v. State, 442 So.2d 325, 326 (Fla. 4th DCA 1983). However, there can be no detention of the citizen "even momentarily" without "reasonable, objective grounds for doing so." Florida v. Royer, 103 S.Ct. at 1324. See also, Terry v. Ohio, 392 U.S. 1 (1968). A detention sufficient to trigger the Fourth Amendment occurs if a reasonable person would have believed that he was not free to leave. INS v. Delgado, ___ U.S. ___, 104 S.Ct. 178, 162 (1984). The facts in this case, conveniently omitted by Petitioner,leave no doubt that any person would have believed that that they were not free to leave.

Petitioner initially makes a conclusory argument that Respondent "could not have had a reasonable impression" that he was not free to leave (PB15). Petitioner basis its argument on the following facts: one, Respondent was "initially only questioned briefly" by the police; two, the officers returned Respondent's ticket, and three, "Respondent could have left the officers at any time" (PB15). Respondent readily concedes these facts, however, there are other, uncontroverted and significant facts not mentioned by Petitioner:

A. While Respondent was free to leave, the officers never told Respondent he had that right (R105). This is a factor which "weighs heavily" in evaluating the encounter. United States v. Waksal, 709 F.2d 653, 661 (11th Cir. 1983). See also Florida v. Royer, ___ U.S. ___ 103 S.Ct. 1319, 1326 (1983).

B. The tone of the encounter was not consensual but rather was more a forced interrogation. Throughout this encounter it is clear that Respondent did not want to cooperate with the police and wanted them to leave him alone. Respondent's protestations got so loud that everyone in the station took notice (R59). Nonetheless, the police used a tag-team effort to wear down Respondent's resolve - first the "rookie" Nutt tried to get Respondent to cooperate and when it became clear that he would not, the "more experienced" Green took over (R98). Instead of respecting Respondent's wishes, Green decided that Respondent's protest meant that he was hiding something (R95) and continued to remain "to persuade" Respondent that he wasn't being bothered (R93-100). This is hardly a "deferential" manner of questioning. United States v. Berry, 670 F.2d 583, 595 (5th Cir.

1982) (Unit B en banc). Whether the encounter is "authoritative" or not is a factor in the analysis. State v. Grant, 392 So.2d 1362, 1365 (Fla. 4th DCA 1981). It is clear here, that the police forced this encounter and acted in an authoritative manner. It just defies any reasonable view to suggest that this encounter was deferential in any sense. See also United States v. Mendenhall, 446 U.S. 554, 561 (1980) (use of language or tone of voice indicating that compliance with the officers' request might be compelled is a circumstance indicating a seizure under the Fourth Amendment.)

C. The physical presence of the police officers suggest that Respondent was not allowed to leave. Here, the two police officers stood on both sides of Respondent (while he was sitting down) within one to two feet (R88). Furthermore, a third police officer, Gaffney, was stationed at the door leading out of the station (R155). This suggestion of confinement became clear when Respondent stood up "real close, right next to [Green]" (R100-1).[5] Despite Respondent's obvious reluctance, the officers did not move. Finally, to insure that Respondent could not escape this "voluntary encounter", the third officer exhibited his gun in his ankle holster (R155). Such "threatening" physical presence is a definite indication that Respondent was seized. United States v. Mendenhall, id.; United States v. Berry, 670 F.2d at 595 (if the officer interferes with the suspect's progress "in any way" it is a circumstance indicating a seizure).

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[5] While Green pointedly refuse to say whether he told Respondent to sit down (R101), Respondent and his witness, Robert Seymour, testified affirmatively that Green did indeed order Respondent to sit down (R123, 146).

D. Petitioner argues that there is a class of encounters between the police and citizens which are not subject to the concerns of the Fourth Amendment, but fails to mention that this contact must be "voluntary", United States v. Mendenhall, supra; Nease v. State, 442 So.2d 325 (Fla. 4th DCA 1983), and not coercive. Florida v. Royer, supra. In this respect, Petitioner avoids the obvious facts and implications of Respondent's repeated and vociferous objections to this intrusion. It does not matter that Officer Green thought that he was not bothering or harassing Respondent - what is important is that Respondent thought he was being bothered and immediately registered his objection. The entire sequence, illuminated clearly by Green's testimony (R91-101), represents a case of blatant police tactics designed to disregard Respondent's wishes. This is not a voluntary encounter under any view of the facts.

Petitioner's failure to consider these factors undermines its conclusion. There are many instances where the police do not detain citizens and only restrain them in a minimal fashion, but the additional factors that Petitioner overlooked make clear that this is not one of those cases.

Notably, Petitioner has chosen not to address Respondent's argument regarding whether there were reasonable grounds to justify the stop in this case (Respondent's Initial Brief, page 10-13). This shortcoming is understandable - the facts that triggered the stop do not compare favorably (for the State) with the facts in Horvitz v. State, 443 So.2d 545 (Fla. 4th DCA 1983) and Martinez v. State, 414 So.2d 301 (Fla. 4th DCA 1982). Petitioner's sole reliance on the fact that there was no seizure

and utter failure to address the justification for the stop amounts to a concession to the only reasonable conclusion possible - the stop was not justified by any objective facts and was improper.

Petitioner next indulges in a cursory treatment of the consent question. Petitioner relies on the facts that: "Respondent does not have a limited capacity", Respondent was informed of his right to refuse consent, the detectives "made no threats of a warrant or of using a narcotic sniffing dog", and Respondent indicated which suitcase should be searched first (PB16). Respondent does not take issue with these isolated facts except to note that an indication of which suitcase to look at first sheds no light on whether coercion was used to obtain the consent. However, Respondent does take issue with Petitioner's narrow view of the facts - in violation of the edict of Schneckloth v. Bustamante, 412 U.S. 218 (1973) to look at "all the circumstances."

Petitioner, once again, fails to address in any manner the other clearly coercive factors, evident even under a view favorable to the State:

A. Inexplicably, Petitioner refuses to acknowledge that the evidence is unrefuted that Respondent registered repeated and vociferous objection to the police officers' presence and inquiry. It was only after an "explanation" by the the two officers that Respondent's unequivocal desires were overwhelmed (R91-101). If this course of conduct prior to the actual consent is considered, as Schneckloth requires, it certainly raises serious questions about Respondent's sudden

about face (after his protestations were obviously ineffectual). Petitioner's failure to consider these crucial facts ignores a central part of the sequence of events in this case. See LaFave, Search and Seizure: A Treatise on the Fourth Amendment, Section 8.2(d,f).

B. Petitioner also fails to address the physical presence of the officers while they were talking to Respondent. Green and Nutt approached Respondent, who was sitting down, and stood on both sides of him, within one to two feet (R100). To complete their intimidating posture, the police officers also stationed a third officer by the door leading out of the station, who exhibited his gun in his ankle holster (R155). There can be no doubt - the trap was sprung (and Respondent was the prize) as soon as the officers approached Respondent. This type of conduct certainly undermines Petitioner's contentions to the contrary and is a factor showing involuntary consent. See LaFave, supra, Section 8.2(b).

C. Another related factor is the failure of the police to tell Respondent he could leave (R105). Of course, the police are not required to impart such information to suspects but it is a factor to be considered. LaFave, supra, Section 8.2(b). It is especially important in this case where Respondent had expressed objection to the police presence and was surrounded by police officers. While Respondent was told he had the right to refuse consent, he was confronted with the reality that the police were

ignoring his expressed desires, had him surrounded, and apparently would not let him leave. There was no option left to Respondent but to tactfully, but not voluntarily, surrender to his captors.

Petitioner's terse, conclusory analysis of "all the circumstances" misses the mark. Petitioner's tunnel vision ignores the clear evidence that Respondent did not want to cooperate with the police, and instead, paints an incomplete picture of the sequence of events. The reality is that Respondent repeatedly made clear his desire to have the police leave and that desire was worn down by the police presence, authoritative tone, and refusal to let him leave. Valid consent must "be in accordance with human experience", Bailey v. State, 319 So.2d 19, 28 (Fla. 1975), and the facts in this case, viewed in their totality, leave no other conclusion but that Respondent's consent was involuntarily given.

Finally, Petitioner argues in one sentence that "[C]onsent to search luggage extends to containers within" (PB16). In support of this statement Petitioner cites State v. Wargin, 418 So.2d 1261 (Fla. 4th DCA 1982) (AB9). Respondent's position is not inconsistent with Wargin. Wargin does not change the established rule that consent can be limited, by expression or implication, LaFave, supra Section 8.1, page 612, but rather approved the search of Wargin's luggage because Wargin had consented to a "search" of his luggage. 418 So.2d at 1262. Thus, in Wargin the suspect gave a broad authorization. The facts in this case are in stark contrast to Wargin. The only consent the police could elicit (from an obviously reluctant

Respondent) was authorization for a "quick hand check" (R43). This is not a broad authorization. See Horvitz v. State, supra (consent to look into one's luggage does not authorize "touching").

The limited consent doctrine retains its vitality despite Wargin. See Horvitz, supra; Leonard v. State, 431 So.2d 614 (Fla. 4th DCA 1983). Petitioner's laconic treatment of the issue fails to address the crux of the matter - what did Respondent actually consent to? It doesn't take much to realize that the retrieval of the tennis ball can from Respondent's luggage and then wrenching off its bottom goes far beyond a "quick hand check." The police actions are "beyond the parameters of consent" and were improper. Leonard v. State, 431 So.2d at 615.

Petitioner presents a carefully constructed picture of events. Understandably, Petitioner relies on a few, isolated positive instances in this record. However this issue requires more - a view of the totality of the circumstances. Throughout this record is the unmistakable reality that while Respondent was adamant in his desires to be left alone, the police were more adamant in their desire to get into Respondent's luggage. Their insistent, pressing attitude caused the police to improperly stop Respondent (without any objective reason to suspect criminal activity), intimidate Respondent into consent, and overstep their limited authorization. Common sense, human experience, and the Fourth Amendment to the United States Constitution reject the over reaching in this case - a classic case of going too far on too little.

POINT III

ASSUMING ARGUENDO THAT AMENDED ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION PERMITS THE STATE TO INTRODUCE ILLEGALLY OBTAINED EVIDENCE AT A PROBATION REVOCATION HEARING, SAID RULE SHOULD ONLY BE APPLIED PROSPECTIVELY

The amendment to Article I, Section 12 of the Florida Constitution cited in Issue I took effect on January 4, 1983. The amendment on its face neither eliminated nor put probationers on notice that probation revocation hearings would no longer be subject to motions to suppress illegally obtained evidence since the United States Supreme Court never made such an explicit Fourth Amendment determination. Thus, if the law of State v. Dodd, supra and Grubbs v. State, supra, has been overruled, it was not the amendment of Article I, Section 12 which effected the change, but rather subsequent case law and judicial decisions.

Respondent committed the acts which formed the basis of the violation of probation on January 26, 1984 (R245). His probationary term was based on crimes committed in November, 1982 (R248-9). The only notice that Respondent arguably had that the exclusionary rule would not apply was in United States v. Leon, supra. As discussed earlier, Leon was the first time that the exclusionary rule was not applied to bar the admission of illegally obtained evidence in an adjudicative proceeding in direct support of a charge that would subject the victim of the search to imprisonment. See United States v. Workman, supra. Thus, Leon, which was decided after January 26, 1984 (on July 5, 1984), pulled the rug out from Respondent. Retroactive application here is fundamentally unfair.

As held by the United States Supreme Court in Bouie v. Columbia, 378 U.S. 347, 84 S.Ct. 1697,12 L.Ed.2d 894 (1964):

> There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language, but also from an unforseeable and retroactive judicial expansion of narrow and precise statutory language....If a state legislature is barred by the ex post facto clause from passing such a law, it must follow that a state Supreme Court is barred by the due process clause from achieving precisely the same result by judicial construction.

Thus, assuming the exclusionary rule to no longer apply to probation revocation hearings, the mere amendment of Article I, Section 12 of the Florida Constitution did not adequately place probationers on notice of said modification, since the United States Supreme Court had not decided a case which even arguably signalled the fundamental shift sought by Petitioner.

Thus, to avoid the ex post facto doctrine, Leon (and our constitutional amendment) must be applied prospectively and not retroactively. As such, the defendant's Fourth Amendment rights are preserved, at least up to the time Leon was decided. Thus, as a matter of constitutional law, see Wilson v. State, 288 So.2d 480 (Fla. 1974) and as a matter of fairness, any change that this Court contemplates cannot be applied to Respondent.

CONCLUSION

Respondent's convictions and sentences should be reversed and remanded because of an improper and illegal search and seizure.

Respectfully submitted,

RICHARD L. JORANDBY
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15th Judicial Circuit of Florida
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy hereof has been furnished, by courier, to Joan Fowler Rossin, Assistant Attorney General, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 9th day of August, 1985.

Of Counsel