IN THE SUPREME COURT OF FLORIDA

VICKIE L. BERNIE and
BRUCE J. BERNIE,

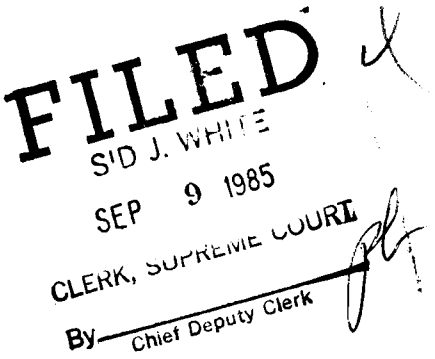
Petitioners,

vs.

STATE OF FLORIDA,

Respondent.

CASE NO. 67,535



PETITIONERS' CORRECTED BRIEF ON JURISDICTION

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CITATION OF AUTHORITIES

SUMMARY OF ARGUMENT

In summary, the Petitioners would state:

1. That the decision of the District Court affects a class of constitutional officers in that it authorizes the various judges of this state while acting as magistrates to completely ignore the statutory law of this State. This is so in that the lower court held that the fact that a judge completely ignored the existence of Florida Statute 933.18 (1983) was not cause to enter an order suppressing evidence.

2. That the decision of the District Court in this case directly conflicts with the decision in Gerardi v. State, 307 So.2d 853 (4th DCA Fla., 1975), in that the Gerardi court suppressed the evidence wrongfully seized, and the lower tribunal in this case held it to be admissible at the trial of this cause.

3. That the District Court construed Article I, Section 12 of the Florida Constitution and/or Amendment IV of the United States Constitution in arriving at its decision in the instant case. This is evidenced in the fact that by implication the lower tribunal applied Article I, Section 12 of the Florida Constitution to effectively hold Florida Statute 933.18 (1983) unconstitutional.

4. This court should exercise its jurisdiction in this matter to determine the appropriate remedy available to a potential Defendant when an issuing magistrate of a search warrant ignores, either through ignorance or willful refusal, to

follow a law of this State. This is so in that the ruling of the District Court sets the judiciary of this State outside the law in making decisions concerning the issuance of search warrants, and this result was never contemplated by any court in this country. To fail to provide some remedy for the conduct complained of in the instant case violates the Florida Constitution in that said document holds that for every wrong there will be a remedy under Florida law. The judges of this State enjoy immunity from civil suit, and the only alternative is to suppress evidence illegally seized as a result of the magistrate's directly violating a generic or statutory law of this State.

STATEMENT OF THE CASE

On October 31, 1983, Petitioners, VICKIE L. BERNIE and BRUCE J. BERNIE, were charged by Information with Possession of Cocaine in violation of Florida Statute Section 893.13. Petitioners filed a Motion to Suppress Evidence seized as a result of an unreasonable search and seizure. A hearing on Petitioners' Motion to Suppress was held on January 30, 1984, at which time a stipulated set of facts of the case was utilized by the trial court in granting the Petitioners' Motion to Suppress on February 7, 1984. On February 15, 1984, the Respondent filed its Notice of Appeal to the District Court of Appeal, Second District of Florida.

On June 21, 1985, the District Court of Appeal Florida, Second District of Florida, entered its Opinion reversing the

suppression of evidence in the lower court. (A copy of said Opinion is attached hereto and labelled Exhibit "A".) On July 1, 1985, the Petitioners filed their Motion for Rehearing in the District Court, and said Motion for Rehearing was denied by said Court on July 29, 1985. (A copy of the Order Denying the Motion for Rehearing is attached hereto and labelled Exhibit "B".)

On August 16, 1985, the District Court entered its Mandate regarding this case, and on August 19, 1985, the Petitioners filed their Notice to Invoke Discretionary Jurisdiction of the District Court Opinion based on the grounds that:

(1) The decision expressly affects a class of constitutional or state officers;

(2) The decision expressly or directly conflicts with the Decision of another District Court of Appeal or of the Supreme Court on the same question of law; and

(3) The decision expressly construes a provision of the state or federal constitution. This petition follows.

STATEMENT OF THE FACTS

The actual facts upon which the District Court of Appeal relied upon in reaching their conclusion concerning the Decision that is appealed are contained on pages 2 and 3 of their Opinion which is attached hereto as pages 2 and 3 of Exhibit "A".

The District Court then continued its Opinion by analyzing Section 933.18, Florida Statutes (1983), which holds that a search warrant for a private dwelling which is presently being occupied as such shall not issue unless the law relating to narcotics or drug abuse is being violated therein. The Court

held that there must be a present or known violation of the narcotics laws in order to permit a warrant to issue for the search of a home, and that this fact must be alleged in a supporting affidavit. The Court stated that there would only be an in futuro violation of the law based on the supporting affidavit, and therefore the affidavit itself did not comply with the requirements of Section 933.18(5), Florida Statutes. Therefore, it held that the affidavit was legally inadequate for purposes of permitting the warrant to issue. In reaching this decision it relied upon Gerardi v. State, 307 So.2d 853 (4th DCA Fla, 1975).

Instead of following the suppression granted in the Gerardi Decision, the Second District continued its Opinion by stating that the Florida Constitution, as it existed at the time of the arrest and search in the instant case, mandated a different result. Ignoring the decision in Gerardi and the result mandated by Section 933.18, Florida Statutes (1983), the District Court relied upon United States v. Leon, 468 U.S.____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), and held that the evidence obtained in violation of the Petitioners' statutory rights was admissible under the good faith exception set forth in Leon.

By implication, the Second District held, as fact, that a magistrate, in attempting to be objective, neutral and detached, had no obligation to follow the statutory law of this State in issuing or refusing to issue search warrants for private homes. By relying on the good faith exception established in Leon, the District Court authorized magistrates to ignore the basic

statutory law of this state. Having made these actual findings of fact and implied findings of fact, the District Court entered its Opinion reversing the suppression of the evidence.

THAT THE DECISION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT, EXPRESSLY AFFECTS A CLASS OF CONSTITUTIONAL OR STATE OFFICERS.

The Opinion of the District Court directly affects a class of constitutional or state officers in that said Opinion clearly sanctions and authorizes the judges of this State, when sitting as a magistrate, to ignore or act independently of the decisional and statutory law of this country and state.

Specifically, in the instant case, the magistrate issuing the search warrant, which all the lower courts have said was improvidently and improperly issued, elected either to ignore or was unaware of Section 933.18 (1983), Florida Statutes, which holds, in pertinent part:

> No search warrant shall issue under this chapter or under any other law of this state to search any private dwelling occupied as such unless:
>
> .... (5) The law relating to narcotics or drug abuse <u>is being</u> violated therein;
>
> .... No warrant shall be issued for the search of any private dwelling under any of the conditions hereinabove mentioned except on sworn proof by affidavit of same credible witness that he has reason to believe that one of the conditions <u>exists</u>, which affidavit shall set forth the facts on which such reason for belief is based. (emphasis supplied.)

The meaning of that statute, as accepted by the District Court in the instant case and by the District Court in <u>Gerardi v. State</u>, 307 So.2d 853 (4th DCA Fla., 1975), is particularly clear in that the statute prohibits the issuance of a search

warrant for an in futuro violation of the narcotics of this state. In fact, the Petitioners would suggest to this Court that the language and meaning of the statute in question is so clear that an appellate opinion is not necessary in determining its intent and purpose. This is particularly true when it is remembered that criminal statutes must be strictly construed. Gildrie v. State, 94 Fla. 134, 113 So. 704 (1927) and State v. Tolmie, 421 So.2d 1087 (4th DCA Fla, 1982).

However, by attempting to apply the recent amendment to Article I, Section 12 of the Florida Constitution to the holding in Gerardi in the instant case, the Second District has held that a magistrate, by the issuance of a warrant in violation of state law, cures any defect in the unlawful search that follows in that said evidence is admissible into court against the person from whom the articles are seized. The Second District relies upon United States v. Leon, 468 U.S._____, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), in reaching this result. The District Court has taken the good faith exception established in Leon, and has caused it to be carried over to judicial officers acting in either good or bad faith in issuing a warrant.

Obviously, no hearing was held to determine if the issuing magistrate in the instant case was acting in good or bad faith or through a lack of knowledge of the statutory laws of this state, and while it is not the intent of the Petitioners to cast any aspersions on the issuing magistrate in this cause in this Brief; absent such a hearing can any Defendant in the courts of this state be assured that he is not the victim of a magistrate who has run amuck and has elected to write his own law.

Under the Decision in the instant case, no review is effective to punish a magistrate for acting in bad faith, and the District Court fails to establish any procedure whereby a magistrate can be held to task for failing to act in a neutral and detached fashion. Essentially, the District Court held that because the police officers involved in the instant case were acting in good faith as established in Leon, then evidence should automatically be admitted even though a magistrate, theoretically knowledgeable of the laws of the State of Florida, fails to follow them laws.

In summary, in the case sub judice, there is no doubt that the warrant issued improvidently, but the Second District in its opinion has held that the failure of a magistrate to follow the law is not judicially cognizable nor should evidence seized in violation of the Fourth Amendment to the Constitution of the United State of America and Article I, Section 12 of the Constitution of the State of Florida, be suppressed when seized under an unlawfully and illegally issued warrant. Clearly, the opinion in the instant case permits a broad class of constitutional and state officers to act in derogation of the laws of this State, and therefore this Court has jurisdiction to hear the case brought to it by the Petitioners herein. Art. V, Sec. 3(3), Florida Constitution.

THAT THE OPINION OF THE SECOND DISTRICT COURT OF APPEAL OF FLORIDA EXPRESSLY AND DIRECTLY CONFLICTS WITH THE DECISION OF THE FOURTH DISTRICT COURT OF APPEAL OF FLORIDA IN GERARDI V. STATE.

That in Gerardi v. State, 307 So.2d 853 (4th DCA Fla.,

1975), the Gerardi Court reached the conclusion that a search warrant must be issued only for a search of a home in which the narcotics and drug laws of this State are being presently violated. The Gerardi Court never attempted to apply the old Article I, Section 12 of the Constitution of the State of Florida in reaching its decision, but rather relied upon Florida Statute Section 933.18 in ordering the suppression of the evidence obtained as a result of the warrant issued in its case.

In the instant case, the Second District, while paying lip service to Gerardi, held that the amendment to the Constitution of the State of Florida was sufficient to make the evidence admissible in the lower court. Although the Second District paid lip service to Gerardi, its result expressly and directly conflicts with the Decision in Gerardi v. State.

Said conflict gives this Court jurisdiction to hear the case brought before it by the Petitioners. Art. V, Sec. 3(3), Florida Constitution.

THAT THE DECISION OF THE DISTRICT COURT OF APPEAL, SECOND DISTRICT OF FLORIDA EXPRESSLY CONSTRUES A PROVISION OF THE STATE OR FEDERAL CONSTITUTION.

In the instant case, the Second District directly construed Article I, Section 12 of the Constitution of the State of Florida in that it held that by its mere amendment by the voters, that Florida Statute Section 933.18 was presently unenforceable in this State.

This is so as the Second District found, despite a clear violation of that statute, that the evidence obtained was

admissible even though the warrant was invalid.

Such a finding by the Second District clearly expresses an interpretation of Article I, Section 12 of the Constitution of the State of Florida that was not intended by the framers of it nor by any decision enunciated by this Court since the amendment became effective.

Therefore, this Court has jurisdiction to hear the case brought before it by the Petitioners herein. Art. V, Sec. 3(3), Florida Constitution.

CONCLUSION

That this Honorable Court has jurisdiction to hear the case brought before it by the Petitioners in that the Decision of the District Court of Appeal of the Second District of Florida expressly affects a class of constitutional or state officers; expressly and directly conflicts with the decision of another District Court of Appeal; and expressly construes a provision of the State or Federal Constitution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the above and foregoing Brief, has been provided to Katherine V. Blanco, Assistant Attorney General, Park Trammell Building, 1313 Tampa Street, Suite 804, Tampa, Florida 33602, Counsel for Appellant, by U.S. Mail, this 6th day of ~~August~~ September, 1985.

ATTORNEY