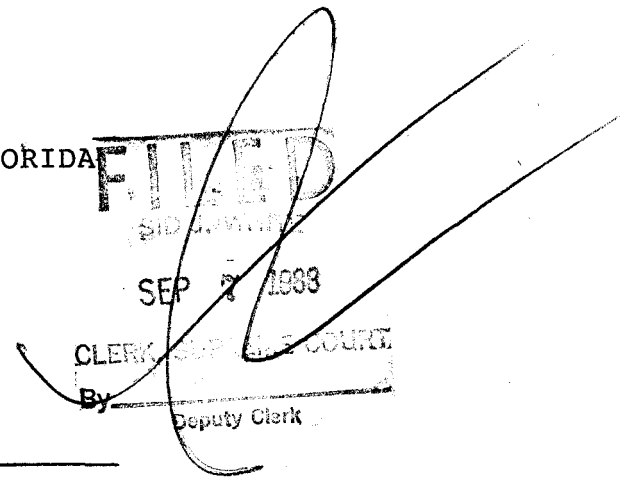
IN THE SUPREME COURT OF FLORIDA



STATE OF FLORIDA,

Petitioner,

v. CASE NO. _____

MICHAEL W. GREEN,

Respondent.

_____/

82,998

PETITIONER'S BRIEF ON JURISDICITON

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PETITIONER'S BRIEF ON JURISDICTION

PRELIMINARY STATEMENT

Respondent, Michael E. Green, Appellant in the First District Court of Appeal and defendant in the circuit court, will be referred to herein as "Respondent." Petitioner, the State of Florida, will be referred to herein as "the State." References to the appendix of this brief will be by the symbol "A" followed by the appropriate page number. References to the record on appeal will be by the symbol "R" followed by the appropriate page number.

STATEMENT OF THE CASE AND FACTS

Officer Ferrick stopped Respondent's automobile at approximately 2:30 a.m. on June 13, 1986, after observing Respondent driving on the wrong side of the road. The road was four lanes wide and traffic was sparse. Ferrick immediately put on his emergency lights to warn Respondent of oncoming traffic and further observed Respondent's vehicle swerve before turning across the median and proceeding in the correct direction. After turning across the median, Respondent stopped his car further down the highway, parking it at an angle on the northwest corner of the intersection with the front tires on the grass area and the right rear of the vehicle at the curb where it would obstruct the flow of traffic in the outside lane.

Ferrick detected an odor of alcohol on Respondent's breath and advised him that he was to perform some field sobriety tests. Ferrick described the alcohol odor as slight but marked it as being moderate when he completed his report. Respondent's completion of the several tests was not altogether successful and it was noted that Respondent experienced difficulty in understanding the basic instructions to one of the tests. Ferrick categorized his ability to understand instructions as fair, but upon completion of Respondent's attempts to perform the test, it was Ferrick's opinion that Respondent was too impaired to operate his automobile. He therefore placed Respondent under

arrest and told him that his vehicle was obstructing the normal flow of traffic. He recalled that he advised Respondent he would not let him back in the vehicle to move it off the road and that it would be towed to the police department impound lot.

Respondent thereafter consented to take a breathalyzer test at the police station, the results of which were .06 and .06+. Ferrick commented to Respondent that the breathalyzer reading was not consistent with the level of impairment he was observing, to which Respondent informed Ferrick tht he was taking tranquilizer medication. Ferrick did not conduct any drug screening on Respondent because he did not think it was necessary.

After taking the breathalyzer test, Respondent desired to make a phone call and was permitted to do so. He was unable to contact anyone to come and get him and was thereafter taken to the county jail.

When Ferrick reported to work for his next shift, he observed that Respondent's car was still in the impound lot. He asked the officer he was relieving if anyone had attempted to pick up the vehicle and was told that no one had done so. By the end of his shift, the car still being present, Ferrick felt obligated to perform an inventory search based on the fact that he had observed luggage on the back seat of the car and did not know what other valuable items might be present. He retrieved the car keys and during the search discovered a loaded .38

caliber revolver underneath the seat, and a blue bag in the console glove compartment holding cocaine straws with suspected cocaine residue, three razor blades, and a plastic baggy with some black capsules in it. The partially opened suitcase revealed a sock stuffed into a shoe in which was found three plastic prescription bottles, one of which had the label scraped off and did not look valid. That bottle contained what appeared to be a large number of valium tablets. At this point, Ferrick returned the cap on the bottle and placed it back in the sock, put the sock in the shoe and zipped up the bag. He took the blue bag and the gun into the station and advised the officer he had found some illegal items. He then retrieved the luggage and the other items. (A 2-4).

Respondent moved to suppress the narcotics and paraphernalia and the circuit court denied the motion on December 12, 1986. Respondent was thereafter found guilty by jury verdict of possession of a controlled substance and paraphernalia (R 487).

On appeal, the First District Court of Appeal reversed with one dissent, holding that the motion to suppress should have been granted (A 1-7). The State's motion for rehearing was denied on August 24, 1988) (A 8).

SUMMARY OF ARGUMENT

The First District's decision below in Green v. State, ___ So.2d ___ (Fla. 1st DCA, July 14, 1987), held that a reasonable alternative to impoundment must be offered to an arrested driver. This decision is in direct conflict with decisions of the Second and Fourth Districts, to wit; State v. Williams, 516 So.2d 1081 (Fla. 2d DCA 1987) and Robinson v. State, ___ So.2d ___, 13 FLW 1244 (Fla. 4th DCA May 25, 1988). These decisions hold that the requirement that a reasonable alternative to impoundment must be offered no longer exists in Florida. Consequently this Court has jurisdiction to review the instant case pursuant to Article V, §3(b)(3), Florida Constitution (1980) and Rule 9.030(a)(2)(A)(iv), Fla.R.App.P.

ISSUE

WHETHER THIS COURT SHOULD EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE DECISION OF THE FIRST DISTRICT COURT OF APPEAL WHICH DIRECTLY CONFLICTS WITH DECISIONS OF THE SECOND AND FOURTH DISTRICT COURTS OF APPEAL.

ARGUMENT

The Petitioner hereby invokes this Court's "conflict" jurisdiction pursuant to Article V, Section 3(b)(3), Florida Constitution (1980) and Rule 9.030(a)(2)(A)(iv), Fed.R.App.P.. The decision below directly conflicts with decisions of the Second and Fourth District Courts of Appeal: State v. Williams, 516 So.2d 1081 (Fla. 2d DCA 1987), and Robinson v. State, So.2d ___, 13 FLW 1244 (Fla. 4th DCA May 25, 1988).

The First District Court of Appeal held below that where a driver is arrested, he or she must be advised that the vehicle will be impounded unless a reasonable alternative to impoundment can be provided by the owner (A 5,6). In so ruling the court relied on Miller v. State, 403 So.2d 1307 (Fla. 1981).

In contrast, the Second District Court of Appeal held correctly in State v. Williams, supra, that

> We conclude that the requirement of the Florida Supreme Court's opinion in **Miller** that an arrested driver be offered an alternative to the impoundment of his car no longer exists. **Colorado v. Bertine**, U.S. ___, 107 S.Ct. 378, 93 L.Ed.2d 739 (1987). In **Bertine** the arrestee, like the defendant in this case, was not offered an alternative to the impoundment of his car. Quoting from **Illinois v. Lafayette**, 462 U.S. 640, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983), the United States Supreme Court said in **Bertine** that that did not matter:

> [t]he real question is not what "could have been achieved," but whether the Fourth Amendement **requires** such steps.... The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative "less intrusive" means.
> ___ U.S. ___, 107 S.Ct. at 742, 93 L.Ed.2d at 747.

Williams, supra at 1084.

Regarding Miller v. State, supra, the Second District went on to state:

> The ruling of **Bertine** that offering reasonable alternatives to impoundment is not necessarily required is fully applicable in Florida due to the 1983 amendment to the provisions of Article I, section 12 of the Florida Constitution, that amendment having come into effect after **Miller's** reliance upon those provisions. The amendment added to Article I, section 12 the requirements that the right under the Florida Constitution to be secure against unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court" and that "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 Amendement to the United States Constitution."

> Accordingly, police searches of arrested motorists' cars in Florida are now appreciably less restrained by the exclusionary rule under which unconstitutionally seized evidence is excluded from the evidence at trial. The case before us exemplifies the foregoing amendment to the Florida Constitution as having, in the words of the Florida Supreme Court, the effect of "removing the 'independent protective force of state law.'" **State v. Lavazzoli**, 434 So.2d 321, 323-24 (FLa. 1983). Prior to the amendment to article I, section 12 Floridians had, as recognized by **Miller**, the "substantive right [under specific wording of Article I, section 12] to have articles or information obtained as the result of an illegal search or seizure excluded from evidence in the courts of this state..." **State v. Bernie**, 472 So.2d 1243, 1246 (Fla. 2d DCA 1985). Following the amendment Florida's exclusionary rule has been characterized by the Florida Supreme Court as "nothing more than a creature of judicial decisional policy" of the United States Supreme Court because the specific wording of the Fourth Amendment does not contain an exclusionary rule and "the federal exclusionary rule [is] preeminently a rule of court and only procedural." **Lavazzoli**, 434 So.2d at 323. As a result, rather than ensuring to Floridians rights under the federal constitution as the amendment to the Florida Constitution might seem to do, the amendment has the effect in this case of taking away a right not provided by the federal constitution.

Williams, supra at 1084, 1085 (A 12, 13).

Similarly, in Robinson v. State, ___ So.2d ___, 13 FLW 1244 (Fla. 4th DCA, May 25, 1988), the Fourth District agreed that the requirement that a reasonable alternative to impoundment must be

offered no longer exists in Florida, and certified the question to this Court as a matter of great public importance.

In so holding, that court stated:

> Needless to say, the Second District did not arbitrarily overrule the Florida Supreme Court, and reached its conclusion because of a United States Supreme Court decision on the same subject. **See Colorado v. Bertine,** U.S. ___, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987) [1 F.L.W. Fed. S53].
>
> We have read **Colorado v. Bertine** and agree with the Second District. Notwithstanding, we are unable to ignore our own supreme court's pronouncements and we therefore certify the following question, it assuredly being one of great public importance:
>
> DOES THE 1983 AMENDMENT TO ARTICLE I SECTION 12 OF THE FLORIDA CONSTITUTION, COUPLED WITH THE **COLORADO V. BERTINE** DECISION, OVERRULE **MILLER V. STATE**, PROVIDING THE POLICE ARE NOT ACTING IN BAD FAITH?

Robinson, supra at 1244, 1245.

The State submits that this issue is indeed one of great public importance as it deals with the question of what is the proper procedure for law enforcement officers to follow in such instances. The resolution of this issue will result in statewide uniformity as opposed to the current situation of regional disparity in court rulings.

CONCLUSION

Since the First District's decision below is clearly in direct conflict with the foregoing decisions, this Honorable Court has discretionary jurisdiction to hear this case.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been forwarded by U.S. Mail to Ms. Rhonda S. Martinec, of Daniel, Komarek & Martinec, Post Office Box 2522, Panama City, Florida, 32402, this 7th day of September, 1988.

BRADLEY R. BISCHOFF
ASSISTANT ATTORNEY GENERAL