IN THE SUPREME COURT OF FLORIDA

CASE NO.: 78,057

STATE OF FLORIDA,

Petitioner,

v.

LUZ PIEDAD JIMENO and ENIO JIMENO,

Respondents.

RESPONDENTS' BRIEF ON REMAND

BENJAMIN S. WAXMAN, ESQUIRE
JEFFREY S. WEINER, ESQUIRE
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QUESTION PRESENTED

Whether, notwithstanding the United States Supreme Court's decision in the instant case, Florida's unique constitutional privacy amendment requires that the trial court's suppression order be affirmed.

SUMMARY OF THE ARGUMENT

Notwithstanding the United States Supreme Court's decision reversing this court's judgment, the decision of the trial court granting the Jimenos' motion to suppress must be affirmed. The United States Supreme Court held that the fourth amendment is satisfied when, based on a suspect's general consent to search his automobile, an officer opens a closed container found inside. The Florida Constitution, however, provides unique and extended protection to such containers. Article I, section 23, demands that "[e]very natural person has the right to be let alone and free from governmental intrusion into his private life...." The very act of concealing an object in a container, such as placing it in a closed paper bag, invokes this special protection and manifests denial of consent to open it except upon express consent. *See* ***State v. Wells***, 539 So.2d 464, 486 (Fla. 1989). Because Mr. Jimeno created such a constitutionally protected zone of privacy inside the paper bag which he failed to disavow, it was fully protected from the governmental intrusion without probable cause that occurred in this case. Thus, consistent with the United States Supreme Court decision in ***Jimeno*** and the law arising under article I, section 23, of the Florida Constitution, the trial court's suppression order must be affirmed.

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ARGUMENT

Notwithstanding the United States Supreme Court's decision in the instant case, Florida's unique constitutional privacy amendment created a legally recognized zone of privacy in the paper bag which could only be invaded based on express consent. Absent such consent, the officer's act in conducting a warrantless search of the bag violated the Defendant's Florida constitutional rights and the trial court's order suppressing the fruits of the search must be affirmed.

In ***State v. Jimeno***, 564 So.2d 1083 (Fla. 1990), this court, in an abbreviated opinion, affirmed the decision of the Third District Court of Appeal which affirmed the suppression order of the trial court. ***State v. Jimeno***, 550 So.2d 1176 (Fla. 3d DCA 1989). The specific issue decided in the negative was whether consent to a general search for narcotics extends to sealed containers within the general area agreed to by the defendant. *Id.* In its opinion, this court only cited ***State v. Wells***, 539 So.2d 464 (Fla. 1989), *aff'd,* 491 U.S. 903, 110 S. Ct. 1632 (1990).

In ***Wells***, this court held that absent express consent to do so, a suspect's general consent to search the trunk of his vehicle does not authorize the forced opening of a locked briefcase found inside. In a paragraph which controls this court's action upon the instant remand, the court stated:

> In the present case, the arresting officer plainly stated that he had no actual consent to open the suitcase found in the automobile trunk. We thus must agree with the court below

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> that the general consent to look in an automobile trunk in this case did not constitute permission to pry open a locked piece of luggage found inside. The very act of locking such a container constitutes a manifest denial of consent to open it, readily discernable by all the world. It creates a legally recognized zone of privacy inside that container, ***Arkansas v., Sanders***, 442 U.S. 753, 765-66, 99 S.Ct. 2586, 2594...(1979), that is protected under the United States Constitution and Florida's privacy amendment from the kind of governmental intrusion without probable cause that occurred in this case. *See* Article I, section 23, Fla. Const.

Id., 539 So.2d at 468.

The United States Supreme Court, in the instant case, resolved a very narrow issue of law. It concluded that any privacy interest protected by the fourth amendment in the contents of a paper bag are satisfied when an objectively reasonable officer searches the bag upon the general consent of a suspect to search the area in which the bag is located. The Court did not, and could not, pass upon the special privacy interest enjoyed by persons in Florida under the Florida Constitution. The limited nature of the Court's opinion is plainly revealed by the manner in which it attempted to distinguish ***Wells***, the only case upon which this court based its decision. The Court claimed that the crucial distinction concerned whether an individual granting permission to search a trunk would expect a searching officer to pry open a brief case located therein: "It is very likely unreasonable to think that a suspect, by consenting to the search of his trunk, has agreed to the breaking open of a locked briefcase within the trunk, but it is otherwise with respect to a closed paper bag." ***Florida v. Jimeno***, ____ U.S. ____, 111 S.Ct. 1801, 1804 (1991).

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Indeed, the reasoning of this court in ***Wells*** was otherwise. The contents of the briefcase were protected not because the suspect or any other reasonable person would have expected it but, instead, because Florida's privacy amendment absolutely guaranteed it. ***Wells***, 539 So.2d at 468. As the court recognized in ***State v. Campbell***, 306 Or. 157, 759 P. 2d 1040 (1988), in addressing a similar constitutional amendment, "[T]he privacy protected by Article I, Section 9, is not the privacy that one reasonably *expects* but the privacy to which one has a *right*." *Id.* at 164.

Due to the enhanced privacy protection afforded citizens in Florida under article I, section 12, the Jimenos had a special privacy interest in the bag in which the cocaine was discovered. Once they closed it, as with the briefcase discussed in ***Wells***, they manifested a denial of consent to open it, readily discernable by all the world. The absolute right to protection and manifest denial of consent to search are no less protected in the closed paper bag than a locked briefcase. Even the United States Supreme Court "has soundly rejected any distinction between "worthy" containers, like locked briefcases, and "unworthy" containers, like paper bags." ***Jimeno***, 111 S.Ct. at 1805 (quoting ***United States v. Ross***, 456 U.S. 798, 822, 102 S.Ct. 2157, 2171 (1982)) (Marshall, J., dissenting). Absent the Jimenos' express disavowal of their unique privacy right in the bag guaranteed by the Florida Constitution, the police officer was prohibited from opening it.

The state will undoubtedly argue that article I, section 12's lockstep provision, limiting its protection to that provided under the fourth amendment as interpreted by the United States Supreme Court, bars this court from the result urged by the Jimenos. A close examination of the case law arising under Florida's relevant constitutional provisions reveals

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that any such limitation is illusory.

This court has, on several occasions, recognized privacy interests under article I, section 23, despite the United States Supreme Court's express rejection of identical privacy interests under the fourth amendment. ***In Winfield v. Division of Pari-Mutual Wagering***, 477 So.2d 544 (Fla. 1985), this court held that article I, section 23, invests Florida citizens with a protected privacy interest in their financial records held by banking institutions. This court's holding directly contradicted the United States Supreme Court's decision in ***United States v. Miller***, 425 U.S. 435, 96 S.Ct. 1619 (1976), which held that a depositor's bank records are not "private papers" protected by the fourth amendment. Similarly, in ***Shaktman v. State***, 553 So.2d 148 (Fla. 1989), this court held that article I, section 23, protects Floridians' privacy in the telephone numbers that they dial. This decision prevailed despite the United States Supreme Court's decision in ***Smith v. Maryland***, 442 U.S. 735, 99 S.Ct. 2577 (1979), which expressly held that the fourth amendment does not provide a reasonable expectation of privacy in the telephone numbers a person dials.

In ***Winfield*** and ***Shaktman***, despite the recognized privacy interests, the searches were upheld because this court concluded that the state had a countervailing compelling interest in effective law enforcement and that this objective was accomplished through the least restrictive means. While in the instant case, it cannot be denied that the state had the same countervailing compelling interest in effective law enforcement, ***but see Jimeno***, 111 S.Ct. at 1806 (Marshall, J., dissenting), it is equally clear that the law enforcement objective was not accomplished through the least intrusive means. A less intrusive and more practical means would have been to specifically ask the Jimenos for permission to search the paper bag.

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Jimeno at 1805-06. Absent the police officer's resort to this least intrusive means, the officer's investigative tactic violated article I, section 23.

In ***Riley v. State***, 511 So.2d 282 (Fla. 1987), this court also avoided the arguably applicable restraint of article I, section 12's conformity provision by distinguishing recent and seemingly controlling United States Supreme Court decisions. This court held that a police helicopter flying lawfully 400 feet above the defendant's rural, residential backyard violated the defendant's right of privacy in his partially covered greenhouse. The unanimous court distinguished the United States Supreme Court decisions in ***California v. Ciraolo***, 476 U.S. 207, 106 S.Ct. 1809 (1986), and ***Dow Chemical Co. v. United States***, 476 U.S. 227, 106 S.Ct. 1819 (1986). In these cases, the Court held that the defendants' subjective expectations of privacy were unreasonable in outdoor areas on the property of the homeowner and business, respectively, which were protected from ground surveillance but unprotected from air surveillance. This court based its decision upon the difference between the unreasonableness of any expectation that property open to the air would be free from observations made from a fixed-wing aircraft within navigable airspace and the reasonableness of an expectation that the same type of property would be free from the same observations made from a helicopter flying below navigable airspace.[1]

In the instant case, the Jimenos' unique and heightened privacy protection in their closed paper bag distinguishes the matter before this court on remand from the case before

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[1] Although the United States Supreme Court reversed this court's decision in ***Florida v. Riley***, 488 U.S. 445, 109 S.Ct. 693 (1989), this court, upon remand, directed that the matter be remanded to the trial court to determine the reasonableness of any expectation of privacy that the defendant claimed in his partially exposed greenhouse. ***Riley v. State***, 549 So.2d 673 (Fla. 1989).

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the United States Supreme Court. It provides an adequate and independent state ground for resolving this case. While under the fourth amendment, the Supreme Court in ***Jimeno*** intimated that an individual's privacy interest in a closed container is no greater than the privacy interest in the vehicle in which it is located, *id.*, 111 S.Ct. at 1804, 1805, under article I, section 23, the privacy interest in the container is far more substantial. ***See Wells***, 539 So.2d at 468. Although under the fourth amendment, closing a paper bag apparently does nothing to elevate ones privacy interest above that held in the area where the paper bag is located and communicates nothing with regard to the owner's consent to open it, in Florida, closing the bag creates a unique bastion of privacy and communicates to the world, as if expressly stated, a denial of consent to open it. ***Wells.***

This case requires this court to further interpret the contours of article I, section 23's privacy provision. If the heritage of privacy enveloped in article I, section 23, ***see Stall v. State***, 570 So.2d 257, 265-68 (Fla. 1990) (Kogan, J. dissenting), is to have any meaning, it must be applied in the instant case. Under Florida's privacy provision, the Jimenos' protected rights in the contents of the paper bag were no less substantial than the defendant's protected rights in the contents of his briefcase established by this court in ***Wells***. In the face of the Jimenos' manifest denial of consent to open it by closing it, nothing short of an express disavowal of that privacy interest could suffice to justify any intrusion. To ensure continuation of the heritage of privacy which has begun to thrive in Florida, this court must speak now and afford these defendants the privacy in personal effects to which all Floridians are constitutionally entitled.

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CONCLUSION

Based on the foregoing reasons, arguments, and citations of authority, this court must affirm the order of the trial court suppressing the evidence.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: **MICHAEL NEIMAND, ESQUIRE,** AUSA, Department of Legal Affairs, 401 N.W. Second Avenue, Miami, Florida 33128; on this 25th day of August, 1991.

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