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IN THE SUPREME COURT OF FLORIDA

JOHN DOE,

Petitioner,

vs. Case No. 79,508

STATE OF FLORIDA,

Respondent.

_____/

ON DISCRETIONARY REVIEW FROM THE
SECOND DISTRICT COURT OF APPEAL, STATE OF FLORIDA

RESPONDENT'S BRIEF ON THE MERITS

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN A. BAKER
Assistant Attorney General
Florida Bar No. 0365645

PEGGY A. QUINCE
Assistant Attorney General
Florida Bar No. 261041

Westwood Center, Suite 700
2002 N. Lois Avenue
Tampa, Florida 33607-2366
(813) 873-4739

COUNSELORS FOR RESPONDENT

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SUMMARY OF THE ARGUMENT

The Constitution does not protect an individual from having such personal attributes as handwriting or fingerprints seized without a warrant. The state attorney investigatory subpoena in this case only requires Petitioner to "give up" personal attributes that are not constitutionally protected. Inasmuch as the subpoena is by no means as intrusive as a warrant and the governments execution thereof, it cannot be said that a subpoena as issued to a defendant who is already in police custody violates any aspect of the Fourth Amendment.

ARGUMENT

ISSUE

WHETHER SECTION 27.04 FLORIDA STATUTES REQUIRES THE STATE ATTORNEY TO DEMONSTRATE PROBABLE CAUSE BEFORE BEFORE HE CAN SUBPOENA A PRISONER TO GIVE FINGERPRINT SAMPLES AND HANDWRITING EXEMPLARS WHICH ARE NOT PROTECTED UNDER THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

The key issue for consideration by this Court is whether Section 27.04, Florida Statutes, requires that probable cause exist before the state attorney can subpoena a prisoner for samples of her fingerprints and handwriting. The Second District below has already indicated that such does not violate the Fourth Amendment to the United States Constitution. State v. Doe, 592 So.2d 1121 (Fla. 2d DCA 1991). In so doing, the court agreed with the decision in Wyche v. State, 536 So.2d 272 (Fla. 3rd DCA 1989). Although the Second District pointed out that it disagreed with the conclusion reached in Saracusa v. State, 528 So.2d 520 (Fla. 4th DCA 1988), an examination of the two decisions reveals no particular conflict inasmuch as Saracusa did not deal with the constitutional aspect of the state attorney's power under Section 27.04.

In Saracusa, the Fourth District decided the constitutional issue solely on the basis of Rule 3.220(b)(1)(i) and (vii), Florida Rules of Criminal Procedure. The court stated:

> The criminal rule relied upon by the state, however, is properly invoked only *after* an information has been filed against a defendant, and then it is still subject to constitutional

limitations. (Citation omitted, emphasis supplied).

Although the Saracusa court went on to cite Hayes v. Florida, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985), they did not, respectfully, indicate why it applied to the case of a prisoner who was already in custody or to a state attorney who was investigating a case and only requesting samples of the prisoner's person that do not come under Fourth Amendment protection.

Wyche, however, delved much more extensively into the issue of a state attorney's power to subpoena a person to give exemplars. The Third District likened the state attorney's power to that of a federal grand jury where even a potential defendant can be called upon to provide nontestimonial evidence. Citing to United States v. Mara, 410 U.S. 19, 93 S.Ct. 774, 35 L.Ed.2d 99 (1973); and United States v. Dionisio, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973), they concluded that because the Fourth Amendment was not implicated by the collection of such personal attributes as fingerprints or handwriting exemplars, the state attorney had the power to compel such from a potential defendant. That the "witness" was in or out of custody was, apparently, of no import to the Third District. Finally, the Wyche court recognized that, when it comes to Fourth Amendment issues, decisions of the United States Supreme Court control. Article I, Section 12 of the Florida Constitution. Accordingly, given ample federal precedent, the Third District found that the Fourth

Amendment is not implicated by the state attorney's subpoena and that probable cause need not be demonstrated before it is issued.

The same principles apply to the instant case, as appropriately recognized by the Second District. Moreover, the Second District distinguished Hayes on the grounds that in Hayes, the police came right to the individuals home and threatened to arrest him. The instant situation involves no intrusion into constitutionally protected space (unless one considers a jail cell with open bars to be the equivalent to a man's castle) and does not involve testimony. Accordingly, unless this Court were to step in and declare Section 27.04 unconstitutional, (an issue never raised below) there is no good constitutional reason to reverse the Second District.

Although the Hayes decision is often cited for what the police cannot do, many fail to cite it for what they can.

> We also do not abandon the suggestion in Davis and Dunanway that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting.

Hayes, at 817. Herein, we have no "removal" inasmuch as the prisoner was already in police custody. Thus, on the instant facts, even the Hayes decision authorizes the instant situation, especially where, at most, the subpoena is not even the equivalent of an arrest or search warrant inasmuch as no police authority will be taking anyone into custody or will be invading someone's constitutionally protected "turf".

CONCLUSION

This Court should affirm the decision of the Second District below on the grounds that the Fourth Amendment is not implicated by the state attorney's power to subpoena Petitioner to give handwriting and fingerprint samples.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

STEPHEN A. BAKER
Assistant Attorney General
Florida Bar # 0365645

PEGGY A. QUINCE
Assistant Attorney General
Florida Bar No. 261041

Westwood Center
2002 N. Lois - 7th Floor
Tampa, Florida 33607
(813) 873-4739

Counselors for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Tony C. Dodds, Esq, Attorney for Petitioner, P. O. Box 2657, Lakeland, Florida 33806, on this 26th day of August, 1992.

OF COUNSEL FOR RESPONDENT