IN THE SUPREME COURT OF FLORIDA

TYVESSEL TYVORUS WHITE,
Petitioner,
v.
STATE OF FLORIDA,
Respondent.

CASE NO. 88,813

REPLY BRIEF OF PETITIONER

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT

DAVID P. GAULDIN
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FLORIDA BAR NO. 26 1580
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ATTORNEY FOR PETITIONER

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IN THE SUPREME COURT OF FLORIDA

TYVESSEL TYVORUS WHITE,

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v. CASE NO. 88,813

STATE OF FLORIDA,

Respondent.

REPLY BRIEF OF PETITIONER

PRELIMINARY STATEMENT

Pursuant to the Florida Supreme Court's Administrative Order dated July 13, 1998, this brief has been printed in Times New Roman (14 point) proportionally spaced.

References to the Respondent's Supplemental Brief on the Merits shall be by the letters "RSB" followed by the appropriate page number.

SUMMARY OF THE ARGUMENT

The State, in effect, argues waiver. It makes no argument on the merits of the issue presented,

First, this issue was raised and discussed by this Court in its opinion in this case. Second, the State waived any argument of procedural default on the part of the Petitioner because the State has had three opportunities to argue this issue. Its first opportunity was in its rehearing petition to this Court's opinion; its second opportunity was in a reply to Petitioner's Brief in Opposition to the Petitioner's Jurisdictional Brief in the United States Supreme Court; and its third opportunity

was in its supplemental brief.

Because the State failed to argue the issue of "preservation" (which it now raises for the first time), the State has waived the waiver argument,

Finally, this Court has recast certified questions on other occasions, and this Court has even answered issues not raised in the certified questions in the case before it.

ARGUMENT

ISSUE

LAW ENFORCEMENT'S UNAUTHORIZED AND WARRANTLESS SEIZURE OF WHITE'S CAR, ABSENT EXIGENT CIRCUMSTANCES NOT ESTABLISHED HERE, CLEARLY VIOLATED THE CONSTITUTIONAL DUE PROCESS REQUIREMENTS OF THE FLORIDA CONSTITUTION AS RECOGNIZED IN DEPARTMENT OF LAW ENFORCEMENT V. REAL PROPERTY, 588 SO.2D 957 (FLA. 1991).

With unwarranted cheek, the State has recategorized Petitioner's issue as: "'May Petitioner raise a new argument for the first time after remand from the United States Supreme Court?' Of course, the State seems to have missed the point of a good portion of this Court's original opinion in White v. State, 710 So.2d 949 (Fla. 1998), which both raised this issue and answered it against the State.

Nonetheless, the State cries procedural foul and seeks to play hardball against the Petitioner. There are, however, at least three strikes against this argument:

Strike One

In this Court's initial opinion in this case, this Court stated: "The major thrust of our holding [in Department of Law Enforcement v. Real Property, 588 So.2d 957

(Fla. 1991)] was that in order to comply with constitutional due process requirements, the government must strictly observe a citizen's constitutional protections when invoking the drastic remedy of forfeiture of a citizen's property." White at 710 So.2d 952.

Clearly, the issue was raised and decided adversely to the state in this Court's initial opinion, Thus, the State, in its rehearing petition, had the opportunity to squarely and forthrightly respond to this issue. It failed to do so. No where in the State's rehearing petition to this Court's opinion in White did the State argue this issue. (Appendix). Thus, the State waived its earliest opportunity to address this issue on the merits. But it was certainly, if the first, not the last opportunity the State had to address this issue, which leads us to....

Strike v o

One of the two bases that White attempted to avoid the certiorari jurisdiction of the United States Supreme Court was the state constitutional (due process) issue. Indeed, White argued extensively in his "Brief of Respondent in Opposition" that the State of Florida's constitutional due process provisions provided an independent basis upon which this Court's opinion was bottomed. (Appendix, Brief of Respondent in Opposition at, for instance, 9-11).

Again, the State had an opportunity to reply to this argument but failed to do so. Rule 15, paragraph 6, of the Rules of the Supreme Court of the United States, in pertinent part states: "Any petitioner may file a reply brief addressed to new points raised in the brief in opposition [to the petition] but distribution and consideration by the Court under paragraph 5 of this Rule will not be deferred pending its receipt."

Again, the State waived its opportunity to reply because it failed to file a reply under Rule 15, paragraph 6, of the Rules of the Supreme Court of the United

States. This, in turn, leads to... .

Strike Three

The State's brief is entitled: '"Respondent's Supplemental Brief on the Merits." Emphasis added]. It is anything but a brief "on the merits." It fails in any way, shape, or form to respond to the Petitioner's Supplemental Brief on the Merits. Indeed, all the State has done is to recast Petitioner's issue (first framed by this Court in its opinion in this case) as one of procedural default. There is no argument whatsoever on the merits. Thus, the State has had a third and final chance to argue on the merits the issue of due process under the state constitution.

In the Big Leagues. Three Strikes and You're Out

Three times the State's stepped into the batter's box, and three times it has stood silent while the judicial umpire has called "strike." The State has fallen prey to the rule of procedural default with which it so delights in ambushing hapless defendants. As this Court stated in Cannady v. State, 620 So.2d 165, 170 (Fla. 1993): "Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State." The State, in short, has waived the waiver argument.

But There's More....

In effect., what this Court did in its original opinion is determine the facial constitutionality of the statute, which requires no preservation below. See, for example, Travis v. State, 700 So.2d 104 (Fla. 1st DCA 1997) for a general discussion on the facial constitutionality of a statute where a constitutional right is involved, as here, as opposed to a statute which only involves vagueness, as in the

actual facts of Travis.

The statute in question in this case was silent as to whether a warrant was required. In holding this statute facially constitutional, this Court in its original opinion (properly) construed state constitutional due process principles to require a pre-seizure hearing. The wisdom of this decision has been fully supported by the argument in White's supplemental brief on the merits.

Loose Ends

The State has some other complaints, which will be dealt with peremptorily.

First, the State appears to complain that the certified question from the District Court of Appeal did not encompass the issue as to whether state constitutional due process principles require a pre-seizure judicial *ex parte* hearing.

On many occasions, this Court has recast the wording of a certified question to encompass all the ramifications of an issue. See, for example, Weiand v. State, 732 So.2d 1044, 1047 (Fla. 1999). On the other hand, in Feller v. State, 637 So.2d 911 (Fla. 1994), this Court answered the first certified question against the Petitioner, refused to answer the second certified question (as a result of its answer to the first question), and then reversed the case on grounds other than those raised in the certified questions.

Clearly, the wording of the certified question was no bar whatsoever to this Court's exercise of its discretionary jurisdiction in reaching the state constitutional due process issue in this case and the initial opinion.

Finally, the state argues that "new cases" not cited below are improper, relying upon cases dealing with a "rehearing", and complains that certain materials in the appendices of White's supplemental brief are "de *hors* the record."

As for the former, this is not a rehearing. It is a remand for this Court to

reconsider (if necessary) its opinion in light of the United States Supreme Court's ruling in this case. The state's citation and reliance upon these cases related to rehearing is irrelevant.

As for the materials "*de hors* the record" they were never meant to be parts of the "record." In this policy issue, they are merely meant to be persuasive as argument is persuasive.

Moreover, this indeed does encompass a policy issue, to wit: whether, for the reasons stated in the supplemental initial brief on the merits, law enforcement will be allowed to run warrantless used car lots.

Last but not least, although White's interests are obviously implicated, and the undersigned represents the same, this Court's ruling will affect every citizen in the State of Florida.

CONCLUSION

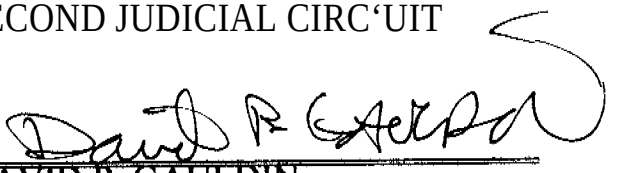
Based on the foregoing arguments and authorities, this Court, in the absence of the United States Supreme Court's willingness to support the constitutional rights of Americans, should support the state constitutional rights of Floridians and require a pre-seizure *ex parte* judicial hearing prior to seizure under the Forfeiture Statute.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been forwarded by delivery to the Office of the Attorney General, The Capitol, Plaza Level, Tallahassee, Florida, this 12th day of August.

Respectfully submitted,

NANCY A. DANIELS
PUBLIC DEFENDER
SECOND JUDICIAL CIRC'UIT



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IN THE SUPREME COURT OF FLORIDA

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Gauldin

IN THE SUPREME COURT OF FLORIDA

TYVESSEL TYVORUS WHITE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 88, 813

MOTION FOR REHEARING

Pursuant to Florida Rule of Appellate Procedure 9.330, the Respondent, the State of Florida, moves this Honorable Court for rehearing, and in support of this Motion states:

1. On February 26, 1998, this Court issued its opinion in the above styled cause.

2. This Court held that pursuant to the Fourth Amendment of the United States Constitution, a warrant is required for seizure of an automobile under the Florida Contraband Forfeiture Act, absent exigent circumstances. Slip opn, p. 4-5. This Court stated: "We simply cannot accept the government's position that it may act at anytime, anywhere, and regardless of the existence of exigent circumstances, or a change in ownership OK possession, to seize a citizen's property once believed to have been used in illegal activity, without securing the authorization of a neutral magistrate." Slip opn, 5.

3. As this Court correctly recognized, under Art. I, § 12, Fla. Const., when addressing Fourth Amendment issues "we are bound to follow interpretations of the United States Supreme Court with relation to the fourth amendment and provide no greater protection than those interpretations." Slip opn., p. s, n. 3 (citations deleted).

4. It is respectfully submitted that this Court has done precisely what is proscribed by Art. I, § 12, and has provided greater Fourth Amendment protection to petitioner and his automobile than that provided under precedent of the United States Supreme Court. This Court, in its decision, relied heavily on the dissent in the district court below, which in turn "relied primarily on the opinion of the United States Court of Appeals for the Second Circuit in U.S. v. Lasanta, 978 F.2d 1300 (2d Cir. 1992)" (slip opn, p. 2 (footnote deleted). This Court as well relied heavily on Lasanta, citing it not only in a full page footnote (n. 4, stretching from p. 2 of the slip opinion, encompassing all of page 3, and ending finally on page 4) with the approving observation that the Second Circuit's "reasoning is sound and speaks for itself[]", n. 4, but citing it no less than five times in the body of the opinion itself. Slip opn., pps. 5-7. Judge Wolf's dissent in the court below is cited and relied upon no less than four times in the body of this Court's decision in this case. It is respectfully

submitted that a Florida District Court of Appeals dissenting opinion and a decision of the Federal Second Circuit are, and under the Florida Constitution, must be, irrelevant to this court's decision on fourth amendment issues. The only relevant body of case law for the determination of this issue is that of the United States Supreme Court.

5. It is respectfully submitted that the decision of this court is contrary to determinative, controlling decisions of the United States Supreme Court on this subject matter, hence, it must be reversed.

6. The United States Supreme Court in Bennis v, Michigan, 116 S.Ct. 994, 134 L.Ed.2d 68 (1996), held that there is no innocent owner exception to seizure. In Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), the Court sanctioned the seizure two months after a drug offense of the yacht of a completely innocent owner, the leasing company. The constitutionally seizure there was effected under a Puerto Rican statute, P.R.Laws Ann., Tit. 24, ss 2512(a)(4), (b) (Supp.1973), which states:

> (a) The proceedings shall be begun by the seizure of the property by the Secretary of Justice, the Secretary of the Treasury or the Police Superintendent, through their delegates, policemen or other peace officers. The officer under whose authority the action is taken shall serve notice on the owner of the property seized or the

> person in charge thereof or any person having any known right or interest therein, of the seizure and of the appraisal of the properties so seized, said notice to be served in an authentic manner, within ten (10) days following such seizure and such notice shall be understood to have been served upon the mailing thereof with return receipt requested. The owners, persons in charge, -and other persons having a known interest in the property so seized may challenge the confiscation within the fifteen (15) days following the service of the notice on them, through a complaint against the officer under whose authority the confiscation has been made, on whom notice shall be served, and which complaint shall be filed in the Part of the Superior Court corresponding to the place where the seizure was made and shall be heard without subjection to docket. All questions that may arise shall be decided and all other proceedings shall be conducted as in an ordinary civil action.

-Calero-Toledo, n. 2

As is apparent under this statute, the seizure is to be effected by a police officer, there is no requirement for obtaining a pre-seizure warrant from a magistrate, there is no necessity for any exigent circumstance, and the ownership status of the thing seized is irrelevant.

In Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), the Court upheld against Fourth Amendment challenge seizure, subsequent search, and introduction of narcotics in evidence against a man whose car was seized under circumstances analytically indistinguishable from those here. Cooper was arrested for narcotics charges, his car was impounded for evidence for the seizure proceedings, it was searched a week later while in the impound yard. The Court stated, 87 S.Ct. 791,

> Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car--whether the State had 'legal title' to it or not--was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own [386 U.S. 62] protection, to search it. It is no answer to say that the police could have obtained a search warrant, for '(t)he relevant test is not whether it is reasonable to procure a search warrant, hut whether the search was reasonable.' *United States v. Rabinowitz, 339* U.S. 56, 66, 70 S.Ct. 430, 435, 94 L.Ed. 653. Under the circumstances of this case, we cannot hold unreasonable under the Fourth Amendment the examination or search of a car validly held by officers for use as evidence in a forfeiture proceeding.

Cooper further makes clear that automobile searches are unique, and case law dealing with fourth amendment concerns touching search and seizure of fixed property are inapposite: "searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property." 87 S.Ct. at 790.

In the leading case establishing the automobile exigent circumstances doctrine, Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925), the Supreme Court held that prohibition agents had valid probable cause to stop, subsequently search, thereafter seize, and introduce into evidence liquor found

hidden behind the upholstery of an automobile. The facts show that the revenue agents developed this probable cause on Sept. 21, 1921 in Grand Rapids, Michigan and stopped and searched the vehicle on December 15, 1921, when they saw it being driven on a highway about 15 miles outside of Grand Rapids.

The Court stated in Carroll, 45 S.Ct. at 287: "The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law." It is apparent in Carroll that the reasonable cause of the officer to stop, search and seize the car, sans any intervening warrant, occurred nearly three months earlier. The car in Carroll was forfeited pursuant to a federal prohibition forfeiture statute much akin to the Florida Statute here, only that it provided a significantly lower degree of due process protection. 45 S.Ct at 282.

In canvassing the cases, the Court noted that it had been well settled for two centuries under English common law before the founding of the United States that revenue agents could stop, search for and seize goods violative of various tax and duty laws. The Court further noted that one of the first acts passed by the very first Congress authorized revenue agents to stop and search

vessels for contraband goods. The Court further stated, 45 S.Ct. at 283,

> The intent of Congress to make a distinction between the necessity for a search warrant in the searching of private dwellings and in that of automobiles and other road vehicles in the enforcement of the Prohibition Act is thus clearly established by the legislative history of the Stanley Amendment. Is such a distinction consistent with the Fourth Amendment? We think that it is, The Fourth Amendment does not denounce all searches or seizures, but only such as are unreasonable.

Examination of controlling Supreme Court precedent on the subject matter (all of which was cited in the State's brief to this court shows), it is respectfully submitted, that this Court's rationale and conclusion cannot withstand scrutiny. The ownership status of the thing seized is irrelevant. Bennis, Calero-Toledo. Seizure can be effected without the officer obtaining a warrant prior. Calero-Toledo, Carroll. Search can be conducted after seizure without prior issuance of a warrant. Cooper. The seizure can be validly effected, without necessity of an intervening warrant, two months after the development of probable cause, Calero-Toledo, or even longer, up to nearly three months, Carroll (which is a longer time span than in this case, see Slip opn., n.2).

7. Also not to be overlooked in the cogent observation of the dissent that by adopting the precedent of the Federal Second Circuit in Lasanta, (the minority view) this Court has rejected

Federal Eleventh Circuit precedent, United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989), which is the majority view on this subject matter. Thus, in Florida, there now exists the inherently conflicting situation that the seizure, search, introduction of the drugs, and forfeiture of the automobile here would be perfectly valid under the Fourth Amendment as interpreted by Eleventh Circuit case law if done by a federal officer in a federal prosecution, but the exact same scenario, if done by a Florida officer in a Florida prosecution, is violative of the Fourth Amendment as interpreted by the Second Circuit.

WHEREFORE, Respondent, State of Florida, respectfully moves this Honorable Court to grant this rehearing, withdraw its opinion of February 26, 1998, and hold in lieu thereof that the seizure, search, forfeiture, and evidence uncovered as a result thereof was constitutionally valid under the Fourth Amendment.

Respectfully submitted,

ROBERT A. BUTTERWORTH
ATTORNEY GENERAL

DANIEL A. DAVID
ASSISTANT ATTORNEY GENERAL
FLORIDA BAR NO. 0650412

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THE CAPITOL
TALLAHASSEE, FL 32399-1050
(904) 488-0600

COUNSEL FOR PETITIONER
[AGO #L96-1-4903TCR]

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished by U.S. Mail to David Gauldin, Asst. Public Defender, Leon County Courthouse, 301 s. Monroe St., Tallahassee, FL. 32301 this 13 day of March, 1998.

Daniel A. David
Attorney for the State of Florida

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Appendix

NO. 98-223

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1998

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

ON PETITION FOR WRIT *OF* CERTIORARI
TO THE SUPREME COURT *OF* FLORIDA

BRIEF OF RESPONDENT IN OPPOSITION

DAVID P. GAULDIN
ASSISTANT PUBLIC DEFENDER
SECOND JUDICIAL CIRCUIT
LEON COUNTY COURTHOUSE
SUITE 401
301 SOUTH MONROE STREET
TALLAHASSEE, FLORIDA 32301
(850) 488-2458

ATTORNEY FOR RESPONDENT

(MEMBER *OF* THE BAR OF THIS COURT)

QUESTION PRESENTED

Petitioner, the State of Florida, presents the following question:

> WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A WARRANT IS REQUIRED BY THE FOURTH AMENDMENT TO SEIZE A MOTOR VEHICLE UNDER A CONTRABAND FORFEITURE ACT AND FOR SUBSEQUENT SEARCH OF SAID VEHICLE CONFLICTS WITH DECISIONS OF THE COURT IN CARROLL V. UNITED STATES, CALERO-TOLEDO V. PEARSON YACHT LEASING, AND COOPER V. CALIFORNIA, THAT OF THE ELEVENTH CIRCUIT IN UNITED STATES V. VALDES AND THE MAJORITY OF STATE COURTS ADDRESSING THIS ISSUE?

Respondent, Tyvessel Tyvorus White, restates the question presented as follows:

> WHETHER THE DECISION OF THE FLORIDA SUPREME COURT HOLDING THAT A STATE OF FLORIDA CITIZEN'S PROPERTY IS PROTECTED BY THE FEDERAL AND FLORIDA CONSTITUTIONS AGAINST WARRANTLESS SEIZURE EVEN WHEN THE SEIZURE IS DONE PURSUANT TO A STATUTORY SCHEME FOR FORFEITURE CONFLICTS WITH HOLDINGS OF THIS COURT TO THE CONTRARY?

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1997

STATE OF FLORIDA,

Petitioner,

v.

TYVESSEL TYVORUS WHITE,

Respondent.

OPINION BELOW

The Florida Supreme Court's opinion is reported as White v. State, 710 So.2d 949 (Fla. 1998). Respondent's appendix contains a copy of the Florida Supreme Court's decision and will be referred to by the letter "A" followed by the appropriate page number.

JURISDICTION

The jurisdiction of this Court is invoked by Petitioner pursuant to 28 U.S.C. Section 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondent accepts Petitioner's constitutional and statutory provisions involved with the addition of the following:

Article I, Section 9 of the Florida Constitution provides Section 9. Due process. -- No person shall be deprived of life, liberty or property without due process of law, or be twice put in jeopardy for the same offense, or be compelled in any criminal matter to be a witness against himself.

STATEMENT OF THE CASE AND FACTS

A more complete rendition of the material facts as found in the Florida Supreme Court's opinion, including relevant deleted footnotes, follows:

> MATERIAL FACTS'
>
> On October 14, 1993, petitioner Tyvessel Tyvorus White (White) was arrested at his place of employment on charges unrelated to this case. After taking White into custody on those unrelated charges, and securing the keys to his automobile, the arresting officer seized his automobile from the parking lot of White's employment. The police did not seize the vehicle incident to White's arrest or obtain a prior court order or warrant to authorize the seizure. Rather, the basis of the seizure was the arresting officers' belief that White's automobile had been used several months earlier to deliver illegal drugs, and therefore the vehicle was subject to forfeiture

---

'The following facts are taken from the First District's opinion. *White, 680* So.2d at 551-55.

by the government.' After confiscation of the vehicle, a subsequent search turned up two pieces of crack cocaine in the ashtray.

'Based on the discovery of the cocaine, White was charged with possession of a controlled substance. White subsequently objected to the introduction into evidence of the cocaine seized during the post-arrest search of his automobile. The trial court reserved ruling on the issue and allowed the evidence to go to a jury. White was thereafter convicted of possession of cocaine; and subsequently the trial court formally denied White's objection and motion to suppress the cocaine evidence.

On appeal, the First District affirmed White's conviction and approved the government's warrantless seizure of White's car. The majority opinion found that the government met the requirements of the Florida Contraband Forfeiture Act, sections 932.701-932.707, Florida Statutes (1993) (hereinafter Forfeiture Act) in that the warrantless seizure of White's automobile was based upon probable cause to believe that the vehicle had facilitated illegal drug activity at some

---

"The dates of the alleged prior illegal activities were July 26, 1993, and August 4 and 7, 1993. We commend the State's candor in providing these dates during oral argument. As both parties noted at oral argument, the record is unclear as to the actual dates. The State noted that these dates are contained in White's motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850.

> time in the past. Further, the majority found that the warrantless seizure did not violate White's Fourth Amendment right to be secure against unreasonable searches and seizures. [Footnote 3 omitted] In dissent, Judge Wolf asserted that the "warrantless seizure of an automobile absent exigent circumstances violates the Fourth Amendment of the United States Constitution even though probable cause exists to believe that the automobile is subject to forfeiture as a result of prior narcotics transactions." *White*, 680 So.2d at 557 (Wolf, J., concurring in part and dissenting in part).
>
> Because the court found that neither this Court nor the United States Supreme Court had addressed the issue of whether law enforcement agencies must obtain a warrant prior to seizing a citizen's property under the Florida Contraband Forfeiture Act, the First District certified the issue as one of great public importance to this Court. [A-2-3]

REASONS FOR NOT GRANTING THE WRIT

The decision of the Florida Supreme Court is not in direct conflict with decisions of this Court that no warrant is required under the Fourth Amendment to seize, search and forfeit a motor vehicle pursuant to a civil forfeiture act.

Essentially, Petitioner requests this Court to take jurisdiction and to quash the holding of the Florida Supreme Court on the basis that the Florida opinion conflicts with

decisions of this Court, the Eleventh Circuit, and the majority of state courts addressing the issue of whether a warrant is required prior, to a seizure of an automobile under a contraband forfeiture' statute.

The Petitioner argues that under the Florida Constitution there can be no independent and state ground for the Florida Supreme Court's decision in this 'case because under Article I, Section 12 of the Florida Constitution, Fourth Amendment issues in the Florida courts must be decided in conformity with decisions of this court, and the Florida courts can afford no higher level of Fourth Amendment protection.[3]

As noted by the Florida Supreme Court, prior to its decision on this issue, neither it nor this Court has addressed the issue of whether law enforcement agencies must obtain a warrant prior to seizing a citizen's property under the Florida Contraband Forfeiture Act. (A-3). Because this Court has not previously addressed this issue, the Florida Supreme Court was free to follow its own precedent. Rolling v. State, 695 So.2d 278, 293 n. 10 (Fla. 1997).

The Petitioner erroneously argues that this Court has addressed the same issues addressed by the Florida Supreme Court

[3]Petitioner cites Bernie v. State, 524 So.2d 988,990-991 (Fla. 1988) and the Florida Supreme Court's decision which explicitly recognized this constraint in its decision. (A-8, note 3).

in its decision in this Court's decisions of Carroll et al v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed.543 (1925), Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 94 S.Ct. 2080, 40 L.Ed.2d 452 (1974), and Cooper v. California, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967).

The issue presented to the Florida Supreme Court in the opinion involving Respondent was whether under the Florida Contraband Forfeiture Act probable cause to forfeit the vehicle (without more) was sufficient to justify a warrantless seizure of the vehicle. That issue was never presented nor contemplated in this Court's decision in Carroll v. United States.

In Carroll, this Court concluded that the government had probable cause to believe that contraband was presently being transported and that because of exigent circumstances created by the mobility of a vehicle, immediate seizure was permissible. The "probable cause" involved in Carroll was not probable cause that the vehicle was subject to forfeiture, but probable cause that at the time of the seizure the vehicle carried contraband goods (prohibited alcohol).

As this Court noted in Carroll, the "...main purpose of the act [involved in Carroll] obviously was to deal with the liquor and its transportation, and to destroy it." [267 U.S. 154]. This Court concluded in Carroll that probable cause existed to believe "...that intoxicating liquor was being transported in the

automobile which" the agents stopped and searched. [Emphasis added; 267 U.S. 162].

It is clear from the context of Carroll that the probable cause involved was probable cause to believe that contraband was presently being transported by the vehicle. In that light, this Court went on to caution that otherwise warrantless seizures were disfavored:

> In cases where the securing of a warrant is reasonably practicable, it must be used and when properly supported by affidavit and issued after judicial approval protects the seizing officer against a suit for damages. In cases where seizure is impossible except without warrant, the seizing officer acts unlawfully and at his peril unless he can show the court probable cause. United States v. Kaplan, (D.C.), 286 F. 963, 972. [Carroll at 267 U.S. 156].

Clearly, Carroll does not support Petitioner's contention that the Florida Supreme Court's opinion conflicts with a decision of this Court and that as a result this Court should accept jurisdiction.

This Court's holding in Calero-Toledo v. Pearson Yacht Leasing co., supra, likewise in no way conflicts with the holding of the Florida Supreme Court's decision in this case. In Calero-Toledo, this Court specifically noted in footnote 14 that: "We have no occasion to address the question whether the Fourth

Amendment warrant or probable-cause requirements are applicable to seizures under the Puerto Rican statutes." 416 U.S. 679, 40 L.Ed.2d at 466.

Calero-Toledo v. Pearson Yacht Leasing Co. was decided under federal constitutional due process requirements, and as will be argued below, the decision by the Florida Supreme Court was bottomed in part, at least, upon Florida Constitutional due process requirements.

Finally, the Florida Supreme Court's decision does not conflict with Cooper v. California. In Cooper, although this Court upheld an inventory search of a car which had been seized pursuant to a California forfeiture statute, the legality of the seizure (as opposed to the search) was never at issue.

Contrary to the implication of Petitioner's petition to this court, the Florida Supreme Court's decision was bottomed upon both the Federal and Florida Constitutions:

> In summary, we answer the certified question in the affirmative and hold that the warrantless seizure of a citizen's property is protected by the federal' and Florida constitutions even when the seizure is made pursuant to a statutory forfeiture scheme. [A-5, Emphasis added].

The Florida Supreme Court's decision was essentially split into two parts under the headings "Department of Law Enforcement" and "Automobile Exception." The former involved the discussion of

state due process principles, the latter a Fourth Amendment analysis.

The heading "Department of Law Enforcement" refers to the Florida Supreme Court's decision in Department of Law Enforcment v. Real Property, 588 So.2d 957 (Fla. 1991). With limitations and restrictions as explained in that opinion, that opinion upheld the constitutionality of the Florida Contraband Forfeiture Act both as to real property and (as involved here) to personal property.

Involved in Department of Law Enforcement were basic due process rights under the Florida Constitution under Article I, Section 9, Florida Constitution. Id. at 964.

With that as background, it is clear that the Florida Supreme Court's decision in this case was bottomed not only upon Fourth Amendment principles but upon state constitutional due process principles as embodied in Article I, Section 9, Florida Constitution. Indeed, the Florida Supreme Court made this clear in reference to Department of Law Enforcement:

> In Department *of Law Enforcement, we* were able to uphold the constitutionality of Florida's forfeiture act only by imposing numerous restrictions and safeguards on the use of the act in order to protect a citizen's property from arbitrary action by the government. In discussing the act we declared:
>
> The Act raises numerous

> constitutional concerns that touch upon many substantive and procedural rights protected by the Florida Constitution. In construing the Act, we note that forfeitures are considered harsh exactions, and as a general rule they are not favored either in law or equity. Therefore, this Court has long followed a police that it must strictly construe forfeiture statutes.

588 So.2d at 961. The major thrust of our holding was that order to comply with constitutional due process requirements, the government must strictly observe a citizen's constitutional protections when invoking the drastic remedy of forfeiture of a citizen's property. In addition to expressly holding that the Fourth Amendment applies to forfeiture attempts by the government, we specifically explained:

> In those situations where the state has not yet taken possession of the personal property that it wishes to be forfeited, the state may seek an ex parte preliminary hearing. At that hearing, the court shall authorize seizure of the personal property if it finds probably cause to maintain the forfeiture act.

Id. at 965. We conclude that the

> government's unauthorized and warrantless seizure, absent exigent circumstances not established here, clearly violated the constitutional safeguards we recognized in *Department of Law Enforcement,*
>
> The government did not seek a warrant or an "ex part preliminary hearing" here in order to secure a neutral magistrate's determination of probable cause. The government just seized the property, thereby putting the property owner and any others claiming an interest in the property in the position of having to take affirmative action against the government in order to protect their rights. This is the very antithesis of the cautious procedure we mandated in *Department of Law Enforcement.* We simply cannot accept the government's position that it may act at anytime, anywhere, and regardless of the existence of exigent circumstances, or a change in ownership or possession, to seize a citizen's property once believed to have been used in illegal activity, without securing the authorization of a neutral magistrate. [Emphasis added]. [A-31.

Thus, the Florida Supreme Court has construed that the Florida Contraband Forfeiture Act is only constitutional under the State of Florida's constitution in the manner that the Florida Supreme Court has construed the act.

The second part of the Florida Supreme Court's opinion is

entitled "Automobile Exception." It is this part of the opinion that implicates the Fourth Amendment.

The Florida Supreme Court notes that the only basis for the unauthorized government seizure in this case was the "so-called Automobile Exception to the warrant requirement." (A-3). However, it is undisputed on the facts of this case that there was no probable cause to believe that contraband was in the vehicle at the time of its seizure (this was conceded by the Petitioner below) nor were there any exigent circumstances which rendered the Automobile Exception applicable here. (A-4).

The Petitioner complains that because the Florida Supreme Court has adopted the "minority view" as found in United States v. Lasanta, 978 F.2d 1300 (2d Cir. 1992) as opposed to what the Petitioner terms the "majority view" in United States v. Valdes, 876 F.2d 1554 (11th Cir. 1989),:

> .there now exists in Florida the inherently anomalous situation that an automobile seized by state officers cannot be searched and forfeited without warrant as the Fourth Amendment is interpreted by the Florida Supreme Court, while that same automobile seized for identical reasons by federal officers, can be searched and forfeited without warrant under the Fourth Amendment, as interpreted by the Eleventh Circuit. [Petitioner's petition at 6].

No, that's not the case at all. Under the Florida Contraband

Forfeiture Act an automobile located in Florida may not be seized without a recognized exception to the Fourth Amendment. Under Title 21, United States Code Section 881, the result may differ depending -upon which federal circuit the offending automobile is found, but conflicts amongst the federal circuits should be resolved by this Court in the federal context, not by a case which merely construes the Florida Contraband Forfeiture Act.

As the Florida Supreme Court noted in its opinion, this Court "...has purposely subjected the Fourth Amendment to only a 'few well-delineated exceptions.' Coolidge v. New Hampshire, 403 U.S. 443, 455, 91 S.Ct. 2022, 2032, 29 L.Ed.2d 564 (1971)." (A-5).

To date, unless this Court intends an expansion of those "well-delineated exceptions" heretofore announced, the "forfeiture exception" espoused by the Petitioner is not one of those recognized exceptions.

In this regard the Florida Supreme Court stated:

> ...[T]he absence of probable cause to believe contraband was in the vehicle combined with an obvious lack of any other exigent circumstances renders the Automobile Exception inapplicable here. The exception does not apply when no probable cause exists and the police arrest either a sleeping suspect [as in] Lasanta, or a suspect at work with keys in his pocket. White. There simply was no concern presented here that an

> opportunity to seize evidence would be missed because of the mobility of the vehicle. Indeed, the entire focus of the seizure here was to seize the vehicle itself as a prize because of its alleged prior use in illegal activities, rather than to search the vehicle for contraband known to be therein, and that might be lost if not seized immediately. [A-4].

Thus, and unless this Court is interested in expanding the exceptions to a warrantless search under the Fourth Amendment, there is no need to grant the Petitioner's petition in this case and to expand the heretofore recognized exceptions to the warrant requirement under the Fourth Amendment.

As noted by the Florida Supreme Court's opinion, the Florida legislature certainly did not have the authority to expand the exceptions to the Fourth Amendment:

> [Footnote 7] As Chief Justice Kogan recently reminded us, the genius of our federal and state constitutions is that they define basic rights that neither the legislative nor executive branches can modify. Krischer v. McIver, 697 So.2d 97, 112 (Fla. 1997) (Kogan, C.J., dissenting). These remarkable documents fenced off from the "ordinary political process" these rights guaranteed all Americans by ensuring they "could not be repealed by a mere majority vote of legislators now nor...alter[ed] through any process except constitutional amendment." Id. at 112-113. [A-9].

CONCLUSION

The decision of the Florida Supreme Court is not in conflict with any well-established Fourth Amendment precedence as set forth by this Court. The Florida Supreme Court interpreted the Florida Contraband Forfeiture Act under both the due process provisions of the Florida state constitution and the Fourth Amendment. Any conflict that exists amongst the federal circuits should be decided by a petition from a federal court.

Respondent respectfully requests this Court to deny the State of Florida's petition for writ of certiorari.