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IN THE SUPREME COURT OF FLORIDA

TYVESSEL TYVORUS WHITE,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE NO. 88, 813

ORIGINAL

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Tyvessel Tyvorus White, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

All emphasis through bold lettering is supplied unless the contrary is indicated.

CERTIFICATE OF FONT AND TYPE SIZE

Counsel certifies that this brief was typed using Courier New 12.

STATEMENT OF THE CASE AND FACTS

This case is before this court after remand from the United States Supreme Court. That court, in Florida v. White, U.S. _, 119 S.Ct. 1555, 143 L.Ed.2d. 748 (May 17, 1999), reversed this court's decision in White v. State, 710 So.2d 949 (Fla. 1998). This court issued Order Setting Briefing Schedule on Remand on June 28, 1999'. Petitioner, Tyvessel White, submitted Supplemental Brief of Petitioner on July 9, 1999. This brief of respondent is submitted in conformity with this Court's June 28, 1999 order.

'White on June 29, 1999 filed with this court Motion to Set Briefing Schedule and Request for Oral Argument.

SUMMARY OF ARGUMENT

Petitioner's due process claim was never presented to or ruled upon by the circuit court, was never considered by the First District, formed no part of the certified question submitted to this court for resolution, constituted no square basis for the decision of this court on the merits, formed no part of the question submitted to the United States Supreme Court upon which certiorari was granted, and does not appear in the decision of the United States Supreme Court.

The United States Supreme Court's opinion in Florida v. White strictly adhered to the issue before the Court -- the application of the Fourth Amendment, not due process.

ARGUMENT

ISSUE

MAY PETITIONER RAISE A NEW ARGUMENT FOR THE FIRST TIME AFTER REMAND FROM THE UNITED STATES SUPREME COURT? (Restated)

Merits

The sole preserved issue in this case -- and decided by the United States Supreme Court -- was whether an antecedent warrant is required under the Fourth Amendment of the United States Constitution for seizure of an automobile under the Florida Contraband Forfeiture Act. The claim that "due process" under the Florida Constitution requires an antecedent warrant for seizure under the Florida Contraband Forfeiture Act was not raised as an objection in the trial court and formed no basis of the trial court's denial of the motion to suppress. Nor was a due process claim raised in the First District Court of Appeal, and such does not appear in the decision of that court.

The due process theory was not argued in the merits to this Court in White v, State, 710 So.2d 949 (Fla. 1998). The due process argument was not the rationale upon which the majority relied in Florida v. White, nor does it appear in the concurring opinion of Justices Souter and Breyer. Likewise due process is not mentioned in the body of the dissenting opinion of Justices Stevens and Ginsburg except for the following reference by Justice Stevens (n.1) that:

> The Florida Supreme Court's opinion could be read to suggest that due process protections in the Florida

> Constitution might independently require a warrant of other judicial process before seizure under the Florida Contraband Forfeiture Act. See **710** So.2d, at 952 (discussing *Department of Law Enforcement v. Real Property, 588* **So.** 2d 957 (1991)). **However, the certified question put to that court referred only to the Fourth Amendment to the United States Constitution.** (e.s.)

The dicta of this court digressing to Desartment of Law Enforcement v. Real Property at 710 So.2d 952 of the decision in White v. State is not relevant to the only question presented to this court, as even Justice Stevens's dissent, note 1, makes clear: whether the Fourth Amendment requires such antecedent warrant.

In State v. Barber, **301** So.2d 7, 9 (Fla. 1974) the Court held: "An appellate court must confine itself to a review of only those questions which were before the trial court and upon which a ruling adverse to the appealing party was made." Steinhorst v. State, **412** So.2d 332, 338 (Fla. 1982): "[I]n order for an argument to be cognizable on appeal, it must be the specific contention asserted as legal ground for the objection, exception, or motion below." As this Court noted in Steinhorst, 412 So.2d at 338: "Since defense counsel did not present this latter argument to the trial court, it is not properly before this Court on appeal." That is precisely the situation here[2].

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[2]Moreover, White's new theory in his supplemental brief is grounded upon citations to a plethora of cases that were never cited to, argued from, or relied upon in any of his briefs to any court before this point. The same point holds true for his appendix to this supplemental brief, containing, aside from the decisions of this court and the United States Supreme Court in this case, a diverse compendium of promotional advertisements for law enforcement seminars, political polemics, and newspaper

See also GaHarbour Marine, Inc. v. Fickett, 484 So.2d 1250 (Fla. 1st DCA 1985) and Price Wise Buying Group v. Nuzum, 343 So.2d *115* (Fla. 1st DCA 1977) (in context of motions for rehearing, proscribing use of new arguments); Cartee v. Fla. Dept. Health and Rehabilitative Services, 354 So.2d 81 (Fla. 1st DCA 1977) (in context of rehearing, proscribing reliance on additional cases); Altchiler v. State, Dept. of Prof. Reg., 442 So.2d 349 (Fla. 1st DCA 1983) (proscribing reference to matters *de hors* the record).

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editorials. But for the two court opinions, all else is inarguably *de hors* the record.

CONCLUSION

Based on the foregoing, the State respectfully submits that the new argument of White, along with his new cases and *de hors* the record appendix cannot be considered for the first time on remand from the United States Supreme Court. As a natural consequence, his request for oral argument on this new issue should likewise be denied. This court should adopt the binding decision of the United States Supreme Court in Florida v. White, supra, on the only issue subject to review: the application of the Fourth Amendment to Florida forfeiture procedures.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS has been furnished by U.S. Mail to David P. Gauldin, Esq., Assistant Public Defender, Leon County Courthouse, Suite 401, 301 South Monroe Street, Tallahassee, Florida 32301, this 6 day of August, 1999.

Daniel A. David
Attorney for the State of Florida

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