IN THE SUPREME COURT OF FLORIDA

BARBARA GAYLE HOLLAND,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

CASE **NO. 88,995**

RESPONDENT'S ANSWER BRIEF ON THE MERITS

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellant 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, Barbara Gayle Holland, the Appellee in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or by proper name.

The symbol "R" will refer to the record on appeal, consisting of one volume and including the transcript of the circuit-court evidentiary hearing; "IB" will designate the Initial Brief of Petitioner. Each symbol will be followed by the appropriate page number in parentheses.

All bold-type emphasis is supplied, and all other emphasis is contained within original quotations unless the contrary is indicated.

STATEMENT OF THE **CASE AND FACTS**

The State agrees with Petitioner's statement of the case and facts, except it adds and clarifies the following.

Petitioner mentions (IB 2) that the police saw the black male run up to other cars that day. The State adds that the other

incidents occurred at the same "complex" and that each time, instead of visiting someone in the "complex," the vehicle "would stay just a couple of minutes and then they'd back out and leave." (R 143)

Although the subjective conclusion of an officer concerning the threshold for a constitutional stop is irrelevant to its legal determination, Petitioner states (TB 3) that Officers Duell and James admitted that they did not have probable cause to stop Holland's vehicle absent running the stop sign. The State clarifies facts discussed by Petitioner. Officer Duell, who observed the transaction between the black male and the vehicles, testified:

> Q. Did you feel you had probable cause to arrest the driver of vehicle that Ms. Holland was in at that time?
>
> A. I'm sorry, I didn't --
>
> Q. Did you feel you had probable cause to arrest the person or stop the person in the vehicle that Miss Holland was in?
>
> A. Yes, probable cause -- I felt, I believe was to stop them. I've worked that area, I've made several undercover buys in that same or similar situation with the same actions. You pull in, an individual comes to your car, you only stay a couple minutes, you back out and leave ... with drug transactions.

(R **145-46)**

Petitioner omits Officer's Duell's testimony that the street crimes unit to which he was assigned does "various duties," including "assist all units from traffic to investigation and patrol units." (R 148)

Petitioner also omits evidence of the routine police practice of stopping a motorist for running a stop sign. Officer Duell acknowledged that if he sees a vehicle run a stop sign, he stops it. (R 149) Officer James testified, "I always ... stop them" for running a stop sign even if I don't suspect them of any other criminal activity. (R 152)

Petitioner omits the following facts: The officer identified himself immediately after stopping the vehicle, then asked only the driver (not Petitioner) to step from the vehicle. Petitioner remained in the passenger seat. The officer's gun was not drawn as he approached the vehicle. (R 156)

SUMMARY OF ARGUMENT

Pursuant to this Court's repeatedly and recently applied precedent, Whren controls both prongs of the certified question. The police possessed probable cause for the offense of running a stop sign, thereby constitutionally stopping the vehicle in which Petitioner was a passenger. Under Whren, this probable cause is the sole determinant of the constitutionality of the stop. Whren easily dismissed Petitioner's potential danger argument as remote. Whren approved that stop. This Court should approve the stop here. As the First DCA panel unanimously concluded, Whren "compels" reversal of the trial court's suppression order.

ARGUMENT

ISSUE

WHETHER WHREN V. UNITED STATES, __ U.S. __, 116 S. CT. 1769, __ L. ED. 2D __ (1996), OVERRULES STATE V. DANIEL, 665 SO. 2D 1040, 1046 (FLA. 1995), AND WHETHER THE PRESENT SUPPRESSION ORDER SHOULD BE REVERSED.

Petitioner contests the First DCA decision, reported at 21 Fla. L. Weekly D1914, reversing the trial court's suppression of cocaine paraphernalia. Petitioner argues that Perez v. State, 620 So. 2d 1256 (Fla. 1993), should be abandoned, essentially arguing that Article I, Section 12, Fla. Const., has a life independent of decisions of the United States Supreme Court, Petitioner argues that by abandoning Perez, Whren V. United States, __ U.S. __, 116 S.Ct. 1769, __ L. Ed. 2d __ (1996), would not overrule State v. Daniel, 665 So.2d 1040 (Fla. 1995).

This Honorable Court's unanimous decision in Daniel is dispositive of Petitioner's attack on Perez..paniel repeatedly reaffirmed the holding in Perez:

> While we are bound by any apposite holdings of the United States Supreme Court on Fourth Amendment issues, *Perez* v. ***State,*** *620* **So.2d 1256** (Fla.1993), ***

665 So. 2d at 1041.

> Our opinion in ***Kehoe*** [v. *State*, 521 **So.2d** 1094 (Fla.1988)] remains good law until such time as the

> United States Supreme Court may overrule or modify it, ***

665 So. 2d at 1047.

> On Fourth Amendment issues, Florida law conforms to apposite precedent of the United States Supreme Court. Art. I, § 12, Fla. Const.; Perez v. ***State,*** 620 So.2d 1256 (Fla.1993). Any Supreme Court pronouncement factually and legally on point with the present case would automatically modify the law of Florida to the extent of any inconsistency.

665 So. 2d at 1047 n. 10.

Daniel's unanimous endorsement of stare decisis in interpreting the applicability of Article I, § 12, Fla. Const., stands on the shoulders of a monumental body of law that Justice Overton summarized in 1993:

> Dissenters ordinarily accept the majority view in subsequent decisions where the issue involved two intellectually reasonable but opposing views. The latter situation is illustrated by Justice Powell's dissent in ***Bates*** v. State ***Bar, 433*** U.S. 350, 389, 97 S.Ct. 2691, 2712, 53 L.Ed.2d 810 (1977), and his subsequent authoring of the majority opinion in ***In*** re ***R.M.J.,*** 455 U.S. 191, 102 S.Ct. 929, 71 L.Ed.2d 64 (1982), based on ***Bates.*** Another illustration involves this Court's decision in ***Bernie [v. State,*** 524 So.2d 988 (Fla.1988)]. Although Chief Justice Barkett and I dissented in ***Bernie,*** we subsequently accepted the majority view, as illustrated by Chief Justice Barkett's opinion in ***Robinson v. State, 537*** So.2d 95 (Fla.1989), where this Court unanimously held that the United States Supreme Court's decision in Colorado v. ***Bertine, 479*** U.S. 367, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987), had superseded our contrary holdings in ***Miller*** v. ***State, 403*** So.2d 1307

(Fla.1981), and *Sanders v. State,* 403 So.2d 973 (Fla.1981).

> More than ten years have passed since the 1982 amendment to article I, section 12, of the Florida Constitution was adopted, and our 1988 decision in *Bernie* has been consistently applied by this Court and other courts of this state for the past five years. *See, e.g., Robinson v. State, 537* So.2d 95 (Fla.1989); *Heller* v. *State, 576* So.2d 398 (Fla. 5th DCA 1991); *State v. Robinson, 565* So.2d 730 (Fla. 2d DCA), *review dismissed,* 574 So.2d 143 (Fla.1990); *Brown v. State,* 561 So.2d 1248 (Fla. 2d DCA 1990); *State v. Starkey,* 559 So.2d 335 (Fla. 1st DCA 1990); *Sutton v. State,* 556 So.2d 1211 (Fla. 2d DCA 1990); *State v.* Norman, 545 So.2d 465 (Fla. 4th DCA 1989); *Renckley v. State,* 538 So.2d 1340 (Fla. 1st DCA 1989) ; *Wyche v. State,* 536 So.2d 272 (Fla. 3d DCA 1988), *review denied,* 544 So.2d 201 (Fla.1989); *State v. Smith, 529* So.2d 1226 (Fla. 3d DCA 1988); *Shaktman v. State,* 529 So.2d 711 (Fla. 3d DCA 1988), *approved, 553* So.2d 148 (Fla.1989). Moreover, there is no question that our *Bernie* decision is a significant watershed case that has major ramifications involving multiple search and seizure issues that are regularly raised in the trial courts of this State.

Perez, 620 So.2d at 1261 (Justice Overton, concurring).

Accordingly, from 1993 onward, this Court and other Florida courts have relied upon Perez's principle. See, e.g., Daniel supra; State v. Bartee, 623 So.2d 458, 459 (Fla. 1993) ("This court recently approved Perez and disapproved the opinion under review based on the recent United States Supreme Court decision in *California v. Hodari D.* . . ."); Soca v, State, 656 So.2d 536, 537-38 (Fla. 3d DCA 1995) ("Article I, Section 12 requires us to

follow the United States Constitution's Fourth Amendment, as interpreted, in all past and future decisions, by the United States Supreme Court") reversed on other ground 673 So. 2d 24 (Fla. 1996) (bound by U.S. Supreme Court cases but here inapplicable as distinguishable). See also Gessler v. Dept. of Business and Professional Resulation, 627 So.2d 501, 504 (Fla. 4th DCA 1993) (stare decisis, "core principle of our system of justice"; citing Justice Overton in Perez).

For example, in addition to Daniel last year, Justice Kogan wrote for a **unanimous** Court in Johnson v. State, 660 So.2d 648, 654 (Fla. 1995):

> Turning to the true issue, we find that it must be governed by the good-faith exception announced in *United States v. Leon, 468* U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), which is binding upon us under article I, section 12 of the Florida Constitution. *Perez v. State, 620* So.2d 1256 (Fla.1993).

Indeed, here, the DCA majority opinion relied upon Perez's principle, and even Judge Van Nortwick's concurring opinion acknowledged that Whren "compels reversal," 21 Fla. L. Weekly **at** D1916, of the trial court order suppressing the probative evidence in this **case.**

Petitioner trivializes stare decisis in ten lines of argument where she hollowly challenges this Honorable Court "to do the

right thing" (IB 6). The State submits that stare decisis, Perez, and the Constitution of the State of Florida, as adopted by its citizens, merit greater respect than Petitioner affords and control the certified question. Petitioner is all alone in ignoring Perez and Whren. Her proposal is lawless.

The question remains' whether Whren, when juxtaposed with Florida traffic statutes, supports the First DCA's reversal of the trial court's suppression of the evidence. As the First DCA's majority and concurring opinions indicated, the answer is straightforward.

Whren limited the applicable Fourth Amendment analysis to a determination of police probable cause of a traffic offense and excluded an examination of police motive from the analysis, Accord Ohio v. Robinettg, slip op. No. 95-891 (U.S. Nov. 18, 1996, downloaded electronically) ("'Subjective intentions play no role in ordinary, probable-cause Fourth Amendment analysis"'). Here, the trial court's ruling that suppressed the evidence relied exclusively (at R 168-72) and erroneously upon its

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[1] The DCA correctly noted, 21 Fla. L. Weekly at D1914: "It is also undisputed in the present case that, once stopped, the driver consented to the search of the subject vehicle." Accordingly, the sole issue litigated, and ruled-upon, in the trial court was the validity of the initial stop (See R 159-72), and consent-to-search was not briefed in the DCA.

condemnation of police motives. Whren rejected this reliance upon "pretext." Petitioner improperly interjects this reliance upon subjective considerations, as she implores this Court to wipe "the smirks on the officers' faces" (IB 8).

Under Whren, 116 S.Ct. at 1777 (1996), the only question is whether the police had "probable cause to believe that petitioners had violated the traffic code."

Section 316.123(2)(a), Fla. Stat., clearly provides that running a stop sign is a violation of Florida law. See § 316.072, Fla. Stat. ("unlawful for any person to do any act forbidden, or to fail to perform any act required, in this chapter"). Moreover, a stop sign proclaims danger, Toolev v. Marqulies, 79 So.2d 421, 422 (Fla. 1955); therefore, although unnecessary to the resolution of the claim under Whren, this violation is neither "minor," Daniel,[2] nor trivial. See Ferrara v. State, 101 So.2d

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[2] Therefore, even if Daniel's pretext analysis were somehow still viable after Whren, it does not apply here. Even if somehow Daniel were viable and applied, the trial court's ruling constituted "plain error," 665 So.2d at 1044 n. 2, because the police possessed probable cause regarding the stop-sign violation and because the officers' testimony was uncontroverted that it was usual practice to stop motorists for running a stop sign. Officer James **"always** . . . stop[s] them" for running a stop sign even if he does not suspect them of any other criminal activity. (R 152) If Officer Duel1 sees "somebody run a stop sign," he stops them. (R 149) Accordingly, the duties of the street crimes unit included assisting "all units from traffic . . . ." (R 148)

797, 798 (Fla. 1958) ("quite properly stopped because he had violated the law by driving through a traffic light that was red") ; R.H. v. State, 671 So. 2d 871 (Fla. 3d DCA 1996)("rolling through" stop sign); State v. Velez, 649 So. 2d 310 (Fla. 3d DCA 1995) (running red light and speeding); State v. Banfield, 614 So. 2d 551, 552-53 (Fla. 2d DCA 1993)(bicyclists disregarded stop sign; improper lights), rev. denied, 626 So. 2d 203 (Fla. 1993); State v. Carmody, 553 So.2d 1366, 1367 (Fla. 5th DCA 1989) (officer's stop based upon observation of Carmody running stop sign, then Carmody failed to produce driver's license); State v. Renda, 553 So.2d 373, 374 (Fla. 2d DCA 1989) ("arrest was also valid because the cocaine was found as part of a legitimate traffic stop" for running a stop sign).

Petitioner argues that the facts of this case fall within an exception to Whren's probable-cause test because of "the danger imposed to Holland" due to an out-of-uniform officer "using an unmarked car" (IB 7-8). Petitioner proposes that the application of this exception would invoke a "balancing analysis," then she improperly argues that the danger of the stop to her would per se render it unconstitutional.

Whren controls against Petitioner's position. No "balancing analysis" whatsoever applies because the stop was not "conducted

in an extraordinary manner, unusually harmful to . . . [Petitioner's] privacy or ... physical interests," 116 S.Ct. at 1776. Whren's operative facts are strikingly similar to the circumstances in the instant case:

> On the evening of June 10, 1993, **plainclothes vice-squad officers** of the District of Columbia Metropolitan Police Department were patrolling a "**high drug area**" of the city in an **unmarked** car. Their **suspicions** were aroused when they passed a dark Pathfinder truck with temporary license plates and youthful occupants waiting at a stop sign, the driver looking down into the lap of the passenger at his right. The truck remained stopped at the intersection for what seemed an unusually long time--more than 20 seconds.

116 S.Ct. at 1772. The police then observed a traffic violation (failure to signal and speeding) and stopped the vehicle, which resulted in an arrest for drugs.

As here, plainclothes police in Whren were in an unmarked police car at the time of the stop, and, as here, the stop was conducted in a high-crime area, yet the unanimous United States Supreme Court upheld the stop as constitutional using the probable-cause test. Accordingly, Petitioner's application of Whren's unusually-harmful passage (quoted at IB 7-8) is misplaced. Whren expressly excluded the "making of a traffic stop out-of-uniform" as not even "remotely" qualifying for any analysis beyond automatically upholding the stop upon the showing

of probable cause. Instead, cases like Whren and here are "run-of-the-mi[ll]." Id. at 1777. The U.S. Supreme Court thereby unanimously rejected Whren's argument that the enforcement of traffic laws by "plainclothes police in unmarked vehicles" may "retard" the governmental interest "by producing motorist confusion and alarm," Id. at 1776; these were not operative factors in the decision upholding the stop. Similarly, they should not be considered here. A fortiori, in Whren, unlike here, the police had violated their "own regulations generally prohibiting this practice." Id. Here, as in Whren, there **was** no showing of the level of extraordinary danger requisite to removing the analysis from a simple probable cause determination.

In sum, performing any "balancing analysis" here would violate Whren. The totality of the facts establish the constitutionality of the stop, appropriately using traffic-probable-cause as the sole analysis. As all three DCA judges held here in accord with the well-settled precedent of this Court, Whren's rule and holding control.

CONCLUSION

Based on the foregoing, the State respectfully submits that both parts of the certified question should be answered in the affirmative, the unanimous decision of the District Court of Appeal that Whren overruled Daniel should be approved, and the trial court's order suppressing the evidence should be reversed.

Respectfully submitted,

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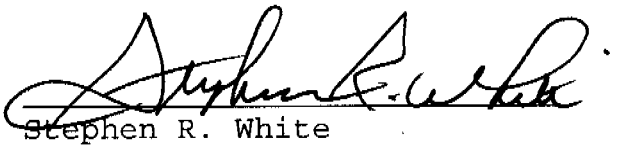
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing RESPONDENT'S ANSWER 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 25th day of November, 1996.



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