IN THE SUPREME COURT OF FLORIDA

SC CASE NO.: SC05-1844

DCA CASE NO. 4D04-2442

STATE OF FLORIDA,

Petitioner,

-VS-

GREGG CAMPBELL,

Respondent.
_____\

ANSWER BRIEF OF RESPONDENT ON THE MERITS

On Petition for Discretionary Review from
the Fourth District Court of Appeal

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PRELIMINARY STATEMENT

Petitioner, the State of Florida, was the prosecution and Respondent, Gregg Campbell, was the Defendant in the Criminal Division of the Circuit Court of the Seventeenth Judicial Circuit, in and for Broward County, Florida. Petitioner was the Appellant and Respondent was the Appellee in the Fourth District Court of Appeal. In this Brief, the parties shall be referred to as they appear before this Honorable Court except that Petitioner may also be referred to as the State and Respondent may be referred to as Campbell or Mr. Campbell.

STATEMENT OF THE CASE AND FACTS

Respondent accepts Petitioner's rendition of the statement of the case and facts as a fair and accurate representation of the record, with the following additions and one correction.[1]

Respondent was reclined in the driver's seat of his car with two young children seated behind him when he was approached by the three detectives (T.5,21,30). Detective Catalano walked from the rear of Respondent's car to the driver's side window, which he believes was rolled up, "touched the window" and "pointed that I was a Sheriff's Officer", before beginning the dialog and asking him "what he was up to" (T. 31). Detectives White and Catalona both testified that Respondent's explanation was that he was waiting for his "baby's mom" to meet him (T. 7, 31). Detective Catalona agreed that he had "no reason to doubt" Respondent's explanation (T.36-37).

The Detectives testified that they had no reason to believe that Respondent was engaged in any sort of criminal activity whatsoever, yet they requested both his driver's license and his registration (T.16, 31). After Respondent told the detectives

[1] Petitioner's Brief indicated that this Court had accepted jurisdiction. Rather, it appears that this Court has postponed the decision regarding jurisdiction and has ordered the merits of the case to be briefed. App. A.

“what he was up to” which they said they “have no reason to doubt”, Respondent was asked for his driver’s license and registration (T.31 37). The car was legally parked and Respondent did not appear to be intoxicated (T.12,17,34). The detectives were not summoned by any concerned citizen and asked to investigate Respondent or his vehicle (T.35). Rather, upon seeing him, they “decided to investigate a little bit further, check for warrants” (T. 35).

The record demonstrates that these particular detectives request driver’s licenses from those whom they encounter as a matter of “routine” (T.9). The purpose of such a request is to determine who it is they are speaking with and to run a warrants check (T.8,23). Their purpose for approaching Respondent in the first instance was “to see what he was doing”, although Detective White had “high hopes” that he would obtain consent to search Respondent’s car (T. 17, 30).

The record establishes that after Respondent surrendered his driver’s license to the police, it took several minutes, “ten, like five to seven minutes” or as low as “three to five minutes”, for the warrants check to be completed through the teletype system (T.33). The record is clear that the firearm was found after the warrants check had already been completed (T. 13).

During the entire time the warrants check was being processed, the police maintained possession of Respondent's driver's license (T.38). Prior to the conclusion of the teletype process, and while still in possession of Respondent's driver's license, the police asked for and received permission to search Campbell's car (T.24). At no time was Respondent advised that he was free to leave or that he could refuse the detectives request to search the car (T. 25). The detectives situated themselves in such a way as to have his car surrounded on three sides; Detective Catalano was by the driver's door, Detective White was by the passenger door, and Detective Carter was to the rear and off to the side of the car (T. 21).

When Respondent "acquiesced" and gave his consent, he was asked to step out of the car in order to facilitate the search (T. 24-25). The firearm was found inside of the car prior to the conclusion of the "warrants check", during a search which was indicated to have taken either "ten seconds" or up to "a matter of minutes" after the search began (T. 12,34).

SUMMARY OF ARGUMENT

The lower court correctly held that a person seated in the driver's seat of a car is effectively detained and not free to leave when the police retain possession of his driver's license. The lower court noted the trial judge could conclude that the initial encounter and surrender of Respondent's driver's license pursuant to a request by law enforcement officers may have been lawful. Respondent's continued detention, however, by the police in their failure to return his driver's license to him before seeking and obtaining consent to search his automobile resulted in the "consent" becoming tainted such that it was rendered involuntary. Accordingly, because the lower court's ruling is a fair and reasonable interpretation of existing law which is consistent with both common sense and Fourth Amendment jurisprudence, this Court should affirm.

ARGUMENT

THE DISTRICT COURT OF APPEAL WAS ENTIRELY CORRECT IN HOLDING THAT WHERE THERE WAS NO FOUNDED SUSPICION TO DETAIN RESPONDENT, YET RETAINED HIS DRIVER'S LICENSE PRIOR TO ASKING FOR AND RECEIVING CONSENT TO SEARCH HIS AUTOMOBILE, THE CONSENT WAS RENDERED INVOLUNTARY. ACCORDINGLY, THE CERTIFIED QUESTION MUST THEREFORE BE ANSWERED IN THE NEGATIVE AND THIS COURT MUST AFFIRM THE SUPPRESSION OF THE FIREARM SEIZED AS A RESULT OF THIS UNLAWFUL SEARCH.

There has never been any dispute from the onset of this litigation that there was so much as an iota of founded or articulable suspicion which would have justified the detention of Respondent. The detectives testified that they had no reason to believe that Respondent was engaged in any wrong-doing or criminal activity at the time they approached him and requested his driver's license and identification (T. 16, 35). The record further shows even after the initial encounter with these three detectives, and after their retention of his license, Mr. Campbell engaged in no suspicious behavior which would have justified any investigation or detention.

The lower court noted that under the circumstances under which Respondent found himself, a reasonable person could properly believe that he was not free to leave. *State v. Campbell*, 911 So.2d 192, 193 (Fla. 4th DCA 2005). The Fourth District decision below noted that "the state does not offer

justification, or articulable suspicion, explaining the deputies' failure to return Campbell's driver's license *before* seeking and obtaining his consent to search" *Campbell*, at 193 (e.a.). It can scarcely be reasonably argued that when an officer retains one's driver's license when one is seated in the driver's seat of an automobile, that this person is "free to leave". Indeed, *Fla. Stat*. 322.15 clearly permits the detention of an individual if he or she were to drive an automobile without their driver's license in their immediate possession.[2]

[2] *Fla. Stat*. 322.15 (1) states in pertinent part as follows: "Every licensee shall have his or her driver's licence ...in his or her immediate possession at all times when operating a motor vehicle and shall display that same upon demand of a law enforcement officer or authorized representative of the department".

This scenario was precisely the situation in which Respondent found himself. After having been approached by the police presumably for no reason other than to satisfy their own curiosity and "to investigate a little bit further, check for warrants" (T.35) and with "high hopes" that he would consent to a search of his car (T. 17), the police requested and were provided Respondent's driver's license. Again, and without any articulable or reasonable suspicion to suspect that Respondent was engaged in any criminal activity at all, the police took his driver's license away from him and began to conduct a computer check to determine whether or not a warrant was outstanding. During the time that the police were still in possession of his license, he was then asked if he would consent to a search of his automobile. The police make a conscious decision not to return Respondent's driver's license to him before they made this request. The continued possession of the license was notwithstanding the fact that they had already had possession of his license for a sufficient period of time in which to conduct any investigation which they deemed to be appropriate. Once they had transmitted the information contained on Respondent's driver's license to the dispatcher, the police had no further use for the license other than to utilize it as leverage to realize their "high hopes" that they could obtain consent to search. The

police deliberately chose not to advise Respondent that he could have his license returned to him at any time, that he was free to leave, or free to refuse their request for consent to search (T. 25).

It strains credulity to believe that a reasonable person placed in Respondent's position would feel as though he or she would have the right or authority to simply tell the police to leave him alone and to return the license. A reasonable person surrounded by three police officers investigating their status would not feel as though the police would favorably respond to a request that they simply return the license and allow him or her to be on their way. Accordingly, the lower court rightfully held that at the time that the police officers were in possession of Respondent's driver's license he was being detained. Further, the lower court quite correctly determined that based upon the fact that Respondent was being detained for no founded suspicion whatsoever when asked for consent rendered the "consent" involuntary. *Campbell*, at 193.

The holding of the Fourth District below is hardly without precedent. Once the detective took Respondent's driver's license, the "common-sense conclusion" a reasonable person would reach is that they are "effectively immobilized" while the police maintain possession of the license so that the person is detained

for Fourth Amendment purposes. *United States v. Thompson*, 712 F.2d 1356, 1359-60 (11th Cir. 1983). In *Salt Lake City v. Ray*, 998 P.2d 274 (Utah App. 2000), the police were called out to a convenience store to investigate a "suspicious female" who had been standing in front of the store for about two hours after having earlier made a purchase. The police asked Ms. Ray for identification and she produced her state identification card. During a warrants check, which took about five minutes, and while still in possession of the identification card, Ms. Ray was asked for and provided consent to search her bag. The court in *Salt Lake City* held that Ms. Ray was seized without founded suspicion based upon the police retaining possession of the identification card. This illegal seizure therefore rendered her consent to search her belongings invalid.

Likewise, in *State v. Frost*, 374 So.2d 593 (Fla. 3d DCA 1979), police officers approached Mr. Frost in the Miami International Airport. They identified themselves as narcotics investigators and asked him if he would show them his identification and airline ticket, to which he complied by giving the police his California driver's license and the ticket. While the police continued to retain possession of his ticket and license, Mr. Frost was asked for and gave consent to search his

briefcase which contained a small amount of cannabis.[3] *Frost*, at 598. The court rejected the state's argument that up until the time when the officers discovered the cannabis inside of his briefcase, and while the officers were still in possession of his ticket and license, "Frost was entirely free simply to walk away from the officers and to decline either to speak with them or to accede to their requests. Thus, it is said, Frost's actions were the result only of his own voluntary decisions and did not at all involve the strictures of the Fourth Amendment..." *Frost*, at 597. Rather, the court held that Frost's consent was indeed the result of an unreasonable seizure and was therefore invalid, and stated the following:

> It seems obvious that any person in Frost's position being questioned by narcotics officers who are holding both his identification and his means of departure would have been, at the very least, "under(the) reasonable impression that he (was) not free to leave the officers' presence." [FN6]. The state argues that even then Frost was in fact free to demand the return of his papers and then to walk away. ***But issues concerning governmental restrain of individual liberty are not to be resolved by determining what, after a close review of the applicable cases, a judge or a lawyer would know policemen are constitutionally*** (sic) ***Authorized to do.*** Rather, they are

[3] After the discovery of the misdemeanor amount of cannabis in his briefcase, Frost was placed under arrest. He then gave consent to search his checked luggage which revealed 88 pounds of cannabis. *Frost*, at 596.

> dependent upon what an ordinary man, faced with a confrontation in the real world with persons who are asserting official authority, would reasonably believe the officers (sic) Can do.[4]

Frost, at 598, (e.a.).

In *Perko v. State*, 874 So.2d 666 (Fla. 4th DCA 2004), the court held that consent obtained in a consensual encounter was rendered invalid because it was obtained while the police officer retained possession of Perko's driver's license. In his specially concurring opinion, Judge Klein wrote:

> Our sister court which upheld a search under these circumstances, did so under the assumption that a person can "withdraw his consent at any time by, for example, asking that the license be immediately returned." *Golphin v. State*, 838 So.2d 705, 707 (Fla. 5th DCA 2003). This, of course, presupposes that the person knows the law of search and seizure. I, for one, despite my law school education, had no idea there was such a thing as a consensual encounter until I became a judge. Because police officers are, in our society, charged with maintaining order and enforcing the law, it would never have occurred to me that I could insist on the return of my license before the officer was finished with it. Nor would it occur to any other person unversed in search and seizure law.

[4] In FN6, the court distinguished the states reliance on *United States v. Wylie*, 186 U.S. App. D.C. 231, 596 F.2d 62 (1977), cert. Denied, 435 U.S. 944, 98 S.Ct. 1527, 55 L.Ed2d 542 (1978) on the basis that Wylie's stop was based on "founded suspicion", whereas it was conceded in *Frost* no founded suspicion existed.

Perko, at 667.

Judge Klein went on to note that several other recent cases from other states have refused "to go along with this charade." [5] *Perko*, at 667. For example, in *State v. Daniel*, 12 S.W. 3d 420 (Tenn. 2000) the Tennessee Supreme Court noted that what began as a consensual police-citizen encounter became a seizure when the police retained the identification in order to conduct a warrants check noting that this police action constituted "a distinct departure from the typical consensual encounter." *Daniel*, at 427. Mr. Daniel was approached by police officers while standing with others in the parking lot of a convenience store. They engaged him in conversation, asked for and received identification, and determined the existence of an outstanding warrant. A search incident to arrest yielded cannabis. In ruling that there had

[5] The "charade" to which Judge Klein refers is the legal fiction that one would reasonably think that they have the right or authority to tell the police to give the license back, or to refuse to relinquish it in the first instance. It appears that the bright line rule which is advocated by Petitioner is that the police can as a matter of routine request and retain *anyone's* licence, even those who have done absolutely nothing suspicious or illegal and "request" permission to search. Unless that person has the legal savvy and knowledge to understand that, at least in theory, he or she could actually end the encounter without acquiescence to the request, reasonable persons will go along with the officers' requests. The holding in *Golphin* truly does require one to suspend any notions of reality, much like a character in "Alice in Wonderland", and is eerily reminiscent of the demand "may I see your papers" of those in the ghettos of Nazi Germany.

been an unreasonable detention and arrest, the court noted; "[W]ithout his identification, Daniel was effectively immobilized. Abandoning one's identification is simply not a practical or realistic option for a reasonable person in modern society." *Daniel*, at 428. The holding in *Daniel* echos that of the United States Supreme Court and the D.C. Circuit.

As noted, reasonable persons will feel that their liberty and freedom to move is substantially curtailed when law enforcement officers are holding their driver's license. *Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (Fla. 1983)*; *United States v. Jordan*, 958 F.2d 1085 (D.C. Cir. 1991). It is absolutely nothing more than legal fiction to pretend that a person who has been encountered by the police and asked to relinquish their driver's license would believe that they have the authority to demand that the officer return that item to them. Rather, the onus should be placed on police officers to first deliver the license back to the person and advise them of their right to refuse consent, *prior* to asking for it. Such a rule of law can hardly be interpreted to place an undue burden on police officers when they seek to obtain consent to search the private property of an individual.

Petitioner's brief claims that the district court's decision is contrary to this Court's opinions in *Baez v. State*, 894 So.2d

115 (Fla. 2004), *Lightbourne v. State*, 438 So.2d 380 (Fla. 1983), and numerous other district court of appeal decisions and cases rendered in other jurisdictions. Petitioner's reliance on these cases is flawed.

In *Baez*, the police responded in order to investigate notification that there was a vehicle parked at nighttime in a warehouse area which is normally abandoned. Both the police and the Broward Emergency Medical Services units responded. Upon arrival, the officer found the area to be dimly lit. Mr. Baez was slumped over the wheel of his parked van. The officer then knocked on the passenger window with his flashlight. Concerned that Mr. Baez may be in need of medical attention, the officer spoke to him through the window of the car. When Mr. Baez apparently could not hear him, he opened the door and got out. There was no demand or request by the officer that Baez exit the vehicle. Baez assured the officer that he was fine and that he had just fallen asleep. The officer then requested to see, "identification".[6] Baez gave the officer his driver's license and a computer check was conducted revealing an outstanding warrant. Subsequent to Mr. Baez' arrest, cocaine was discovered which was the subject matter of his motion to suppress. *Baez*, at

[6] In the case at bar, the detective requested not simply "identification" but rather requested that Respondent provide him with his license and registration (T.31).

115-116.[7] The issue as to whether or not Mr. Baez was detained when the officer retained the driver's license to conduct a warrants check was ***not decided*** by this Court. *Baez,* at 120, Chief Justice Pariente, dissenting. The actual holding of *Baez* was that the ***suspicious behavior*** of Mr. Baez provided the officer with a ***founded suspicion to conduct further investigation***. *Baez*, at 117. On this point, this court noted:

> The totality of the circumstances presented demonstrates that unlike in *Diaz*[8], the officer did have a ***reasonable basis and reasonable suspicion to investigate Baez further.*** Baez was found in a ***suspicious condition*** – slumped over the wheel of his van – in a location in which he should not normally have been – a dimly lit warehouse area at night. Baez voluntarily exited his vehicle, and when asked for identification, gave his driver's license to the officer. ***The officer had sufficient cause to further investigate by doing a computer check based on Baez's suspicious behavior. It was not unreasonable for the officer to proceed with the computer check when he had not yet eliminated reasonable concern and justified and articulable suspicion of criminal conduct. Unlike in Diaz, the officer here had not eliminated all criminal suspicion.***

Baez, at 117(e.a).

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[7] The cocaine was found in the back seat of the transporting office's car where Mr. Baez had been seated. *Baez*, at 116.

[8] *State v. Diaz*, 850 So.2d 435 (Fla. 2003)(detention of a driver after the basis for stop was resolved constituted an unreasonable restraint on driver's liberty and information concerning the identity obtained from driver after that point was constitutionally tainted). See further discussion of *Diaz* and similar district court holdings, infra at pp. 23-25.

Respondent exhibited none of the characteristics which were highlighted in the *Baez* case which justified the officers ability to detain Mr. Baez based upon a "reasonable basis and reasonable suspicion." Unlike in *Baez*, Respondent was simply sitting in a legally parked car, when the police officers happened upon him on a routine patrol (T.5, 21, 35). The police were not called to the scene by a concerned citizen (T. 35). They had no reason to suspect that Respondent was engaged in any criminal activity when the police requested and received Respondent's driver's license and retained possession of it when asking and receiving consent to search the car (T. 16,24). *Baez* and the lower court's decision in *Campbell* are clearly distinguishable by their facts.

Likewise, Petitioner relied heavily on the *Lightbourne* decision of this Court. The facts in *Lightbourne* indicate that Officer McGowan approached Mr. Lightborne in order to investigate a suspicious car which had been called to his attention by a concerned citizen. *Lightbourne*, at 387. Officer McGowan engaged Mr. Lightbourne and asked him his address, what his reason for being there was, and conducted a "routine check on defendant's car and identification". *Lightboure*, at 387. At some point during the encounter, Mr. Lighbourne became nervous in his appearance and made furtive movements. The officer then conducted a pat down for weapons wherein a firearm was

discovered. *Lightbourne*, at 389, 390. Accordingly, the search which revealed a firearm in Mr. Lightbourne's possession was upheld because Mr. Lightbourne engaged in behavior which authorized the officer to perform a legitimate *Terry* pat-down.[9] This Court concluded that the contact between Officer McGowan and Mr. Lightbourne was consensual, ***"prior to"*** Mr. Lightbourne giving the license to the officer. *Lightbourne,* at 388. *Lightbourne* ***did not hold*** that one is free to leave after surrendering his or her driver's license to the police.

Petitioner has placed reliance on *U.S. v. Mendenhall*, 446 U.S. 544 (1980). *Mendenhall* has no bearing on the certified question pending before this Court.

In *Mendenhall*, police officers approached Ms. Mendenhall in a concourse of an airport and asked for and received Ms. Mendenhall's ticket and driver's license. Importantly, the officers ***returned these items*** back to her ***prior*** to asking her to accompany them to an office for further questioning. *Mendenhall*, at 548. After going to the office, which was located up a flight a stairs and about 50 feet from where she had first been approached, she was asked if she would submit to a search ***and was told she had the right to decline the search if she wanted to***, but she responded, "[G]o ahead". *Mendenhall,* at 548.

[9] *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)

Subsequently, Ms. Mendenhall was again asked if she would consent to be searched. The police then took her to a private room where a female officer asked if she would consent to be searched and she responded that she would. The officer requested that she remove her clothing to which Ms. Mendenhall agreed and while in the process of doing so, handed the officer packages of heroin. Accordingly, the facts in *Mendenhall* are completely different than those in the case at bar. Notably, the police in *Mendenhall* ***returned the driver's license and the ticket prior to asking for and receiving consent to be searched***. This is not the case here where the officers retained possession of Respondent's driver's license while they asked for consent to search his vehicle. Here, unlike in *Mendenhall*, Respondent's freedom to move about was substantially restricted by the officer's actions in retaining the licence. Relying on *Mendenhall*, Petitioner asserted in their brief that the record was devoid of any evidence or circumstances that "even remotely indicate seizure". Petitioner's initial brief on the merits. at 14. Respondent respectfully submits that his freedom of movement was ***substantially impaired*** and he was ***effectively immobilized*** and seized when the officer retained his driver's license. *Perko, Frost, Daniel, Jordan,* and *Royer*, supra. Without the license, he could not legally drive his car. *Fla. Stat.* 322.15.[10]

[10] As noted earlier, if Campbell had chosen simply to drive

Other cases cited by Petitioner are likewise not controlling. In *Michigan v. Chesternut*, 486 U.S. 567, 108 S.Ct. 1975, 100 L.Ed. 2d 565 (1988), the police drove along next to a person who had taken flight upon seeing them. When they got up close to him, Michael Chesternut discarded a number of packets which were soon discovered to contain codeine, a controlled substance under Michigan law. It was held that no unconstitutional seizure occurred based upon the actions of the police. Not only was Mr. Chesternut free to leave, ***he did leave***. Thus, the court correctly noted that he was not detained. Further, *Chesternut* does not address the issue as to the voluntariness of a consent search. The court simply held that under those facts, Mr. Chesternut was not detained and the seizure of the abandoned drugs was constitutionally permissible.

Petitioner cited *Florida v. Bostick*, 501 U.S. 429 (1991) to support their position that this court should reverse *Campbell*. The facts in *Bostick* are entirely different than in the case at bar. Terrance Bostick was on a bus when confronted by police officers. After obtaining and reviewing his identification, it was "immediately returned" to him and he was "specifically advised" that he had the right to refuse the request to search.

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off without his license, Respondent would have provided the police with the statutory authority for his detention.

Bostick, at 431-32. Further, because he was on a bus, his freedom of movement was not impacted by any police action; it was impacted because he was a passenger on a bus. *Bostick*, at 436. Accordingly, there was no detention which was caused by the police. The facts presented at bar are in stark contrast to those in *Bostick*; the detectives retained Campbell's license, they did not advise him that he had any legal right to refuse to give consent, and his freedom to leave was eliminated by the specific actions of the police, not some other unrelated factor.

Petitioner cited *Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319 (Fla. 1983)*, for the proposition that it is constitutionally permissible for the police to approach someone in an airport and examine their airline ticket and driver's license. *Royer* did hold that it was constitutionally permissible for the police to approach a person in a *public place* and ask for and examine an airline ticket and identification.[11] Based on Mr. Royer's actions and the police investigation, it was held that the police had a reasonable basis to conduct a *Terry* stop and investigation. *Royer* held that under the circumstances, the investigatory stop morphed into an arrest without probable cause. *Royer*, at 503.

[11] Walking about an airport concourse is without a doubt a "public place." Respondent was seated inside of his car, legally parked in his "baby's mom" parking lot. This is a place where he should have been able to expect substantially more privacy than someone walking through a public transportation hub.

Importantly, the court stated ***"by returning his ticket and driver's license, and informing him that he was free to go if he so desired, the officers may have obviated any claim that the encounter was anything but a consensual matter from start to finish."*** *Royer*, at 504 (e.a.). Indeed, the foregoing statement from *Royer* provides significant guidance as to how this court should respond to the certified question before it.

Petitioner cited *I.N.S. v. Delgado*, 466 U.S. 210 (1984). There, it was held that in a workplace, where I.N.S. agents were stationed at the door, no seizure took place where the employees were asked by agents about their legal status in this country. The court determined that the conduct of the agents should not have conveyed the belief that the employees were being detained "if they simply gave truthful answers to the questions put to them or if they simply refused to answer." *Delgado,* at 218. No issue as to consent to search one's property was involved in *Delgado*. The issue as to whether the workers were detained ***by virtue of the agents retaining their property*** was not addressed in *Delgado*. Accordingly, that case is not controlling on the issue presented on this appeal.

There were also Florida district court of appeal cases cited by Petitioner which they maintain support their position. For example, Petitioner cited *State v. Chang*, 668 So.2d 207 (Fla. 1st

DCA 1996). In that case, the police encountered Anthony Chang and some others in front of a vacant house. Mr. Chang was on foot. The officer asked for identification and Mr. Chang provided a driver's license. The police also ran the tag of a car parked in front of the house which came back as registered to Chang. After running a computer check and determining that he was not wanted, ***Officer Schwab returned Chang's driver's license back to him***. *Chang*, at 208. Only then did the police request and obtain consent to search Chang's car which contained a concealed firearm. Petitioner asserts that the fact the officer returned the license prior to asking for consent to search "is of no import to this case." Petitioner's initial brief on the merits, at 19. Here, the ***primary issue*** is whether the ***retention*** of the Respondent's driver's license, which was obtained by the police without founded suspicion, rendered his otherwise untainted consent to become tainted.[12] Clearly, *Chang* is not controlling.

Another case relied on by Petitioner is *McLane v. Rose*, 537 So.2d 652 (Fla.2nd DCA 1989). In this case, the police were in a neighborhood known to be a high drug trafficking area. On their

[12] Petitioner also asserted; "In this case, the encounter remained consensual and the evidence is uncontroverted that Respondent voluntarily consented to the search of his vehicle." Petitioner's initial brief on the merits, at 19. This argument is circular in nature as it assumes that the retention of Campbell's license did not convert an initial voluntary encounter into a detention for Fourth Amendment purposes. This is precisely the issue before this Court.

initial visit to the area, they police discovered a gun in one of the mailboxes and drug paraphernalia in one of the vacant apartments.

The duplex was being investigated at the behest of a citizen who lived in one of the apartments. While the officers were standing in front of one of the duplexes, Ansell Rose drove up into the driveway. Immediately upon his headlights illuminating the officers, he backed up into the road and stopped, leaving the headlights and motor running. After Rose did not move for a "considerable period of time" the officer's approached the car and asked for and received his driver's license. *McLane*, at 653. During the time that the computer check was underway, the passenger attempted to conceal something between her seat and the center console. Fearing that the item may be a weapon, the police ordered the passenger from the car. The officer then reached inside between the seat and the console and discovered cocaine. He then arrested the passenger and ordered Rose from the car. At this point, the computer check revealed an active warrant for Rose. A post arrest search of his person revealed additional cocaine. *McLane*, at 653.

The *McLane* opinion noted that "nothing in the record indicates that the appellee was not free to leave or ever expressed a desire to leave ***prior to relinquishing his driver's***

license to the officers." *McLane*, at 654, (e.a.). The court went on to state;

> Any detainment of the appellee occurred after the officers had properly discovered cocaine and paraphernalia within the vehicle and ordered the appellee out of the vehicle. At this time, ***if not before***, the officers were aware of facts which provided a well founded suspicion sufficient to detain the appellee.

McLane, at 654 (e.a.).

Again, the facts are completely different than those at bar. Rose's passenger created a founded suspicion for the officers to conduct a *Terry* search for weapons. Rose was properly detained by virtue of his passengers actions and the officers discovery of cocaine. Unlike Mr. Rose, Respondent engaged in no behavior which created any founded suspicion to detain. Importantly, *McLane* did not address the issue as to whether the officers could have obtained consent from Rose while still in possession of his license. In fact, the opinion simply observed that ***prior to relinquishing his driver's license,*** Rose did not express any desire to leave and that a permissible encounter had occurred. *McLane*, at 654. As was the case with *Chang*, this case is not controlling on the issue to be decided.

This court has definitively held that in a traffic stop scenario, once the officer determines that his reason for stopping the car was erroneous, any further detention of the

driver other than a simple explanation for the initial purpose of the stop infringes on one's Fourth Amendment rights. *State v. Diaz*, 850 So.2d 435 (Fla. 2003). In *Diaz*, a police officer stopped Robert Diaz because he could not read the expiration date of his temporary tag. As he approached Mr. Diaz, he was able to clearly read the tag and realized that it was not expired. This Court ruled that detention of Diaz after the initial basis for stop was resolved constituted an unreasonable restraint on driver's liberty and information obtained from driver after that point was constitutionally tainted. Thus, evidence that he was driving on a suspended license was ordered to be suppressed. *Diaz*, at 440. Likewise, in *Lanier v. State*,____ So.2d _____, 30 Fla. L. Weekly D2373 (Fla. 2nd DCA Oct. 7, 2005) the police stopped a car known to have a probation violator in the passenger seat. After the arrest of passenger, the officer asked to see the driver's license and registration of the driver. While a check was being conducted on the license, Lanier got out of the car and refused to get back in when so ordered by Officer Shea. Lanier then put his hand in his pants and refused to remove it upon being ordered to do so. A struggle ensued and Lanier was handcuffed.

Subsequently, a baggie of cocaine was found near the struggle. In reversing the conviction for possession of cocaine and resisting arrest without violence, the court stated;

> Once the passenger was arrested , the reason for the initial stop was satisfied, and the only contact Shea was permitted was to tell Lanier the reason for the stop and to allow him to be on his way. By requesting Lanier's identification and requiring him to remain in his vehicle while Shea checked for outstanding warrants, Shea violated the provisions of the Fourth Amendment and the supreme court's clear holding in *Diaz*. Accordingly, the trial court erred in denying Lanier's motion to suppress.

Lanier, at D2374. See also, *Fernandez v. State*, _____ So.2d , 2006 WL 26179 (Fla. 1st DCA Jan. 6, 2006)(vehicle stop and subsequent driver's license check invalid where initial basis to stop, to cite the *female registered owner* of a vehicle for driving with a suspended license, where officer realized the *driver was a male;* ascertaining the driver's identity and discovering that he had a suspended license was constitutionally impermissible).

Based upon the holdings in *Diaz*, *Lanier*, and *Fernandez*, it is reasonable to conclude that if it is constitutionally impermissible to even request identification from the driver of a car after the purpose for the stop has been satisfied or otherwise established to have been erroneous, the request for

identification from a citizen who provided the police no legal basis to justify any detention in the first instance certainly impacts on one's Fourth Amendment protections.[13]

The Fourth District certified the question to this Court based on the concern that the answer to it is of great importance to law enforcement. *Campbell,* at 193. That is to say, law enforcement must be provided with some guidance as to how to proceed when they are retaining one's license when they are engaged in an otherwise consensual encounter and wish to seek consent to search that person's automobile. It is generally considered to be the case that in Fourth Amendment situations, the court will typically look at the totality of circumstances in order to determine whether or not a seizure has taken place which would then render an otherwise consensual encounter to be involuntary. *Poppel v. State,* 626 So.2d 185 (Fla. 1993). This apparent rule of law is not firm and certainly has exceptions in Fourth Amendment jurisprudence. A stark exception to the "totality of circumstances" analysis rule is the holding in *New York v. Belton*, 453 U.S. 454, 101 S.Ct. 2860, 69 L.Ed 2d 768 (1981). See also, *Diaz*, supra. In *Belton*, the United States Supreme Court fashioned a bright line rule so that law

[13] This line of cases is certainly difficult to reconcile with the decision in *Golphin* which indicates that the police are constitutionally permitted to ask for and obtain the license of a pedestrian without any founded suspicion whatsoever.

enforcement could have guidance in making a determination when they would be justified in searching an automobile after the arrest of the driver. There had been considerable confusion amongst the law enforcement community and the courts as to the permissible constitutional bounds by which police officers were constrained to when confronted with such a situation. Of course, *Belton* held that *whenever* there was an arrest by law enforcement of a driver of an automobile, there was a per se rule that gave police officers cart blanc to search that passenger compartment of the car under the theory that the automobile is by definition movable and potential contraband could be discarded/destroyed or that there could be weapons in the car causing a safety concern for the officer. Thus, when appropriate, the courts have created bright line or per se rules to provide the police with guidance

Respondent submits that it is reasonable to fashion a per se rule that instructs the police that; 1) when engaged in an interaction with a citizen, 2) who has provided no founded suspicion to detain, and 3) has provided his license or other identification to the police, the officer must return the document to this person and advise him of his right to both leave and refuse consent before asking for it. The law enforcement community should be placed on notice that to do otherwise will render “consent” to search in such an instance to be involuntary

and that evidence derived in such a manner will be suppressed. Such a holding would be reasonable, constitutional, and in keeping with civil liberties and common sense.

CONCLUSION

Based upon the foregoing arguments and authorities, it is respectfully submitted that this Court should answer the certified question in the negative and affirm the holding below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of this Brief was delivered by U.S. Mail to MONIQUE E. L'ITALIEN, Assistant Attorney General, Attorney General's Office, 1515 North Flagler Drive, Suite 900, West Palm Beach, Fl., 33401-2299 this 9th day of January, 2006.

Samuel R. Halpern

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that Respondent's brief complies with the spacing and font requirements of Fla. R. App. P. 9.210 and this Honorable Court's order dated July 13, 1998. This brief is double-spaced, set in 12 point font, Courier New which is not proportionally spaced.

By:
Samuel R. Halpern