IN THE SUPREME COURT OF FLORIDA

CHAVIS ZIEGLER AND TRISTAN ELLIS,

Petitioners,

Case No. SC06-589

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF

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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. Petitioners, Chavis Ziegler and Tristan Ellis, the Appellants in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

The record on appeal consists of four volumes, which will be referenced according to the respective number designated in the Index to the Record on Appeal. "IB" will designate Petitioner's Initial Brief. Each symbol will be followed by the appropriate page number in parentheses.

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

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner’s statement of the case and facts as being generally supported by the record subject to the following additions:

The trial court denied the suppression motions by written order as follows:

ORDER ON DEFENDANTS' MOTIONS TO SUPPRESS

At hearing January 13, 2005, the Court received the following in evidence: depositions of Deputy Brownfield and Deputy Jackson (stipulated in by all three attorneys: A.S.A. Hingson, Siegmeister, Baker); the video tape of the stop which led to the recovery of the items sought to be suppressed; and the live testimony of Deputy Brownfield. Additionally, the Court heard argument of counsel and received several cited cases for review.

Based upon the evidence before me, the Court finds as follows:

1) At the time of the stop, the officers had probable cause to believe the temporary tag on the vehicle as not "conspicuously displayed ... as to be clearly visible from the rear of the vehicle." [Florida Statute 320.131(4)].

2) The fact that when a very high-intensity law-enforcement spotlight pointed at the tag made it visible, still does not meet the statutory requirements.

3) The high-intensity spotlighting of the tag would have been dangerous if done before the vehicle was out of the usual traveling lanes. The temporary tag was not "clearly visible" with normal headlights at normal distances.

4) Once the stop was started (blue lights) based on the 320.131(4) violation, and the car pulled over, it was reasonable to walk up to the car and make an explanation – this put the officer in a position to better see the tag, but clearly does not meet 320.131(4) criteria.

5) When the officer went to the stopped/pulled-over vehicle, that is when he smelled the burnt cannabis/marijuana smell. Whether he was there for a few seconds making an explanation, or longer is not significant – the odor had been detected – and probable cause was existing.

6) Additionally, consent was obtained for the search. However, this was after the stop and

contact – which if invalid/unconstitutional would invalidate the consent.

The Motions to Suppress are DENIED.
DONE AND ORDERED in Chambers at Lake City, Columbia County, Florida, this 13th day of Jan., 2005.

/s/ Paul S. Bryan
PAUL S. BRYAN
Circuit Judge

(I:51-52)

SUMMARY OF ARGUMENT

Issue One. The First District below properly found State v. Diaz, 850 So.2d 435 (Fla. 2003) distinguishable on the facts of this case. The non-visible temporary tag stop was valid under Diaz. The deputy had every right to be where he was under Diaz when he smelled the odor of burned marijuana. Thus, even if he had been in the process of explaining and releasing under Diaz rather than asking for identification, he would have been presented with this independent probable cause. That probable cause permitted search of the passenger compartment and discovery of the narcotics in this case.

Issue Two. The First District below properly held the contraband in Petitioners' car would have been inevitably discovered. Under a totality of the circumstances approach, there was an investigation underfoot. Alternatively, even if inevitable discovery is found wanting, there is independent source. The deputy was lawfully at the passenger side window under Diaz. The impropriety occurred in what he was saying at this lawful vantage point – asking for identification rather than explaining and releasing. At that lawful vantage point he would have been presented with probable cause via the burnt marijuana smell even if the Diaz post stop explanation element had been literally

complied with. Lastly, Petitioners' formulation that the deputy could only communicate with the car occupants through a rolled up window is an untenable position. Asking a stopped motorist to roll down a window to facilitate communication is a *de minimis* action that would hardly be intimidating or intrusive to a reasonable motorist.

ARGUMENT

ISSUE I

WHETHER THE TRIAL COURT ERRED BY DENYING SUPPRESSION IN THIS CASE? (Restated)

Standard of Review

Connor v. State, 803 So.2d 598, 608 (Fla. 2001):

> [A]ppellate courts should ... accord a presumption of correctness to the trial court's rulings on motions to suppress with regard to the trial court's determination of historical facts, but appellate courts must independently review mixed questions of law and fact that ultimately determine constitutional issues arising in the context of the Fourth and Fifth Amendment and, by extension, article I, section 9 of the Florida Constitution.

Moreover, "The ruling of the trial court on a motion to suppress comes to us clothed with a presumption of correctness and we must interpret the evidence and reasonable inference and deductions in a manner most favorable to sustaining the trial court's ruling." Johnson v. State, 608 So. 2d 4, 9 (Fla. 1992), citing Owen v. State, 560 So. 2d 207, 211 (Fla. 1990), cert. denied, 112 L. Ed. 2d 118, 111 S. Ct. 152 (1990).

Under Art. 1, § 12, Fla. Const. (1968), Florida courts must decide suppression issues "in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United

States Supreme Court." Florida courts are mandated under this provision to follow United States Supreme Court rulings on the subject matter, Bernie v. State, 524 So.2d 988 (Fla. 1988), and Florida's constitutional privacy provision does not alter this obligation. State v. Hume, 512 So.2d 185 (Fla. 1987). Bernie states, 524 So.2d at 990-991, that under the conformity clause, Florida courts are "bound to follow the interpretations of the United States Supreme Court with relation to the fourth amendment and provide no greater protection than those interpretations."

Burden of Persuasion

In a direct appeal or collateral proceeding, the party challenging the judgement or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court. § 924.051(7), Fla. Stat. (2001), provides:

> In a direct appeal ... the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

Accord, Abbott v. State, 334 So. 2d 642, 646-647 (Fla. 3d DCA 1976), cert. den., 431 U.S. 968, 97 S. Ct. 2926, 53 L.Ed.2d 1064 (1977):

> The burden of establishing error is always on the appellant. The verdict or judgment of guilt having arrived in this court clothed with a presumption of correctness, all inferences to be drawn from the evidence are to be in favor of the verdict or judgment of guilt. Crum v. State, Fla. App. 1965, 172 So. 2d 24, 25. As a general proposition, it is the burden of appellant to make error appear in the record. Bryant v. State, Fla. App. 1967, 204 So. 2d 9.

A trial court's ruling is presumed correct. Applegate v. Barnett, 377 So.2d 1150 (Fla. 1979). The trial court's decision, not its reasoning, is reviewed on appeal and will be affirmed even when based on erroneous reasoning. Caso v. State, 524 So.2d 422, 424 (Fla. 1988). A trial court may be right for the wrong reason. Grant v. State, 474 So.2d 259, 260 (Fla. 1st DCA 1985). Because the trial court's decision is presumed correct, "the appellee can present any argument supported by the record even if not expressly asserted in the lower court." Dade County School Bd. v. Radio Station WQBA, 731 So. 2d 638, 645 (Fla. 1999).

Merits

Respondent recognizes the holding of this Court in State v. Diaz, 850 So.2d 435 (Fla. 2003). Respondent here argues for neither reversal nor modification of Diaz. Respondent recognizes that under Diaz, once a vehicle is stopped for a non-visible temporary tag and upon walking up to that vehicle the officer can see the tag is good, then

> the sheriff's deputy could lawfully make personal contact … only to explain … the reason for the initial stop. … anything more than an explanation of the stop was a violation of Mr. Diaz's Fourth Amendment rights.
> Id. at 440

Succinctly, Respondent argues, as was found by the First District below, Diaz is not applicable to the facts of this case and hence does not control the outcome. In sum, the stop for a non-visible tag was permissible under Diaz. Once the visibility of the tag was ascertained, then under Diaz all the deputy could do was "make personal contact … only to explain … the reason for the initial stop." And it is here, and precisely here, during this permitted "personal contact … to explain … the reason for the initial stop" that Diaz becomes non-applicable.

That is because during that lawful personal contact to explain the reason for the stop, the deputy smelled burnt marijuana per the factual findings of the circuit court. Once

the burnt marijuana odor was detected, the law applicable to events changed.

Because of the burnt marijuana odor, it was no longer under Diaz a situation where "after the officer is fully satisfied that the motorist has not committed a violation of the laws of the State of Florida," id. at 440, the officer's only permissible role is to make personal contact, explain the reason for the stop, and send that motorist who has "not committed a violation of the laws of the State of Florida" back on his journey. In distinction here, once the burnt marijuana smell was detected, the deputy had a discrete, ascertainable, viable fact upon which to believe the laws of the state of Florida were, at that very moment, before his very eyes, being violated. Ascertainment of this violation of Florida Statutes occurred at a time and a place where the deputy had every right to be: on a public roadway, at the window of the stopped car, where he was supposed to, under Diaz, make personal contact, explain the reason for the stop, and send the car on its way.

Even if Diaz had been inarguably and exactly followed by the Deputy on the side of the Interstate in this case, the following would have occurred: the Deputy stops the car for a non-visible temporary tag. On walking up to the stopped car he sees the tag. He walks to the passenger side window, furthest

from passing traffic[1]. To make personal contact, he taps on the window. He says, in effect, “I at first couldn’t see your temporary tag, but I now can and it is good. You’re free to go on your way.” During that explanation period he can smell the burnt marijuana from the stopped car while he is doing exactly what Diaz commands.

Once the burnt marijuana aroma is detected, the deputy has a valid basis to detain and investigate further. “As the odor of previously burnt marijuana certainly warranted a belief that an offense had been committed, this unquestionably provided the police officers on the scene probable cause to search the passenger compartment of the respondent's vehicle.” State v. Betz, 815 So. 2d 627, 633 (Fla. 2002)[2].

The stop for a non-readable temporary tag is valid. Diaz. Once a valid stop is effected, the officer or officers could order both the driver, Pennsylvania v. Mimms, 434 U.S. 106, 98

[1] Working from the shoulder of the road furthest away from passing highway traffic is a legitimate police technique. “The hazard of accidental injury from passing traffic to an officer standing on the driver's side of the vehicle may also be appreciable in some situations. Rather than conversing while standing exposed to moving traffic, the officer prudently may prefer to ask the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both.” Pennsylvania v. Mimms, 434 U.S. 106, 110-111 (U.S. 1977). Hence the officer-occupant contact here through the passenger as opposed to the driver side window.

[2] Both the cannabis and the cocaine were found in the passenger compartment. (I:4).

S. Ct. 330, 54 L. Ed. 2d 331 (1977) and the passenger, Maryland v. Wilson, 519 U.S. 408, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997) out of the car with no specific or articulable reason to do so, just on the basis of officer safety. If such police orders to drivers and occupants are sustainable under the Fourth Amendment when there is no specific or articulable reason to do so, there can be no plausible argument against them when the officer has a specific articulable reason to believe a law violation is underway through the detection of the burnt marijuana smell from the car.

A stop based on a non-visible or non-readable temporary tag is permissible. Diaz. The officer had probable cause through the smell of burned marijuana from the car to believe a violation of Florida statutes was underway. Betz. He could order out both the driver, Mims, and the passenger, Wilson. He developed this probable cause in a place and manner where he had every right to be, making personal contact with the occupants of the stopped car. Diaz.

It is thus seen that the officer's request during the permissible encounter under Diaz for identification rather than telling the car occupants why they were stopped and that they were free to go is immaterial. Whether explaining under this Diaz encounter that they were free to go or requesting I.D., it

is seen that in either circumstance the officer would have smelled the marijuana. Once the probable cause presented itself during the Diaz contact after the stop, the officer could lawfully take the actions he did.

Hence, the trial court properly denied suppression on this record and the First District properly found Diaz non-controlling. The decision of the First District should thus be upheld here.

ISSUE II

WHETHER THE FIRST DISTRICT ERRED BY HOLDING THAT THE CONTRABAND IN THE PETITIONERS' VEHICLE WOULD HAVE BEEN INEVITABLY DISCOVERED (Restated)

Standard of Review

Respondent has been unable to ascertain a case which precisely states the standard of review for the inevitable discovery doctrine. Respondent asserts, based on Ornelas v. United States, 517 U.S. 690, 116 S. Ct. 1657, 134 L. Ed. 2d 911 (1996) and Nix v. Williams, 467 U.S. 431, 81 L. Ed. 2d 377, 104 S. Ct. 2501 (1984) that it is a mixed question of law and fact, with factual findings presumptively correct and the legal issue subject to *de novo* review.

Merits

Petitioners fault the First District for finding that the contraband in Petitioners' vehicle would have been inevitably discovered. The First District wrote, in pertinent part, Zeigler v. State, 922 So. 2d 384, 385 (Fla. 1st DCA 2006):

> Although Officer Brownfield impermissibly asked for Appellants' identification, the trial court correctly determined that the contraband was not required to be suppressed. Under the inevitable discovery rule, when evidence is obtained through

> the result of unconstitutional police procedures, the evidence will still be admissible if it would have been discovered through legal means. See Jeffries v. State, 797 So. 2d 573, 577-578 (Fla. 2001). Here, the trial court determined that Officer Brownfield smelled marijuana when he went to Appellants' stopped vehicle. Had Officer Brownfield immediately explained the reason for the stop when he made personal contact with Appellants, rather than first asking Appellants for their identification, he would have still smelled marijuana and thus developed probable cause to detain Appellants.

This is an unremarkable exposition of law. Petitioners argument seems to be centered on two particular contentions: *one*, there was no on-going criminal investigation into petitioners' drug trafficking, and *two*, it is "speculation that petitioners would have lowered their car window even if Deputy Brownfield had not demanded identification." (IB, p. 24).

Taking those assertions in order, as to point one, Petitioners endeavor to break the traffic stop into discrete small segments to defeat inevitable discovery. Essentially, because the deputy, upon walking up to the car, was satisfied there was no issue as to the temporary tag, there was no criminal investigation afoot. Because no criminal investigation was underway, the aroma of marijuana coming from the car occurred during a non-investigation phase, hence it must be ignored.

Petitioners' contention ignores that it is the totality of the circumstances that govern Fourth Amendment analysis. United States v. Arvizu, 534 U.S. 266, 273, 122 S. Ct. 744, 151 L. Ed. 2d 740 (2002):

> When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. (trailing citation deleted)

Arvisu clearly rejects breaking down an event into discrete sub-parts, some or all of which are innocent in isolation, and relying on them individually, rather than considering the episode as a whole under the totality of the circumstances approach. 534 U.S. at 274-275. The Arvisu court labeled the breaking down of the event into discrete sub-parts an impermissible "divide-and-conquer analysis." Id. at 274. And that is precisely what Petitioners endeavor to do here, in contravention of the holdings of the United States Supreme Court on Fourth Amendment analysis.

Moody v. State, 842 So.2d 754 (Fla. 2003) is not to the contrary. Petitioners incorrectly interpret Moody to require an active drug trafficking investigation be underway so as to allow application of the inevitable discovery doctrine. (IB, p. 24).

Moody was decided in the context of a murder investigation, but does not require any specific type or focus of an investigation to be underway. This Court stated, citing to Justice Stevens' concurrence in Nix v. Williams, 467 U.S. 431, 457, 104 S.Ct. 2501, 81 L.Ed. 2d 377 (1984): "In making a case for inevitable discovery, the State must show "that at the time of the constitutional violation an investigation was already under way." Moody at 759[3].

In this case, under a totality of the circumstances approach, Arvisu, a narcotics investigation was triggered as soon as the deputy smelled the burnt marijuana coming from the car. Moreover, Respondents assert that this smell of marijuana would be triggered independent source, a sister to inevitable discovery. Nix v. Williams, 467 U.S. 431, 443-444, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984):

> The independent source doctrine allows admission of evidence that has been discovered by means wholly independent of any constitutional violation. That doctrine, although closely related to the inevitable discovery doctrine, does not apply here; Williams' statements to Leaming[4] indeed led police to the child's body, but that is not the whole story. The independent source doctrine

[3] It must be noted that a statements "contained in a concurrence [do not] constitute[] binding precedent." Maryland v. Wilson, 519 U.S. 408, 412-413, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997)

[4] This was regarding the famous "Christian burial speech" that triggered the suspect to point out to police where the victim's body was.

> teaches us that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred. See Murphy v. Waterfront Comm'n of New York Harbor, 378 U.S. 52, 79 (1964); Kastigar v. United States, 406 U.S. 441, 457, 458-459 (1972). When the challenged evidence has an independent source, exclusion of such evidence would put the police in a worse position than they would have been in absent any error or violation. There is a functional similarity between these two doctrines in that exclusion of evidence that would inevitably have been discovered would also put the government in a worse position, because the police would have obtained that evidence if no misconduct had taken place. Thus, while the independent source exception would not justify admission of evidence in this case, its rationale is wholly consistent with and justifies our adoption of the ultimate or inevitable discovery exception to the exclusionary rule.
> (one footnote added and one deleted)

The impermissible conduct here was not the stop. The stop for the non-readable temporary tag was good under Diaz. Where the impropriety occurred was during the permissible personal encounter at the passenger window. As set out in Issue One, even if Diaz had been followed to the letter during this personal encounter, the olfactory probable cause would have presented itself.

Thus, the presentation of probable cause during the permissible personal encounter is an intervening independent

factor that allowed continued detention and investigation. Again, the stop was permissible and the personal contact was permissible under Diaz. It was only what the deputy said during this permissible personal encounter (asking for ID as opposed to explaining the basis for the stop and releasing) that runs afoul of Diaz. Even if he had been merely explaining the basis for the stop under Diaz, he would have smelled the burnt marijuana, which is probable cause under Betz for a search of the passenger compartment of the vehicle.

The independent presentation of probable cause during the permissible personal encounter obviates the Diaz taint of the deputy asking for ID rather than explaining the basis for the stop. Instructive is State v. Frierson, 926 So. 2d 1139 (Fla. 2006). Appellee in Frierson was stopped for a traffic infraction that in itself was invalid, and after the stop, the officer obtained his license, ran a check, and arrested him on a warrant that turned out to be issued to another person. Frierson was arrested on the warrant, and a search incident to arrest revealed a firearm which led to a charge of possession of a firearm by a convicted felon.

This Court in Frierson framed the issue thusly, 926 So.2d at 1143:

> Whether evidence seized in a search incident to an arrest based upon an outstanding arrest warrant

> should be suppressed because of the illegality of the stop which led to the discovery of the outstanding arrest warrant.

It is of course noted that there was no warrant based arrest. However, it is submitted the occurrence of independent probable cause during the stop acts as a sufficient intervening cause to obviate the taint of the illegality, just as the warrant did in Frierson.

This Court in Frierson did state, id. at 1144: "Crucially, the search was incident to the outstanding warrant and not incident to the illegal stop." However, the stop here was legal per Diaz. It is only the post-stop action of the deputy in asking for ID, rather than explaining and then releasing, that runs afoul of Diaz.

Frierson, id. at 1143 sets out a three part test to implement a Wong Sun[5] fruit of the poisonous tree analysis, which comes from United States v. Green, 111 F.3d 515 (7th Cir. 1997) as cited in Judge Gross' concurrence in Frierson v. State, 851 So. 2d 293 (Fla. 4th DCA 2003):

> (1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct.

[5] Wong Sun v. United States, 371 U.S. 471, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963).

The time span here between “illegality” (asking for ID during permissible encounter rather than explaining and releasing) is admittedly short, which would counsel against attenuation of the taint. However, the brevity of the time span “is not dispositive.” Id. at 1144. This Court continued, id.,

> In turning to the next factor, the outstanding arrest warrant was an intervening circumstance that weighs in favor of the firearm found in a search incident to the outstanding arrest warrant being sufficiently distinguishable from the illegal stop to be purged of the "primary taint" of the illegal stop.

This Court was impressed by the warrant being an entirely separate intervening cause, a judicial directive to take the person named therein into custody, and wholly irrelevant to the original illegal stop. Respondent notes anew that this stop was permissible under Diaz, the violation only occurring after the permissible stop during the permissible personal encounter, and the violation during that encounter was asking for ID instead of explaining and releasing.

Respondent submits that the occurrence of independent, verifiable probable cause during the permissible personal encounter should count in virtual equal measure to that of a warrant. The deputy here needed to go on no fishing expedition, rather the aroma of illegality presented itself to him as he came into contact with the car occupants. When the deputy had

probable cause via the burnt marijuana smell, it was his duty to proceed to investigate.

As to the third Wong Sun factor, this Court in Frierson stated, id. at 1144-1145:

> We believe to be very significant the third factor in the Brown[6] analysis, which is whether the purpose and flagrancy of the official misconduct in making the illegal stop outweighs the intervening cause of the outstanding arrest warrant so that the taint of the illegal stop is so onerous that any evidence discovered following the stop must be suppressed. In this case, we do not find that the purpose and flagrancy of misconduct in illegally stopping respondent was such that the taint of the illegal stop required that the evidence seized incident to the outstanding arrest warrant should be suppressed. The law enforcement officer made a mistake in respect to the enforcement of the traffic law, but there was no evidence that the stop was pretextual or in bad faith.
> (footnote added)

It must be stated here again: under Diaz, there was nothing flagrant or illegal in Petitioners' traffic stop. It was only after the permissible stop during the likewise permissible encounter, that law enforcement error occurred. Like Frierson, there is no evidence here of pretext or bad faith. The deputy simply failed to comply with the Diaz post-stop permissible dialogue.

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[6] Brown v. Illinois, 422 U.S. 590, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), as explained in United States v. Green, 111 F.3d 515 (7th Cir. 1997). Green was clearly the foundation stone of this Court's reasoning and decision in Frierson.

The question here is should law enforcement be put in a worse position when during a valid Diaz stop the officer asks for identification rather than explaining and releasing. Respondent respectfully submits that the answer should be no: As explained in detail prior, whatever the conversation during the Diaz "explanation phase" the officer would have been presented with independent olfactory probable cause.

To require that this independent olfactory probable cause must be ignored would put law enforcement in a worse position, contrary to the teaching of Nix. Requiring that independent probable cause be ignored would do little or nothing to further the prophylactic rule of Diaz. There would still be personal contact between police and driver under Diaz to explain the basis for the stop in any event. Thus, drivers would not be shielded from additional police contact.

Lastly, Petitioners' argument that police should have had exclusive contact with them solely through a closed vehicle window should be rejected. The record shows this was a night-time stop on the shoulder of an Interstate highway, with passing cars and trucks speeding by. It is not reasonable to conclude that a conversation could be intelligently held under these circumstances through a pane of glass. Nor does such position as advanced by Petitioners contemplate a thunderstorm, heavier

traffic (perhaps in an urban setting), noise from independent sources, or a driver who wears a hearing aid.

A police request or directive to roll down a window during a traffic stop is *de minimis* and, it is submitted, something that a reasonable motorist would expect during such stop. The United States Supreme Court in both Mimms and Wilson described ordering drivers and passengers out of pulled-over cars as *de minimis*. There can be no principled contention that directing a window to be rolled down to facilitate conversation is **more** intrusive. Thus, a police officer asking a stopped motorist to roll down a window should not be held as a basis to overturn the ruling of the First District below.

CONCLUSION

Based on the foregoing, the State respectfully submits the decision of the First District below, Zeigler and Ellis v. State, 922 So. 2d 384 (Fla. 1st DCA 2006), also reported at 31 Florida Law Weekly D706 (Fla. 1st DCA March 7, 2006) should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Phil Patterson, Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, by MAIL on this 11th day of September, 2006.

Respectfully submitted and served,

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[AGO# L06-1-10007]

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the font requirements of Fla. R. App. P. 9.210.

_____
Daniel A. David
Attorney for State of Florida

IN THE SUPREME COURT OF FLORIDA

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APPENDIX

Zeigler and Ellis v. State, 922 So. 2d 384 (Fla. 1st DCA 2006)