IN THE SUPREME COURT OF FLORIDA

DONALD ELDRENAL JENKINS, Petitioner, v. STATE OF FLORIDA, Respondent.	Case No. SC06-839

ON REVIEW OF DECISION FROM THE
SECOND DISTRICT COUERT OF APPEAL, STATE OF FLORIDA

BRIEF OF RESPONDENT ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Donald Jenkins was charged with possession of cocaine with intent to sell or deliver. (R8). Jenkins filed a motion to suppress. (R15-22). A hearing was held September 17, 2003. (R8). At the hearing, Officer Kellie Daniel testified that she has been with the Tampa Police Department for over six and a half years, working street level narcotics. (R166). On January 15, 2003, Officer Daniel came into contact with Appellant, who she identified in court. (R166). On that day, Officer Daniel was working with a confidential informant, with whom she had successfully worked before. (R166). Officer Daniel had used this confidential informant about three or four times in similar page-outs, and other people have also used him. (R169). Also, Officer Daniel has used this confidential informant about two other times in search warrant buys. (R169). Each of the three or four times that Officer Daniel had used this confidential informant; it resulted in an arrest. (R170). There was only one situation where the confidential informant actually got into the vehicle, but when the seller saw the officers, he got spooked and tossed the confidential informant out of the car. (R170). The seller in the car got away. (R170).

The confidential informant called in to volunteer his services on January 15th; Officer Daniel did not call him.

(R171). This confidential informant just wanted to work. (R167). That day, he called another officer and said, “Listen, do you need anything?” The officer responded, “Yeah, we’re going to hit the street. Do you have anything?” The confidential informant said “yeah” and that he would work with them. (R167).

The confidential informant advised her that he knew a man named “D,” from whom he had gotten dope before. (R166). The confidential informant said he could call “D” and meet with him. (R166). The confidential informant used Officer Daniel’s cell phone, talked with a man named “D” and ordered a quantity of cocaine. (R167). Officer Daniel watched the confidential informant dial the phone. (R182). When Appellant’s cell phone was later seized from his vehicle it had Officer Daniel’s number on it. (R182;183). The confidential informant described “D” as a tall, black male and gave a cell phone number for him. (R171). The confidential informant said that “D” is going to come to the Texaco at Nebraska and Osborne, in about fifteen minutes, driving a brown boxy four door Chevy. (R174). The area of Nebraska and Osborne is known for drugs, and Officer Daniel frequents it with her assignments. (R168).

Officer Daniel drove the confidential informant to the Texaco and dropped him off in the parking lot (R175). Officer Daniel was situated directly across the street with a full view

of the Texaco station. (R168). She was able to maintain a visual of the confidential informant. (R176). The confidential informant was never out of the officers' sight; while Officer Dausch drove, Officer Daniel kept an eye on the confidential informant. (R177). The confidential informant was standing in the parking lot, waiting for "D" to arrive. (R168). The Chevy parked inside the parking lot by the Texaco. (R168). The confidential informant saw the Chevy pulling in with "D" in it and ran across the street. (R168). He told Officer Daniel, "That's him; that's him". (R168). The confidential informant was supposed to take off his hat, as a signal that it was "D". (R177-8). The confidential informant, however, was nervous and ran across the street, telling Officer Daniel, "That's him; that's him." (R177-8). Officer Daniel testified that, even after a year, confidential informants are still nervous when they are doing it. (R178). Although it was not the correct signal, it sufficed. (R178). Along with the confidential informant identifying the car, Officer Daniel also saw the four-door, brown Chevy pull into the parking lot. (R168). Officer Daniel advised units to move in, and they detained the suspect. (R168). Officer Rego detained Appellant, and Officer Daniel was behind him. (R179). Officer Rego had his weapon out (T181). Appellant was a suspect in a narcotics investigation at that time; and they had reasonable suspicion. (R179). Corporal

Howard went across the street with the confidential informant, who said that was definitely him. (R180). At that time, Officer Daniel walked away from the scene, and it was taken over by Sergeant Graham. (R180).

Officer Todd Rego testified that, on January 15, 2003, he worked with Officer Daniel in a QUAD capacity, in a buy-bust transaction at Osborne and Nebraska (R185-6). Officer Rego was about two blocks north, when he received the call from Officer Daniel to move in. (R186). Officer Daniel described the vehicle as a brown, box Chevy (R186). He arrived in about fifteen to twenty seconds. (R187). Officer Rego arrived first with his partner, Ely Vasquez. (R187). Officer Rego's contact with Appellant was limited to detaining Appellant. (R187). He pulled up, got out of his vehicle, and took Appellant out of the car at gunpoint. (R186). Officer Rego opened Appellant's car door, took Appellant out of the car, and handcuffed him. (R187). Officer Rego did not search the car; that was the extent of his contact with Appellant. (R187).

Officer Kevin Bonollo testified that he also worked with the QUAD squad on January 15, 2003, assisting Officer Daniel on one of the bust teams for the page-out. (R190-2). Officer Bonollo was located about one block north and one block west of the location (R192). It took him about twenty seconds to arrive at the Texaco (R192). Officer Bonollo positioned his vehicle

behind the brown, boxy Chevy, which was the description of the car given to him by Officer Daniel. (R192). At that time, Officer Rego was already assisting Appellant out of the car. (R192). Appellant was brought out of the car for the officers' safety. (R200). Officer Bonollo did not have his weapon drawn. (R199). Officer Bonollo searched Appellant's car, after he was placed in handcuffs. (R193). Officer Bonollo found a cell phone in the front seat, which he gave to Officer Daniel. (R193). After no narcotics were found in the car, Officer Bonollo searched Appellant by performing a pat-down. (R193;200). Officer Bonollo was looking for narcotics and anything that would hurt him. (R201). Appellant had $641 in his front pocket, but no narcotics were found. (R193). Sergeant Graham, a supervisor, advised Officer Bonollo to see if the narcotics were inside his clothing. (R193;203). Officer Bonollo pulled back the waistband of Appellant's boxer shorts and inside the crack of his buttocks, sticking up, was a regular, Ziplock-type sandwich bag (R193-4). The bag was twisted up, and Officer Bonollo could see the top of the plastic bag, sticking up about two inches (R193-4). Officer Bonollo did not put his hand inside Appellant's buttocks (R204). It was a pretty large sandwich bag, and it was sticking out. (R204). The crack cocaine was at the bottom of the bag (R194). Appellant was wearing baggie, blue jeans, where the waist came down low, and

the boxers could be seen. (R194). At no time was Appellant asked to disrobe. (R14). Officer Bonollo had no additional contact with Appellant. (R194). There were eight to ten officers there (R194). Officer Bonollo stayed with Appellant until he was transported (R195).

The facts as reported in the Second District's opinion, are as follows:

> At the hearing on the motion to suppress, testimony was given by Tampa Police Department officers, as well as by Jenkins, concerning the circumstances which led to Jenkins' arrest. Officer Kellie Daniel testified that she "was working with a confidential informant" with whom she had successfully worked in the past. According to Daniel, the informant advised her that he knew a man named "D" from whom the informant had previously received "dope" and whom he could call on the phone to "order a quantity of cocaine." Using Daniel's cell phone, the informant called "D" and ordered cocaine, while Daniel was listening to the informant's "side of the conversation." The informant related to Daniel that "D" would be going to the Texaco station at the intersection of Nebraska and Osborne in about fifteen minutes and that "D" would "be driving a brown boxy 4-door Chevy." The informant provided no further information regarding the suspect other than "a vague description of a tall black male."
>
> The Texaco station was "directly across the street" from where Daniel was located. Daniel "had full view of the Texaco." Subsequently, the informant, after seeing a 4-door brown Chevy pulling into the Texaco Station, came "running across the street" from the station, telling Daniel, "'that's him, that's him.'" When the Chevy parked in the parking lot by the Texaco Station, Daniel "ordered units to move in where the vehicle was located, at which time the vehicles moved in and detained the suspect."
>
> Daniel also testified that the area of the Texaco Station is one "known for drugs." She explained her prior experience with the informant: "I've used him in similar

pageouts where we've arrested, gotten a quantity of dope," as well as "in search warrant buys." Daniel testified that she had "used [the informant] about three or four times" in incidents similar to that involved in the instant case. With one exception, those incidents resulted in an arrest. The exception involved circumstances where the suspect "got spooked" and fled because he observed law enforcement. According to the testimony of Officer Todd Rego, he "took [Jenkins] out of the car at gunpoint," and "placed handcuffs on him." Rego testified that he "felt we had probable cause [Jenkins] was about to commit a felony" but that he "was just detaining him."

Officer Kevin Bonollo testified that he arrived on the scene as Officer Rego was assisting Jenkins out of the car. According to Bonollo, he searched the car but did not find anything. He then searched Jenkins but "was unable to find any narcotics on his person." Bonollo was then advised by Sergeant Graham-the supervising officer-"'to see if [the cocaine] was inside [Jenkins'] clothing anywhere.'" Bonollo testified:

> I opened up the defendant's boxer shorts and inside his butt crack sticking up was a sandwich bag, like a regular Ziploc type of sandwich bag and it was twisted. The dope, the crack cocaine was at the bottom. It was twisted up[,] and I could see the top of the plastic about two inches.

Bonollo testified that he then pulled out the plastic bag containing the cocaine.

Jenkins gave testimony conflicting with Officer Bonollo's testimony concerning the retrieval of the plastic bag containing the cocaine. According to Jenkins, Bonollo "ordered [him] to pull down [his] pants and bend over." Jenkins testified that when he did not com-ply, the officers forced him to comply by grabbing him from each side,

> pulling him over, and bending him down. Jenkins further testified he was "completely naked in the buttocks area" when the officers "dropped [his] pants to [his] knees . . . and pulled [his] boxers down." At the conclusion of the hearing on the motion to suppress, the trial court concluded that "there was probable cause to do a search based on what [the court] heard from the police officers." The court also found that "there was no strip search, not what is typically called a strip search."

Jenkins v. State, 924 So.2d 20 (Fla. 2d DCA 2006).

The Second District held that under the totality of circumstances, the police in the instant case had probable cause to arrest the defendant and that the search was reasonable under the Fourth Amendment because the officers had a particularized basis for believing defendant had cocaine concealed on his person. The District court further held that the search was a strip search within the meaning of Fla. Stat. §901.211 (2003) and that the strip search in this case did not meet the requirements of §901.211(3). However, the district court held that the §901.211 did not authorize exclusion of the evidence as a remedy for violation of the statute and affirmed the trial court's decision. The Second District concluded that "the application of the exclusionary rule for violations of section 901.211 cannot be justified. Given the legislature's specific attention to the issue of remedies, it would be overreaching to read a remedy into the statutory scheme when the remedy was not

recognized or authorized by the legislature." Id. The Court certified conflict with D.F. v. State, 682 So.2d 149 (Fla. 4th DCA 1996),1 in which the appellate court held that evidence obtained in a strip search conducted in violation of §901.211 Florida Statutes must be suppressed.

The Petitioner raises three issues in his Initial Brief. However, Issue II is the only issue for which the Second District Court of Appeal certified conflict to this Court.

1 The Second District also certified conflict with D.F. on the same issue in Laster v. State, 31 Fla. L. Weekly D1371 (Fla. 2d DCA May 12, 2006). Laster is pending in Case No. SC06-1016.

SUMMARY OF THE ARGUMENT

Issue I: The scope of the search incident to arrest in this case was minimally intrusive under the circumstances, it was based upon probable cause, and was reasonable under both the Federal and State constitutions. The officers had a particularized basis for believing the defendant had cocaine concealed on his person and properly balanced the need for the particular search against the invasion of personal rights. The trial court did not err in denying the Appellant's motion to suppress and the Second District did not err in affirming the trial court's order.

Issue II: The Second District Court of Appeal correctly determined that the exclusionary rule is not the remedy for violations of § 901.211 Fla. Stat. Section 901.211 Florida Statutes provides that the remedy for violation of the strip search statute is civil in nature and not the exclusion of the evidence. This Court should approve the Second District's holding in this case and disapprove of Fourth District's contrary holding in D.F.

Issue III: Under totality of circumstances, the police had probable cause to arrest the Petitioner. The reliance of the police on information provided by the informant was supported by the informant's prior reliable performance and by the

informant’s predictions concerning the behavior of the defendant. The Second District did not err in affirming the trial court’s order.

ARGUMENT

ISSUE I: WHETHER THE SEARCH IN THIS CASE WAS REASONABLE UNDER THE FEDERAL AND STATE CONSTITUTIONS. (Restated)

"When reviewing a motion to suppress, the standard of review for the trial court's application of the law to its factual findings is de novo, but a reviewing court must defer to the factual findings of the trial court that are supported by competent, substantial evidence." Cillo v. State, 849 So. 2d 353 (Fla. 2d DCA 2003). The trial court's ruling on a motion to suppress comes to the appellate court clothed with a presumption of correctness. Henry v. State, 613 So. 2d 429 (Fla. 1992); State v. Rizo, 463 So.2d 1165 (Fla. 3d DCA 1984). The appellate court will interpret evidence and the reasonable inferences derived therefrom in the manner most favorable to the trial court. Freeman v. State, 559 So.2d 295 (Fla. 1st DCA 1990); State v. Bravo, 565 So. 2d 857 (Fla. 2d DCA 1990).

The search in this case was reasonable under the Fourth Amendment. With respect to searches of the person of a prisoner, the court balances four factors in determining whether such searches are reasonable under the Fourth Amendment: (1) the scope of the intrusion, (2) the manner in which it was

conducted, (3) the justification for initiating it, and (4) the place in which it was conducted. Gonzalez v. State, 541 So. 2d 1354, 1355-6 (Fla. 3d DCA 1989). See Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979). Under Wolfish, the test for reasonableness "requires a balancing of the need for the particular search against the invasion of personal rights that the search entails." Id.

Here, the Second District correctly held that:

> An examination of the circumstances of the search of Jenkins, in light of the factors employed in the balancing test enunciated in Wolfish, leads us to conclude that the search was reasonable under the Fourth Amendment. The "scope of the particular intrusion" was limited, and the "manner in which it [was] conducted" was restrained. The search was less invasive than a strip search in which some or all of the subject's clothing is removed. The invasion of Jenkins' privacy was significant, but the seriousness of the invasion was not equivalent or similar to the invasion of privacy involved in a typical strip search. In determining the reasonableness of the search, it is of course important that no private part of Jenkins' body was exposed to public view.
>
> Although the search was unquestionably more intrusive than the typical search incident to arrest, the officers had a reasonable basis for initiating the search and conducting it in the manner in which it was performed before transporting Jenkins to jail. The officers had probable cause to believe that Jenkins had come to the scene with cocaine to sell. Only after their initial efforts to find the cocaine on Jenkins' person and in his vehicle were

unavailing did the officers conduct the further more invasive search of Jenkins' person. The officers thus had a particularized basis for believing that Jenkins had cocaine concealed on his person. On that basis, they were justified in conducting the further search of Jenkins' person to prevent the disposal of the cocaine by Jenkins.

In conducting the search, the officers properly balanced "the need for the particular search against the invasion of [Jenkins'] personal rights that the search en-tailed." Wolfish,441 U.S. at 559. Accordingly, the search was reasonable under the Fourth Amendment. See United States v. Williams, 209 F.3d 940, 944 (7th Cir. 2000) (upholding search where officer "felt a hard object between the cheeks of [the defendant's] buttocks," then "retrieved the object by sliding his hand under [the defendant's] waistband and down the back part of his pants," and the "seizure of the drugs did not add significantly to [the defendant's] invasion of privacy"); United States v. Alexander, 755 F. Supp. 448, 454 (D.C. Dist. 1991) (upholding search "in which [officer] reached inside [defendant's] underwear on a public side-walk"); State v. Jenkins, 82 Conn. App. 111, 842 A.2d 1148, 1158 (Conn. App. Ct. 2004) (upholding search where officers took defendant "away from the street and out of public view" and "pulled his pants and underwear away from his body specifically to retrieve the glassine packets [the officer] discovered and suspected were there from the patdown of the defendant"); State v. Smith, 342 N.C. 407, 464 S.E.2d 45 (N.C. 1995) (adopting reasoning of dissent in State v. Smith, 118 N.C. App. 106, 454 S.E.2d 680, 687 (N.C. App. 1995) (Walker, J., concurring in part and dissenting in part)) (upholding search where officer slid down defendant's underwear in search conducted in public street behind door of defendant's car).

Jenkins, 924 So.2d at 26-7.

The scope of the search in this case was minimally intrusive under the circumstances, it was based upon probable cause, and was reasonable under both the Federal and State constitutions. The officers properly balanced the need for the particular search against the invasion of personal rights that the search entailed. Therefore, the motion to suppress was properly denied by the trial court and properly affirmed by the Second District.

ISSUE II: WHETHER THE FLORIDA STRIP SEARCH STATUTE PROVIDES THAT VIOLATIONS OF THAT STATUTE BE REMEDIED THROUGH THE EXCLUSIONARY RULE. (Restated)

Petitioner's Brief raises three issues. However, Issue II is the only issue for which the Second District Court of Appeal certified conflict to this Court. The Second District certified conflict between its opinion in the case below and the Fourth District's opinion in D.F. v State, 682 So.2d 149 (Fla. 4th DCA 1996) on the issue of whether the exclusionary rule is the remedy for violations of Florida Statute §901.211.

Section 901.211 Florida Statutes provides as follows.

> (1) As used in this section, the term "strip search" means having an arrested person remove or arrange some or all of his or her clothing so as to permit a visual or manual inspection of the genitals; buttocks; anus; breasts, in the case of a female; or undergarments of such person.
>
> (2) No person arrested for a traffic, regulatory, or misdemeanor offense, except in a case which is violent in nature, which involves a weapon, or which involves a controlled substance, shall be strip searched unless:
>
> (a) There is probable cause to believe that the individual is concealing a weapon, a controlled substance, or stolen property; or
>
> (b) A judge at first appearance has found that the person arrested cannot be released

> either on recognizance or bond and therefore shall be incarcerated in the county jail.
>
> (3) Each strip search shall be performed by a person of the same gender as the arrested person and on premises where the search cannot be observed by persons not physically conducting or observing the search pursuant to this section. Any observer shall be of the same gender as the arrested person.
>
> (4) Any body cavity search must be performed under sanitary conditions.
>
> (5) No law enforcement officer shall order a strip search within the agency or facility without obtaining the written authorization of the supervising officer on duty.
>
> (6) Nothing in this section shall be construed as limiting any statutory or common-law right of any person for purposes of any civil action or injunctive relief.

§901.211 Fla. Stat.

In D.F., the defendant was arrested for outstanding traffic warrants and taken to the police station where a strip search was performed and cocaine was discovered in a Ziploc bag between the defendant's buttocks. The defendant claimed that the strip search violated subsections (3), (4) and (5) of §901.211 Florida Statutes because the search was conducted in the presence of another inmate, was not conducted under sanitary conditions, and the officer did not obtain written authorization. The appellate court found that the strip search statute had been violated and that "given both the historical purpose of the exclusionary rule

and the substantial statutory violation of the statute, suppression of the cocaine obtained by the unlawful strip search is an appropriate remedy." Id. at 154. The court in D.F. did not reach the question of whether the strip search violated the defendant's constitutional rights against unreasonable searches and the rights of privacy guaranteed by the Florida Constitution." Id.[2]

In the instant case, the appellate court found that the search of the defendant was reasonable under the Fourth Amendment, that the strip search statute had been violated, but that exclusion of the evidence was not the proper remedy for violations of the strip search statute where the statute did not authorize the exclusion of evidence as a remedy. The Second District in this case disagreed with the Fourth district's opinion in D.F. The Second District found Fourth District's reliance on Gulley v. State, 501 So.2d 1388 (Fla. 4th DCA 1987) which dealt with the admissibility of DUI test results to be

[2] It is worth noting that subsection (5) of the statute requires written permission for strip searches conducted "within the agency or facility." Contrary to the Second District's conclusion that the statute applies to all strip searches of arrested persons, this language seems to imply that the statute applies to strip searches conducted within places like a police station or detention facility. In fact, the search in D.F. V. State, 682 So.2d 149 (Fla. 4th DCA 1996), is distinguishable from the instant case in that it took place in a holding cell. Accordingly, there may not be

unpersuasive “given the express statutory provisions requiring the exclusion of DUI test results obtained in violation of the statute.” The Second District concluded that “the application of an exclusionary rule established by specific statutory provisions does not support the application of an exclusionary rule in another statutory context where the statutory text provides no explicit basis for application of that rule.” Jenkins, 924 So.2d at 31.

The Second District in this case concluded that:

> the officers' description of the search established that the search was a "strip search" within the meaning of section 901.211. Although the search of Jenkins does not correspond to the common conception of what is involved in a strip search, the search nonetheless falls within the scope of the expansive definition of "strip search" set forth in section 901.211(1).

Jenkins, 924 So.2d at 28. However, the court also determined that §901.211 Florida Statutes provides that the remedy for violation of the strip search statute is civil in nature and not the exclusion of the evidence.

Section 901.211(6) states that “Nothing in this section shall be construed as limiting any statutory or common-law right of any person for purposes of any civil action or injunctive relief.” This language indicates that the legislature intended

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express and direct conflict between D.F. and the instant case.

for damages to be the remedy for statutory violations. 3

As Judge Farmer noted in the dissenting opinion in D.F., "The United States Supreme Court has fashioned the exclusionary rule for constitutional violations, i.e., when law enforcement officers violate the Fourth Amendment in searching and seizing evidence during investigations, the Court has never suggested that the exclusionary rule should be applied as a matter of constitutional law when non-constitutional violations occur in an investigation, and in fact, has held to the contrary." D.F. v. State, 682 So.2d 149 (Fla. 4th DCA 1996) citing United States v. Caceres, 440 U.S. 741 (1979). As the Supreme Court has explained "The exclusionary rule operates as a judicially created remedy to safeguard against future violations of the Fourth Amendment rights through the rule's general deterrent effect." Arizona v. Evans, 514 U.S. 1 (1995). The judicial branch should not fashion a constitutional remedy for nonconstitutional violations and should not add a provision that the legislature did not intend to include.

In the instant case, the Second District found that:

The existence of a statutory provision

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3 In fact, case law shows that civil remedies are available and have been pursued for violation of the strip search statute. See Welch v. Rice, 636 So.2d 172 (Fla. 2d DCA 1994)(reversing summary judgment that 901.211(5) did not apply to offense of indirect criminal contempt)

acknowledging the availability of remedies other than the remedy of excluding evidence militates strongly against the conclusion that the statute by implication authorizes the exclusionary rule as a remedy. See D.F., 682 So. 2d at 154, 155 (Farmer, J., dissenting) (stating that the inclusion of the provision relating to remedies in section 901.211(6) "makes clear to me that the legislature in-tended for damages to be the remedy if the statute is ignored"); United States v. Thompson, 936 F.2d 1249, 1251-52 (11th Cir. 1991) (holding that exclusionary rule was not applicable as remedy for statutory violation and stating that where "Congress specifically designates a remedy for one of its acts, courts generally presume that it engaged in the necessary balancing of interests in de-termining what the appropriate penalty should be"); United States v. Michaelian, 803 F.2d 1042, 1049 (9th Cir. 1986) (expressing "reluctance to imply a judicial remedy for violations of [a statute] given Congress'[s] explicit provision of a remedy"); see also People v. Hawkins, 468 Mich. 488, 668 N.W.2d 602, 609 (Mich. 2003) (holding that exclusionary rule was not applicable to evidence obtained pursuant to warrants issued in violation of statute and court rule, and stating that "whether the exclusionary rule should be applied to evidence seized in violation of a statute is purely a matter of legislative intent"); cf. City of Kettering v. Hollen, 64 Ohio St. 2d 232, 416 N.E.2d 598, 600 (Ohio 1980) (discussing policy enunciated by court "that the exclusionary rule would not be applied to statutory violations falling short of constitutional violations, absent a legislative mandate requiring the application of the exclusionary rule"); Winfrey v. State, 78 P.3d 725, 729 (Alaska App. 2003) ("'When the government has violated a statute (as op-posed to the Constitution), suppression of evidence has

> generally been imposed only when the government's violation of the statute demonstrably prejudiced a defendant's ability to exercise related constitutional rights or to prepare or present a defense.'" (quoting Nathan v. Municipality of Anchorage, 955 P.2d 528, 533 (Alaska App. 1998))).
>
> We therefore conclude that application of the exclusionary rule for violations of section 901.211 cannot be justified. Given the legislature's specific attention to the issue of remedies, it would be overreaching to read a remedy into the statutory scheme when that remedy was not recognized or authorized by the legislature.

Jenkins, 924 So.2d at 33-4.

This Court's opinions in State v. Johnson (814 So.2d 390) (Fla. 2002) and Benefield v. State, 160 So.2d 706 (Fla. 1964), neither of which involve the strip search statute, are both instructive and easily distinguishable.

In Benefield, the officers did not make any attempt to comply with § 901.19(1), Fla. Stat. (1963)(the knock and announce statute) before conducting a warrantless arrest of Benefield in his home. In Benefield, this Court applied the exclusionary rule. The district court in Benefield found that although the knock-and-announce provisions are silent as to remedies available for violations, "the application of the exclusionary rule in this statutory context must be understood in the context of deep-seated common law and the Fourth Amendment concerns raised by unannounced entries." Jenkins v.

State, 924 So.2d 20 (Fla. 2d DCA 2006).

Here, the officers had probable cause to search the Appellant's person for drugs, and as the district court correctly held, his Constitutional rights were never violated. Section 901.211 regulates the means of a search, not its constitutionality. In addition, §901.19 (knock-and-announce) does not provide for civil remedies, whereas § 901.211 does. Therefore, Benefield does not control this case.

Furthermore, the United States Supreme Court recently made it clear that, even in case of "knock-and-announce" violations, the remedy of exclusion is not automatic. Hudson v. Michigan, 2006 U.S.LEXIS 4677 (June 15, 2006).

In Hudson, the Supreme Court determined that a violation of Michigan's knock and announce statute did not require suppression of the evidence found in the search. In Hudson, the police obtained a warrant to search Hudson's home but only waited "three to five" seconds after announcing their presence before entering the home. The Supreme Court found that the exclusionary rule was inappropriate for such a violation. The court found that:

> the social costs of applying the exclusionary rule to knock-and-announce violations are considerable; the incentive to such violations is minimal to begin with, and the extant deterences against them are

> substantial – incomparably greater than the factors deterring warrantless entries when Mapp was decided. Resort to the massive remedy of suppressing evidence of guilt is unjustified.

Id. The Supreme Court found that the misconduct of the sort in Hudson will be deterred by the availability of civil suits, professionalism, and internal police discipline. Id. The court further noted that the interests protected by the knock-and-announce requirement "do not include the shielding of potential evidence from the government's eyes." Id.

In State v. Johnson, 814 So. 2d 390 (Fla. 2002), the Florida Supreme Court held that since the State made a good faith effort to obtain the defendant's medical records in a constitutionally and statutorily permissible manner pursuant to §395.3025(4)(d) Florida Statutes, the State was not be precluded from trying again to obtain the medical records, according to the statute. In other words, the exclusionary rule did not apply when the State made a good faith effort to comply with the statute. As the Second District stated in the instant case:

> [a]lthough Johnson expresses a willingness to use the exclusion of evidence as a remedy for the violation of statutory requirements where the legislature has not addressed the issue of remedies, it by no means establishes a broadly applicable exclusionary rule for all statutory violations.

Id.

In addition, Appellant has other remedies that the defendant in Johnson did not have, as § 395.3025, Fla. Stat. (2001) did not allow for any civil remedies. Moreover, the deterrent purpose of the exclusionary rule is lost in a case in which the police did not engage in willful or negligent conduct. Therefore, the exclusionary rule should not apply to violations of §901.211 Florida Statutes.

ISSUE III: WHETHER THE POLICE HAD PROBABLE CAUSE TO ARREST THE PETITIONER. (Restated).

Whether reasonable suspicion or probable cause exists is reviewed de novo. Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 134 L.Ed.2d 911 (1996) (holding that determinations of reasonable suspicion to conduct stop and probable cause to perform search should be reviewed de novo as mixed questions of law and fact); Melendez v. Sheriff of Palm Beach County, 743 So. 2d 1145 (Fla. 4th DCA 1999) (stating that determinations of probable cause and reasonable suspicion are entitled to de novo review on appeal).

However, the historical facts associated with the search, i.e., who searched what, are "findings of historical fact" to be reviewed "only for clear error," and "due weight" should be accorded "to inferences drawn from those facts by resident judges and local law enforcement officers." Graham v. State, 714 So. 2d 1142, 1143 (Fla. 1st DCA 1998), quoting Ornelas v. United States, 517 U.S. 690, 116 S.Ct. 1657, 1663, 134 L.Ed.2d 911 (1996).

The Second District in this case properly determined that there was probable cause to arrest Jenkins, finding that:

> the testimony established that the informant had previously provided the police with information in circumstances similar to the

> instant case--that is, where the informant identified a suspect who was selling drugs and then arranged to purchase drugs from the suspect. In addition, the police heard the informant arrange a drug transaction, after which the informant predicted that a vehicle matching the description of Jenkins' vehicle would shortly arrive at the Texaco Station. When the vehicle arrived as predicted, the police were able to corroborate a crucial element of the information provided by the informant. The informant then specifically identified Jenkins as the suspect with whom the drug transaction had been arranged. Under the totality of the circumstances present here, the police had probable cause to arrest Jenkins.

Jenkins, 924 So.2d 20 (Fla. 2d DCA 2006).

The source of information in this case was a known confidential informant, who had provided completely reliable information in the past. Officer Daniel testified that she had used this confidential informant three or four times in prior page-outs, which usually resulted in an arrest. In addition, Officer Daniels had successfully used this confidential informant in search warrant buys. Other officers have also used this confidential informant. Therefore, this confidential informant has proven to be reliable and credible.

In this case, the officer confirmed each detail of the informant's tip. The confidential informant used Officer Daniel's cell phone to call Appellant. The confidential informant showed Officer Daniel a piece of paper with a phone

number and the letter “D” on it. Officer Daniel watched the confidential informant as he dialed the cell phone (Officer Daniel’s cell phone number later appeared on the cell phone taken from Appellant’s car). The confidential informant asked Appellant for a certain quantity of cocaine and told him to meet at the Texaco at Nebraska and Osborne.

After the phone conversation, the confidential informant told Officer Daniel that “D,” a tall, black man would come to that Texaco in fifteen minutes, driving a brown, boxy four-door Chevy. Officer Daniel and her partner, Officer Dausch, drove the confidential informant to the Texaco station and dropped him off. Officer Daniel kept an eye on the confidential informant, as her partner parked across the street with a full view of the station. Officer Daniel never lost visual contact with the confidential informant. As the confidential informant indicated, a car fitting the description drove into the Texaco station. The confidential informant was extremely nervous (Officer Daniel testified that even seasoned confidential informant often get nervous). Instead of taking off his hat, he went across the street telling Officer Daniel, “That’s him; that’s him.” Although it was not the pre-arranged signal to indicate that he was the target, it sufficed. Officer Daniel confirmed each of the confidential informant’s tips, and nothing

indicated any of the information was unreliable.

This case is distinguishable from Owens v. State, 854 So.2d 737 (Fla. 2d DCA 2003); Everette v. State, 736 So.2d 726 (Fla. 2d DCA 1999); and Mitchell v. State, 787 So.2d 224 (Fla. 2d DCA 2001) in regards to the proven veracity and reliability of the confidential informant.

In Owens, no information was given as to the number of times the confidential informant had previously given information or whether the information resulted in arrests. Id. at 738. Here, Officer Daniel testified that the confidential informant had always been reliable and often resulted in arrests. She, and other officers, used this confidential informant for page-outs and search warrant buys. In addition, the confidential informant's information in Owens did not predict any future behavior. The informant only stated that a black man, named Wayne, about 5'5", wearing no shirt, was standing at a certain location with marijuana in his pocket. Id. at 738. The information did not reveal any future behavior, such as in this case, where the informant correctly predicted that Appellant would drive to a specific Texaco station in fifteen minutes, driving a brown, boxy four-door car, in addition to other details. Therefore, Owens is not controlling.

In Everette, this Court held that there was no evidence

presented to show that the informant in the past had proved to be reliable. In addition, no information was given as to how the confidential informant had received the information. Even the information itself lacked significant detail and corroborating circumstances. Here, the evidence presented showed that the officer had used the informant in the past, and the officer testified that the informant proved to be a reliable source. Moreover, the officer corroborated the details given by the informant. Finally, the informant, in this case, openly told the officers how he knew "D" and even made the phone call to Appellant in their presence. Therefore, this case is also distinguishable.

Finally, Mitchell v. State is distinguishable. In Mitchell, the confidential informant's tip that two black males were selling narcotics at Groover's Store in Palmetto and described the first as "wearing a red Buccaneers jersey with number 81" and the second with a white hat, white shirt and blue pants. Id. at 226. This information was readily available to any member of the public. There were no facts giving the source of the information or the type of narcotics being sold. In this case, however, the confidential informant gave information of future behavior not known by the general public. In addition, the source of the information and the type of narcotics

(cocaine) was provided. Therefore, Mitchell is also distinguishable.

The tip in the instant case is similar to the tip in Vandiver v. State, 779 So.2d 289 (Fla. 2d DCA 1998). In Vandiver, the Second District found that:

> Under the "totality of the circumstances" test announced in State v. Butler, 655 So. 2d 1123 (Fla. 1995), the officers had probable cause to make the stop. We are persuaded, as was the court in Butler, by the existence of the credible confidential informant, the detail of the tip, and the subsequent corroboration of the tip. See also State v. Flowers, 566 So. 2d 50 (Fla. 2d DCA 1990). The officers were told that an individual named Robin, who was at a certain residence on Sumner Drive in K-Ville, had drugs on her person. The confidential informant also said that Robin drove a four-door blue vehicle that was somewhat raggedy. When the officers arrived at the residence within ten to fifteen minutes of the tip, they saw only one vehicle, a small, blue, four-door vehicle, parked on the side of the residence. When they ran the tag number, they discovered that the car was registered to appellant, Robin Vandiver. Ten to fifteen minutes later, the vehicle left, and they could see that a white female was driving. When the officers subsequently stopped the car, they discovered drugs on her person. At each step of the investigation, the officers were able to further confirm the confidential informant's story. This was sufficient corroboration to support the stop.

Id. at 291.

In Vandiver, as in the instant case, the informant provided

the exact location where the defendant could be found and that when they located him, what kind of car he would be found in. Therefore, since the tip was sufficiently detailed and officers corroborated everything except the final fact, possession of cocaine, the stop was justified. Even if the details that were confirmed were innocent in nature, '[a]n informant's predictions of future innocent behavior can sometimes authorize the police to stop and search..." State v. Hillman, 780 So.2d 156 (Fla. 2d DCA 2001); Clifford v. State, 750 So.2d 92, 93 (Fla. 2d DCA 1999); See State v. Flowers, 566 So.2d 50 (Fla. 2d DCA 1990)(holding that where the police verify all the details of a confidential informant's tip, except for the final one of the commission of the crime, the detention and search based upon this information will be upheld because probable cause will have been furnished); see also State v. Hadden, 629 So. 2d 1043 (Fla. 2d DCA 1993)(holding that the investigatory stop was justified by corroboration of confidential informant's tip).

In this case, the informant predicted the future behavior that Appellant, a tall, black male, would drive to a specific Texaco, at a certain time, in an old, brown, four-door car. In conjunction with the rest of the informant's information, the officer was authorized to stop and search Appellant. "In determining whether information given by an informant will give

an officer probable cause for a warrantless arrest and search, the totality of the circumstances must be weighed, including the veracity of the informant, the amount of details in the tip, and corroboration of the details by the officers." Illinois v. Gates, 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983.

In State v. Butler, 655 So.2d 1123 (Fla. 1995), the Florida Supreme Court held that the informant's tip provided "an abundance of overall detail" and that "within minutes of receiving the tip, the police corroborated every item in the tip except the ultimate determination of whether Butler had any drugs on his person." Id. This Court concluded in Butler that:

> [u]nder the totality of the circumstances, including the credible informant, the detailed tip, and the corroborating circumstances, we cannot say that the trial court erred in determining that Officer Putnam possessed sufficient knowledge to conclude that there was a probability of criminal activity on the part of Butler.

Id. at 1130-1131. As in Butler, the tip in this case was not information easily obtainable by the general public, but information known only to one who had close contact or dealings with Appellant. Also like Butler, the confidential informant's information in the instant case was similarly corroborated within minutes.

The courts may "look to the information provided by the tip

and determine its reliability by the specificity of the information and its corroboration by prompt police action finding an individual in the general area of a named location who precisely fits the description given. . . .” State v. Webb, 398 So. 2d 820 (Fla. 1981); See also State v. Hetland, 366 So.2d 831 (Fla. 2d DCA 1979) approved 387 So.2d 963 (Fla. 1980). The information received in the instant case was sufficiently detailed to warrant the search once the officer corroborated the details. See Butler, 655 So. 2d at 1130-1131; State v. Brown, 556 So.2d 790 (Fla. 2d DCA 1990).

Under totality of circumstances, the police had probable cause to arrest the Petitioner. The reliance of the police on information provided by the informant was supported by the informant’s prior reliable performance and by the informant’s predictions concerning the behavior of the defendant. The Second District did not err in affirming the trial court’s order denying the motion to suppress.

CONCLUSION

Petitioner respectfully requests that this Honorable Court affirm the decision of the Second District Court of Appeal.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. mail to Carol J.Y. Wilson, Assistant Public Defender, P.O. Box 9000, Bartow, Florida 33831, this ____ day of June, 2006.

CERTIFICATE OF FONT COMPLIANCE

I HEREBY CERTIFY that the size and style of type used in this brief is 12-point Courier New, in compliance with Fla. R. App. P. 9.210(a)(2).

Respectfully submitted,

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