IN THE SUPREME COURT OF FLORIDA

DONALD ELDRENAL JENKINS, :

Petitioner, :

vs. : Case No. SC06-839

STATE OF FLORIDA, :

Respondent. :

_______________________________:

DISCRETIONARY REVIEW OF DECISION OF THE
DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

INITIAL BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

CAROL J. Y. WILSON
Assistant Public Defender
FLORIDA BAR NUMBER 0368512

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR PETITIONER

TOPICAL INDEX TO BRIEF

PAGE NO.

STATEMENT OF THE CASE AND FACTS 1

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF THE ARGUMENT 9

ARGUMENT 11

ISSUE I.

WHETHER THE FEDERAL AND STATE CONSTITUTIONAL PROTECTIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES PERMIT THE POLICE TO CONDUCT A PUBLIC VISUAL INSPECTION OF AND SEIZURE FROM AN EIGHTEEN YEAR OLD'S BUTTOCKS IN AN URBAN GAS STATION PARKING LOT DURING NORMAL BUSINESS HOURS, ABSENT EVIDENCE THAT THE SOUGHT CONTRABAND COULD BE REMOVED OR DESTROYED IF THE DETAINEE WERE ESCORTED TO A PRIVATE LOCATION?

ISSUE II.

WHETHER THE FLORIDA STRIP SEARCH STATUTE PROVIDES THAT VIOLATIONS OF THAT LEGISLATIVELY MANDATED CODE OF CONDUCT FOR POLICE STRIP SEARCHES CAN BE REMEDIED THROUGH THE EXCLUSIONARY RULE?

ISSUE III.

WHETHER THE POLICE HAD PROBABLE CAUSE TO ARREST PETITIONER BASED SOLELY ON A CI'S IDENTIFICATION OF HIM AS THE PERSON WHO HAD TELEPHONED REGARDING AN OFFER TO SELL COCAINE?

CONCLUSION 47

CERTIFICATE OF SERVICE 52

CERTIFICATION OF FONT SIZE . . . .

.48

TABLE OF CITATIONS

PAGE NO.

Federal Cases

Bell v. Wolfish,
441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979) 12,15, 18, 19, 21,22

Boyd v. United States,
116 U.S. 616, 626 (1886) 11, 12

Chimel v. California,
395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969) 16, 22

Draper v. Walsh,
790 F.Supp. 1553 (W.D.Okla.1991) 17

Evans v. Stephens,
407 F.3d 1272, 1281 (2005) 14

Illinois v. Lafayette,
462 U.S. 640, 103 S.Ct. 2605, 2609, 77 L.Ed.2d 65 (1983) 23

John Does 1-100 v. Boyd,
613 F.Supp. 1514, 1522 (D.Minn.1985) 17

Mapp v. Ohio,
367 U.S. 643, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081, 1085 (1961) 15, 25, 37

Mary Beth G. v. City of Chicago,
723 F.2d 1263, 1272 (7th Cir.1983) 31

Olmstead v. United States,
277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944 (1928) 38

Schmerber v. California,
384 U.S. 757, 767 (1966) 24, 25

Terry v. Ohio,
392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968) 22

United States v. Alexander,
755 F.Supp. 448, 454 (D.C.Dist.1991) 21, 26, 27

United States v. Dorlouis,
107 F.3d 248 (4th Cir.1997) 18

United States v. Edwards,
415 U.S. 800, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974) 16

United States v. Ford,
232 F.Supp.2d 625 (E.D. Va. 2002) 19, 24

United States v. Robinson,
414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) 16

United States v. Williams,
209 F.3d 940, 944 (7th Cir.2000) 21, 26, 27

Wolf v. People of State of Colorado,
338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949) 24-25

Wood v. Clemons,
89 F.3d 922, 928 (1st Cir.1996) 17

State Cases

Benefield v. State,
160 So.2d 706 (Fla. 1964) 6, 35,
36, 38

Butler v. State,
655 So.2d 1123 (Fla. 1995) 39, 46, 47

D.F. v. State,
682 So.2d 149 (Fla. 4th DCA 1996) 1, 8, 12, 13, 31

Deserly v. Department of Corrections,
298 Mont. 328, 995 P.2d 972 (2000) 17

Everette v. State,
736 So.2d 726 (Fla. 2d DCA 1999) 39, 46

Gonzalez v. State,
541 So.2d 1354 (Fla. 3d DCA 1989) 12

Harvey v. State,
703 So.2d 1113 (Fla. 1st DCA 1998) 45

Holly v. Auld,
450 So.2d 217, 219 (Fla.1984) 31

Illinois v. Gates,
462 So.2d 213 (1983) 39

Jenkins v. State,
924 So.2d 20 (Fla. 2d DCA 2006) 1,2,7,8,21,22,24,29,32

Laney v. State,
379 Md. 522, 842 A.2d 773 (2004) 15

Mckenzie Check Advance of FL, LLC v. Betts,
2006 WL 1096679 (Fla., filed April 27, 2006)
17

Mitchell v. State,
787 So.2d 224 (Fla. 2d DCA 2001) 46

Montgomery v. State,
897 So.2d 1282, 1285 (Fla.2005) 30, 31

Owens v. State,
854 So.2d 737 (Fla. 2d DCA 2003) 46

People v. Defore,
242 N.Y. 13, 150 N.E. 585 (1926) 37

People v. West,
170 Cal.App.3d 326, 216 Cal.Rptr. 195 (1985) 13

Rankin v. Colman,
476 So.2d 234 (Fla. 5th DCA 1985), review denied, 484 So.2d 7
(Fla. 1986) 13

Rivera v. State,
859 So.2d 495, 509 (Fla. 2003) 44-45

State v. Jenkins,
82 Conn.App. 111, 842 A.2d 1148 (2004) 21, 26, 27

State v. Johnson,
814 So.2d 390 (Fla. 2002) 6, 35, 36, 38

State v. Smith,
342 N.C. 407, 464 S.E.2d 45 (1995) 21, 26, 27

State v. Walker,
1998 WL 429121 (Ohio App. 10 Dist. 1998) 20

Vera v. State,
400 So.2d 1008 (Fla. 3d DCA 1981) 12

Constitutional Provisions

Article I, §12, Fla. Const.
14,39

U.S. Const. Amend. IV, XIV 14, 39

Statutes

§901.211, Fla. Stat. (2003) 29-32, 35-37

Other Authorities

Black's Law Dictionary (7th Edition 2004)
16

Broom, Constitutional Law
11

Cox, Inst. Eng. Government
11

May, Constitutional History of England
11

W. La Fave, Search and Seizure § 10.9(b) 13

Wayne LaFave, Search and Seizure § 5.3(a) 18

William J. Simonitsch, Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment, 54 U. MIAMI L.REV. 665, 667 (2000) 16, 17, 25

STATEMENT OF THE CASE AND FACTS

The Second District Court of Appeal below ruled that a strip search conducted of an eighteen-year-old detainee's buttocks in a commercial gas station parking lot located adjacent to two busy thoroughfares during normal business hours was constitutionally permissible and, although in violation of Florida's strip search statute, did not require the application of the exclusionary rule. Jenkins v. State, 924 So.2d 20 (Fla. 2d DCA 2006). The district court certified conflict with the Fourth District's decision in D.F. v. State, 682 So.2d 149 (Fla. 4th DCA 1996), in which the district court held that the exclusionary rule is an appropriate remedy for enforcement of the legislatively mandated standards for police conduct during strip searches. Id. at 34.

On January 15, 2003, an unknown confidential informant (CI) telephoned someone named "D" with a police cellular telephone in the presence of some Tampa police officers of a street level narcotics unit.(R165-167). The CI telephoned "D," because he said he had bought drugs from him in the past. (R171). The police had no details about the past sale, such as what drug was purchased, under what circumstances, for how much money, or how the seller stored the drugs he sold. (R171). The only description of this "D" seller was that he

was a tall black male who would be driving a brown boxy four-door Chevy. (R167, 171). There was no evidence presented regarding where the sale itself was to occur, under what circumstances, or what quantity of cocaine was involved.

After the cellular telephone conversation ended, the CI told the lead female police officer, Officer Daniel, that in fifteen minutes "D" was going to arrive at a Texaco gas station located in a fairly busy intersection with a medium volume of consumer traffic. (R175-176). Because of the CI's identification of a certain car that pulled into the busy Texaco gas station, Officer Rego pulled his firearm on the driver, eighteen-year-old Donald Jenkins, and placed him in handcuffs, without asking his name. (R179, 186-187). Officer Bonollo searched his car and person for cocaine. (193, 200, 202, 204). Finding none, the officer got permission from the group sergeant "to see if it was inside his clothing anywhere" and to "do what I need to do." (R193, 202-203). During the course of the search, a medium number of people drove in and out of the gas station. (R176). In the presence of the entire 8 to 10 person squad, (R196), including female officer Daniel, (R212), in the gas station (Jenkins v. State, 924 So.2d at 29) or drug store parking lot (R212-213), Officer Bonollo testified he "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." (R193-194). Officer Bonollo testified that he reached inside Mr. Jenkins' boxer shorts and pulled out the baggie that was tucked in between the buttocks. (R204).

Donald Jenkins was charged with one count of possession of cocaine with intent to sell or deliver. (R8-9). The defense filed a motion to suppress evidence on the grounds that the police had no basis to stop him, or probable cause to arrest him, and because the police had conducted an open illegal strip search in a public area. (R15-22). A hearing was held on the suppression motion before Judge Rex Barbas on September 17, 2003. (R161).

Officer Kellie Daniel testified at the hearing that she had used the CI for similar "page-outs" three or four times previously over an unknown time span. Officer Daniel described a "page-out" as "when we call the people up to have them deliver a quality of cocaine to a certain location." (R170). Those prior page-outs resulted in arrests, although one time "the guy [suspect] got spooked," and left the area. (R170).

In this case the police stayed across the street from the Texaco station, while the CI went to the Texaco parking lot. (R168). Officer Daniel saw the CI from across the street from the Texaco station when a 4-door brown car had pulled into the

Texaco parking lot. (R168). The arranged signal for identifying the seller was supposed to be the CI taking off his hat. (R177). Instead of the CI taking off his hat, he ran across the street to the officer yelling, "That's him, that's him." (R168). A brown 4-door Pontiac parked in the Texaco lot, and the CI identified that car. (R168, 196-197).

Prior to the search, Officer Bonollo's only information was that Mr. Jenkins had drugs. (R201). Officer Bonollo had no information that Mr. Jenkins was armed with a weapon. (R201). A search of Mr. Jenkins immediately after he was taken out of his car did not revealed any drugs to the police. (R201).

Mr. Jenkins testified on his own behalf that the police pulled over another car and searched the occupant in the same manner he was searched. (R208-209). The police officers agreed that another car was stopped along with Mr. Jenkins, and stated the car was stopped because the CI told the police that car had drugs in it as well. (R208-213). Mr. Jenkins testified that the police forced him to bend over, had pulled down his pants and underwear down to his knees, exposing his naked body in a public place. (R206-207). Then the police searched into his rear end. (R206).

Judge Barbas denied the motion to suppress on the grounds that the CI's identification prior to the arrest provided the police with exigent circumstances and probable cause to search

the car and Mr. Jenkins' underwear and buttocks. (R225-226). In so ruling, the trial court stated the following:

> I believe the exigent circumstances are because of the mobility of the car indeed itself, that there was probable cause to believe that either contraband was on him or in his motor vehicle. The exigent circumstances are created by the mobility of the situation and the short time sequence between the time the police became aware of the information and the time the information was to be executed.
>
> It was only 15 minutes. There was no time in order to get a search warrant and to try to get a search warrant in that situation is not warranted under the case law as enunciated by the United States Supreme Court and our own Florida Supreme Court and the Third District Court of Appeals and the Second District Court of Appeals.
>
> Additionally, the facts given by this confidential informant were sufficient to constitute probable cause to search the defendant and the motor vehicle had it have been placed into a search warrant.
>
> He was identified along with his motor vehicle. If all those facts were placed in the four corners of a search warrant affidavit, that he identifies the defendant as he's going into the service station, that a buy was set up with him to deliver a quantity of cocaine, that it was supposed to take place in fifteen minutes and fifteen minutes later he shows up in a car matching that description, all these cases are because the description is for the police officer to go out later to try and identify them. That's what Judge Altenbernd is talking about in the <u>Highsmith</u> case.
>
> In this case, you have the confidential informant identifying the defendant and the vehicle. You don't need any greater description than that. . . .
>
> They have a right to search. It's an exigent circumstance because of potential destruction of the material involved and

> because of the small quantity and the small amount of time that the police had in order to take custody of him, in order to search him and that vehicle. Those – that is exactly what an exigent circumstance is."

(R223-225). The trial court additionally determined that "[t]here was no strip search." (R226-227).

Appellant entered a no contest plea to the charges and was sentenced to 17.1 months imprisonment. (R144-146, 151-153, 235-241). The trial court ruled that the motion to suppress was dispositive of the case. (R238).

On direct appeal, the state argued in its answer brief that the search was not a strip search and did not violate §901.211, Fla. Stat. (2003), the strip search statute, and that probable cause did exist to arrest Mr. Jenkins when he was removed at gunpoint from his car. (II:Tab III). The state did not on its own raise the question of whether the strip search statute provided for the use of the exclusionary rule as a remedy. (II:Tab III). The district court held oral arguments in the case on November 3, 2004. On June 29, 2005, the district court ordered supplemental briefs, addressed to whether the exclusionary rule applied to statutory strip search violations found in §901.211, Fla. Stat. (2003). (II:Tab II, Tab IV, Tab V).

In the supplemental briefs, the state argued that the police had acted in good faith and that the strip search statute specifically provided that damages are the sole remedy

if the statute is violated. Petitioner argued below that the public strip search in this case was prohibited by the state and federal constitutions, as well as by §901.211, Fla. Stat. (2003), and that the police lacked probable cause to arrest Mr. Jenkins. (II:Tab I). In the supplemental briefs, Petitioner argued that this Court's decisions in Benefield v. State, 160 So.2d 706 (Fla. 1964) and State v. Johnson, 814 So.2d 390 (Fla. 2002) required exclusion of the evidence in this case, and that the police did not act in good faith by conducting a public search of Mr. Jenkins' boxer shorts and buttocks in an urban public parking lot. Petitioner additionally argued below that the plain language of the strip search statute does not preclude or limit remedies for a violation of its provisions.

The district court issued a decision ruling that the police had probable cause to arrest Mr. Jenkins and that the police parking lot strip search was constitutionally permitted, but violated the strip search statute, §901.211, Fla. Stat. (2003). The district court found the police had violated the strip search statutory provisions requiring that strip searches be conducted "on premises where the search cannot be observed by persons not physically conducting or observing the search pursuant to this section," and the requirement that prior written authorization for the strip search be obtained. Jenkins v. State, 924 So.2d at 29.

The district court concluded, however, that the exclusionary rule was not a statutorily authorized remedy for a violation of §901.211, Fla. Stat. (2003), and on those grounds affirmed the trial court's denial of the motion to suppress. Id. at 33-34. The district court stated that the statute did refer to remedies, but did not specify the applicability of the exclusionary rule. Id. at 33. Since the provision mentioning remedies did not specifically refer to the exclusionary rule, the district court reasoned the exclusionary rule was not statutorily authorized. Id. at 33-34. The Second District certified conflict with the Fourth District's opinion in D.F. Id. at 34.

Appellant filed a Notice to Invoke this Court's jurisdiction based on the certified conflict. This Court ordered briefs on the merits without determining whether to grant jurisdiction.

SUMMARY OF THE ARGUMENT

The district court erred in concluding that the state and federal constitutions permit as reasonable a search into the buttocks of an eighteen-year-old detainee in a public gas station parking lot located near a busy intersection in Tampa, Florida, and conducted during normal business hours. The record below contains no factual proof of exigent circumstances requiring that the search be conducted in this manner to avoid destruction of the evidence. This unnecessary and publicly humiliating search was unreasonable and violated the state and federal prohibitions against unreasonable searches and seizures.

The district court wrongly construed the state strip search statute in concluding that the exclusionary rule is not a permissible remedy for a violation of the legislatively mandated code of conduct for police strip searches. The statute contains no provision specifying what remedies are available for violations of the statute, but the law does state that existing civil remedies are not restricted by the strip statute provisions. The district court's strained interpretation of the strip statute law is not consistent with a plain reading of the law and contradicts the stated legislative intent.

The district court erred in determining that probable cause for an arrest was properly determined from a CI's identification of Mr. Jenkins as the person who had recently offered to sell the CI cocaine. The police observed no actions by Mr. Jenkins indicating he was about to sell any drugs, but arrested him immediately after the CI identification. Reversal and discharge are required.

ARGUMENT

ISSUE I.

WHETHER THE FEDERAL AND STATE CONSTITUTIONAL PROTECTIONS AGAINST UNREASONABLE SEARCHES AND SEIZURES PERMIT THE POLICE TO CONDUCT A PUBLIC VISUAL INSPECTION OF AND SEIZURE FROM AN EIGHTEEN YEAR OLD'S BUTTOCKS IN AN URBAN GAS STATION PARKING LOT DURING NORMAL BUSINESS HOURS, ABSENT EVIDENCE THAT THE SOUGHT CONTRABAND COULD BE REMOVED OR DESTROYED IF THE DETAINEE WERE ESCORTED TO A PRIVATE LOCATION?

In 1765, Lord Camden, Chief Justice of the Common Pleas, in England, declared that the issuance of general search warrants, which originated with the Star Chamber, was an illegal practice. Boyd v. United States, 116 U.S. 616, 626 (1886); See 3 May, Const. Hist. England, c. 11; Broom, Const. Law, 558; Cox, Inst. Eng. Gov. 437. In so ruling, Lord Camdem stated, "It is very certain that the law obligeth no man to accuse himself, because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust; and it would seem that this search for evidence is disallowed upon the same principle. Then, too, the innocent would be confounded with the guilty." Boyd v. United States, 116 U.S. at 629.

In ruling on the constitutionality of a law permitting the government to subpoena evidence from the accused, the United States Supreme Court stated in 1886, "It is not the

breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty, and private property, where that right has never been forfeited by his conviction of some public offense,-it is the invasion of this sacred right which underlies and constitutes the essence of Lord CAMDEN's judgment." Id. at 630.

Then Judge Pariente has stated that "It is the manner in which the search is conducted in a given case which may violate the Fourth Amendment." D.F. v. State, 682 So.2d 149, 152 (Fla. 4th DCA 1996). In determining whether Fourth Amendment principles and the Florida statute governing strip searches were violated when a juvenile was searched after an arrest on warrants for a traffic offense, Judge Pariente relied on the following legal analysis: "As the third district stated in Gonzalez v. State, 541 So.2d 1354, 1355-56 (Fla. 3d DCA 1989), a case dealing with the strip search of a prisoner: '[O]ne of the constitutional rights retained by a prisoner, at least to some minimal extent, is the protection of the Fourth Amendment against unreasonable searches and seizures. Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979). 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. Bell; Vera v. State, 400 So.2d 1008, 1010 (Fla. 3d DCA 1981). Applying these standards, it seems clear to us that "a more substantial showing should be necessary to justify a search of the person [of a prisoner] when it involves a strip search or an intrusion into the body." 4 W. La Fave, *Search and Seizure* § 10.9(b), at 110 (2d ed. 1987). The "more intense, unusual, prolonged, uncomfortable, unsafe or undignified the procedure, or the more it intrudes upon essential standards of privacy, the greater the requirement that the procedure be found necessary." People v. West, 170 Cal.App.3d 326, 216 Cal.Rptr. 195, 200-01 (1985).

In Rankin v. Colman, 476 So.2d 234 (Fla. 5th DCA 1985), review denied, 484 So.2d 7 (Fla. 1986), the fifth district applied the same balancing test to a case involving a strip search conducted after an arrest for failure to produce a driver's license. The court in Rankin v. Colman, held that 'a strip search and body cavity search of persons arrested for minor traffic offenses is prima facie unreasonable and an unwarranted intrusion on the personal privacy of such persons, at least without showing some justification by the arresting authority." Id. at 238. 'There must be a strong showing justifying such search in view of the minor character of the charge.' Id." D.F. v. State, 682 So.2d at 152-153.

More recently the en banc panel of the Eleventh Circuit Court of Appeals, following the time honored principles of constitutional jurisprudence, held that the federal constitution requires that strip searches of arrested detainees be conducted in a reasonable manner. Evans v. Stephens, 407 F.3d 1272, 1281 (2005). In Evans the court analyzed the facts of that case by scrutinizing "the totality of the circumstances--for example, the physical force, anal penetration, unsanitariness of the process, terrifying language, and lack of privacy--collectively establish a constitutional violation, especially when the search was being made in the absence of exigent circumstances requiring the kind of immediate action that might make otherwise questionable police conduct, at least arguably, reasonable." Id. at 1282.

In this case in which the police used a public parking lot to visually inspect an eighteen-year-old young man's buttocks and the police officer seized with bare hands a plastic bag tucked into Petitioner's buttocks, the search and seizure were not conducted in a reasonable manner. The police public search inside of Mr. Jenkins's boxer shorts and the seizure from his buttocks violated Mr. Jenkins' federal and state constitutional rights to be free from unreasonable searches and seizures. Art I, §12, Fla. Const.; U.S. Const. Amend. IV, XIV. The decision of the district court must be

quashed.

Here the police were searching for suspected cocaine because a confidential informant (CI) identified Mr. Jenkins as the person who had just called him and offered to sell him cocaine. Without waiting for the CI and Mr. Jenkins to even meet, the police arrested Mr. Jenkins. The police then searched the car he was driving and his person and found no drugs. There is no evidence in this record that the police had any reason for suspecting Mr. Jenkins had placed contraband down his pants or between his buttocks or had concealed drugs underneath his clothing.

This record is barren of any proof of what quantity of drugs was to be sold, where the actual sale was to occur, and the manner the seller stored the goods. Because the state adduced no facts indicating Mr. Jenkins had contraband stored in the private sections of his body, the police search inside his buttocks amounted to a fishing expedition to find the cocaine. To find this key evidence, the police could not constitutionally search inside Mr. Jenkins' private bodily areas, looking into his pants and buttocks in an open and completely public urban area which the Tampa police officer described as "fairly busy." (R175). Such a search was not reasonable under the federal and state constitution.

The Fourth Amendment of the United States Constitution guarantees individuals the right to be secure in "their

persons, houses, papers and effects against unreasonable searches and seizures." Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 1687, 6 L.Ed.2d 1081, 1085 (1961); Laney, 379 Md. At 545, 842 A.2d at 786. In determining the reasonableness of a search, each case requires a balancing of the government's need to conduct the search against the invasion of the individual's privacy rights. *Bell v. Wolfish,* 441 U.S. 520, 559, 99 S.Ct. 1861, 1884, 60 L.Ed.2d 447, 481 (1979). Additionally, it is well established that warrantless searches are *per se* unreasonable under the Fourth Amendment absent some recognized exception, such as a search incident to a lawful arrest. *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). The Supreme Court in *Chimel v. California,* 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), articulated the bases for a search incident to arrest, those being, "to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape ....[or] to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction." *Id.* at 763, 89 S.Ct. at 2040, 23 L.Ed.2d at 694; *see also United States v. Edwards,* 415 U.S. 800, 802-03, 94 S.Ct. 1234, 1237, 39 L.Ed.2d 771, 775 (1974); *United States v. Robinson,* 414 U.S. 218, 226, 94 S.Ct. 467, 472, 38 L.Ed.2d 427, 435 (1973.

The term "strip search" has been defined and used in differing contexts in Fourth Amendment jurisprudence. In general, strip searches involve the removal of the arrestee's clothing for inspection of the under clothes and/or body. *See* William J. Simonitsch, *Visual Body Cavity Searches Incident to Arrest: Validity Under the Fourth Amendment*, 54 U. MIAMI L.REV. 665, 667 (2000). Some have defined strip searches to also include a visual inspection of the genital and anal regions of the body. *Id.* BLACK'S LAW DICTIONARY (7th Ed.2004) defines a strip search as "a search of a person conducted after that person's clothes have been removed, the purpose usually being to find any contraband the person might be hiding." There is a distinction between a strip search and other types of searches, such as body cavity searches, which could involve visually inspecting the body cavities or physically probing the body cavities. *Simonitsch, supra*, at n. 9. Based upon the record, it appears that in this case a strip search was conducted rather than a physical body cavity search.

It is clear that strip searches by their very nature can be degrading and invasive. *See Wood v. Clemons*, 89 F.3d 922, 928 (1st Cir.1996) (stating that "a strip search, by its very nature, constitutes an extreme intrusion upon personal privacy, as well as an offense to the dignity of an

individual."); *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir.1983) (noting that "strip searches involving the visual inspection of the anal and genital areas [are] ....demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission."); *John Does 1-100 v. Boyd*, 613 F.Supp. 1514, 1522 (D.Minn.1985)(commenting that the "experience of disrobing and exposing one's self for visual inspection by a stranger clothed with the uniform and authority of the state, in an enclosed room inside a jail, can only be seen as thoroughly degrading and frightening."); *Deserly v. Department of Corrections*, 298 Mont. 328, 995 P.2d 972, 977 (2000) (noting that being strip searched "is an embarrassing and humiliating experience"); *Draper v. Walsh*, 790 F.Supp. 1553, 1559 (W.D.Okla.1991) (stating, "Strip searches can be described by a number of adjectives, but being dignified is not one of their number").

Even though intrusive, however, strip searches have been permitted under the Fourth Amendment in various settings. *See* *Bell*, 441 U.S. at 523-24, 99 S.Ct. at 1864, 60 L.Ed.2d at 458-59 (strip search allowed of pretrial detainee in a detention center); *United States v. Dorlouis*, 107 F.3d 248 (4th Cir.1997) (strip search in a police van was allowed because the defendant was suspected of hiding money related to his

arrest for drug possession). Strip searches commonly have been upheld for two reasons: (1) as a means to maintain the security of the detention facility; and (2) as a search incident to arrest. *See* 3 Wayne LaFave, *Search and Seizure* § 5.3(a) at 108-09 (3d ed.1996).

In *Bell v. Wolfish*, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979), the Supreme Court addressed the permissible scope of searches incident to arrest that occurred in association with pretrial detention. *Id.* at 523, 99 S.Ct. at 1866, 60 L.Ed.2d at 458. Several defendants brought a class action suit challenging detention policies requiring pre-trial detainees to be subjected to a "visual body cavity" search every time the detainee had contact with individuals outside of the institution. *Id.* The Court assessed the reasonableness of these searches by stating:

The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider (1) the scope of the particular intrusion, (2) the manner in which it is conducted, (3) the justification for initiating it, (4) and the place in which it is conducted. *Id.* at 559, 99 S.Ct. at 1884, 60 L.Ed.2d at 481.

Using this United States Supreme Court analysis, the search and seizure of contraband in this case were unreasonableness and therefore illegal.[1] The unlawful nature of the search here lies in the fact that 1) the police lacked facts indicating Mr. Jenkins had any contraband secreted in his buttocks or other private areas; 2) the invasive search did not need to be conducted in the public parking lot, but could easily have been done in a private setting; thus there was no need for the police to engage in this form of a strip search in this setting. United States v. Ford, 232 F.Supp.2d 625, 630-631 (E.D. Va. 2002)(government failed to show why circumstances required police to look into Mr. Ford's buttocks on a public highway at the end of rush hour). The police easily could have taken Mr. Jenkins to any place and obtained greater privacy than was afforded in this case. There was no evidence in this record stating why the police could not have escorted Mr. Jenkins under observation to a police station or local jail, where he could have been searched in a private room by a single male officer. State v. Walker, 1998 WL 429121 (Ohio App. 10 Dist. 1998)("based on the intrusive nature of the search, involving the officer's use of rubber

[1] Although Petitioner challenges the lawfulness of the arrest, see Issue III, infra, in this issue, Petitioner focuses on the manner in which the search was conducted and does not here expound on the argument that the police unlawfully conducted a strip search of Mr. Jenkins, because he was illegally arrested.

gloves to reach inside the defendant's pants and remove drugs from the defendant's private areas, we conclude that the public search of defendant in a parking lot exceeded the scope of a reasonable search”).

In finding the search reasonable in this case, the district court stated,

> "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

entail[ed]."*27 *Wolfish*, 441 U.S. at 559, 99 S.Ct. 1861. 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 sidewalk"); Jenkins v. *State*, 82 Conn.App. 111, 842 A.2d 1148, 1158 (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 (1995) (adopting reasoning of dissent in *State v. Smith*, 118 N.C.App. 106, 454 S.E.2d 680, 687 (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).

6.

Looking down an 18-year-old's buttocks in a public parking lot during business hours in not conduct commonly referred to as either reasonable or "restrained." The district court, in justifying its conclusions, focuses on the fact that the young detainee was not disrobed in public. The police described and the trial court found the search involved

the police pulling back Petitioner's boxer shorts, peering into his buttocks, and reaching inside his boxer shorts to pull out a plastic bag tucked into his buttocks. The district court found "[t]he invasion of Jenkin's privacy was significant...." Jenkins v. State, 924 So.2d at 26. This significant invasion was required, the district court reasoned, because the police had not yet found any cocaine in the car or during a routine search of Mr. Jenkins incident to arrest. Id. at 26-27.

According to this logic, since no cocaine had been found, the police were entitled to look in any place they might believe the drugs to be. No facts indicated the CI knew Mr. Jenkins to keep contraband secreted in his private parts or even that the sale would be consummated at the gas station. Under the district court's logic, the police need for evidence trumped any social or individual need for privacy and decency, as well as any well established requirement that significant invasions of privacy be supported by some particularized facts. See Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)(facts showing reasonable suspicion must be known prior to police stopping and detaining someone); Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). (probable cause for arrest permits a search incident to that arrest); Bell v. Wolfish, 441 U.S. 520, 99 S.Ct. 1861, 60 L.Ed.2d 447 (1979)(pre-trial detainees inside a jail could

reasonably be subject to strip searches after having contact with outside public).

The arrest of a subject is not a blank check for any kind of search the police might deem necessary. To conduct an invasive search of the inner clothing of the accused, the police were required to know facts showing the accused had contraband secreted in private parts of his body and that there was no other reasonable means for obtaining that contraband. In this case the police lacked any such information indicating Mr. Jenkins kept cocaine inside his private areas, and the police easily could have taken him to a private location to conduct the search they publicly undertook.

The United States Supreme Court has noted that police conduct during a search incident to arrest on the streets could be deemed unreasonable or embarrassingly intrusive in public circumstances, especially when the search could more readily and privately be performed at a police station. Illinois v. Lafayette, 462 U.S. 640, 103 S.Ct. 2605, 2609, 77 L.Ed.2d 65 (1983). The court in *Lafayette* noted, by way of example, that "the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street." *Id.*

The district court fails to explain why it was reasonable to conduct this search in a public parking lot in a busy urban

commercial area. The district court stresses facts showing the police had looked into Mr. Jenkins' private parts publicly only after other searches did not disclose the sought contraband, but these facts do not make reasonable the manner of search that occurred here. The district court completely overlooks any need for the police to justify or explain why this search had to be conducted in such a public place. The sought contraband could not have magically disappeared from Mr. Jenkins' person during a police car ride under observation to a more private location. See United States v. Ford, 232 F.Supp.2d 625, 630-631 (E.D. Va. 2002)(government did not show how plastic baggie in detainee's buttocks could have disappeared during transport to a private location). The district court stresses that no body parts were exposed to the public. Jenkins v. State, 924 So.2d at 26. Under the district court analysis in this case, it is reasonable and therefore constitutional to search publicly inside a person's undergarments. This reasoning permits the police to look publicly into the blouses, shirts, pants, and undergarments of any person suspected of shoplifting, as well as drug possession. This expansive view of police powers is not constitutionally permitted; indeed it is legislatively prohibited. §901.211, Fla. Stat. (2003).

Ours is a society that values individual privacy and promotes dignity and decency. As the United States Supreme

Court stated in Schmerber v. California, 384 U.S. 757, 767 (1966), "The overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State. In Wolf [v. People of State of Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782] we recognized '(t)he security of one's privacy against arbitrary intrusion by the police' as being 'at the core of the Fourth Amendment' and 'basic to a free society.' 338 U.S., at 27, 69 S.Ct. at 1361. We reaffirmed that broad view of the Amendment's purpose in applying the federal exclusionary rule to the States in Mapp [v. Ohio, 367 U.S. 643 (1961)." Thus in Schmerber, in which the court considered the constitutionality of a blood draw taken of an unconscious driver, the court determined that "the [Fourth Amendment] questions we must decide in this case are whether the police were justified in requiring petitioner to submit to the blood test, and whether the means and procedures employed in taking his blood respected relevant Fourth Amendment standards of reasonableness." Schmerber v. California, 384 U.S. at 768.

Applying a similar analysis to the case at bar, this Court must determine whether the police were justified in requiring Mr. Jenkins to permit a search inside his underwear and buttocks in a public parking lot and whether the means of searching inside his private areas in a public place was reasonable. See Simonitsch, William J., "Visual Body Cavity

Searches Incident to Arrest: Validity Under the Fourth Amendment", 54 U. Miami L. Rev. 665 (2000).

Even assuming the police in this case had probable cause to arrest Mr. Jenkins for drug possession, the police lacked probable cause or even reasonable suspicion to believe Mr. Jenkins had cocaine specifically hidden in his buttocks. This case is not like those cases cited by the district court in which the police had reason to believe the contraband was in the person's clothing or undergarments. *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 of suspect who confessed to having drugs on his person "in which [officer] reached inside [defendant's] underwear on a public sidewalk" with only the following described activity: "There were no pedestrians in sight, no residences or business establishments open in the vicinity, nor other activity with the exception of light motor traffic on First Street."); *State v. Jenkins,* 82 Conn.App. 111, 842 A.2d 1148, 1158 (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 huge bulge felt during patdown of the defendant in a case in which defendant had directly negotiated a heroin sale with the arresting officer); *State v. Smith,* 342 N.C. 407, 464 S.E.2d 45 (1995) (adopting reasoning of dissent in *State v. Smith,* 118 N.C.App. 106, 454 S.E.2d 680, 687 (1995) (Walker, J., concurring in part and dissenting in part)) (upholding 1:30 a.m. search where officer slid down defendant's underwear in search conducted in public street behind door of defendant's car and where police took effort to position defendant away from any public view during search and where CI told police that drugs were kept near defendant's crotch).

These authorities cited by the district court all contain circumstances in which either the arresting officer had specific information that drugs were on the person of the detainee, *United States v. Williams*; *United States v. Alexander*; *State v. Jenkins*; *State v. Smith*; or that the police conducted the public search in a time and manner where few persons could observe. *United States v. Alexander*; *State v. Jenkins*; *State v. Smith*.

In the case sub judice the police were on a fishing

expedition for contraband and had no clue where to find it. They had searched the car and Mr. Jenkins and had uncovered nothing. The police looked inside Mr. Jenkins' boxer shorts, not because they knew facts suggesting cocaine might be secreted inside or around his private areas, but because they had not yet found what they were searching for. The record does not contain any proof that the CI told the police Mr. Jenkins kept his drugs in any particular manner or place and provided no additional evidence to support the parking lot search inside Petitioner's clothing. Even if the police had probable cause to arrest Mr. Jenkins, the police still only had the same lawful authority to search him in the same manner any other arrested detainee publicly might be searched.

The invasive and humiliating search that occurred here demeans not only the person subjected to it, but all persons within its view. No reasonable person wants to live in a society that permits police public searches of undergarments or wants to be subjected to the specter of either observing or experiencing such public humiliation. While extraordinary circumstances may require an occasional and unusual exception to the protection of our long time honored principles of protecting privacy, dignity and common decency, such circumstances should be reserved only for such exceptions, not for circumstances such as these in which only police convenience was served. Nothing in this record shows why the

police were not able to simply transport young Mr. Jenkins under observation to another private location for a private search which respected Mr. Jenkins' privacy rights, as well as afforded the police its opportunity to practice any common and usual search of arrested detainees.

In this case the police conduct of searching inside his boxer shorts and buttocks in a public parking lot humiliated Mr. Jenkins and demeaned all those present. To paraphrase Lord Camden, the innocent were confounded with the guilty. Such a practice should be deemed unreasonable and unconstitutional. The decision of the district court should be quashed.

ISSUE II.

WHETHER THE FLORIDA STRIP SEARCH STATUTE PROVIDES THAT VIOLATIONS OF THAT LEGISLATIVELY MANDATED CODE OF CONDUCT FOR POLICE STRIP SEARCHES CAN BE REMEDIED THROUGH THE EXCLUSIONARY RULE?

§901.211 of the Florida Statutes requires the following: "(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." In this case the search the police conducted a strip search within the meaning of this statute when they inspected Mr. Jenkins' buttocks in the public parking lot and removed a plastic bag from his buttocks. Clearly a strip search occurred here when the police decided to search Mr. Jenkins' buttocks, which were concealed by clothing, and the district court properly so concluded. Jenkins v. State, 924 So.2d at 28-29. The Petitioner below argued that three provisions subsections (3), (4) and (5) of the statute were violated because the search was conducted in a public place in public view, without use of rubber gloves or other sanitary conditions, and without written authorization by a supervisor. The district court concluded that only (3) and (5) were violated and did not

discuss the police failure to search under more sanitary conditions. Id. All three subsections were violated in this case.

The additional provisions of §901.211 require that "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." The search here occurred in a public setting where the lead officer, a female was present, according to other police officers of the same force. (R212). No rubber gloves were used to conduct the search into the buttocks area, and the search occurred in an open area; thus the search was not performed under sanitary conditions. Clearly the search in this case violated the carefully articulated legislation that must be applied to these searches that are so intrusive to a person's being.

As this Court recently stated, "When construing the meaning of a statute, we must first look at its plain language. *Montgomery v. State,* 897 So.2d 1282, 1285

(Fla.2005). Furthermore, '[w]hen the language of the statute is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory interpretation and construction; the statute must be given its plain and obvious meaning.' *Id.* (quoting *Holly v. Auld,* 450 So.2d 217, 219 (Fla.1984))." Mckenzie Check Advance of FL, LLC v. Betts, 2006 WL 1096679 (Fla., filed April 27, 2006).

Section 901.211(6) provides that "Nothing in this section shall be construed as limiting any statutory or common law rights of any person for purposes of any civil action or injunctive relief." The plain meaning of this statute should be read as providing that the strip search statute does not limit civil actions. This provision states a rule of construction; it does not list or exclude applicable remedies. A plain reading of the strip search statute is that remedies are not delineated in the body of the statute.

Logically the provision plainly states that it should not be read to limit a person seeking redress for violations of the statutory provisions. It would lead to an absurd result then to interpret the statute as meaning that the exclusionary rule remedy cannot be used when this statutory provision is violated. The plain meaning of the statute requires no limitation of existing remedies for redress of violation of this statute. D.F. v. State, 682 So.2d 149,153 (Fla. 4th DCA

1996).

The Fourth District's interpretation of this provision is sound and logical. As the court in D.F. stated, "We discern no intent on the part of the legislature to limit the court's ability, in the appropriate case, to suppress the results of a strip search obtained in violation of the statute. The fact that the statute contains the language that "[n]othing 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," see § 901.211(6) does not evince a legislative intent to limit the sanctions imposed by the trial courts for statutory violations. Rather, it evinces an expansive legislative intent."

The Second District in Jenkins uses a strained reasoning to conclude the strip search statute does not provide for use of the exclusionary rule as a remedy for violation of statute. The district court reasoned that because subsection (6) does not specifically provide for the use of the exclusionary rule, the legislature did not intend that the exclusionary rule be used as a remedy for statutory violations in a criminal case. Jenkins v. State, 924 So.2d at 32-33. The district court states, "In the instant case, however, the legislature explicitly addressed the issue of remedies in section 901.211(6), but failed to make any mention of the exclusion of evidence as a remedy." Id. at 32. After so interpreting this

provision, the district court concludes, "The existence of a statutory provision 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." Id. at 33.

The district court reaches this result after discussing various other statutes that have been interpreted as permitting the use of the exclusionary rule as a remedy. The examples explored by the district court are the exclusion of evidence obtained in violatation of the laws for the admissibility of blood and alcohol tests in DUI cases, for violations of the knock and announce statute, and for violations of laws setting for the procedures for obtaining confidential medical records by subpoena. The district court reasons that in these other instances use of the exclusionary rule was permitted through case law interpreting the applicable statutes, because either the statute did not mention remedies for a violation or, in the case of the blood and alcohol tests, because the statute provided that such tests, when properly administered, were admissible. The knock and announce and the medical records statutes both were silent as to the remedy of exclusion. The DUI statute is also silent regarding the remedy of exclusion, but has been interpreted in case law to provide for that remedy.

The district court distinguishes the use of the

exclusionary rule in those cases by stating that the knock and announce and medical records laws were silent regarding remedies and the DUI statute actually provided for the exclusion of evidence. Under this logic, the silence of the knock and announce and medical records laws allows for the use of exclusion of evidence as a remedy, but any mention of remedies for any reason in a statute indicates a legislative intent about whether the exclusionary rule is included or excluded. The DUI statute which does not expressly provide for use of the exclusionary rule as a remedy for statutory violations. The DUI statute provides for the exclusion of evidence only because the courts have so interpreted it. The district court gives no reasoning for why the strip search laws, which regulate police conduct in strip searches, should not logically also be interpreted to include the use of the exclusionary rule as a remedy for plain violations of that statute's provisions.

Additionally, the district court determined that all the other instances in which exclusion was permitted as a remedy occurred because of "deep-seated common law and Fourth Amendment concerns." Jenkins v. State, 924 So.2d at 32. Applying such analyses to the strip search statute, it is difficult to understand why the district court reached the result it did. The language of the statute regarding remedies plainly is expansive, not restrictive. Thus an expansive or

at a minimum an inclusive interpretation of the use of remedies is appropriate. Additionally, it is difficult to perceive of a more deep seated notion in our jurisprudence that that of being free from unreasonable police public searches of private areas of the body. By comparison, the use of DUI tests that do not comply with a statutory scheme, or obtaining medical records in a manner not authorized by statute, pale in comparison.

One must resort to a strained reading to interpret the statute to exclude one specific form of remedy simply because in some part of the statute remedies are generally mentioned. What the legislature did set forth in this statute, however, was a rule of construction to be used regarding civil remedies and injunctive relief. Thus, the use of the word "construed" in the provision. This construction provision should not be read to restrict or impact the use of the exclusionary rule as a remedy for a statutory violation in a criminal case. This provision telling the courts how to construe civil remedies, should not be read as a provision that states what remedies in general are available or excluded.

The exclusionary rule is a long standing remedy used to address a violation of a constitutional right or a statute implementing or expanding on a constitutional right. This Court's precedent has already stated that the appropriate remedy for a violation of §901.211, Fla. Stat., is the

suppression of the evidence. The exclusion remedy is required in order to deter police from strip searching persons in public parking lots. The public policy of protecting the privacy of an accused from having his private areas searched in a public parking lot and the public policy of preserving a minimum standard of human decency for such searches requires the remedy of the exclusionary rule, regardless of the absence of a specific statutory authorization for this remedy.

This Court's decisions of State v. Johnson, 814 So.2d 390 (Fla. 2002) and Benefield v. State, 160 So.2d 706 (Fla. 1964), support the use of the exclusionary rule as a remedy for §901.211, Fla. Stat. (2003).

In Benefield v. State, 160 So.2d 706 (Fla. 1964), the police plainly failed to comply with the statutory requirements of entry into a home for the purposes of making an arrest. The state supreme court determined that the knock and announce statute codified the common law principle of sanctity of one's home and the permitted forced entry in certain circumstances. Upon finding the statute violated, the high court determined that exclusion of the evidence was the proper remedy.

Similarly, in this case §901.211, Fla. Stat. (2003) is a codification of the constitutional right to privacy and to be free from unreasonable searches and seizures, in the specific context of the most invasive type of search, a strip search.

The remedy for this statutory violation should also be exclusion, the same remedy afforded for violation of the knock and announce statute.

More recently, in State v. Johnson, 814 So.2d 390 (Fla. 2002), the state supreme court determined that the state's failure to follow the correct statutorily delineated notice procedure in obtaining medical records required use of the exclusionary rule as a remedy, in order to give the statue meaning. The state court determined that to hold otherwise "would render the statute meaningless." Id. at 393.

In both instances, the exclusionary rule was the required remedy because the applicable statute, which provided for lawful means of obtaining the sought evidence, was violated and because the need for deterrence of such further violations was recognized.

In this case the police violated §901.211, Fla. Stat. by conducting a strip search of an accused in a public parking lot in the presence of a female officer. If the exclusionary rule is not used to deter such police misconduct, then we can expect to see police officers looking down a suspect's pants, blouses and other clothing in public areas. Use of the exclusionary rule in this case protects not only the accused, but the common decency to which we all adhere as a society.

As the United States Supreme Court stated in Mapp v. Ohio, 367 U.S. 643, 659 81 S.Ct. 1684, 1693-1694, 6 L.Ed.2d

1081 (1961), in applying the exclusionary rule as a remedy for the states, "There are those who say, as did Justice (then Judge) Cardozo, that under our constitutional exclusionary doctrine '(t)he criminal is to go free because the constable has blundered. People v. Defore, 242 N.Y. at page 21, 150 N.E. at page 587. In some cases this will undoubtedly be the result. But, as was said in Elkins,'there is another consideration-the imperative of judicial integrity.' 364 U.S. at page 222, 80 S.Ct. at page 1447. The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. As Mr. Justice Brandeis, dissenting, said in Olmstead v. United States, 1928, 277 U.S. 438, 485, 48 S.Ct. 564, 575, 72 L.Ed. 944. Our government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. * * * If the government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.'"

A plain reading of the statute reveals that no clause specifies what specific remedies are legislatively imposed or prohibited. The plain language of the statute is not restrictive regarding remedies. To interpret the statute as legislatively mandating certain remedies, while excluding others, requires going outside the plain meaning of the words

and giving the statute a meaning that was not stated and that contradicts the statute's given liberal rule of construction.

The statutory interpretation of the district court does not follow the plain meaning of the statute or this Court's decisions in State v. Johnson, 814 So.2d 390 (Fla. 2002) and Benefield v. State, 160 So.2d 706 (Fla. 1964). This district court's decision should be quashed.

ISSUE III.

WHETHER THE POLICE HAD PROBABLE CAUSE TO ARREST PETITIONER BASED SOLELY ON A CI'S IDENTIFICATION OF HIM AS THE PERSON WHO HAD TELEPHONED REGARDING AN OFFER TO SELL COCAINE?

"To determine whether information from a confidential informant gives rise to probable cause a court must look at the totality of the circumstances." Everette v. State, 736 So.2d 726, 727 (Fla. 2d DCA 1999). Illinois v. Gates, 462 So.2d 213 (1983) and Butler v. State, 655 So.2d 1123 (Fla. 1995). The totality of the circumstances requires that "the court must measure the confidential informant's veracity as well as the basis of the C.I.'s knowledge. Veracity can be established by proof that the C.I. has provided reliable information in the past or has provided detailed and verifiable information on the occasion in question." Id.

In this case the evidence presented to the trial court failed to establish probable cause for arresting Mr. Jenkins when he drove his Pontiac up to the Texaco gas station. The seizure of Mr. Jenkins and the resulting search of his vehicle and person were illegal and violated his rights under the 4th and 14th amendments to the United States Constitution and under Article I, Section 12 of the Florida Constitution.

Officer Daniel testified that she had used the CI for similar "page-outs" three or four times previously over an

unknown time span. (R170). Officer Daniel described a "page-out" as "when we call the people up to have them deliver a quality of cocaine to a certain location." (R170). Those prior page-outs resulted in arrests, although one time "the guy [suspect] got spooked," and left the area. (R170).

The record facts do not establish the CI's reliability based on a track record of successful information provided. Although the CI had provided information 3 or 4 times for "similar" situations, no time frame was given to show how long the CI had been providing accurate information to Officer Daniel. The CI's reliability under the presented facts shows he or she provided information leading to arrests 3 or 4 times out of 5 or 6 incidents. From the record facts of the prior incidents, it is not possible to tell if the CI gave the police sufficient correct details, or insufficient or inaccurate information that lead to no arrest. From this record it cannot be assumed that the CI gave correct information in the case that did not result in an arrest. The 3 or 4 prior arrests resulting from this CI's accurate information to the police is too few to establish veracity and the lack of a time frame over which the incidents occurred further lessens the proof of the CI's reliability for giving accurate information. Since the CI admitted knowing where to buy cocaine from prior personal purchases of "dope," the CI is an admitted drug buyer, which lessens his credibility further.

(R166).

In addition to having an insufficient established track record for veracity, the CI did not give the police any details about this seller or this sale. This lack of detail made it impossible for the police to verify the CI's information in any meaningful fashion. The only identifying information the CI gave prior to the police arrest was observable by any member of the public. The CI gave no particularly unique facts about this seller that the police could verify prior to an arrest, other than the described car's arrival at a public gas station. The CI told the police that a tall black male named "D" would be arriving in a brown boxy 4-door Chevy at the Texaco gas station in 15 minutes to sell him an unspecified amount of cocaine. The evidence in this record establishes only that the police saw the CI making a telephone call to someone, that the CI told the police about this "D" person arriving in the brown four door Chevy, and that the CI ran across the street yelling "That's him!" when a brown car drove up to the Texaco station. (R167). The CI identified the car, and not the person inside the car prior to the police making the arrest of Mr. Jenkins. (R168).[2[1]] Mr.

[2[1]] The trial court erroneously concluded that the CI had identified the person inside the car. (R224). The record shows that Officer Daniel testified, "Evidently, the CI comes running across the street. He sees the Chevy pulling in with D in it, he runs across the street. He's telling me, 'That's him, that's him.' The Chevy parks inside the parking lots there by the Texaco. I advised units to move in where the

Jenkins did not act suspicious or leave when the CI was running across the street yelling, "That's him!" Logically, any drug seller would suspect police involvement when observing this type of conduct by the buyer.

The police did not overhear the entire telephone conversation made by the CI, and did not even verify if the CI had actually called anyone. (R172-174). In this record the police did not know from the CI how the sale would take place, what form of cocaine he was buying, what amount, or where the seller kept the drugs. The police did not know if this was a small sale or a large one. The CI did not give a description of the seller's age, clothing or any specific identifying features of the seller. The police noted no drugs prior to stopping the car and had no information the cocaine would be secreted. Although the timing of the brown car's arrival comported with the CI's information, there was not enough detail from the CI to establish probable cause that the car occupant was engaging in the criminal activity of selling cocaine. At best the CI's information showed that he claimed he had called someone to buy drugs and a vehicle looking like the one belonging to the person he claimed he had called had

(..continued)
vehicle was located, at which time the vehicles moved in ad detained the suspect."

"Q. Did you actually see the 4-door brown Chevy pull into the parking lots as well?"

"A. I did."

"Q. And the CI identified it for you? "

"A. Yes." (R168).

arrived at the appointed time. This is not enough to establish probable cause for drug possession.

The lack of probable cause in this case is evident from the nature of the search that followed the arrest. The police did not simply detain Mr. Jenkins, but forcibly removed him from his car at gunpoint and placed him in handcuffs. (R187, 189). Certainly he was placed under arrest from the time he was in contact with the police at the gas station. The police then searched Mr. Jenkins by patting down his clothing and found no drugs. (R193). The police searched the vehicle and found no drugs. (R193). The police were randomly searching to determine whether the CI had provided correct information. The level of the search had to be elevated to a public invasive hunt down Mr. Jenkins' undergarments, before any evidence of drug possession could justify the arrest. The facts of this search show a classic case of the illegal search resulting in the only evidence that could justify the arrest.

If probable cause existed for the arrest, then no drugs needed to be found on Mr. Jenkins in order to arrest for a criminal offense. The basis for the arrest in this case, however, was grounded on the fact that cocaine was found in the buttocks. This is so because the CI simply did not give the police enough information to establish probable cause for an arrest prior to finding the secreted drugs inside the

(..continued)

buttocks. The CI's telephone call, the vague description of a tall black male named "D" arriving timely in a boxy 4 door brown Chevy, and the identification of a vehicle prior to the police stopping its occupant simply did not show that the car occupant had agreed to and was ready and able to sell cocaine to the CI.

The trial court heavily weighted the CI's identification prior to the arrest in determining there was sufficient evidence to establish probable cause to arrest Mr. Jenkins. (R223-225). The identification found in this record was initially of the car as it pulled into the parking lot. (R168). The CI ran across the street as the brown car is pulling into the Texaco lot. (R168). The CI identified the car, but the record does not contain any identification by the CI of Mr. Jenkins prior to stopping the car. (R168). This kind of identification does not supply enough verifiable information to provide the police with probable cause for an arrest. The CI is a drug buyer who called someone to buy some drugs, gave a vague description of the seller and his vehicle, and then pointed out Mr. Jenkins' vehicle as matching that vague description. Even the police testimony did not reflect a belief that this was enough information to justify an arrest of Mr. Jenkins when his car pulled up to the Texaco station.(R179). The trial judge also found that there was a small quantify of drug at issue, despite a complete lack of

record evidence about the amount of drugs or form of cocaine involved in the sale. (R225).

This Court has stated that an appellate court 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. Rivera v. State, 859 so.2d 495, 509 (Fla. 2003). A reviewing court should not presume facts to be correct that have no factual basis in the record, and must review de novo the constitutional and statutory interpretation questions presented in this case.

The police actions of removing Mr. Jenkins from his car at gunpoint and handcuffing him constituted an arrest and not a mere detention. The search of his vehicle and his person were not justified by the facts known to the police, because no weapons were suspected. Harvey v. State, 703 So.2d 1113 (Fla. 1st DCA 1998). A search during a detention can be justified only by a reasonable belief that the suspect is armed with a dangerous weapon. §901.151, Fla. Stat. (2003). The CI gave the police no information about any weapons and the police had no information that Mr. Jenkins had any weapons. (R200-201). The search of the car was not justified by reasonable suspicion that the vehicle contained weapons.

Certainly if the police had no legal basis for searching Mr. Jenkins by means of a pat down, the police had no legal basis for conducting the invasive search that lead to the contraband in this case. Harvey v. State, supra. The police had no legal grounds for searching Mr. Jenkins' buttocks in a public parking lot.

The CI simply did not provide enough information of the kind that courts have found to be sufficient to establish probable cause for an arrest. In Butler v. State, 655 So.2d 1123 (Fla. 1995), this Court found that a CI who had provided information that resulted in felony arrests 60% to 70% of the time in at least twenty cases over less than three months. The CI told the police that the seller wrapped cocaine inside rolled-up one-dollar bills and placed them in his pants pocket to sell. The CI additionally gave a detailed description of the seller's appearance, the location, type of drugs sold and where the seller kept his supply of drugs and the method of delivery. This kind of information could not be easily detected by anyone seeing Butler on the street, but would be known only by someone who had had prior dealings with the seller. Id. at 1130-1131. The police in Butler corroborated the information provided by the CI when they saw the described person turn away from the police and try to walk away. Id.

By contrast, in this case, no detailed description was given of Mr. Jenkins. The only information about his

appearance was that he was a tall black man named "D." There was no information given by the CI that showed particular knowledge about the seller. No information about the amount of the sale, the form of the cocaine, the place where the seller kept the cocaine, or the manner of distribution. The vague vehicle description and the information easily observable by the public, as provided in this case, are more similar to the CI veracity and information found lacking in Owens v. State, 854 So.2d 737 (Fla. 2d DCA 2003) and Mitchell v. State, 787 So.2d 224 (Fla. 2d DCA 2001) and Everette v. State, 736 So.2d 726, 727 (Fla. 2d DCA 1999). The lack of detail showing the CI's knowledge was not cured by the CI's identification of a car which fit the vague description he had given the police. The CI's information was not enough to establish probable cause and to permit an arrest at the time Mr. Jenkins drove up to the gas station.

This being so, the search and resulting seizure were illegal and suppression of the seized drugs, money and cell phone must be suppressed. The district court's decision must be quashed.

CONCLUSION

Based on the arguments and authorities presented herein, Petitioner respectfully requests that this Court accept jurisdiction and quash the decision of the district court and discharge Petitioner.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Tiffany Gatesh Fearing, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of June, 2006.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

____

JAMES MARION MOORMAN
Public Defender
Tenth Judicial Circuit
(863) 534-4200

CAROL J. Y. WILSON
Assistant Public Defender
Florida Bar Number 0368512
P. O. Box 9000 - Drawer PD
Bartow, FL 33831

CJW