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

REPLY BRIEF OF PETITIONER ON THE MERITS

JAMES MARION MOORMAN
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

CAROL J. Y. WILSON
Assistant Public Defender
FLORIDA BAR NUMBER O368512

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

ATTORNEYS FOR PETITIONER

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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?

The state, in a footnote, suggests that there is no conflict between D.F. and this case, because the strip search statute "seems to imply that the statute applies to strip searches conducted within places like a police station or detention facility." Answer Brief at 20 n.2. The state gathers this conclusion from subsection (5) which provides "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." §901.211(5), Fla. Stat. The plain language of this provision does not limit the statute's applicability to only a building. Clearly the language "agency" means the police or law enforcement agency as a whole. This argument that misconstrues the statute's plain language should be ignored.

The state further argues that this Court should limit its decision to considering whether the exclusionary rule applies to the strip search statute and ignore the presented issues of whether the search was constitutionally impermissible as unreasonable under the Fourth Amendment or whether the police had a lawful basis for arresting Mr. Jenkins. This Court's

jurisdiction over these issues is not limited by the district court's certification of conflict. In this case the other two presented issues must be addressed, because they need to be resolved prior to determining whether the strip search issue remains as an issue. If the arrest and/or search are deemed illegal under the state or federal constitutions, then exclusion of the evidence is required as the remedy for those constitutional violations and the strip search statutory remedies are no longer at issue. Thus the only logical way to address the issue certified to this Court is to consider all three presented issues.

The state argues that damages are the intended sole remedy implied in this subsection 5. Answer Brief at 21. This is not what the provision plainly states. To adhere to this argument one must read into the statutory provision meaning that simply is not there.

Additionally, to assert this position, one must assume that the legislature intended that violations of the strip search statute could be effectively purchased by law enforcement. In other words, statutory violations, according to the state's interpretation, would only carry a financial cost. This argument in effect puts certain rights up for sale and permits the government to violate those rights only at the risk of paying money for the violation. What real purpose would the strip search statute legislation serve, if violations were intended to be addressed only through jury

awards? The state and district court's interpretation of that statute not only requires looking beyond the plain language of the statute, but requires replacing that plain language with meaning that is at odds with the statute itself as a whole.

As applied to Mr. Jenkins, the argument that damages is the sole provided remedy assumes that Mr. Jenkins would be able to retain some attorney to represent him in a damages claim for a violation of the strip search statute, and that such a claim would result in a damage award against the individual violating officers. This argument has no basis in the real practice of law as it occurs in this state and country. Lawyers generally do not accept cases for which they cannot obtain adequate relief for a client or compensation for services rendered. Under the state's reasoning, Mr. Jenkins could have brought such a claim already, were there lawyers ready willing and able to assert such a claim and were the money damages claimed to be available a reality. A search of the Hillsborough County Circuit Court online records as of July 18, 2006, shows no such law suit. http://207.156.115.81/oridev/criminal_pack.ins. Indeed, Mr. Jenkins has a district court's written opinion stating his rights under the statute were violated. The remedy of civil damages, although authorized by the statute, is in reality only a myth for Mr. Jenkins and others similarly situated. It is not reasonable or logical to construe the legislatively mandated remedies to include only a remedy that provides no

real relief for Mr. Jenkins or others similarly situated.

An analysis of the example civil case cited by the state, Welch v. Rice, 636 So.2d 172 (Fla. 2d DCA 1994), provides an example of why the civil damages remedy is a myth in cases like this. Welch involved a strip search of someone for whom a capias had been issued after failing to appear for a violation of a county ordinance requiring a license for her cat. A damages claim for a strip search statue violation against a woman who failed to get her cat a license is a very different case from that presented in Mr. Jenkins' drug sale case. It seems reasonable to conclude that one does not anticipate being strip searched if arrested for failing to obtain a pet a license, whereas that is not a reasonable assumption if one engages in drug sales. An examination of other cases listed by Justice Scalia in his majority opinion in Hudson v. Michigan, 126 S.Ct. 2159 (2006), as examples of damage claims for constitutional violations, shows that such damage claims in reality are brought on behalf of a person injured in a manner apart from the police constitutional or statutory violation itself. See Green v. Butler, 420 F.3d 689 (7th Cir. 2005)(homeowner and girlfriend filed 1983 suit after police violated knock and announce rule to enter home and search parolee to whom they had rented a room); Holland ex rel. Overdorff v. Harrington, 268 F.3d 1179 (10th Cir. 2001)(suit regarding disputed violation of knock and announce rule where no evidence of the crime was seized during the home search and

where SWAT team used firearms against minor children ages 4, 8, and 14); Mena v. City of Simi Valley, 226 F.3d 1031 (9th Cir. 2000)(concerned police entry into home owned by Mena to search rented out room, where rented rooms were separately padlocked and where police during search woke up an 18 year old girl, not the subject of the search, and immediately handcuffed her); Gould v. Davis, 165 F.3d 265 (4th Cir. 1998)(no knock search of suspect's parent's home for a handgun when suspect was in custody and police had no factual basis for believing parents would not otherwise permit police to execute search warrant).

If the exclusionary rule is eliminated as a strip search violation remedy, then the police have no incentive to pay attention to the statute's requirements, as a violation of that law will generally cause no compensable injury to the victim of the violation. Loewenthal, Milton A., Evaluating the Exclusionary Rule in Search and Seizure, 49 UMKC L.Rev. 24 (1980). (study of police attitudes toward the exclusionary rule showing, inter alia, that regardless of what substitute remedies might be provided, the police are 'bound to view the elimination of the exclusionary rule as an indication that the fourth amendment is not a serious matter, if indeed it applies to them at all." at 30).

The United States Supreme Court recently held that the exclusionary rule does not apply to violations of the knock and announce rule. Hudson v. Michigan, 126 S.Ct. 2159 (2006).

In so holding a bare majority of the high court stated that the interests that underlie the knock and announce rule, do not underlie the exclusion of the evidence obtained for a violation of the knock and announce requirement. Because knocking and announcing alone does not result in finding the evidence sought to be excluded, the high court reasoned the purposes of the exclusionary rule are not served in using that remedy for that kind of constitutional violation.

Hudson and its reasoning do not apply to this strip search violation. The knock and announce rule is not at issue in this case, so Hudson does not provide precedent for this issue. The logic of Hudson also does not compel eliminating the exclusionary rule as a remedy for violations of the strip search statute.

The purposes of the strip search statute clearly are served through the use of the exclusionary rule as a remedy. The evidence sought to be excluded here was discovered here only during the offensive search that violated the statute. The offensive search did not have to occur in the manner chosen by the police, but could easily have been done in a more private setting than a public parking lot during business hours in a major city. The police misconduct was not a matter of mere miscalculation or timing, but a matter of clear choices made in violation of straightforward legislatively set forth procedures.

The wrong done in this case is not similar to the Hudson

knock and announce wrong of waiting only 3 to five seconds prior to entering a home when a longer wait prior to entry would have made the home entry completely legal. In this case an eighteen-year-old young man had his buttocks visually searched in a public parking lot during normal business hours. The police choice of where to conduct the search and the manner of the public search is the harm. The wrong suffered is clearly not only to Mr. Jenkins, but to the public subjected to the search, as well as to the stated privacy principles specifically delineated by the legislature in the strip search statute.

The legislature enacted the strip search bill to protect a greater good which includes those person subjected to viewing the strip search, as well as the person searched. This point is poignantly exemplified in the facts of Laster v. State, SC06-1016, currently pending before this court for consideration of the same strip search statute issue. Mr. Laster's strip search occurred in front of a three-year-old boy and his mother who lived in the neighborhood where the police publicly exposed Mr. Laster's buttocks during the strip search. The strip search law defines the parameters of privacy afforded an arrested person as well as the parameters of protection afforded the greater society from viewing the arrest process. Thus exclusion of evidence seized in violation of the strip search laws clearly serves the purposes of the strip search laws.

Justice Scalia's reasoning in Hudson would require the use of the exclusionary rule in this instance. Justice Scalia stated that exclusion of the evidence must serve to protect the violated rule. Here exclusion of the evidence protects the violated privacy rule. This is so because the legislature has set forth a simple body of rules regarding strip searches. The statutory provisions can easily be adhered to in most cases and easily could have been followed in this case. If the police can conduct a public strip search as occurred in this case without otherwise jeopardizing their investigation, then this strip search legislation amounts to no more than a set of suggested guidelines. If damages is the sole remedy, then the police can violate the rule and merely pay for a given violation. Exclusion of the evidence, on the other hand, serves to protect the legislatively spelled out rules for privacy during a strip search. See Kamisar, Yale, "In Defense of the Search and Seizure Exclusionary Rule," 26 Harv. J. L. & Pub. Pol'y 119 (2003). If evidence gotten in violation of the strip search legislation is subject to exclusion, then the public's privacy interests are protected and the police have a reasonable way of conducting a strip search. If exclusion is not a remedy, then the police have no investigative incentive to follow the legislature's rules and the public and arrestees are subjected to the police choice forums for strip searches.

The state argues that "the deterrent purpose of the

exclusionary rule is lost in a case in which the police did not engage in willful or negligent conduct." Answer Brief at 26. The state does not explain how the police conduct in this case was reasonable or proper or was not willful or negligent. This case concerns the willful disregard of the strip statute requirements. The police did not need to search Mr. Jenkins in the time, place and manner in which they chose to search him. This case is exactly the sort of case for which exclusion of the evidence is the appropriate remedy for deterring future similar police misconduct.

CERTIFICATE OF SERVICE

I certify that a copy has been mailed to Catherine Coombs Cline, Concourse Center #4, 3507 E. Frontage Rd. - Suite 200, Tampa, FL 33607, (813) 287-7900, on this _____ day of July, 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