IN THE SUPREME COURT OF FLORIDA

CASE NO. SC09-2163
DCA CASE NO. 3D08-1094

ALFREDO MORENO-GONZALEZ,

Petitioner,

vs.

THE STATE OF FLORIDA,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW TO THE
DISTRICT COURT OF APPEAL, THIRD DISTRICT

RESPONDENT'S BRIEF ON THE MERITS

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STATEMENT OF THE CASE AND FACTS

Petitioner, Alfredo Moreno-Gonzalez, was the defendant in the trial court and Appellee in the District Court of Appeal, Third District. Respondent, the State of Florida, was the prosecution in the trial court and the Appellant in the District Court of Appeal, Third District.

On June 15, 2007, the State of Florida filed an information charging Petitioner with being in actual or constructive possession of an excess of 25 pounds, but less than 2000 pounds, of cannabis. (R. 6-8). The cannabis was found at Petitioner's home on or about May 16, 2007. (R. 6-8). Petitioner filed a pre-trial motion to suppress physical evidence. (R. 14-27). In his motion, Petitioner argued that the evidence should be suppressed because the home was searched without a warrant. (R. 15-16). Second, the defense argued that the warrant that was later issued was insufficient on its face because it was not supported by lawfully acquired probable cause. (R. 15-16). Third, Petitioner argued that the affidavit in support of the warrant was not properly signed by the affiant. (R. 15-16).

The State filed a response. (R. 32-48). In its response, the State argued that the affidavit in support of the search warrant was valid as the affiant, Detective Lourdes Hernandez, both swore and subscribed the documents. (R. 32). Detective Hernandez subscribed to each page of the affidavit before Judge Del

Pino as reflected by her initials in the lower right hand corner. (R. 33). Second, the receipt of the search warrant was timely filed. (R. 33). The warrant was executed on the same date as it was signed. (R. 33). Third, the State argued that the entry into the home was consensual. (R. 33). Officers knocked on the front door of the home. (R. 33). A woman, later identified as the housekeeper, answered the door and told them to come to the back door. (R. 33). As the Detective Hernandez walked to the back door, she smelled live marijuana coming from the garage. (R. 33). The housekeeper answered the back door, invited the officers to enter into the screened porch and the kitchen area. (R. 33). The officers informed the housekeeper of the purpose of their visit and requested her consent to search the home. (R. 33). She told them she could not give consent, but that the homeowner who was at home asleep could provide consent. (R. 33). The homeowner refused to give consent. (R. 33). Thereafter, the police then obtained a warrant. (R. 33). Finally, the State argued that there was probable cause to obtain a search warrant based upon the odor of live marijuana. (R. 34).

On March 3, 2008, the trial court conducted an evidentiary hearing on the Petitioner's motion to suppress. (R. 84-174). Detective Lourdes Hernandez, of the Miami-Dade Police Department, testified on behalf of the State. (R. 89-143). Detective Hernandez has been a police officer for ten years. (R. 89). She has been

with the narcotics division for five years and has undergone specialized training in the detection of marijuana grow houses. (R. 89-90). She has also been involved with approximately 150 marijuana grow house investigations. (R. 90). On May 16, 2007, she was conducting an investigation with the United States Drug Enforcement Administration ("DEA"). (R. 90). She was contacted by a DEA agent who told her that there was a tip regarding a grow house. (R. 90). Detective Hernandez and DEA Agent Pete Yates went to the home located at 22590 SW 252nd Street[1] in order to conduct an area canvas. (R. 91). When they got to the home, they went through an open gate and knocked on the front door. (R. 90-91). At this time, a woman inside of the home told them to go around the back. (R. 93).

The officers walked around the side of the house and smelled a strong odor of live marijuana coming from a detached garage next to the house. (R. 94). The officers walked between the home and a detached garage. There was approximately twenty to twenty-five feet between the garage and home. (R. 98). The garage had numerous PVC pipes going into the structure and the windows were covered. (R. 106). Officer Hernandez could also hear water pumps inside the garage. (R. 106).

The woman opened the sliding glass door at the back of the home and

[1] The house they were originally investigating was located at 22690 SW 22nd

invited the officers into the kitchen of the residence. (R. 98-99). Once they were in the home, they told her who they were and that they were there as part of a narcotics investigation. (R. 99, 137). The woman told them that she was the housekeeper. (R. 99). The housekeeper advised the officers that the owner of the home was asleep. (R.100). Detective Hernandez requested that the housekeeper go wake up the owner so that the officers could speak to him. (R.100). Agent Yates followed the housekeeper. (R. 100).

When the owner, Petitioner Moreno-Gonzalez, came to the kitchen Detective Hernandez explained who she was and why they were at the home. (R.101). She asked him if he was willing to give consent to search. (R.101). The Petitioner would not give consent to search. (R. 101). At that point, Detective Hernandez contacted another officer to stay at the home while she wrote the search warrant and had it reviewed by the State Attorney's Office. (R. 102).

After the warrant was reviewed, Detective Hernandez took the warrant to the chambers of Judge Del Pino. (R. 102-103, 128). Detective Hernandez swore to the affidavit in support of the search warrant and the search warrant. (R. 103, 128-129). She initialed the bottom of each page of the affidavit, including the signature page, and the warrant itself. (R. 43, 103-104, 130). The warrant covered

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Street. The house was just west of the Defendant's home.

all of the buildings on the Petitioner's property. (R. 105). When the warrant was executed, officers discovered marijuana hydroponics labs in both the detached garage and in a shed on the property. (R. 108). The impounded marijuana weighed 47.6 pounds. (R. 109).

On cross-examination, Detective Hernandez testified that:

> Q. And what did the judge do?
> A. She first swears me in. Once that is done, she reviews or she reads both the affidavit and the search warrant.
> Q. And then each of you initials the bottom of each page?
> A. Correct.

(R. 129). She also stated that although she initialed each page, she forgot to sign the signature line of the affidavit in support of the warrant. (R. 130, 131). However, she did initial the bottom of the signature page. (R. 130). She testified that she swore to the affidavit. (R. 131). In particular, the defense asked:

> Q. Is this your common practice, as an officer, when doing search warrants, not to sign [sic] that says affiant?
> A. Yes, it was overlooked on my part that it wasn't signed. However, I did swear into that affidavit. I did initial it on the bottom.

(R. 131).

Next, Agent Pete Yates of the DEA testified. (R. 144-167). Agent Yates accompanied Detective Hernandez to the Defendant's home. (R. 146). Agent Yates was wearing a vest that was marked "Police" on the front and "DEA" on the

back. (R. 149). After knocking on the front door a female opened the door. (T. 146-147). Detective Hernandez and the female spoke in Spanish for a moment and after their conversation the female closed the door. (R. 147). Agent Yates did not understand the conversation between Detective Hernandez and the female. (R. 148). Hernandez and Yates then proceeded around the side towards the back of the home. (R. 147-148). Agent Yates then accompanied the female to wake up the Petitioner. (R. 148-149).

Agent Yates testified that the Petitioner did not give consent to search. (R. 150). Agent Yates and Detective Hernandez walked into the screened in porch. (R. 150). Agent Yates stood with the Defendant, but did not enter the home again, while Detective Hernandez went to write the warrant. (R. 150). On cross-examination, Agent Yates testified that he did not smell any marijuana as he walked past the garage. (R. 158).

At the conclusion of the hearing, the court heard arguments regarding whether Detective Hernandez's initials constitute subscribing to search warrant. (R. 172). The Eleventh Judicial Circuit, in and for Miami-Dade County, found that it did not and granted the motion to suppress. (R. 172). On April 16, 2008, the court issued a written order granting the motion to suppress. (R. 78-80). The court granted the motion on the basis that it found that the warrant was issued contrary

to Florida Statute Section 933.06 as Detective Hernandez's affidavit was not properly signed. (R. 78-80).

The State appealed the granting of Petitioner's motion to suppress. On appeal, the State argued that the trial court erred in granting the s motion to suppress as the affidavit in support of the search warrant was subscribed because Officer Hernandez swore to the affidavit in support of the search warrant before Judge Del Pino. Further, the State argued that the officers relied on the warrant in good-faith, therefore the a good faith exception to the exclusionary rule recognized in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), should apply.

The Third District Court of Appeal reversed the decision of the Eleventh Judicial Circuit, in and for Miami-Dade County. State v. Moreno-Gonzalez, 18 So. 3d 1180 (Fla. 3d DCA 2009). In its opinion, the district court noted that although the affidavit was not signed, it was undisputed that probable cause was shown by the officer swearing to the allegations in the affidavit under oath before the judge, initialing each of the pages of the affidavit, and also initialing each of the three pages of the search warrant. Id. at 1180-81. The district court noted that under the 1982 amendments to Article I, Section 12 of the Florida Constitution, the court was required to construe the right against unreasonable searches and

seizures in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Moreno-Gonzalez, 18 So. 3d at 1181-1183.

The district court observed that the in construing the Fourth Amendment, the United States Supreme Court has stated that that "courts should not invalidate the warrant by interpreting the affidavit in a hypertechinical, rather than a commonsense, manner." Id. at 1183 (citing to United States v. Ventresca, 380 U.S. 102, 109, 85 S.Ct. 741, 13 L.Ed. 2d 684 (1965). The court found that it would be entirely unrealistic and lacking in common sense to find that the technical deficiency of failing to sign a document, the contents of which were sworn to under oath and initialed on each page, was fatal to the question of probable cause for the issuance of a search warrant. Moreno-Gonzalez, 18 So. 3d at 1184. Furthermore, the court noted that although the Florida Constitution provides that probable cause is to be "supported by affidavit," under Florida Statute Sections 92.525 and 92.50(1), the affidavit at issue was sufficient to support the issuance of the warrant and the absence of a signature was not fatal. Moreno-Gonzalez, 18 So. 3d at 1184-85. The court held that the trial court erred in finding that the lack of signature on the affidavit was fatal and suppressing the evidence as a result. Moreno-Gonzalez, 18 So. 3d at 1185.

Thereafter, Petitioner filed for review in this Court. On May 21, 2010, this Court accepted jurisdiction of this case.

SUMMARY OF THE ARGUMENT

The district court correctly concluded that the absence of the signature on the affidavit in support of the search warrant did not require suppression of the evidence seized pursuant to the warrant as the affiant otherwise swore before a magistrate that the facts were true. Florida Statute Section 933.06, Sworn Application Required Before Issuance, that in order to issue a warrant a judge must have the application of some person for said warrant duly sworn to and subscribed, and may receive further testimony from witnesses or supporting affidavits, or depositions in writing, to support the application. Fla. Stat. § 933.06. Here, Detective Hernandez, the affiant, substantially complied with the statutory requirements before issuance of the warrant. The officer appeared personally before the magistrate and gave a verbal oath to the judge, in person. The judge swore her in and reviewed the affidavit and search warrant. Although the detective failed to sign the line above where it says "Affiant" she did sign her initials beside "Affiant Initials" on every page of the affidavit – including the signature page where it says "Affiant." Detective Hernandez failed to sign the signature line through oversight, not through a desire to circumvent the affidavit requirements. The officer, by swearing to the affidavit, subjected herself to a charge of perjury if the affidavit proved untrue. Therefore, her failure to sign on

the signature line should be considered a sloppy technical error which has been explained away and cured. Accordingly, the fruits of the search should be admissible as it was the officer's intention was to be bound by oath and invoke punishment if the contents of the affidavit later proved to be false.

Second, the good-faith exception to the exclusionary rule precludes suppression of the evidence seized in this matter because the warrant was based on probable cause and reliance on it was in good faith. In United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the United States Supreme Court recognized that the exclusionary rule need not be applied to evidence obtained as the result of an illegal search when the officer conducting the search acted in objectively reasonable reliance on the invalid warrant. Leon's good-faith exception to the exclusionary rule precludes suppression of the evidence seized because it was objectively reasonable to rely on the warrant, the Detective was neither reckless nor dishonest in obtaining, she did not attempt to avoid swearing a formal oath, and the warrant was supported by probable cause.

Alternatively, in 1982, Article 1, Section 12 of the Florida Constitution was amended to provide that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures "shall be construed in conformity with the 4th Amendment to the United States

Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const. Prior to this amendment to the Florida Constitution, the courts were free to provide the people with a higher standard of protection from governmental intrusion than that afforded by the federal constitution. However, after the people approved this amendment, Florida courts became bound to follow the interpretations of the United States Supreme Court with relation to the Fourth Amendment, and provide no greater protection than those interpretations. Despite the Petitioner's arguments to the contrary, in order for a United States Supreme Court pronouncement to be controlling on Florida courts, the facts pertaining to the Supreme Court case need not be identical to those present before the Florida courts. In construing the Fourth Amendment, the United States Supreme Court has stated that "courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." United States v. Ventresca, 380 U.S. 102 (1965). In the instant case, a technical deficiency should not be fatal as the officer swore under oath that the contents of the affidavit were true and correct. Accordingly, this Court should find that the court below properly applied the Conformity Clause of Article I, Section 12, of the Florida Constitution, and find that, in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the U.S. Supreme Court, it was error

for the trial court to find the lack of signature on the affidavit to be a fatal error and suppressing the evidence as a result.

ARGUMENT

I. THE DISTRICT COURT OF APPEAL PROPERLY CONCLUDED THAT THE ABSENCE OF THE AFFIANT'S SIGNATURE ON THE AFFIDAVIT IN SUPPORT OF THE SEARCH WARRANT DID NOT REQUIRE SUPPRESSION.

A. The absence of affiant's signature on the affidavit does not defeat the affidavit when the affiant otherwise swore before a magistrate that the facts in the affidavit are true.

Regardless of whether the Third District Court of Appeal was correct in applying the Conformity Clause of Article 1, Section 12 of the Florida constitution, the district court correctly concluded that the absence of the signature on the affidavit in support of the search warrant did not require suppression. Article 1, Section 12, of the Florida Constitution provides that:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

Art. I, §12, Fla. Const. Chapter 933 of the Florida Statutes governs the issuance of search warrants. Under Florida Statute Section 933.06, Sworn Application Required Before Issuance:

> The judge must, before issuing the warrant, have the application of some person for said warrant duly sworn to and subscribed, and may receive further testimony from witnesses or supporting affidavits, or depositions in writing, to support the application. The affidavit and further proof, if same be had or required, must set forth the facts tending to establish the grounds of the application or probable cause for believing that they exist.

§ 933.06, Fla. Stat. (2007).

In the present case, Detective Hernandez substantially complied with the statutory requirements before issuance of the warrant. On May 16, 2007, Detective Hernandez appeared personally before Judge Victoria Del Pino. The judge swore her in and reviewed the affidavit and search warrant. Hernandez testified that she swore to both the affidavit in support of the search warrant and the search warrant. Although Detective Hernandez failed to sign the line above where it says "Affiant" (R.43), she did sign her initials beside "Affiant Initials" on every page of the affidavit – including the signature page where it says "Affiant." The officer also gave a verbal oath to the judge, in person.

The purpose of the requiring an affiant to "swear" to the information

supporting an application for a search warrant is grounded within the Fourth Amendment to the United States Constitution which requires that

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

US Const. Amend. IV.

> No particular ceremony is necessary to constitute the act of swearing …. It is only necessary that something be done in the presence of the magistrate issuing the search warrant which is understood by both the magistrate and the affiant to constitute the act of swearing.

Simon v. Oklahoma, 515 P.2d 1161 (Okl.Crim.App.1973). See also United States v. Brooks, 285 F.3d 1102 (8th Cir. 2002) (notwithstanding fact officer "did not remember the notary having him raise his right hand and solemnly swear" to tell the truth, oath requirement met here; officer "was under oath when he made the application for the warrant because he intended to undertake and did undertake that obligation by the statements he made in his affidavit and by his attendant circumstance"; "a person may be under oath even though that person has not formally taken an oath by raising a hand and reciting formalistic words"); Wilson v. Arkansas, 10 Ark.App. 176, 662 S.W.2d 204 (1983) (though judge did not require affiant to raise right hand and say statement "the truth, the whole truth, and

nothing but the truth, so help me God," affidavit was sworn to because it intended to be under oath and affidavit said it was); Idaho v. Nunez, 138 Idaho 636, 67 P.3d 831 (2003)(where on a later occasion additional testimony given by original affiant to support reissuance of unexecuted search warrant, itself not an invalid procedure, it is of no significance that oath was not administered again on second occasion, as that "proceeding … was treated by all parties as a continuation of the first"); New Hampshire v. Sands, 123 N.H. 570, 467 A.2d 202 (1983)("purpose of the oath is to ensure that the affiant consciously recognizes his legal obligation to tell the truth," and thus "the magistrate's oath constituted 'swearing' … despite his failure to use the words 'so help you God'").

Black's Law Dictionary defines an oath as

> a solemn declaration, accompanied by a swearing to God or a revered person or thing, that one's statement is true or that one will be bound to a promise. The person making the oath implicitly invites punishment if the statement is untrue or the promise is broken. The legal effect of an oath is to subject the person to penalties for perjury if the testimony is false.

Black's Law Dictionary (8th ed. 2004).

The key is whether the procedures followed were such "that perjury could be charged therein if any material allegation contained therein is false." Simon v. Okalahoma, 515 P.2d 1161 (Okl.Crim.App.1973); Markey v. State, 47 Fla. 38, 37

So. 53 (Fla. 1904). In New York v. Sullivan, 56 N.Y.2d 378, 452 N.Y.S.2d 373, 437 N.E.2d 1130 (1982), the warrant issued on the affidavit of a police officer and also a document containing additional essential facts signed by the informant and containing this warning: "False statements made herein are punishable as a Class A Misdemeanor pursuant to § 210.45 of the Penal Law." In upholding the warrant, the court stated:

> There is no constitutional prescription as to the particular form of the 'oath or affirmation' or the exact manner in which it is to be administered. In the usual case, there will be a formal swearing before a notary to the truth of the information provided, and any written statements submitted in support of the warrant application generally will contain the traditional jurat. This does not mean, however, that such procedural formality is a sine qua non of the 'oath or affirmation' requirement. Indeed, a method of verification by which the maker of the statement is first alerted to the criminal consequences of knowingly providing false information in connection with a warrant application and then voluntarily acknowledges his acceptance of those consequences should suffice for purposes of the constitutional mandate that a warrant be issued upon proof 'supported by oath or affirmation'.

Id. at 1133. The court went on to note that the statute referred to in the statement does provide for criminal prosecution for a false statement in a document which contains such a reference and the court thus concluded that "this statutorily authorized form notice served as the procedural and functional equivalent of the more traditional type of oath or affirmation." Id. Compare Ferguson v.

Commissioner, 921 F.2d 588 (5th Cir.1991) (person who refused to use the word "swear" or "affirm" could satisfy oath or affirmation requirement by adding acknowledgment that she was subject to penalties for perjury to statement that facts to be given are "accurate, correct, and complete"); with United States v. Richardson, 943 F.2d 547 (5th Cir.1991)(no oath re unrecorded telephonic warrant process, as magistrate did not recall using word "swear" and person giving information "did not manifest a recognition of his duty to speak the truth").

Here, Detective Hernandez met with the judge in person and swore to the contents of the affidavit in support of the warrant. She initialed each page of the affidavit but forgot to sign the signature line. Detective Hernandez failed to sign the signature line through oversight, not through a desire to circumvent the affidavit requirements. Therefore, the fruits of the search should be admissible as her intention was to be bound by oath and invoke punishment if the contents of the affidavit were false.

Indeed, there is broad consensus to support a finding that a written affidavit is not per se defective because it contains no signature, as long as the prosecution can show via testimony that the affiant has taken an oath. See e.g. United States v. Russell, 974 F. 2d 1344, *4 (9th Cir. 1992)(finding that where Appellant argued that it was error for the lower court to find unsigned affidavit in support of

search warrant was valid, the circuit court found that the affidavit was made under oath and that the failure to sign was an oversight therefore suppression was not required); Louisiana v. Roubion, 378 So.2d 411 (La.1979)(The unintentional absence of a search warrant applicant's signature does not render an attempted affidavit ineffective when he complies with every other statutory requisite by attesting under oath to the facts establishing probable cause, if the purported written affidavit identifies the officer as the affiant, and if the issuing magistrate knows the officer and is certain of his identity); Valdez v. Maryland, 300 Md. 160, 476 A.2d 1162 (1984)(sufficient that officer took oath and signed judge's notes; representation of oath need not itself appear on face of the document); Massachusetts v. Young, 6 Mass.App.Ct. 953, 383 N.E.2d 515 (1978) (officer's failure to sign affidavit does not invalidate warrant where facts in affidavit were sworn to and identity of affiant is clear); Michigan v. Mitchell, 428 Mich. 364, 408 N.W.2d 798 (1987)("search warrant based on an unsigned affidavit will be presumed to be invalid, but this presumption of invalidity may be rebutted by a showing that the facts in the affidavit were presented under oath to the magistrate"); Illinois v. Johnson, 304 N.E.2d 681 (Ill. App. Ct. 1973)(Where a two-page complaint for a search warrant constituted a single document, the language of the complaint showed that the magistrate necessarily considered the

specifications on the second page in issuing the warrant, the identity of affiants was clearly shown in body of complaint, and the signatures of complaining officers were verified by a magistrate on the first page, it was not necessary that affiants' signatures also appear at end of the document.) Massachusetts v. Young, 383 N.E.2d 515 (Mass. App. Ct. 1978)(An officer's failure to sign the search warrant affidavit did not render the affidavit invalid where in fact the warrant was issued upon facts sworn to in the affidavit and where the identity of the affiant was clear from other parts of the affidavit.); Huff v. Virgina, 213 Va. 710, 194 S.E.2d 690 (1973)(It was not necessary that the affiant, who was identified in the affidavit and jurat, sign the search warrant affidavit).

In Smith v. Texas, 207 S.W.3d 787, 792 (Tex. Crim. App. 2006), the Texas Court of Criminal Appeals, the high court, considered the exact issue facing the Court in the instant matter. The officer in Smith set out all of the facts pertaining to his investigation in a probable cause affidavit and swore to them, but failed to actually sign the document. Id. at 788-89. As in Florida, Texas law specifically provides that "[a] sworn affidavit setting forth substantial facts establishing probable cause shall be filed in every instance in which a search warrant is requested." Id. at 790-91, n. 10; Tex.Code Crim. Proc. Ann. Art.18.01(b). Nevertheless, after examining evidence of the officer swearing to the affidavit, the

Texas court upheld the validity of the affidavit and found that "[a]lthough the affiant's signature on an affidavit serves as an important memorialization of the officer's act of swearing before the magistrate, it is that act of swearing, not the signature itself, that is essential." Id. 792. The court in Smith held that an affiant's failure to sign his affidavit is not necessarily fatal if it can be proved by other means that he did swear to the facts contained within the affidavit before the magistrate.

Florida courts have also upheld the validity of warrants containing a defect. In State v. McManus, 404 So. 2d 757, 758 (Fla. 4th DCA 1981), the district court stated that "official oversights, if satisfactorily explained, will not constitute fatal defects, where the same are not proscribed by law, and the defendant is not prejudiced." In McManus, the trial judge, through oversight, failed to affix his signature, jurant, and seal. The statute on oaths, affidavits, and acknowledgements Section 92.50, Florida Statutes requires a jurat or certificate of acknowledgement. In McManus the court upheld the validity of the warrant despite the defects. Similarly, in Pepilus v. State, 554 So. 2d 667 (2d DCA 1990), the district court upheld the validity of an affidavit in support of a search warrant the failed to contain an attesting seal. The court found that the absence of the seal did not render the warrant fatally defective because by swearing to the affidavit, the

officer subjected himself to a charge of perjury if the affidavit proved untrue. Id.

Here, as in McManus and Pepilus the statute requires compliance before the issuance of search warrant. Although Detective Hernandez failed to sign on the signature line, she swore to the affidavit in support of the search warrant before Judge Del Pino. (R. 103-104, 128-130). The oversight in this matter has been explained and should not constitute a fatal defect.

In Cain v. State, 287 So. 2d 69, 70 (Fla. 1973), this Court upheld a search where the affidavit in support of search warrant alleged observations on May 17, 1972, of marijuana growing on defendants' premises, the affidavit was executed on May 17, 1972, and where the warrant was served on that same day, the failure to fill in the blank space with the exact date of execution of the warrant was "***a mere technicality*** and not prejudicial." Cain v. State, 287 So. 2d 69, 70 (Fla. 1973) (emphasis added). The warrant in Cain, similar to the affidavit in the instant case, did not conform strictly to the statutory provision authorizing its issuance in that Florida Statute Section 993.05 prohibits the issuance of a search warrant in blank.

This Court's opinion in Cain supports the contention that the lack of an affidavit signature in this case constitutes a technical error, as was the case in the United State's Supreme Court case of United States v. Ventresca, 380 U.S. 102 (1965)(discusses *infra*), rather than a substantive error as argued by the dissent's

opinion in the Third District Court of Appeal. The dissent in this case explains that Section 933.06, Florida Statutes, has been violated and that a violation of this section is substantive. However, in Cain, Florida Statute Section 993.05 was also violated, and this Court still found the error on the affidavit to be merely "technical." Hence, the instant situation is factually on point with McManus and Ventresca because both cases involve "technical" errors with regard to the affidavit at issue; and the district correctly determined that the evidence seized pursuant to the warrant should not have been suppressed.

Here, if the statements had been false, Detective Hernandez could have been prosecuted for perjury because an oath was administered. She swore in front of a judge to the truth of her statements, the contents of the document, and initialed each page. The officer, by swearing to the affidavit, subjected herself to a charge of perjury if the affidavit proved untrue. Pepilus v. State, 554 So. 2d 667 (Fla. 2d DCA 1990). Therefore, considering the instant case under the same principle as McManus, Cain, and Ventresca her failure to sign on the signature line should be considered a sloppy technical error which has been explained away and cured. See State v. Tolmie, 421 So. 2d 1087 (Fla. 4th DCA 1982)(Letts, J. Dissenting).

By analogy, under contract law principles, parties can become bound to the terms of a written contract, even though they do not sign it, where assent may be

shown by the acts or performance of the party. BDO Seidman, LLP v. Bee, 970 So. 2d 869, 874 (Fla. 4th DCA 2007). Here, although she forgot to sign the affiant signature line, Detective Hernandez evidenced her desire to be bound by the affidavit by her actions. She swore under oath, in the judge's presence, to the contents of affidavit in support of the warrant and initialed each page. Thus, as the there was substantial compliance with the requirements to issue a search warrant, this Court should find that the search warrant in this case was valid.

B. The good-faith exception to the exclusionary rule precludes suppression of the evidence seized in this matter because the warrant was based on probable cause and the other officers' reliance on the warrant was in good faith.

Further, the other officers' good faith reliance on the issued warrant should bar the application of the exclusionary rule. In United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984), the Supreme Court recognized a good faith exception to the exclusionary rule. It is the State's position that this good faith exception should be applied in this case. Leon holds that the exclusionary rule need not be applied to evidence obtained as the result of an illegal search when the officer conducting the search acted in objectively reasonable reliance on the invalid warrant. In reaching this decision, the United States Supreme Court emphasized that the exclusionary rule was designed to deter

police misconduct and, therefore, suppression is not required when the officer acted with objective good faith in obtaining a search warrant and then properly executed the warrant. *Id*. at 3417-3419. See also Perez v. State, 620 So.2d 1256 (Fla. 1993)(By reason of the 1982 amendment to article I, section 12 of the Florida Constitution, this Court is bound to follow the United States Supreme Court's interpretations of the Fourth Amendment and to provide no greater protection than those interpretations.)

Here, Leon's good-faith exception to the exclusionary rule precludes suppression of the evidence seized because: (1) the officer's reliance on the warrant was in good faith; (2) it was objectively reasonable to rely on the warrant, because Detective Hernandez was neither reckless nor dishonest in obtaining it; and (3) the warrant was supported by probable cause. Under Leon's good-faith exception, the Fourth Amendment exclusionary rule is not to "be applied to exclude the use of evidence obtained by officers acting in reasonable reliance on a detached and neutral magistrate judge's determination of probable cause in the issuance of a search warrant that is ultimately found to be invalid." United States v. Taylor, 119 F.3d 625, 629 (8th Cir. 1997).

In a companion case to Leon, Massachusetts v. Sheppard, 468 U.S. 981, 82 L. Ed. 2d 737, 104 S. Ct. 3424 (1984), the United States Supreme Court applied

the Leon exception to the fruits of a search conducted pursuant to a warrant that was inaccurate due to the issuing judge's failure to correct a clerical error. Id. at 988-91. The Court observed, "we refuse to rule that an officer is required to disbelieve a judge who has just advised him . . . that the warrant he possesses authorizes him to conduct the search he has requested." Id. at 989-90. "If an officer is required to accept at face value the judge's conclusion that a warrant form is invalid, there is little reason why he should be expected to disregard assurances that everything is all right[.]" Id. at 990.

In United States v. Hessman, 369 F. 3d 1016 (8th Cir.2004), the Circuit Court considered whether a warrant that was not sworn or attested to could be reasonably relied on. There the court noted:

> We previously found Leon applicable even when a facially obvious error exists on a warrant. United States v. Thomas, 263 F.3d 805, 808-09 (8th Cir. 2001) (noting the address on the warrant was different from the address in the affidavit). In Thomas, we rejected the argument that, because the facial error was the officer's, the officer could not reasonably rely upon it. Id. We observed "this is not sufficient to change the fact that the issuing judicial officer bears the primary responsibility for ensuring the accuracy of the warrant as the final reviewing authority." Id. at 809.

Hessman, 369 F. 3d at 1021. The court went on to observe:

> Other circuits confronting similar situations have applied the Leon good-faith exception to the exclusionary rule. In United States v. Richardson, 943 F.2d 547, 548, 550-51 (5th Cir. 1991), the Fifth Circuit reversed the district court's decision to suppress where the

agent had not signed the affidavit and the magistrate judge, in a telephone conversation, did not require an oath or affirmation of the facts in the affidavit. The court ruled the magistrate judge's failure to administer the oath was not a departure from his neutral and detached role, but was an inadvertent mistake. Id. at 550. Nor had the magistrate judge been misled by false information. Id. Also, the court observed the lower court's decision to suppress the evidence was not based on a finding the affidavit lacked probable cause or was facially deficient in some way. Id. Thus, the Richardson case did not fall within any of the four situations "to which the Leon Court envisioned the exclusionary rule would still apply." Id. The Fifth Circuit explained the exclusionary rule functions as a judicially created remedy devised to protect Fourth Amendment rights "through its deterrent effect, rather than a personal constitutional right of the party aggrieved." Id. at 550-51 (quoting Leon, 468 U.S. at 906). The exclusionary rule's deterrent purpose would not be served by penalizing the officer for the judge's mistake, because "the rare occasion when a magistrate accidentally fails to administer an oath cannot be eliminated by suppressing the evidence in that situation." Id. at 551 (citing Leon, 468 U.S. at 906). The court also found it was unlikely police will recklessly or willfully try to evade the oath or affirmation requirement. Id. According to the Fifth Circuit, "suppressing the evidence seized in the case will add nothing to protect against an affiant who misrepresents the facts to the magistrate, nor will it encourage officers to take their chances in submitting deliberately or recklessly false information, for they will expect to be sworn when preparing their warrant applications." *Id.*

Further, in United States v. Kelley, 140 F.3d 596, 604 (5th Cir. 1998), the Fifth Circuit rejected a "per se rule that an unsigned and undated warrant can never suffice," and concluded suppression would not serve a deterrent purpose. The court relied upon Sheppard and the Supreme Court's refusal to rule an officer must disbelieve a judge who has advised the officer, by word and action, that the warrant the officer possesses authorizes the search requested. Id. at 603 (citing Sheppard, 468 U.S. at 989-90). While noting its decision was not intended to undercut the importance of the Fourth Amendment requirements, the court held the good-faith exception applied to the

> case, because the "objective criteria" for a search warrant, probable cause, existed. Id.

Hessman, 369 F. 3d at 1021-1022. The Hessman Court concluded that the evidence against the defendant should not have been suppressed. It held that "[t]he error in this case belonged to the issuing magistrate. Deputy Suhr did not attempt to avoid swearing a formal oath. Applying the exclusionary rule here would not serve a deterrent purpose, because "the rare occasion when a magistrate accidently fails to administer an oath cannot be eliminated by suppressing the evidence in that situation." Hessman, F. 3d at 1022(citing to "Richardson, 943 F.2d at 551"); see also United States v. Smith, 63 F.3d 766 (8th Cir. 1995)(where the Eighth Circuit quoted from Sheppard in applying the Leon good faith exception where police officers searched a home with a signed warrant, but an unsigned jurat/affidavit.)

Similarly, here, Detective Hernandez did not attempt to avoid swearing a formal oath. She swore in front of the judge to the truth of her statements. As the Third District Court of Appeal's majority opinion notes the United States Supreme Court has stated that in construing the Fourth Amendment "courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner." United States v. Ventresca, 380 U.S. 102, 108-09

(1965). As this warrant was supported by probable cause the evidence obtained pursuant to the issued warrant should not be subject to the exclusionary rule. Accordingly, this Court should find the warrant here was valid as it the officer did swear to the affidavit and it was supported by probable cause.

II. THE THIRD DISTRICT COURT OF APPEAL PROPERLY APPLIED THE CONFORMITY CLAUSE OF ARTICLE I, SECTION 12, OF THE FLORIDA CONSTITUTION, AND IN CONFORMITY WITH THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS INTERPRETED BY THE U.S. SUPREME COURT, PROPERLY DETERMINED THAT IT WAS ERROR FOR THE TRIAL COURT TO FIND THAT THE LACK OF SIGNATURE ON THE AFFIDAVIT TO BE A FATAL ERROR AND SUPPRESSING THE EVIDENCE AS A RESULT.

Similar to the Constitution of the United States, the Florida Constitution provides the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures. Art. I, § 12, Fla. Const. In 1982, this right was amended to add that "this right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court." Art. I, § 12, Fla. Const. Prior to the 1982 amendment, courts in this state "were free to provide its citizens with a higher standard of protection from governmental intrusion than that afforded by the federal constitution." State v. Lavazzoli, 434 So.2d 321, 323 (Fla.1983). However, with this amendment, Florida courts became bound to follow the interpretations of the United States Supreme Court with relation to the Fourth Amendment, and provide no greater protection than those interpretations. See

State v. Butler, 655 So.2d 1123, 1125 (Fla.1995) ("This Court is bound, on search and seizure issues, to follow the opinions of the United States Supreme Court regardless of whether the claim of an illegal arrest or search is predicated upon the provisions of the Florida or United States Constitutions.") (citations omitted); Bernie v. State, 524 So.2d 988, 992 (Fla.1988)(the conformity clause "brings this State's search and seizure laws into conformity with all decisions of the United States Supreme Court rendered before and subsequent to the adoption of that amendment.").

This Court has held that for the Conformity Clause to apply there must be a United States "Supreme Court pronouncement factually and legally on point." State v. Daniel, 665 So. 2d 1040, 1047 n.10 (Fla. 1995) ("Any Supreme Court pronouncement factually and legally on point with the present case would automatically modify the law of Florida to the extent of any inconsistency."). However, the Petitioner's analysis of Daniel is overly broad. While "[a]ny Supreme Court pronouncement factually and legally on point with the present case would automatically modify the law of Florida," this does not foreclose the applicability of United States Supreme Court case law that is legally, but not 100% factually, on point.

In footnote 10 of Daniel this Court states that "Florida law conforms to apposite precedent of the United States Supreme Court." Daniel, 665 So. 2d at 1047 n.10. Merriam-Webster defines "apposite" as "highly pertinent or appropriate." Additionally, the Florida Supreme Court, in the main text of its opinion in Daniel, explicitly states that Florida law conforms to any relevant precedent of the United States Supreme Court, even if the facts are not directly on point. Id. at 1041 ("[W]e are bound by *any apposite* holdings of the United States Supreme Court on Fourth Amendment issues…") (emphasis added); see J.J.V. v. State, 17 So.3d 881 (Fla. 4th DCA 2009) ("[I]n applying the law regarding search and seizure issues, we are bound, under the conformity clause of the state constitution, to follow *applicable* United States Supreme Court precedents.") (emphasis added); Panter v. State, 8 So. 3d 1262, 1265 (Fla. 1st DCA 2009) ("In Florida, when ruling on search and seizure issues, courts are required by the conformity clause in article I, section 12 of the Florida Constitution to follow the *applicable* United States Supreme Court precedents.") (emphasis added); Brye v. State, 927 So. 2d 78, 80 (Fla. 1st DCA 2006) ("By state constitutional mandate in the conformity clause, we are to resolve Fourth-Amendment search and seizure issues in accordance with *applicable* United States Supreme Court precedents.") (emphasis added).

Indeed, in order for a United States Supreme Court pronouncement to be controlling on Florida courts, the facts pertaining to the Supreme Court case need not be identical to those present before the Florida courts. Several previous cases from this Court are illustrative of this concept. For instance, in Holland v. State, 696 So. 2d 757, 759 (Fla. 1997), this Court states that it is "'bound by any apposite holdings of the United States Supreme Court on Fourth Amendment issues."' Id. (citing State v. Daniel, 665 So. 2d 1040, 1041 (Fla. 1995)). In Holland, this Court held that "similar facts" in Whren v. United States, 517 U.S. 806 (1996), were sufficient to bind Florida courts with respect to the Supreme Court's holding in Whren.

Also, in Stewart v. State, 549 So. 2d 171, 173 (Fla. 1989), this Court held that the defendant's Fourth Amendment rights were not violated when a detective, with the permission of the defendant's grandparents, listened to a conversation between the defendant and his grandmother. Id. In support of its ruling, this Court cited United States v. White, 401 U.S. 475 (1971). In White, the United States Supreme Court ruled that no Fourth Amendment violation occurred where government agents testified at trial concerning a conversation they had monitored between an informant wearing a warrantless bug and the defendant. Id. Consequently, the Florida Supreme Court found "no article I, section 12 violation"

because the "passive role played by Detective Lease in the instant case with the consent of the grandparents is far less intrusive than that played by the government officers in White." Stewart, 549 So. 2d at 173.

Likewise, the facts in United States v. Ventresca, 380 U.S. 102 (1965), are sufficiently similar to those in the instant case. Accordingly, Ventresca is binding on the Florida courts and is dispositive of the issue herein. Hence, the United State Supreme Court's pronouncement in Ventresca that "courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a commonsense, manner" controls. Id. at 109.

In Ventresca, the Court considered the question of how to interpret the text of an affidavit in support of a search warrant in order to determine whether probable cause for a search exists. There the affidavit in support of a search warrant was defective because it did not make it clear that the information contained in the affidavit was based upon knowledge of the affiant or other reliable investigators. Id. at 104. The court of appeals reversed the defendant's conviction on the ground that the affidavit for a search warrant pursuant to which the evidence was found was insufficient to establish probable cause. Id. at 103. However, the United States Supreme Court reversed the intermediate court finding that properly read in a commonsense rather than a technical way, the affidavit

showed ample facts to establish probable cause and could not fairly be regarded as reflecting observations made in any significant part by persons other than government investigators. Id. at 110-11.

The purpose of the oath is to subject the person to penalties of perjury and the alleged defect in the instant case is that the affidavit was not signed and thus not subject to the oath. Although the affidavit in Ventresca was signed, it did not make it clear that the facts in the affidavit were known to the affiant and, as such, at least in part, the affiant could not be swearing to the truthfulness of those facts - i.e., the affiant was not subjecting himself to the penalty of perjury as to the contents of the affidavit because the affidavit did not demonstrate personal knowledge as the basis for the affidavit. Similarly, the instant case involves a "less intrusive" situation in that the search warrant affidavit simply lacked the signature of the attesting detective; at the same time, it was undisputed that probable cause was shown by the detective swearing to the allegations in the affidavit under oath before the judge, after having initialed each page of the affidavit, as well as each page of the search warrant. The Court in Ventresca held that technical flaws in the affidavit did not render it deficient. Surely, if technical flaws are not sufficient to shed doubt on the existence of *constitutionally-mandated* probable cause, then certainly a missing signature in an otherwise

proper affidavit should not be fatal, as the warrant clause of Fourth Amendment does not require a signed and sworn affidavit, but only that probable cause be supported by oath or information. United States v. Henry, 931 F.Supp. 452 (S.D.W.Va. 1996).

Indeed, the Fifth Circuit Court of Appeals has previously considered an analogous issue to the one at bar. There, in United States v. Mendoza, 491 F.2d 534 (5th Cir. 1974), the search warrant affidavit was signed by a different officer than the one making the declarations in the affidavit. Stating it was following the United States Supreme Court's interpretation of the Fourth Amendment (and citing Ventresca, 380 U.S. 102 (1965)), the court found that the technical deficiency was not fatal because both officers swore under oath that the contents of the affidavit were true and correct. As the Third District Court of Appeal correctly recognized below:

> Similarly, in our case, the officer testified he swore to the allegations in the affidavit under oath before the judge and initialed each of the pages of the affidavit as well as initialed each of the three pages of the search warrant. Under the U.S. Supreme Court's interpretation of the Fourth Amendment, it would be entirely unrealistic and lacking in common sense to find that the technical deficiency of failing to sign a document, the contents of which were sworn to under oath and initialed on each page, is fatal to the question of probable cause for the issuance of a search warrant.

State v. Moreno-Gonzalez, 18 So. 3d 1180, 1184 (Fla. 3d DCA 2009).

Accordingly, this Court should find that the court below properly applied the Conformity Clause of Article I, Section 12, of the Florida Constitution, and find that, in conformity with the Fourth Amendment to the United States Constitution, as interpreted by the U.S. Supreme Court, it was error for the trial court to find the lack of signature on the affidavit to be a fatal error and suppressing the evidence as a result.

CONCLUSION

This Court should approve the decision of the lower court or otherwise conclude, for the issues set forth herein, that the search warrant was valid.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Brief on the Merits was mailed this_____day of September to Martin L. Roth, One East Broward Blvd., suite 700, Fort Lauderdale, FL 33301.

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CERTIFICATE REGARDING FONT SIZE AND TYPE

The undersigned attorney hereby certifies that the foregoing Brief of Respondent on Jurisdiction has been typed in Times New Roman, 14-point type.

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