IN THE SUPREME COURT OF FLORIDA

CEDRIC TYRONE SMALLWOOD,

Petitioner,

Case No. SC11-1130

v.

STATE OF FLORIDA,

Respondent.

RESPONDENT'S ANSWER BRIEF

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PRELIMINARY STATEMENT

Respondent, the State of Florida, the Appellee in the District Court of Appeal (DCA) and the prosecuting authority in the trial court, will be referenced in this brief as Respondent, the prosecution, or the State. Petitioner, Cedric Tyrone Smallwood, the Appellant in the DCA and the defendant in the trial court, will be referenced in this brief as Petitioner or proper name.

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

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

STATEMENT OF THE CASE AND FACTS

The State accepts petitioner’s statement of the case and facts as being generally supported by the record. The State notes that the essential facts of the case are contained in the opinion of the Florida First District Court of Appeals published at Smallwood v. State, 61 So. 3d 448 (Fla. 1st DCA 2011).

SUMMARY OF ARGUMENT

This Court should answer the certified question in the negative. The outcome in this search and seizure case is controlled by the decision of the United States Supreme Court in United States v. Robinson, 414 U.S. 218 (1973). As a result, the search incident to arrest of the defendant's cellular phone found on his person was per se reasonable. Additionally, even if this Court determined that Robinson did not control, under the principles of United States v. Leon, 468 U.S. 897 (1984), the results of the search should not be suppressed because the officers acted in objective good faith and their transgression was not of such a magnitude as to make suppression the appropriate remedy. Finally, even if the photographs should have been excluded, under the facts of this case, the admission of the photographs was harmless beyond a reasonable doubt.

ARGUMENT

ISSUE I

DOES THE HOLDING IN UNITED STATES v. ROBINSON, 414 U.S. 218 (1973), ALLOW A POLICE OFFICER TO SEARCH THROUGH PHOTOGRAPHS CONTAINED WITHIN A CELL PHONE WHICH IS ON THE ARRESTEE'S PERSON AT THE TIME OF A VALID ARREST, NOTWITHSTANDING THAT THERE IS NO REASONABLE BELIEF THAT THE CELL PHONE CONTAINS EVIDENCE OF ANY CRIME? (Restated)

Petitioner contends that this certified question from the First District should be answered in the negative. The State asserts that the aforementioned United States Supreme Court precedent and controlling provisions of the Florida Constitution dictate that the certified question be answered in the affirmative.

Standard of Review

In MacNamara v. State, 357 So. 2d 410, 412 (Fla. 1979), the court held

> The ruling of the trial court on a motion to suppress, when it comes to the reviewing court, is clothed with the presumption of correctness, and the reviewing court will interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustain the trial court's ruling.

Additionally, "a reviewing court should not substitute its judgment for that of a trial court, but rather, should defer to the trial court's authority as a fact finder." Wasko v. State,

505 So. 2d 1314, 1315 (Fla. 1987)(citing DeConigh v. State, 433 So. 2d 501 (Fla. 1983).

A ruling on a motion to suppress is a mixed question of law and fact with two appropriate standards of review. See United States v. Harris, 928 F.2d 1113, 1115-16 (11th Cir. 1991). The standard of review for the trial court's factual findings is whether there is competent and substantial evidence to support the trial court's findings. See Tibbs v. State, 397 So. 2d 1120, 1123 (Fla. 1981). The standard of review for the trial court's application of the law to the factual findings is de novo. See Williams v. State, 721 So. 2d 1192, 1193 (Fla. 1st DCA 1998).

Constitutional Limits on Review

The Florida courts are constitutionally required to interpret search and seizure issues in conformity with the Fourth Amendment of the United States as interpreted by the United States Supreme Court. See Art. I, § 12, Fla. Const.; State v. Butler, 655 So. 2d 1123 (Fla. 1995).

Preservation

The issue of whether the trial court properly denied petitioner's motion to suppress the cell phone images in this case has been adequately preserved for review.

Argument

The First District certified to this court as a question of great public importance the issue of whether the United States Supreme Court's decision in United States v. Robinson, 414 U.S. 218 (1973), permits a law enforcement to search through photographs contained on a cellular phone found on the arrestee's person at the time of his valid arrest, even in the absence of a reasonable belief that the cellular phone contains evidence of any crime. The State suggests that the answer to the question is yes in the factual situations presented in the current case and in Fawdry v. State, 70 So. 3d 626 (Fla. 1st DCA 2011).[1] Additionally, if this Court were to reach the opposite conclusion, because this case involves the suppression of evidence, this Court must necessarily decide whether the exceptions contained in United States v. Leon, 468 U.S. 897 (1984), apply. Furthermore, the admission of the photographs in the present case, even if they should have been excluded, is harmless beyond a reasonable doubt.

[1] It is important to note that under the facts presented in this case and in Fawdry, which is also pending in this Court, the defendants had made no effort to secure their phones to prevent access by others. No password entry was required to access the phone and no password protection was enabled with respect to any of the data seized and relied upon in this case or Fawdry. Had the phone or data been password protected, then the analysis of this case may be affected and the case might have been subject to other additional analysis.

A. Robinson, 414 U.S., Controls the Outcome in This Case and Dictates that the Evidence Seized from the Cellular Phone During the Search Incident to Arrest Was Not Suppressable.

The Fourth Amendment protects citizens against unreasonable searches or seizures. U.S. Const. amend IV. Warrantless searches are per se unreasonable under the Fourth Amendment, "'subject only to a few specifically established and well-delineated exceptions.'" Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710, 1716 (2009). One such exception is the post-arrest, pre-incarceration inventory search. It is also well settled that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007)(citing Robinson, 414 U.S. at 235). Police officers are not constrained to search only for weapons or instruments of escape on the arrestee's person; they may also, without any additional justification, look for evidence of the arrestee's crime on his person in order to preserve it for use at trial. See id. at 259-60. The permissible scope of a search incident to a lawful arrest extends to containers found on the arrestee's person. See id. at 260 (*citing* United States v. Johnson, 846 F.2d 279, 282 (5th Cir. 1988)(per curiam); see also New York v.

Belton, 453 U.S. 454, 460-61 (1981)(holding that police may search containers, whether open or closed, located within arrestee's reach); Robinson, 414 U.S. at 223-24.

In Robinson, 414 U.S. at 219, the defendant was convicted of possession of heroin. Officer Jenks saw the defendant driving a car. See id. at 220. Officer Jenks, as a result of his previous contact with the defendant four days earlier, knew that the defendant's license had been revoked. See id. Officer Jenks stopped the defendant. See id. Officer Jenks told the defendant that he was arresting him for operating a vehicle after the revocation of his license. See id. The Court assumed that this amounted sufficient probable cause to arrest the defendant. See id. at 220-21. Officer Jenks followed police procedure and searched the defendant. See id. at 221-22. During the search, Officer Jenks felt an object in the defendant's left coat pocket that he could not identify. See id. at 223. Officer Jenks removed that item which turned out to be a crumpled cigarette package. See id. Officer Jenks could not tell what was in the package, but was able to discern that the items inside the package were not cigarettes. See id. Officer Jenks located 14 capsules containing heroin in the package. See id.

The lower court determined that the heroin should have been suppressed. See id. However, the United States Supreme Court reviewed the matter and reach the contrary conclusion. The Court stated:

> **It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment.** This general exception has historically been formulated into two distinct propositions. **The first is that a search may be made of the person of the arrestee by virtue of the lawful arrest.** The second is that a search may be made of the area within the control of the arrestee.
>
> Examination of this Court's decisions shows that these two propositions have been treated quite differently. **The validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation, and has remained virtually unchallenged until the present case.** The validity of the second proposition, while likewise conceded in principle, has been subject to differing interpretations as to the extent of the area which may be searched.

Id. at 224 (emphasis added).

The Court noted that in Agnello v. United States, 269 U.S. 20 (1925), it had repeated its "categorical recognition of the validity of a search incident to lawful arrest." The Court quoted from its opinion which provided "'[t]he right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and size things connected with the crime as its fruits or as the means by which it was

committed, as well as weapons and other things to effect an escape from custody, is not to be doubted.'" Id. at 225 (quoting Agnello, 269 U.S. at 30). The Court noted that since Agnello, the case law continued to express "**no doubt...as to the unqualified authority of the arresting authority to search the person of the arrestee**." Id. at 226 (emphasis added)(citing, Carroll v. United States, 267 U.S. 132 (1925); Marron v. United States, 275 U.S. 192 (1927); Go-Bart Co. v. United States, 282 U.S. 344 (1931); United States v. Lefkowitz, 285 U.S. 452 (1932); Harris v. United States, 331 U.S. 145 (1947); Trupiano v. United States, 334 U.S. 699 (1948); United States v. Rabinowitz, 339 U.S. 56 (1950); Preston v. United States, 376 U.S. 364 (1964); and Chimel v. California, 395 U.S. 752 (1969)).

The Court noted that in Chimel it had overruled Rabinowitz and Harris "as to the area of permissible search incident to a lawful arrest, full recognition was again given to the authority to search the person of the arrestee." Id. at 225-26. The Court noted that in Chimel, 395 U.S. at 762-63, it stated:

> "When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. **In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.**"

Id. at 226 (emphasis added).

The Court further noted that in Adams v. Williams, 407 U.S. 143 (1972), it had concluded that a search incident to arrest and the subsequent vehicle search was lawful, and that the Court had reaffirmed its position regarding the authority to search incident to a valid arrest in Cupp v. Murphy, 412 U.S. 291, 295 (1973). See id.

Importantly, the Court concluded its recitation stating:

> **Since the statements in the cases speak not simply in terms of an exception to the warrant requirement, but in terms of an affirmative authority to search, they clearly imply that such searches also meet the Fourth Amendment's requirement of reasonableness.**

Id. (emphasis added).

The lower court concluded that the officer may not "ordinarily proceed to fully search the prisoner. He must, instead, conduct a limited frisk of the outer clothing and remove such weapons that he may, as a result of that limited frisk, reasonably believe and ascertain that the suspect has in his possession." Id. at 227. The United States Supreme Court rejected the position taken by the lower court. The Court differentiated the scope of a search permissible in a Terry v. Ohio, 392 U.S. 1 (1968), situation from the extent of search permissible pursuant to an arrest for probable cause. See id. The Court specifically rejected the appellate court's position

that "[s]ince there would be no further evidence of such a crime to be obtained in a search of the arrestee, the court held that only a search for weapons could be justified." Id.

The Court reiterated its decision in Terry, 392 U.S. at 25-26, wherein it stated:

> ". . . An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons, and the interests each is designed to serve are likewise quite different. An arrest is the initial stage of a criminal prosecution. It is intended to vindicate society's interest in having its laws obeyed, and it is inevitably accompanied by future interference with the individual's freedom of movement, whether or not trial or conviction ultimately follows. The protective search for weapons, on the other hand, constitutes brief, though far from inconsiderable, intrusion upon the sanctity of the person."

Id. at 228.

The Court rejected the narrow reading advanced by the lower court "that the only reason supporting the authority for a full search incident to lawful arrest was the possibility of discovery of evidence or fruits" during a search incident to arrest. Id. Instead, the Court found

> **The justification or reason for the authority to search incident to a lawful arrest rests quite as much on the need to disarm the suspect in order to take him into custody as it does on the need to preserve evidence on his person for later use at trial.** Agnello v. United States, 269 U.S. 20, 46 S.Ct. 4, 70 L.Ed. 145 (1925); Abel v. United States, 362 U.S. 217, 80 S.Ct. 683, 4 L.Ed.2d 668 (1960). **The standards traditionally governing a search incident to lawful arrest are not,**

> **therefore, commuted to the stricter Terry standards by the absence of probable fruits or further evidence of the particular crime for which the arrest is made.**

Id. at 234 (emphasis added). The Court continued:

> Nor are [we] inclined, on the basis of what seems to us to be a rather speculative judgment, to qualify the breadth of the general authority to search incident to a lawful custodial arrest on an assumption that persons arrested for the offense of driving while their licenses have been revoked are less likely to possess dangerous weapons than are those arrested for other crimes. It is scarcely open to doubt that the danger to an officer is far greater in the case of the extended exposure which follows the taking of a suspect into custody and transporting him to the police station than in the case of the relatively fleeting contact resulting from the typical Terry-type stop. This is an adequate basis for treating all custodial arrests alike for purposes of search justification.

Id. at 234-35 (footnote omitted).

The Court also announced that it more fundamentally disagreed with the lower court rejecting the lower court's "suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." Id. at 235. The Court stated:

> **We do not think the long line of authorities of this Court dating back to Weeks, or what we can glean from the history of practice in this country and in England, requires such a case-by-case adjudication.** A police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc

> judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search. **The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.**

Id. (emphasis added).

As a result, the Court concluded that the search of defendant by Officer Jenks was permissible. The Court stated that "[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct." Id. at 236.

In 1983, the United States Supreme Court in Belton, 453 U.S. at 461, defined a container as:

> "Container" here denotes any object capable of holding another object. It thus includes closed or open glove compartments, consoles, or other receptacles located anywhere within the passenger compartment, as well as luggage, boxes, bags, clothing, and the like. Our

> holding encompasses only the interior of the passenger compartment of an automobile and does not encompass the trunk.

In Finley, the Fifth Circuit analogized a cellular phone to a closed container when he was arrested which may be searched. See Finley, 477 F.3d at 259. The Supreme Court in Belton went on to explain that, "[s]uch a container may, of course, be searched whether it is open or closed, since the justification for the search is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." Belton, 453 U.S. at 461.

Other courts have permitted officers to retrieve text messages and other information from cellular phones and pagers seized incident to arrest for purposes of preserving evidence. See United States v. Murphy, 552 F.3d 405, 411 (4th Cir. 2009); United States v. Young, 278 Fed. Appx. 242, 245-46 (4th Cir. 2008)(holding that officers may retrieve text messages from cell phone during search incident to arrest); United States v. Hunter, No. 96-4259, 1998 WL 887289, at *3 (4th Cir. Oct. 29, 1998)(holding that officers may retrieve telephone numbers from pager during search incident to arrest); Newhard v. Borders, 649 F. Supp. 2d 440 (W.D. Va. 2009); United States v. Ortiz, 84 F.3d 977, 984 (7th Cir. 1996); United States v. Santillan, 571 F.

Supp. 2d 1093, 1102 (D. Ariz. 2008); United States v. Deans, 549 F. Supp. 2d 1085, 1093-94 (D. Minn. 2008).

Similarly, in Fawdry, 70 So. 3d at 627, the defendant was arrested pursuant to a warrant on charges related to the sexual battery of a child. When he was arrested, the officer seized the defendant's cellular phone and proceeded to open the phone. See id. Upon opening the phone, the officer discovered that the wallpaper contained an image constituting child pornography. See id. Fawdry moved to suppress the images obtained from his phone without a warrant during the search incident to arrest. See id. The trial court denied the motion. See id.

In affirming the order of the trial court denying the motion to suppress, the First District opined that

> Although the authority to conduct this search is justified by the need to protect officer safety and prevent the destruction of evidence of the suspect's crime, the lawfulness of a warrantless search incident to a lawful arrest "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 477, 38 L.Ed.2d 427 (1973). Accordingly, a search of a suspect incident to a lawful arrest is a "'reasonable' search" under the Fourth Amendment, requiring "no additional justification." Id. Further a lawful arrest allows an arresting officer to search personal effects, including open and closed containers, carried by the suspect. Savoie v. State, 422 So.2d 308, 313–14 (Fla. 1982) (citing United States v. Brown, 671 F.2d 585 (D.C. Cir. 1982)). Such a search is permitted, not

> because a suspect has no privacy interests in his personal effects, but because a lawful custodial arrest justifies the infringement of any privacy interest a suspect may have in such effects. See New York v. Belton, 453 U.S. 454, 461, 101 S.Ct. 2860, 2864, 69 L.Ed.2d 768 (1981).

Id. at 628-29 (footnotes omitted). The court explained:

> Although it may be true that a digital file itself is "wholly unlike any physical object found within a closed container," the information found within it is likely no different than information found within a printed physical copy of a digital file. Indeed, before the innovations made available in current cell phone technology, the information contained within digital files would have been contained in tangible copies and carried in closed containers. Digital files and programs on cell phones have merely served as replacements for personal effects like address books, calendar books, photo albums, and file folders previously carried in a tangible form. Viewed in this light, the cell phone merely acts as a case (i.e. closed container) containing these personal effects. When in tangible form, the aforementioned personal effects could clearly be searched incident to arrest if found in a case carried on the suspect's person or in a vehicle which the suspect occupied. See Savoie, 422 So. 2d at 313–14; see also Robinson, 414 U.S. at 235–36. Accordingly, a search of a digital version of these personal effects would be similarly permissible. After all, it is the information itself in which a person's privacy interests lie. See Finley, 477 F.3d at 259 (explaining that although the defendant's employer owned the telephone, the defendant still "had a reasonable expectation of privacy in the call records and text messages on the cell phone"). Accordingly, a distinction based upon the manner in which that information is stored is unwarranted.

Id. at 630.

However, in certain circumstances, particularly where the search has gone far afield, other courts have found the searches of cellular phones to be unreasonable. In United States v. Quintana, 594 F. Supp. 2d 1291, 1294 (M.D. Fla. 2009), officers stopped the defendant for speeding on Alligator Alley. The officer who stopped the defendant smelled the odor of raw marijuana emanating from inside the vehicle. See id. The officer asked Quintana to provide identification and to exit the vehicle. See id. at 1295. Because he was concerned about the marijuana smell, the officer radioed for backup. See id. Backup arrived five minutes later. See id. Since the defendant spoke only Spanish, the backup officer summoned yet another officer to translate. See id. That officer arrived five minutes later. See id. The defendant gave officers permission to search the vehicle. See id. Several items in the car had the odor of marijuana on them and one shoe appeared to have marijuana wedged into the sole. See id. The officers found no additional marijuana in the vehicle. See id.

The officer asked Qunitana about his travel plans, and the defendant indicated that he was traveling to Miami to pick up his wife Amy because they were moving to Ocala. See id. Thereafter, the officer was informed by dispatch that Quintana's driver's license was suspended. See id. The officers placed

Quintana under arrest for driving on a suspended license. See id. After Quintana was taken into custody, his cellular phone rang. See id. The translating officer removed the phone from Quintana's pocket without obtaining Quintana's permission. See id. The officer dialed the number of the last call. See id. Quintana's wife answered the phone and told the officer that she was not planning to move. See id. After the call, the officer looked through the phone and photographs on the phone looking for evidence related to the odor of marijuana. See id. 1295-96. The officer found photographs of marijuana plants. See id. at 1296. The officers thought that the photograph might be related to the address on Quintana's driver's license. See id.

Another officer phoned a trooper in Hillsborough County and told him that he suspected a marijuana grow house was located at Quintana's address. See id. That trooper called his son and another trooper and the three proceeded to Quintana's address. See id. When troopers arrived at the residence, they found that the house was enclosed by a fence with a locked gate. See id. Nothing outside the fenced area was indicative of marijuana being grown. See id. As a result, one of the troopers jumped the fence and the other two walked through a separate closed gate. See id. When they got near the residence, the troopers

smelled the odor of raw marijuana coming from the house. See id.

One of the troopers contacted one of the officers at the traffic stop and informed the officer of his findings. See id. The officer read Quintana his Miranda rights. See id. Thereafter, Quintana admitted to growing marijuana at the residence. See id. Quintana consented to a search of the residence after he was transported to the station. See id. at 1297.

Quintana argued that the officers exceeded the scope of their authority to search his person by removing his cellular phone from his pocket while he was handcuffed and by looking through the photographs on his phone. See id. at 1298-99. The Government contended that the search was incident to a lawful arrest. See id. at 1299.

The district court began its analysis stating that

> Cellular phones contain a wealth of private information such as recent-call lists, emails, text messages, and photographs. United States v. Zavala, 541 F.3d 562, 577 (5th Cir. 2008). An owner of a cell phone generally has a reasonable expectation of privacy in the electronic data stored on the phone. See Quon v. Arch Wireless Operating Co., 529 F.3d 892, 905 (9th Cir. 2008)(finding reasonable expectation of privacy in text messages stored on cell phone); United States v. Finley, 477 F.3d 250, 259 (5th Cir. 2007) (same). Thus, a search warrant is required to search the contents of a cell phone unless an exception to the warrant requirement exists. See United States v.

James, No. 1:06CR134 CDP, 2008 WL 1925032, at *4 (E.D.Mo. Apr. 29, 2008).

Id.

The court noted that the exception for a search incident to a lawful arrest existed to the warrant requirement. The court noted that these searches are permitted "because they provide for the safety of law enforcement and prevent the destruction or concealment of evidence." Id. (citing Chimel v. California, 395 U.S. 752, 762-63 (1969)).

At issue in Quintana was also the automobile exception which permits the search of the occupant as well as passenger compartment of the vehicle. See United States v. Gonzalez, 71 F.3d 819, 825 (11th Cir. 1996). The court continued that the "authority to conduct such searches does not turn on the probability that weapons or evidence will be discovered." See id. (citing Robinson, 414 U.S. at 235).

The court noted that the Fifth Circuit allowed the search of cellular phone in Finley, 477 F.3d. See id. The court took note of the Finley logic which reasoned that the search was permissible because officers "may 'look for evidence of the arrestee's crime on his person in order to preserve it for use at trial.' Id. (quoting Finley, 477 F.3d at 259-60). The court also noted that the decisions involved cases where the defendants had been accused of drug activity and the reasoning

indicated that the devices may have been used to communicate with others in drug enterprises. See id. The Quintana court stated that "[w]hether a cell phone may be searched incident to an arrest to prevent the destruction or concealment of evidence of another crime is a different issue." Id. at 1300. The court cited the decision in Knowles v. Iowa, 525 U.S. 113 (1998), wherein the Court addressed the preservation of evidence issue in the context of a traffic stop for speeding. See id. In Knowles, the officer issued the defendant a citation and found marijuana during a search of the vehicle. See id. The Knowles Court concluded that the preservation of evidence exception disappeared after the officer's issued the speeding citation. See id. The Court arrived at its conclusion because the evidence necessary to prosecute the speeding infraction would have been obtained once the citation issued. See id. (citing Knowles, 525 U.S. at 118). The Court concluded no additional evidence of speeding could have been found on Knowles or in his car, so there was no concern for loss of evidence possible. See id.

The Quintana court suppressed the evidence stating

> the contents of Defendant's cell phone had nothing to do with officer safety or the preservation of evidence related to the crime of arrest. This type of search is not justified by the twin rationales of Chimel and pushes the search-incident-to-arrest doctrine beyond its limits.

Id. at 1300-01.

In Knowles, 525 U.S. at 114, the United States Supreme Court answered the question of whether when an officer stops a person for speeding, which is an arrestable offense, and decides to issue a citation only may consistent with Fourth Amendment principles conduct a search of the full vehicle. The Court answered the question in the negative. See id. The Court discussed its previous holdings in this area stating:

> In Robinson, *supra*, we noted the two historical rationales for the "search incident to arrest" exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial. 414 U.S., at 234, 94 S. Ct. 467. See also United States v. Edwards, 415 U.S. 800, 802-803, 94 S. Ct. 1234, 39 L. Ed. 2d 771 (1974); Chimel v. California, 395 U.S. 752, 762-763, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969); Preston v. United States, 376 U.S. 364, 367, 84 S. Ct. 881, 11 L. Ed. 2d 777 (1964); Agnello v. United States, 269 U.S. 20, 30, 46 S. Ct. 4, 70 L. Ed. 145 (1925); Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652 (1914).

Id. at 116-17. The Court found that neither of the two historical rationales applied to the search of Knowles. See id. at 117. With respect to the first rational, the Court explained:

> We have recognized that the first rationale-officer safety-is "'both legitimate and weighty,'" Maryland v. Wilson, 519 U.S. 408, 412, 117 S. Ct. 882, 137 L. Ed. 2d 41 (1997)(quoting Pennsylvania v. Mimms, 434 U.S. 106, 110, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977)(per curiam)). The threat to

> officer safety from issuing a traffic citation, however, is a good deal less than in the case of a custodial arrest. In Robinson, we stated that a custodial arrest involves "danger to an officer" because of "the extended exposure which follows the taking of a suspect into custody and transporting him to the police station." 414 U.S., at 234-235, 94 S.Ct. 467. We recognized that "[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and not from the grounds for arrest." Id., at 234, n. 5, 94 S. Ct. 467. A routine traffic stop, on the other hand, is a relatively brief encounter and "is more analogous to a so-called 'Terry stop' ... than to a formal arrest." Berkemer v. McCarty, 468 U.S. 420, 439, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). See also Cupp v. Murphy, 412 U.S. 291, 296, 93 S. Ct. 2000, 36 L. Ed. 2d 900 (1973)("Where there is no formal arrest...a person might well be less hostile to the police and less likely to take conspicuous, immediate steps to destroy incriminating evidence").

Id. at 117-18. As to the second rationale, the Court found that the state had not shown justification for "the need to discover and preserve evidence." Id. at 118. The Court indicated that once the defendant had been issued the speeding citation, "all the evidence necessary to prosecute that offense had been obtained." Id. The Court stated: "No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car." Id. The court rejected the states argument that because a person might attempt to hide evidence of his identity or destroy evidence "of another, as yet undetected crime" such searches

should be permissible. Id. The Court found that if the officer was not satisfied as to the driver's identity, then, perhaps, the officer would have a basis to arrest the driver rather than issuing a citation. See id. With respect to evidence of another crime, the Court stated: "the possibility that an officer would stumble onto evidence wholly unrelated to the speeding offense seems remote." Id.

In the present case, the issue of the reasonableness and permissibility of the search falls squarely within the dictates of the United States Supreme Court's decision in Robinson. The current case does not present a Knowles or Quintana-like situation, but rather a search incident to arrest fitting within the second well defined rationale espoused in Robinson. Knowles is additionally inapposite because there was no vehicle search in this case, only a purely Robinson search incident to arrest of the person of petitioner. The officer arrested petitioner pursuant to an arrest warrant obtained the day after the crime. The officer obtained the phone and verified that the phone was the phone petitioner had been calling him from. The officer then, immediately after he placed petitioner into the patrol car, reviewed the photographs stored in the phone for evidence related to the robbery for which petitioner was arrested. Thus, Robinson constitutes the controlling authority in this case and

Robinson's per se reasonableness finding controls the outcome. As a result, the search incident to arrest of petitioner was permissible and reasonable.

Additionally, the officer did not utilize the photographs to proceed on a multi-county fishing expedition which violated search and seizure principles on multiple levels as the Quintana officers did. The officer here looked for evidence related to the robbery, the weapon used in the robbery and the proceeds stolen from the robbery, the offense for which petitioner was arrested. The officer found just that evidence on the phone. As a result, the search of the phone was a valid search incident to arrest for purposes of preserving evidence related to the robbery.

Petitioner has urged that the search had an insufficient basis for the invasion of petitioner's privacy. However, the search of the phone is no different than the search of the pockets, wallet of other container found on a suspect after arrest for evidence. The phone is simply like a purse or makeup bag in the immediate personal possession of an arrestee, an organizer, pill box, film canister, envelope containing photographs or zippered coin purse found in the hands of the arrestee or in his or her pocket. The phone just like any of the zippered or closed items may or may not contain a wealth of

information. There is no question that each of the aforementioned items would be subject to search incident to arrest. The phone simply combines several of these items into one object.

Petitioner contends next that once the phone was seized, the evidence was essentially safe. As a result, petitioner asserts that a warrant should have been obtained. This argument is without legal support and is contrary to the per se rule contained in Robinson. There is no requirement under the search incident to arrest exception for an officer to obtain a warrant prior to searching a closed container found on the person of the person arrested. There is no difference for Fourth Amendment purposes between a cellular phone and a calendar, diary, wallet, film canister, zippered pouch, etc., which are capable of containing other objects. All of these items fit into the category of closed containers. The cellular phone is simply an electronic version of each of these and functions as an electronic brief case.

Finally, any number of things could have occurred to destroy the evidence contained on the cellular phone from the instant of arrest until a warrant could be obtained. Petitioner could have met bond and taken his items with him, the battery to the phone could have lost its charge, the phone could have

become damaged when the phone was plugged in again, etc. This is why the preservation of evidence exception exists. The rationale provides for the discovery of evidence at the earliest possible time related to the crime for which petitioner was arrested.

Petitioner also asserts that the search in this case was subject to further scrutiny for reasonableness as discussed in Bell v. Wolfish, 441 U.S. 520 (1979), and Jenkins v. State, 978 So. 2d 116, 126 (Fla. 2008). Neither case is applicable as the method and intrusiveness of the search is not at issue as Jenkins and Wolfish each involve intrusive strip searches or set forth what constitutes a strip search. Further, in Wolfish, at issue were searches based on less than probable cause that occurred during detention. The facts in this case, place it squarely within the purview of Robinson, which rejected the application of Terry search standards in searches incident to arrest. In Jenkins, this Court ultimately concluded that the search was not a strip search, and appears to have mistakenly imported the language from Wolfish. This is so because pursuant to Robinson's express statements, searches incident to arrest of the person and his or her effects are ***per se*** reasonable. As such, the decision of the United States Supreme Court in Robinson coupled with the dictates of the Florida Constitution

requiring the interpretation of Fourth Amendment law in conformity with that Court's pronouncements controls the outcome in this case and the determination that the search in this case did not violate the Fourth Amendment as it was a valid search incident to arrest of an item found on the petitioner's person which was not locked or otherwise protected from viewing.

B. The United States Supreme Court Decision in Arizona v. Gant, 556 U.S. 332, 129 S. Ct. 1710 (2009), Provides No Assistance in the Determination of This Matter.

Petitioner asserts that the recent ruling in Gant, 556 U.S., alters the landscape set forth by the United States Supreme Court in its other holdings. Gant has no application to the current case. In Gant, the Court held that the search of the defendant's vehicle after the defendant had been handcuffed and placed into the patrol vehicle was unreasonable. See Gant, 129 S. Ct. at 1714. Gant was arrested for driving on a suspended license. See id. The officers handcuffed Gant and placed him into the patrol vehicle. See id. Thereafter, they searched the defendant's vehicle and found cocaine in the pocket of a jacket in the backseat of the vehicle Gant had been driving. See id. The Arizona court concluded that because Gant could not access the car to retrieve weapons or evidence at the time of the search, the search incident to arrest exception did

not justify the search of the vehicle. See id. The Court agreed with that conclusion. See id. The Court clarified that its decision in Belton, 453 U.S., did not authorize a vehicle search incident to arrest "after the arrestee has been secured and cannot access the interior of the vehicle." Id. The Court, however, concluded "that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." Id.

The Court began its analysis acknowledging that there are only a few well-delineated exceptions to the warrant rule. See id. 1716. The Court stated:

> Among the exceptions to the warrant requirement is a search incident to a lawful arrest. See Weeks v. United States, 232 U.S. 383, 392, 34 S. Ct. 341, 58 L. Ed. 652 (1914). The exception derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations. See United States v. Robinson, 414 U.S. 218, 230-234, 94 S. Ct. 467, 38 L. Ed. 2d 427 (1973); Chimel, 395 U.S., at 763, 89 S. Ct. 2034.

Id. The Court continued:

> **In Chimel, we held that a search incident to arrest may only include "the arrestee's person and the area 'within his immediate control'-construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."** Ibid. That limitation, which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting

> arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy. See ibid. (noting that searches incident to arrest are reasonable "in order to remove any weapons [the arrestee] might seek to use" and "in order to prevent [the] concealment or destruction" of evidence (emphasis added)). **If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.** E.g., Preston v. United States, 376 U.S. 364, 367-368, 84 S.Ct. 881, 11 L. Ed. 2d 777 (1964).

Id. (emphasis added).

The Court noted that it extended the Chimel rationale to searches in the automobile context in Belton. See id. 1717-18. In Belton, the Court held:

> that when an officer lawfully arrests "the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of the automobile" and any containers therein. Belton, 453 U.S., at 460, 101 S. Ct. 2860 (footnote omitted) . That holding was based in large part on our assumption "that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach.'" Ibid.

Id. The Court discussed at length the multiple interpretations that had been given to its Belton decision, and stated:

> To read Belton as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the Chimel exception-a result clearly incompatible with our statement in Belton that it "in no way alters the fundamental principles

> established in the Chimel case regarding the basic scope of searches incident to lawful custodial arrests." 453 U.S., at 460, n. 3, 101 S. Ct. 2860. Accordingly, we reject this reading of Belton and hold that the Chimel rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.

Id. at 1719. The Court also concluded:

> Although it does not follow from Chimel, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." Thornton, 541 U.S., at 632, 124 S. Ct. 2127 (SCALIA, J., concurring in judgment). In many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. See, e.g., Atwater v. Lago Vista, 532 U.S. 318, 324, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001); Knowles v. Iowa, 525 U.S. 113, 118, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998). But in others, including Belton and Thornton, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.

Id. The limitations of the application of Gant are clearly espoused in the Court's holding:

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Id. at 1723-24.

Nothing in Gant overrules or limits the Court's decision in Robinson. Robinson involved a search of a person incident to arrest and Gant and cases such as Chimel as discussed in Gant relate to areas in the reach of the person, but not on the person.

As discussed *supra*, Robinson had been stopped four days earlier for driving on a suspended license. See Robinson, 414 U.S. at 222. An officer observed Robinson driving a vehicle. See id. As a result of the information he had from the previous stop, the officer stopped Robinson. The officer arrested Robinson for the offense. See id. During the pat-down incident to arrest, the officer felt an item in Robinson's jacket pocket. See id. The officer removed the item from the pocket and discovered that the item was a crumbled cigarette package. See id. at 222-23. The officer opened the cigarette package and found capsules containing heroin inside. See id. at 223.

The Robinson Court stated:

> The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the

> arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.

Id. at 235. With respect to the cigarette package found on Robinson's person during the search, the Court stated:

> Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that Jenks did not indicate any subjective fear of the respondent or that he did not himself suspect that respondent was armed. Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it; and when his inspection revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct. Harris v. United States, 331 U.S., at 154-155, 67 S. Ct., at 1103-1104; Warden v. Hayden, 387 U.S. 294, 299, 307, 87 S. Ct. 1642, 1646, 1650 (1967); Adams v. Williams, 407 U.S., at 149, 92 S. Ct., at 1924.

Id. at 236-37.

Gant did nothing to alter the landscape of searches of the person of an arrestee incident to that arrest. In this case, the cellular phone and cigarette package fit occupy the same space in the Fourth Amendment analysis. Both items were seized from the person of the arrestee. The officer was not required to obtain a warrant to look inside the closed container, the cigarette pack, in Robinson. Likewise, in the current case, the officer properly seized the cellular phone from petitioner's

person during the effectuation of the arrest pursuant to a valid arrest warrant and properly looked inside the closed container, the cellular phone in this case. Consequently, the trial court properly declined to suppress the photographs of the proceeds of the crime contained on the petitioner's cellular phone which was not password protected.

C. The Exclusionary Rule Should Not Be Applied Under the Facts of This Case.

The United State Supreme Court's decision in Gant is inapplicable to the current case. Further, the exclusionary rule should not be applied under the facts and law applicable to this case.

In Leon, 468 U.S. at 907-908, the Court explained the evolution and purpose of the exclusionary rule. The Court stated:

> **The Fourth Amendment contains no provision expressly precluding the use of evidence obtained in violation of its commands**, and an examination of its origin and purposes makes clear that the use of fruits of a past unlawful search or seizure "[works] no new Fourth Amendment wrong." United States v. Calandra, 414 U.S. 338, 354 (1974). The wrong condemned by the Amendment is "fully accomplished" by the unlawful search or seizure itself, ibid., and the exclusionary rule is neither intended nor able to "cure the invasion of the defendant's rights which he has already suffered." Stone v. Powell, [428 U.S. 465, 540 (1976)] (WHITE, J., dissenting). **The rule thus operates as "a judicially created remedy designed**

> **to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.**" United States v. Calandra, supra, at 348.

Id. at 906 (emphasis added). The Court continued its discussion as to whether the rule is appropriately applied stating:

> **Whether the exclusionary sanction is appropriately imposed in a particular case**, our decisions make clear, **is "an issue separate from the question whether the Fourth Amendment rights of the party seeking to invoke the rule were violated by police conduct**." Illinois v. Gates, [462 U.S. 213, 223 (1983)].

Id. (emphasis added). Regarding the application of the rule, the Court continued:

> The substantial social costs exacted by the exclusionary rule for the vindication of Fourth Amendment rights have long been a source of concern. "Our cases have consistently recognized that **unbending application of the exclusionary sanction** to enforce ideals of governmental rectitude **would impede unacceptably the truth-finding functions of judge and jury.**" United States v. Payner, 447 U.S. 727, 734 (1980). An objectionable collateral consequence of this interference with the criminal justice system's truth-finding function is that some guilty defendants may go free or receive reduced sentences as a result of favorable plea bargains. **Particularly when law enforcement officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system.** Stone v. Powell, 428 U.S., at 490. Indiscriminate application of the exclusionary rule, therefore, may well "[generate] disrespect for the law and administration of justice." Id., at 491. Accordingly, **"[as] with any remedial**

> **device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served**." United States v. Calandra, supra, at 348; see Stone v. Powell, supra, at 486-487; United States v. Janis, 428 U.S. 433, 447 (1976).

Id. at 907 (footnote omitted)(emphasis added). In Coolidge v. New Hampshire, 403 U.S. 443, 489-90 (1971), the Court stated:

> The exclusionary rules were fashioned "to prevent, not to repair," and their target is official misconduct. They are "to compel respect for the constitutional guaranty in the only effectively available way -- by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217. But **it is no part of the policy underlying the Fourth and Fourteenth Amendments to discourage citizens from aiding to the utmost of their ability in the apprehension of criminals.**

In this case, the "officers have acted in objective good faith or their transgressions have been minor, the magnitude of the benefit conferred on such guilty defendants offends basic concepts of the criminal justice system." Leon, 468 U.S. at 907. According to United States Supreme Court precedent, the exclusionary rule is not to be indiscriminately applied. No remedial objective would be served by the application of the rule to the current case. The officer in the current case showed respect for the constitutional protections by securing the arrest warrant and searching only petitioner's person incident to arrest. Further, there is no well delineated case law to provide guidance to an officer in performance of his

duties with respect to review of cellular phone data under facts such as those presented in this case, especially where the information stored on the cellular phone was in no way protected, just as the cigarette pack in Robinson.

Further, should this Court determine that Gant does alter the landscape, contrary to the State's assertions, then Leon's "good faith exception" should apply because the arresting officer's actions demonstrate an objectionably reasonable reliance on well-settled precedent. The United States Supreme Court recently held that Leon's good faith exception to pre-Gant searches of vehicles incident to arrest precluded exclusion of the evidence as an appropriate remedy. See Davis v. United States, 131 S. Ct. 2419 (2011). Based on the reasoning expressed in Davis, this Court should apply the Leon good faith exception to the facts presented in this case.

D. Assuming Error Occurred, Any Error Would Be Harmless Unser the Facts of This Case.

Should this Court find that the photographs should have been suppressed, any error in their admission was harmless under the facts of this case. The focus of a harmless error analysis "is on the effect of the error on the trier-of-fact." State v. DiGuilio, 491 So. 2d 1129, 1139 (Fla. 1986). "The question is whether there is a reasonable possibility that the error

affected the verdict." Id. The harmless error test places the burden on the State as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict, or alternatively state, that there is no reasonable possibility that the error contributed to the conviction. See Goodwin v. State, 751 So. 2d 537 (Fla. 1999). If the reviewing court can say beyond a reasonable doubt that the error did not affect the verdict, then the error is by definition harmless." Pope v. State, 679 So.2d 710, 714 (Fla. 1996).

The trial testimony presented in this case plainly demonstrates that if it was error to admit the photographs, the error was harmless. Fadi Alhsari testified that he worked for his uncle, who owned the Price Right Food Store. (RIV 159.) On January 24, 2008, Mr. Alhsari worked his regular shift, which was the morning shift from 8:00 a.m. to 1:00 p.m. (RIV 161.) When he arrived at the store, Mr. Alhsari noticed a woman waiting for him to open. (RIV 162.) After the woman left, Mr. Alhsari turned on the surveillance cameras and machines. (RIV 163-64.) While Mr. Alhsari undertook these tasks, he heard the doorbell ring. (RIV 163-64.) Mr. Alhsari did not see anyone when he looked, but as he returned to his activities, petitioner jumped across the counter putting a black and silver gun to his

head. (RIV, 163-64, 187.) Petitioner told Mr. Alhsari to get down on the ground and went through Mr. ALhsari's pockets taking his wallet. (RIV 165.) Mr. Alhsari remained on his stomach on the floor during the incident, but he looked back to see what petitioner was doing. (RIV 165.)

Petitioner repeatedly asked "where the money at." (RIV 166.) Mr. Alhsari pointed to the first box where money was kept. (RIV 166.) Petitioner opened the box and took the $600 to $800 cash that was in the box. (RIV 167.) Petitioner threw the box onto the ground. (RIV 167.)

Petitioner again asked "where the money at." (RIV 167.) Mr. Alhsari told petitioner more money was in the drawer to a white cabinet. (RIV 167-68.) Petitioner found an additional $1000 to $1500 cash in that location. (RIV 168.) Petitioner again asked "where the money at," but Mr. Alhsari did not tell him where any more money would be located. (RIV 168.)

Petitioner continued searching and found a .38 Special Magnum, which he took. (RIV 169.) Petitioner then located another cigar box that contained $13,000 to $15,000 cash. (RIV 170.) Mr. Alhsari's uncle withdrew the money the previous day because the store cashed checks on Thursdays and Fridays. (RIV 171.) The cash was folded in the box and secured with rubber bands. (RIV 171.)

The State played the video from the store security camera for the jury. (RIV 171-75.) During the video, Mr. Alhsari indicated that petitioner wore gloves, a mask and a hood during the incident. (RIV 173.) Mr. Alhsari described the gloves as "two colored," with a light color on the front and dark on the top. (RIV 173.) Mr. Alhsari testified that he could see petitioner's eyes. (RIV 173.) Once petitioner exited the store, Mr. Alhsari stood up and hit the store's emergency button. (RIV 175.) Mr. Alhsari then called 911. (RIV 175.)

The State played the 911 call for the jury. (RIV 176-83.) During the call, Mr. Alhsari described petitioner as a black male, wearing a black hood and a mask. (RIV 177-78.) Mr. Alhsari indicated that the black male was dark skinned, about five feet, seven inches or five feet, eight inches tall, and weighed about 160 pounds. (RIV 179.) Mr. Alhsari indicated that he did not know what color pants petitioner wore, but stated that petitioner wore a black jacket. (RIV 179-80.) During the call, another customer, Willie Cook, stated that petitioner was wearing black jeans. (RIV 181-82.) Mr. Alhsari indicated that the robber was 22 or 23. (RIV 183.) Mr. Alhsari then told the operator that he knew the robber because he was a regular customer. (RIV 183.)

Thereafter, Mr. Alhsari identified petitioner as the person who robbed the store. (RIV 184.) Mr. Alhsari recognized petitioner's voice because petitioner came into the store and Mr. Alhsari spoke to petitioner every day. (RIV 184-85.) Mr. Alhsari indicated that had been coming to the store regularly for approximately a year and a half. (RIV 184-85.) Petitioner came to the store with his girlfriend who was pregnant. (RIV 185.) Mr. Alhsari identified petitioner in a photo from a photospread. (RIV 188-89.) Mr. Alhsari identified the gloves worn in the robbery which were also introduced into evidence. (RIV 190.)

Mr. Alhsari identified also identified petitioner and his girlfriend in the cellular phone images. (RIV 232.) Mr. Alhsari indicated that he knew petitioner by his nickname, which was "Dooley." Mr. Alhsari also indicated that petitioner looked the same in the photographs as he did on the day of the robbery. (RIV 232.) Mr. Alhsari also indicated that the money appeared in the photographs to be folded in the same way he had it folded in the box. (RIV 232). Mr. Alhsari indicated that the gun depicted in two cellular phone images was similar to the gun used in the robbery. (RIV 233.)

William Cook testified that he went to the store on the morning of January 24, 2008. (RIV 238.) When he approached the

store, he saw a man wearing dark clothes running from the store with his head down. (RIV 239.) The man ran up the street, through the field and jump the six foot fence to the park. (RIV 239.) Mr. Cook heard that the store had just been robbed. (RIV 239-40.)

Keith Seay testified that he went to the store on the morning of January 24, 2008. (RIV 242-43.) That morning, he walked through the park to get to the store. (RIV 243.) Mr. Seay stated that he knew petitioner by the name "Dooley." (RIV 244.) On the morning of the robbery, Mr. Seay saw petitioner coming through the park. (RIV 244-45.) Mr. Seay saw petitioner jump the fence into the park. (RIV 245.) When petitioner passed Mr. Seay, he and Dooley exchanged a fist bump. (RIV 245.) Petitioner had on gloves, which were gray and black with writing on them, a dark jacket and dark pants. (RIV 246.) Petitioner did not appear to be in a hurry. (RIV 246.) Mr. Seay indicated that the gloves in evidence resembled the gloves petitioner wore that day. (RIV 247.) When Mr. Seay turned around as he walked to the store, petitioner no longer had on the gloves. (RIV 248.) Petitioner had passed a trash can at that point. (RIV 248.)

When Mr. Seay arrived at the store, the police pulled up. (RIV 249.) Mr. Seay told Mr. Alhsari to police were there.

(RIV 249.) At that time, Mr. Alhsari told Mr. Seay that Dooley had just robbed him. (RIV 249.) Mr. Seay told police that he had just seen petitioner in the park. (RIV 249.) Mr. Seay identified the trash can that petitioner had walked past in the park. (RIV 250). Mr. Seay participated in a photospread. (RIV 251-52). Mr. Seay wrote "it look like him" on petitioner's picture. (RIV 252.) Mr. Seay wrote that because he was used to seeing him look differently than petitioner did in the photograph. (RIV 252.)

Officer Tutson of the Jacksonville County Sheriff's Office responded to the Price Right Food Store on January 24, 2008 within two to three minutes of Mr. Alhsari's 911 call. (RIV 264-65.) Officer Borntraeger also responded to the scene. (RIV 265.) Officer Tutson located that a pair of gloves in a trash can. (RIV 266.) Officer Tutson secured the trash can to be certain that the items in the trash can were not disturbed. (RIV 266.) After twenty-five to thirty minutes, a crime scene technician arrived. (RIV 267.) Officer Tutson identified the gloves in evidence as the gloves he had seen in the trash can. (RIV 267.) When he first arrived, Officer Tutson testified that he spoke with Mr. Alhsari. (RIV 269.) Mr. Alhsari told him that the man who robbed him sounded familiar, but he could not give him a name at that time. (RIV 269.)

Det. Lisa Kicklighter was the evidence technician who responded to the scene. (RIV 273.) When she arrived, Det. Kicklighter met with Officer Borntraeger. She learned about the robbery and that the store's surveillance camera recorded the robbery. (RIV 275.) Det. Kicklighter photographed the scene and reviewed the surveillance footage. (RIV 275.) Det. Kicklighter also photographed the trash can where the gloves were found, along with scuff marks in the grass indicating that someone had jumped over a fence. (RIV 277-78.) Det. Kicklighter collected the gloves and placed them in a dryer vault. (RIV 279.)

Officer Ike Brown with the Jacksonville County Sheriff's Office responded to the store. (RIV 282-84.) When he arrived at the scene, Officer Tutson told him that a witness had provided the name Dooley as a suspect. (RIV 284.) Officer Brown recognized Dooley as being an individual he knew. Officer Brown learned Dooley's real name by speaking with Dooley's mother. (RIV 285.) Officer Brown identified the petitioner as Dooley. (RIV 286.) Officer Brown asked petitioner's mother to call petitioner. Officer Brown then spoke with petitioner over the phone. Officer Brown asked petitioner to come in to speak with him. (RIV 287.) Two weeks later, petitioner finally met with Officer Brown after missing several other appointments.

(RIV 287-88.) Officer Brown arrested petitioner and patted petitioner down before placing him into his patrol car. (RIV 288.) During the pat down, Officer Brown found a cellular phone in petitioner's pocket. (RIV 288.) Officer Brown looked at the phone to see if the phone was the same phone petitioner had been calling him from, and to see if petitioner had any photographs might be evidence of the crime. (RIV 288.) Officer Brown found photographs of petitioner holding large amounts of cash, a gun and jewelry. (RIV 288-89.) Officer Brown stated that the photos had all been taken within a few days following the robbery. (RIV 290-92.)

Det. Darion Green responded to the robbery. (RIV 313-15.) Det. Green described the photospread conducted with Mr. Alhsari. Mr. Alhsari identified petitioner’s photo. (RV 319-22.) Det. Green also described the photospread he showed to Mr. Seay from which Mr. Seay identified petitioner. (RV 322-24.) Det. Green collected DNA from petitioner. (RV 325-26.)

Shana Mills, a DNA analyst, testified that she compared the DNA from petitioner's sample to DNA obtained from the gloves. (RV 342.) Petitioner could not be excluded as a contributor to the mixture of DNA found in either glove. (RV 345.) The results indicated that the gloves contained DNA from at least two individuals, at least one of whom was male. (RV 345.)

Thus, the overwhelming nature of the evidence and the identifications made in this case establish that the admission and limited usage of the photographs make the error, if any, harmless beyond a reasonable doubt. There is no reasonable possibility that the admission of the photographs had any effect on the jury's verdict in this case. This is a case involving substantial physical evidence that tied petitioner to the crime along with witness identifications from witnesses who knew the petitioner prior to the commission of the crime.

CONCLUSION

Based on the foregoing, the State respectfully submits the certified question should be answered in the negative, the decision of the District Court of Appeal reported at Smallwood v. State, 61 So. 3d 448 (Fla. 1st DCA 2011), should be approved, and the judgment and sentence entered in the trial court should be affirmed.

SIGNATURE OF ATTORNEY AND CERTIFICATE OF SERVICE

I certify that a copy hereof has been furnished to Barbara Busharis, Esq.; Assistant Public Defender; Leon County Courthouse, Suite 401; 301 South Monroe Street; Tallahassee, Florida 32301, by electronic mail on this 28th day of November, 2011.

Respectfully submitted and served,

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CERTIFICATE OF COMPLIANCE

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

_____
Christine Ann Guard
Attorney for State of Florida

IN THE SUPREME COURT OF FLORIDA

CEDRIC TYRONE SMALLWOOD,

Petitioner,

Case No. SC11-1130

v.

STATE OF FLORIDA,

Respondent.

APPENDIX

Smallwood v. State, 61 So. 3d 448 (Fla. 1st DCA 2011).