

No. 20-1445

IN THE
Supreme Court of the United States

NATHAN RAY FOREMAN,
Petitioner,

v.

STATE OF TEXAS
Respondent.

On Petition for Writ of Certiorari
To The Texas Court of Criminal Appeals

MOTION FOR STAY

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Counsel for Petitioner
*lead Counsel

**TO THE JUSTICES OF THE SUPREME COURT OF THE
UNITED STATES:**

COMES NOW NATHAN RAY FOREMAN, Petitioner herein, by and through his attorney, **STANLEY G. SCHNEIDER**, and moves this Court to grant a stay of the enforcement of the affirmance of his convictions pending disposition of his petition for writ of certiorari to the Supreme Court of the United States and would show the Court as follows:

I. Jurisdiction

This Court has jurisdiction to grant a stay of the mandate of the Court of Appeals for the Fourteenth Supreme Judicial District pursuant to 23 U.S.C. 2101§ (f).

Pursuant to Supreme Court Rule 23, this Court has jurisdiction to grant a stay of the mandate of the Court of Appeals for the Fourteenth Supreme Judicial District which is set to issue on May 3, 2021.

On January 14, 2021, Petitioner filed an unopposed motion for stay of mandate pending disposition of a petition for writ of certiorari with the Court of Appeals for the Fourteenth Supreme Judicial District. Exhibit 1. On February 2, 2021, the court of appeals granted a stay of mandate for 90 days for filing of a petition for writ of certiorari pursuant to TEX. R. APP. P. 18.2. Exhibit 2. Petitioner filed a second motion to stay of

mandate after the petition for writ of certiorari was filed in this Court. Exhibit 3. The Court of Appeals for the Fourteenth Supreme Judicial District denied Petitioner's second motion for stay of mandate¹ pending disposition of his petition for writ of certiorari by the Supreme Court which is set to issue on May 3, 2021. Exhibit 4. Absent a stay by this Court, Petitioner will be forced to surrender to custody upon issuance of a mandate by the Court of Appeals.

**II. Texas Law allows only a 90 day stay of mandate
to file a petition for writ of certiorari in the
Supreme Court of the United States in a criminal case**

Petitioner has been granted a 90 day stay of mandate pending the filing of his petition for writ of certiorari which expires on May 3, 2021. The Court of Appeals has granted Petitioner all of the relief that he is entitled pursuant to Texas law.

In a criminal case in Texas, a party seeking review of a decision by the Texas Court of Criminal Appeals or a court of appeals is eligible for a stay of the appellate mandate for a period of 90 days. Texas law does not allow for a Texas court to stay its mandate in a criminal case for a

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The State did not take a position in regards to the second motion for stay of mandate after the filing of the petition for writ of certiorari.

period of time longer than 90 days pending disposition of a timely filed petition for writ of certiorari in the Supreme Court of the United States.

Tex. R App Rule 18.2 reads in full:

Rule 18.2 Stay of Mandate. --

A party may move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. The motion must state the grounds for the petition and the circumstances requiring the stay. The appellate court authorized to issue the mandate may grant a stay if it finds that the grounds are substantial and that the petitioner or others would incur serious hardship from the mandate's issuance if the United States Supreme Court were later to reverse the judgment.

In a criminal case, the stay will last for no more than 90 days, to permit the timely filing of a petition for writ of certiorari. After that period and others mentioned in this rule expire, the mandate will issue.

Tex. R. App. 18.2.(emphasis added)

The Court of Appeals granted Petitioner's request for relief on February 2, 2021. Petitioner has gotten all of the relief for which he is entitled by the Texas Rules of Appellate Procedure.

III. Factual Background

Petitioner was convicted of aggravated robbery and aggravated kidnaping in a jury trial. On appeal, he argued the trial court erred in failing to suppress surveillance videos of the auto shop where the offense

occurred because the affidavit for search warrant failed to include *any* evidence that there was a surveillance camera system installed at the shop.

The *en banc* Fourteenth Court of Appeals reversed the conviction, essentially holding that a magistrate cannot infer the existence of a video surveillance system in the absence of any factual allegations in the affidavit for search warrant existed. *Foreman v. State*, 561 S.W.3d 218 (Tex. App. – Houston [14th Dist.] 2018, pet. granted) (*en banc*). The Court of Criminal Appeals granted the State’s petition for discretionary review and unanimously reversed the court of appeals and affirmed the trial court. *Foreman v. State*, 613 S.W.3d 160 (Tex. Crim. App. 2020). On January 13, 2021, the Texas Court of Criminal Appeals denied Petitioner’s motion for rehearing.

IV. The Stay of Mandate Expires Before the Deadline

Upon filing of his petition for writ of certiorari, the State waived its right to respond. Petitioner’s petition for writ of certiorari is set for conference on May 13, 2021.

The mandate on appeal is set to issue from the Fourteenth Court of Appeals on May 3, 2021. Petitioner is schedule to appear in Court on

May 6, 2021. If the mandate issues he will have to surrender to custody.

V. Substantial Issues are Presented

The State of Texas, by not opposing the initial 90 day stay of mandate agreed that a substantial issue of constitutional law exists in the petition filed.

The Court of Appeals for the Fourteenth Supreme Judicial District found that there exists substantial constitutional issues presented in this case.

The Court of Criminal Appeals, in its opinion reversing the *en banc* court of appeals and affirming the trial court acknowledged “this is a close case.” 613 S.W.3d at 167.

Petitioner believes that a substantial constitutional issue was presented in his petition for writ of certiorari. Petitioner believes that the decision by the Court of Criminal Appeals conflicts with well established precedent from the Supreme Court. In particular, Petitioner maintains that the decision by the Court Criminal Appeals specifically conflicts with establish Supreme Court precedent which provides that the core of the Fourth Amendment’s warrant clause is that a magistrate may not issue a search warrant without first finding “probable cause” that a particular

item will be found in a particular location. The Supreme Court has stated repeatedly that the test is whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a “substantial basis” for issuing the warrant. *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984). Probable cause exists when, under the totality of the circumstances, there is a “fair probability” that contraband or evidence of a crime will be found at the specified location. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The conflict existing with the United States Courts of Appeals is evidenced by the recent decision by the United States Court of Appeals for the Fifth Circuit in *United States v. Morton*, No. 19-10842 (5th Cir. January 5, 2021) (not yet reported), which directly conflicts with the opinion from the Court of Criminal Appeals.

In *Morton*, a child pornography case, the Fifth Circuit addressed whether a search warrant affidavit that presented only evidence of personal drug possession and an officer’s generalized allegation about the behavior of drug traffickers authorized the search of photographs stored on a defendant’s cell phone. The affidavit in question asserted that the affiant had probable cause to believe that photographs on Morton’s cell

phone contained evidence of drug crimes. The court ruled that the affidavit failed to establish that the phone contained evidence pertinent to drug possession. And, the court ruled that because there was no evidence related to the content of the photographs on the phones, the search of the photographs on Morton's cell phone violated the Fourth Amendment to the Constitution. The Court stated:

the affidavit leaves us with only the allegations that (1) Morton was found with drugs so (2) it therefore follows that the photographs on Morton's phones will provide evidence of Morton's crime of drug possession. With only this bare factual support that Morton possessed drugs, the affidavits contain nothing to link Morton's marijuana and ecstasy with the photographs on his phones. The affidavits thus do not create a "fair probability" or "substantial chance" that evidence of the crime of drug possession will be found in the photographs on Morton's cellphones.

(Slip opinion p. 11).

VI. Failure to Stay the Mandate would result in Substantial Hardship to Petitioner

Petitioner's substantial liberty interests will be affected if this Court does not stay the issuance of the mandate in these causes. Petitioner was released on bond after this Court set bail at \$50,000 in each case after the reversal of his convictions by the En Banc court. *Foreman v. State*, 565 S.W.3d 371 (Tex. App 14th 2018).

Petitioner has abided by every condition of bond imposed by the trial court since his release from custody. The record would show that he is not a flight risk and there has been no evidence that he committed any violation of the law of this State or the United States.

Following the setting of bail by the Court of Appeals, Petitioner was released from custody on bond on November 16, 2018. He appeared in 177th Judicial District Court, Harris County, Texas on November 19, 2018. His next appearance in the 177th Judicial District Court was on May 13, 2019. Beginning on September 6, 2019 and continuing through March 2, 2020, the trial court required Petitioner to appear in the 177th Judicial District Court every two weeks as a condition of his release.

Because COVID-19, on March 2, 2020, Petitioner has appeared monthly. Since the Court of Criminal Appeals issued its opinion on November 25, 2020, Petitioner has appeared four times in the 177th Judicial District Court. Petitioner appeared on January 7, 2021, February 17, 2021, February 22, 2021 and March 31, 2021.

His next scheduled appearance is May 6, 2021.

WHEREFORE, PREMISES CONSIDERED, Petitioner prays
that this Court stay the mandates in the above cases pending final
disposition of the petition for writ of certiorari pending in this Court.

Respectfully submitted,

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Counsel for Petitioner

**NO. 14-15-01005-CR
NO. 14-15-01006-CR**

**IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT
HOUSTON, TEXAS**

FILED IN
14th COURT OF APPEALS
HOUSTON, TEXAS
1/19/2021 4:43:34 PM
CHRISTOPHER A. PRINE
Clerk

NATHAN RAY FOREMAN

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APPELLANT

VS.

THE STATE OF TEXAS

APPELLEE

**APPEAL IN CAUSE NOS. 1374837 & 1374838
IN THE 177TH JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS**

**APPELLANT'S UNOPPOSED MOTION TO
STAY THE MANDATE PENDING THE
FILING OF AN APPLICATION FOR
WRIT OF CERTIORARI TO THE
UNITED STATES SUPREME COURT**

**STANLEY G. SCHNEIDER
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ATTORNEY FOR APPELLANT

TO THE HONORABLE JUSTICES OF THIS COURT:

COMES NOW NATHAN RAY FOREMAN, Appellant herein, by and through his attorney, **STANLEY G. SCHNEIDER**, and files this Unopposed Motion to Stay the Issuance of this Court's mandate pending the filing and disposition of an application for writ of certiorari to the United States Supreme Court from the decision of the Texas Court of Criminal Appeals in *Foreman v. State*, PD-1090-18, PD-1091-18 (November 25, 2020), Rehearing denied January 13, 2021 pursuant to Tex. R. App. Rule 18.2.

I.

Tex. R. App Rule 18.2 provides that this Court may stay the issuance of its mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. Rule 18.2 provides in pertinent part:

A party may move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari.

Appellant will show that this appeal presented a significant constitutional issue that needs to be resolved by the Supreme Court of the United States. The procedural history of this case is unusual and reflects the magnitude of the issue presented.

II.

Appellant was indicted in cause numbers 1374837 and 1374838 with th felony

offenses of aggravated kidnapping and aggravated robbery with a deadly weapon. He was convicted by a jury and sentenced by the trial court to 50 years in prison. Prior to trial, multiple hearings were held incident to Appellant's motion to suppress the search of computers found at his business and the recovered surveillance video on them. Appellant alleged that the search warrant affidavit presented to a magistrate lacked probable cause to seize the computer because the affidavit failed to mention any facts related to the computers or the existence of a security system that recorded events at the business. The trial court granted the motion to suppress as to two computers seized but denied the motion to suppress as to the computer that contained a video of the incident that was the subject of the prosecution.

A panel of this Court affirmed the conviction by a plurality decision. Justice Jamison, in the lead opinion, found it was possible for a magistrate to infer probable cause from the facts in the affidavit. Justice Donovan, in a concurring opinion, found Appellant lacked standing to contest the search of the business office. While dissenting, Justice Christopher¹ found standing and lack of probable cause. Appellant sought en banc review in this Court. The En Banc Court determined that the affidavit lacked any facts from which a magistrate could infer that probable cause existed for the seizure of the computers located at Appellant's business. *Foreman v. State*, 561

¹ Justice Christopher is now the Chief Justice of this Court.

S.W.3d 218 (Tex. App. 14th 2018) (pdr granted).

The State's petition for discretionary review was granted.

The Court of Criminal Appeals reversed the decision of this Court in an opinion issued on November 25, 2020. *Foreman v. State*, 2020 Tex. Crim. App. LEXIS 959, 2020 WL 6930819. The Court opined that based on the description of the building where Appellant's business was located including the existence of tinted windows and the name of Appellant's business on a sign, a magistrate could infer that a video security system existed which justified the seizure of computers found at the business. The Court of Criminal Appeals denied Appellant's motion for rehearing on January 13, 2021.

III.

Due to the pandemic, on March 19, 2020, the Supreme Court issued an order extending the time to file an application for writ of certiorari to 150 days after the decision from which review is sought. Appellant's application for writ of certiorari is due to be filed on or before June 12, 2021.

IV.

Appellant believes that a substantial constitutional issue will be presented to the Supreme Court of the United States. Appellant believes that the decision by the Court of Criminal Appeals conflicts with well established precedent from the

Supreme Court as well as decisions from United States Courts of Appeals.

In particular, Appellant maintains that the decision by the Court Criminal Appeals specifically conflicts with establish Supreme Court precedent which provides that the core of the Fourth Amendment’s warrant clause is that a magistrate may not issue a search warrant without first finding “probable cause” that a particular item will be found in a particular location. The Supreme Court has stated repeatedly that the test is whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a “substantial basis” for issuing the warrant. *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984). Probable cause exists when, under the totality of the circumstances, there is a “fair probability” that contraband or evidence of a crime will be found at the specified location. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The conflict existing with the United States Courts of Appeals is evidence by the recent decision by the United States Court of Appeals for the Fifth Circuit in *United States v. Morton*, No. 19-10842 (January 5, 2021), which directly conflicts with the opinion from the Court of Criminal Appeals.

In *Morton*, a child pornography case, the Fifth Circuit addressed whether a search warrant affidavit that presented only evidence of personal drug possession and an officer’s generalized allegation about the behavior of drug traffickers authorized

the search of photographs stored on a defendant's cell phone. The affidavit in question asserted that the affiant had probable cause to believe that photographs on Morton's cell phone contained evidence of drug crimes. The Court ruled that the affidavit failed to establish that the phone contained evidence pertinent to drug possession. And, the Court ruled that because there was no evidence related to the content of the photographs on the phones, the search of the photographs on Morton's cell phone violated the Fourth Amendment to the Constitution. The Court stated:

the affidavit leaves us with only the allegations that (1) Morton was found with drugs so (2) it therefore follows that the photographs on Morton's phones will provide evidence of Morton's crime of drug possession. With only this bare factual support that Morton possessed drugs, the affidavits contain nothing to link Morton's marijuana and ecstasy with the photographs on his phones. The affidavits thus do not create a "fair probability" or "substantial chance" that evidence of the crime of drug possession will be found in the photographs on Morton's cellphones.

(Slip opinion p. 11).

The Fifth Circuit correctly applied long standing Supreme Court precedent by stating:

The Supreme Court has observed: "[M]any situations which confront officers in the course of executing their duties are more or less ambiguous, [and] room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). And further, "[m]ere affirmation of belief or suspicion is not enough." *Nathanson v. United States*, 290 U.S.

41, 47 (1933). The facts here lead to the sensible conclusion that Morton was a consumer of drugs; the facts do not lead to a sensible conclusion that Morton was a drug dealer. Under these facts, reasonably well-trained officers would have been aware that searching the digital images on Morton's phone—allegedly for drug trafficking-related evidence—was unsupported by probable cause, despite the magistrate's approval.

(Slip opinion p. 13).

As recognized by this En Banc Court and by the Court of Criminal Appeals in this case, there are no *actual* facts contained in the affidavit that would support a probable cause determination regarding the seizure of computers. The affidavit's probable cause statement does not mention computers or surveillance equipment within its factual basis.

The question becomes the reasonableness of inferences drawn from the bland description of a building containing a business and the business' name on a sign. The Court of Criminal Appeals reversing this Court decision relied on inferences drawn from inferences drawn from the affidavit's description of the premises and the name of a business on sign to infer that a computer and surveillance equipment existed and supports a probable cause determination. In reversing this Court decision, the Court of Criminal Appeals did not identify any facts that actually support a probable cause determination.

V.

Appellant's substantial liberty interests will be affected if this Court does not stay the issuance of the mandate in these causes. Appellant was released on bond after this Court set bail after the reversal of his convictions by the En Banc court. *Foreman v. State*, 565 S.W.3d 371 (Tex. App 14th 2018).

Appellant submits that he has abided by every condition of bond imposed by the trial since his release from custody. The record would show that he is not a flight risk and there has been no evidence that he committed any violation of the law of this State or the United States.

Following the setting of bail by this Court, Appellant was released on bond on November 16, 2018. He appeared in 177th Judicial District Court on November 19, 2018. His next appearance in the 177th Judicial District Court was on May 13, 2019. Beginning on September 6, 2019 and continuing through March 2, 2020, the trial court required Appellant to appear in the 177th Judicial District Court every two weeks as a condition of his release. Because COVID-19, on March 2, 2020, Appellant appeared monthly. Since the Court of Criminal Appeals issued its opinion on November 25, 2020, Appellant has twice appeared in the 177th Judicial District Court. His next court date is February 17, 2021.

VI.

The undersigned attorney has consulted with Assistant Harris County District Attorney Clint Morgan concerning this motion. Mr. Morgan has indicated that given the issues presented he is unopposed to this Court granting this motion to stay this Court's mandate.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Court stay the issuance of its mandate pursuant to Tex. R. App. Rule 18.2 pending disposition of the application for writ of certiorari due to be filed on or before June 12, 2021.

Respectfully submitted,

SCHNEIDER & MCKINNEY, P.C.

/s/ Stanley G. Schneider

Stanley G. Schneider

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ATTORNEY FOR APPELLANT
NATHAN RAY FOREMAN

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing Appellant's Unopposed Motion to Stay the Mandate Pending the Filing of an Application for Writ of Certiorari to the United States Supreme Court has been mailed, emailed and/or hand delivered on the office of the Harris County District Attorney's Office, 500 Jefferson, Suite 600, Houston, Texas 77002, on this 19th day of January 2021, to the following:

Clinton Morgan
Assistant Criminal District Attorney
morgan_clinton@dao.hctx.net

/s/ Stanley G. Schneider
Stanley G. Schneider

Automated Certificate of eService

This automated certificate of service was created by the eFiling system. The filer served this document via email generated by the eFiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Belen Vara on behalf of Stanley Schneider
Bar No. 17790500
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Envelope ID: 49836502
Status as of 1/19/2021 4:48 PM CST

Associated Case Party: Nathan Foreman

Name	BarNumber	Email	TimestampSubmitted	Status
Stanley G.Schneider		stans3112@aol.com	1/19/2021 4:43:34 PM	SENT
Belen Vara		stanschneider.legalassistant@gmail.com	1/19/2021 4:43:34 PM	SENT

Associated Case Party: Harris County District Attorney's Office

Name	BarNumber	Email	TimestampSubmitted	Status
Clint Morgan		morgan_clinton@dao.hctx.net	1/19/2021 4:43:34 PM	SENT

Exhibit 2

Justices

KEN WISE
KEVIN JEWELL
FRANCES BOURLIOT
JERRY ZIMMERER
CHARLES A. SPAIN
MEAGAN HASSAN
MARGARET "MEG" POISSANT
RANDY WILSON



Chief Justice

TRACY CHRISTOPHER

Clerk

CHRISTOPHER A. PRINE
PHONE 713-274-2800

Fourteenth Court of Appeals

301 Fannin, Suite 245
Houston, Texas 77002

Tuesday, February 2, 2021

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* DELIVERED VIA E-MAIL *

Clinton Morgan
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* DELIVERED VIA E-MAIL *

RE: Court of Appeals Number: 14-15-01005-CR
Trial Court Case Number: 1374837

Style: Nathan Ray Foreman v. The State of Texas

Please be advised that on this date the Court **GRANTED APPELLANT'S** motion to stay issuance of the mandate for 90 days in the above cause.

Panel Consists of Chief Justice Christopher and Justices Jewell and Poissant.

Sincerely,

/s/ Christopher A. Prine, Clerk

cc:

**NO. 14-15-01005-CR
NO. 14-15-01006-CR**

**IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT
HOUSTON, TEXAS**

NATHAN RAY FOREMAN	§	APPELLANT
	§	
VS.	§	
	§	
THE STATE OF TEXAS	§	APPELLEE

**APPEAL IN CAUSE NOS. 1374837 & 1374838
IN THE 177TH JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS**

**APPELLANT'S SECOND MOTION TO STAY THE MANDATE
PENDING THE DISPOSITION OF THE PETITION FOR
WRIT OF CERTIORARI TO THE UNITED STATES
SUPREME COURT FILED ON APRIL 13, 2021**

**STANLEY G. SCHNEIDER
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ATTORNEY FOR APPELLANT

TO THE HONORABLE JUSTICES OF THIS COURT:

COMES NOW NATHAN RAY FOREMAN, Appellant herein, by and through his attorney, **STANLEY G. SCHNEIDER**, and files this Second Motion to Stay the Issuance of this Court's mandate pending disposition of the petition for writ of certiorari to the United States Supreme Court filed on April 13, 2021, from the decision of the Texas Court of Criminal Appeals in *Foreman v. State*, PD-1090-18, PD-1091-18 (November 25, 2020), Rehearing denied January 13, 2021 pursuant to Tex. R. App. Rule 18.2.

I.

Tex. R. App Rule 18.2 provides that this Court may stay the issuance of its mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari. Rule 18.2 provides in pertinent part:

A party may move to stay issuance of the mandate pending the United States Supreme Court's disposition of a petition for writ of certiorari.

Rule 18.2 also provide that in a criminal case, the stay will last no longer than 90 days to permit the timely filing of a petition for writ of certiorari. The rule is silent as to a stay in criminal case pending the disposition of a petition for writ of certiorari. The rule states that after that period and other periods mentioned in the rule, the mandate shall issue. The plain language of the rule indicates that once a petition for

writ of certiorari is filed and substantial issues are presented, this Court can grant a stay pending disposition of the petition.

II.

On February 2, 2021 this Court granted a stay of the mandate for 90 days pending the filing of the petition for writ of certiorari to the United States Supreme Court.

III.

Attached are records pertaining to the e-filing of the petition for writ of certiorari on April 13, 2021. The receipt and tracking of the delivery of the petition to the Supreme Court of the United States.

IV.

The State did not oppose the granting of a stay of the mandate of this Court pending the filing of the petition for writ of certiorari to the Supreme Court of the United States.

V.

Appellant will show that this appeal presented a significant constitutional issue that needs to be resolved by the Supreme Court of the United States. The procedural history of this case is unusual and reflects the magnitude of the issue presented. Appellant was indicted in cause numbers 1374837 and 1374838 with the felony

offenses of aggravated kidnapping and aggravated robbery with a deadly weapon. He was convicted by a jury and sentenced by the trial court to 50 years in prison. Prior to trial, multiple hearings were held incident to Appellant's motion to suppress the search of computers found at his business and the recovered surveillance video on them. Appellant alleged that the search warrant affidavit presented to a magistrate lacked probable cause to seize the computer because the affidavit failed to mention any facts related to the computers or the existence of a security system that recorded events at the business. The trial court granted the motion to suppress as to two computers seized but denied the motion to suppress as to the computer that contained a video of the incident that was the subject of the prosecution.

A panel of this Court affirmed the conviction by a plurality decision. Justice Jamison, in the lead opinion, found it was possible for a magistrate to infer probable cause from the facts in the affidavit. Justice Donovan, in a concurring opinion, found Appellant lacked standing to contest the search of the business office. While dissenting, Justice Christopher¹ found standing and lack of probable cause. Appellant sought en banc review in this Court. The En Banc Court determined that the affidavit lacked any facts from which a magistrate could infer that probable cause existed for the seizure of the computers located at Appellant's business. *Foreman v. State*, 561

¹ Justice Christopher is now the Chief Justice of this Court.

S.W.3d 218 (Tex. App. 14th 2018) (pdr granted).

The State's petition for discretionary review was granted.

The Court of Criminal Appeals reversed the decision of this Court in an opinion issued on November 25, 2020. *Foreman v. State*, 2020 Tex. Crim. App. LEXIS 959, 2020 WL 6930819. The Court opined that based on the description of the building where Appellant's business was located including the existence of tinted windows, bay doors and the name of Appellant's business on a sign, a magistrate could infer that a video security system existed which justified the seizure of computers found at the business. The Court of Criminal Appeals denied Appellant's Motion for Rehearing on January 13, 2021.

VI.

Appellant believes that a substantial constitutional issue will be presented to the Supreme Court of the United States. Appellant believes that the decision by the Court of Criminal Appeals conflicts with well established precedent from the Supreme Court. In particular, Appellant maintains that the decision by the Court Criminal Appeals specifically conflicts with establish Supreme Court precedent which provides that the core of the Fourth Amendment's warrant clause is that a magistrate may not issue a search warrant without first finding "probable cause" that a particular item will be found in a particular location. The Supreme Court has stated

repeatedly that the test is whether a reasonable reading by the magistrate would lead to the conclusion that the four corners of the affidavit provide a “substantial basis” for issuing the warrant. *Massachusetts v. Upton*, 466 U.S. 727, 733 (1984). Probable cause exists when, under the totality of the circumstances, there is a “fair probability” that contraband or evidence of a crime will be found at the specified location. *Illinois v. Gates*, 462 U.S. 213, 238 (1983).

The conflict existing with the United States Courts of Appeals is evidence by the recent decision by the United States Court of Appeals for the Fifth Circuit in *United States v. Morton*, No. 19-10842 (January 5, 2021), which directly conflicts with the opinion from the Court of Criminal Appeals.

In *Morton*, a child pornography case, the Fifth Circuit addressed whether a search warrant affidavit that presented only evidence of personal drug possession and an officer’s generalized allegation about the behavior of drug traffickers authorized the search of photographs stored on a defendant’s cell phone. The affidavit in question asserted that the affiant had probable cause to believe that photographs on Morton’s cell phone contained evidence of drug crimes. The Court ruled that the affidavit failed to establish that the phone contained evidence pertinent to drug possession. And, the Court ruled that because there was no evidence related to the content of the photographs on the phones, the search of the photographs on Morton’s

cell phone violated the Fourth Amendment to the Constitution. The Court stated:

the affidavit leaves us with only the allegations that (1) Morton was found with drugs so (2) it therefore follows that the photographs on Morton's phones will provide evidence of Morton's crime of drug possession. With only this bare factual support that Morton possessed drugs, the affidavits contain nothing to link Morton's marijuana and ecstasy with the photographs on his phones. The affidavits thus do not create a "fair probability" or "substantial chance" that evidence of the crime of drug possession will be found in the photographs on Morton's cellphones.

(Slip opinion p. 11).

The Fifth Circuit correctly applied long standing Supreme Court precedent by stating:

The Supreme Court has observed: "[M]any situations which confront officers in the course of executing their duties are more or less ambiguous, [and] room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar v. United States*, 338 U.S. 160, 176 (1949). And further, "[m]ere affirmance of belief or suspicion is not enough." *Nathanson v. United States*, 290 U.S. 41, 47 (1933). The facts here lead to the sensible conclusion that Morton was a consumer of drugs; the facts do not lead to a sensible conclusion that Morton was a drug dealer. Under these facts, reasonably well-trained officers would have been aware that searching the digital images on Morton's phone—allegedly for drug trafficking-related evidence—was unsupported by probable cause, despite the magistrate's approval.

(Slip opinion p. 13).

As recognized by this En Banc Court and by the Court of Criminal Appeals in this case, there are no *actual* facts contained in the affidavit that would support a probable cause determination regarding the seizure of computers. The affidavit's probable cause statement does not mention computers or surveillance equipment within its factual basis.

The question becomes the reasonableness of inferences drawn from the bland description of a building containing a business and the business' name on a sign. The Court of Criminal Appeals reversing this Court decision relied on inferences drawn from inferences drawn from the affidavit's description of the premises and the name of a business on sign to infer that a computer and surveillance equipment existed and supports a probable cause determination. In reversing this Court decision, the Court of Criminal Appeals did not identify any facts that actually support a probable cause determination.

VII.

Appellant's substantial liberty interests will be affected if this Court does not stay the issuance of the mandate in these causes. Appellant was released on bond after this Court set bail after the reversal of his convictions by the En Banc court. *Foreman v. State*, 565 S.W.3d 371 (Tex. App 14th 2018).

Appellant submits that he has abided by every condition of bond imposed by the trial since his release from custody. The record would show that he is not a flight risk and there has been no evidence that he committed any violation of the law of this State or the United States.

Following the setting of bail by this Court, Appellant was released on bond on November 16, 2018. He appeared in 177th Judicial District Court on November 19, 2018. His next appearance in the 177th Judicial District Court was on May 13, 2019. Beginning on September 6, 2019 and continuing through March 2, 2020, the trial court required Appellant to appear in the 177th Judicial District Court every two weeks as a condition of his release. Because COVID-19, on March 2, 2020, Appellant appeared monthly. Since the Court of Criminal Appeals issued its opinion on November 25, 2020, Appellant has appeared four times in the 177th Judicial District Court. Appellant appeared on January 7, 2021, February 17, 2021, February 22, 2021 and March 31, 2021. He is scheduled to appear on May 6, 2021.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant prays that this Court stay the issuance of its mandate pursuant to Tex. R. App. Rule 18.2 pending disposition of the petition for writ of certiorari due to be filed on or before June 12, 2021.

Respectfully submitted,

SCHNEIDER & MCKINNEY, P.C.

/s/ Stanley G. Schneider

Stanley G. Schneider

Texas Bar No. 17790500

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ATTORNEY FOR APPELLANT

NATHAN RAY FOREMAN

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the attached and foregoing Appellant's Second Motion to Stay the Mandate Pending the Disposition of the Petition for Writ of Certiorari to the United States Supreme Court has been mailed, emailed and/or hand delivered on the office of the Harris County District Attorney's Office, 500 Jefferson, Suite 600, Houston, Texas 77002, on this 14th day of April 2021, to the following:

Clinton Morgan
Assistant Criminal District Attorney
morgan_clinton@dao.hctx.net

/s/ Stanley G. Schneider

Stanley G. Schneider



Welcome Stanley G. Schneider | Sign Out

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Petition for a Writ of Certiorari- State

Payment: \$300.00

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Petitioner:

Foreman, Nathan

Respondent:

State of Texas

State/Territory:

Texas

Is this a Capital Case?

No

Attorney

Stanley G. Schneider(Counsel of Record)

Party Name:

Nathan Foreman

Firm:

Schneider & McKinney, P.C.

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Documents

Petition - 40576 pdf Schneider br.pdf

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Certificate Word Count -40576 Schneider Certificate of Compliance.pdf

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Supreme Court of the United States

4/13/2021

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Belen Vara on behalf of Stanley Schneider
Bar No. 17790500
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Envelope ID: 52470809
Status as of 4/14/2021 4:52 PM CST

Associated Case Party: Nathan Foreman

Name	BarNumber	Email	TimestampSubmitted	Status
Stanley G.Schneider		stans3112@aol.com	4/14/2021 4:50:21 PM	SENT
Belen Vara		stanschneider.legalassistant@gmail.com	4/14/2021 4:50:21 PM	SENT

Associated Case Party: Harris County District Attorney's Office

Name	BarNumber	Email	TimestampSubmitted	Status
Clint Morgan		morgan_clinton@dao.hctx.net	4/14/2021 4:50:21 PM	SENT

Justices

KEN WISE
KEVIN JEWELL
FRANCES BOURLIOT
JERRY ZIMMERER
CHARLES A. SPAIN
MEAGAN HASSAN
MARGARET "MEG" POISSANT
RANDY WILSON

**Chief Justice**

TRACY CHRISTOPHER

Clerk

CHRISTOPHER A. PRINE
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Fourteenth Court of Appeals

301 Fannin, Suite 245
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Tuesday, April 20, 2021

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RE: Court of Appeals Number: 14-15-01006-CR
Trial Court Case Number: 1374838

Style: Nathan Ray Foreman v. The State of Texas

Please be advised that on this date the Court **DENIED APPELLANT'S** motion to stay issuance of the mandate in the above cause.

Panel Consists of Chief Justice and Justices Jewell and Poissant.

Sincerely,

/s/ Christopher A. Prine, Clerk

CC: