No. 21-7577

ORIGINAL

LEGAL MAIL

FILED
MAY 28 2021
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

NICHOLAS NORRIS KERR,
Petitioner,

vs.

STATE OF FLORIDA,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
FIRST DISTRICT COURT OF APPEAL

PETITION FOR WRIT OF CERTIORARI

Nicholas N. Kerr DC# N17237
(Your Name)

P.O. Box 800
(Address)

Raiford, Florida 32083
(City, State, Zip Code)

QUESTION(S) PRESENTED

Whether Petitioner's Fourth, Fifth, and Fourteenth Amendment Rights to the United States Constitution Require this Court to vacate Petitioner's conviction that was obtained by the State of Florida's consistent misinterpretation and misapplication of this Court's automobile exception established in *Carroll*?

LIST OF PARTIES

☒ All parties appear in the caption of the case on the cover page.

☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

State v. Kerr, Case No: 2010-CF-000187; Calhoun County, Florida

Kerr v. State, 95 So.3d 218; Case No: 1D11-3972 (Fla. 1st DCA July 23, 2012) (direct appeal from criminal judgment attacking validity of conviction based upon the illegal search and seizure of vehicle parked within curtilage of residence.)

Kerr v. State, 2012 Fla. App. LEXIS 14974; Case No: 1D11-3972 (Fla. 1st DCA August 21, 2012) (direct appeal from criminal judgment, rehearing denial attacking validity of conviction based upon the illegal search and seizure of vehicle parked within curtilage of residence.)

Kerr v. State, 152 So.3d 569; Case No: 1D14-3097 (Fla. 1st DCA November 10, 2014) (appeal from denial of Motion for Postconviction Relief attacking validity of conviction based upon the illegal search and seizure of vehicle parked within curtilage of residence.)

Kerr v. State, 2014 Fla. App. LEXIS 21129; Case No: 1D14-3097 (Fla. 1st DCA December 17, 2014) (rehearing denial from denial of Motion for Postconviction Relief attacking validity of conviction based upon the illegal search and seizure of vehicle parked within curtilage of residence.).

Kerr v. Jones, 2017 U.S. Dist. LEXIS 44755; Case No: 5:15cv6-WS/CAS (N.D. Fla. February 28, 2017) (federal habeas corpus petition attacking validity of conviction based upon the illegal search and seizure of vehicle parked within curtilage of residence.)

Kerr v. Jones, 2017 U.S. Dist. LEXIS 44736; Case No: 5:15cv6-WS/CAS (N.D. Fla. March 27, 2017) (federal habeas corpus petition attacking validity of conviction based upon the illegal search and seizure of vehicle parked within curtilage of residence.)

Kerr v. Jones, 2017 U.S. Dist. LEXIS 22984; Case No: 5:15cv6-WS/CAS (N.D. Fla. September 29, 2017) (request for Certificate of Appealability from denial of federal habeas corpus petition attacking validity of conviction based upon the illegal search and seizure of vehicle parked within curtilage of residence.)

Kerr v. State, 313 So.3d 586; Case No: 1D19-3597 (Fla. 1st DCA December 15, 2020) (appeal from denial of Second or Successive Motion for Postconviction Relief attacking validity of conviction based upon the illegal search and seizure of vehicle parked within curtilage of residence, based upon *Collins v. Virginia*, 138 S. Ct. 1663, 201 L.Ed.2d 9 (2018).)

*Kerr v. State,*Case No: 1D19-3597 (Fla. 1st DCA March 15, 2021) (rehearing denial on appeal from denial of Second or Successive Motion for Postconviction Relief attacking validity of conviction based upon the illegal search and seizure of vehicle parked within curtilage of residence, based upon *Collins v. Virginia*, 138 S. Ct. 1663, 201 L.Ed.2d 9 (2018).)

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the First District Court of Appeal for Florida on Petitioner's direct appeal is reported at: 313 So.3d 586, Case No: 1D19-3597 (Fla. 1st DCA December 15, 2020), rehearing denied March 15, 2021.

JURISDICTION

The First District Court of Appeal for the State of Florida entered judgment on December 15, 2020, and denied rehearing on March 15, 2021. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution reads:

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

Florida Statutes § 790.23, upon which Petitioner was convicted, reads in pertinent part:

> (1) It is unlawful for any person to own or to have in his or her care, custody, possession, or control any firearm, ammunition, or electric weapon or device, or to carry a concealed weapon, including a tear gas gun or chemical weapon or

device, if that person has been:

(a) Convicted of a felony in the courts of this state

(3) Except as otherwise provided in subsection (4), any person who violates this section commits a felony of the second degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Florida Statutes § 893.13(6)(b), upon which Petitioner was also convicted, read in pertinent part:

(6)(a) It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree, punishable as provide in s. 775.802, s. 775.083, or s. 775.084.

(6)(b) If the offense is the possession of not more than 20 grams of cannabis, as defined in this chapter, the person commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083. For the purposes of this subsection, "cannabis" does not include the resin extracted from the plants of the genus *Cannabis* , or any compound manufacture, salt, derivative, mixture, or preparation of such resin.

STATEMENT OF THE CASE

In November of 2010, Petitioner was charged with Count I: possession of a firearm by a convicted felon, Count II: (no information filed on duplicate count); Count III: discharging a firearm in public, and Count IV: possession of marijuana, less than 20 grams.

Jury trial was held on June 13, 2011. The jury found Petitioner guilty as charged of Count I, with a specific finding of actual possession. Petitioner was found not guilty of discharging a firearm in public, and convicted as charged of possessing marijuana.

Petitioner was sentenced on July 6, 2011 to: Count I: 15 years and Count IV: time served.

Petitioner's trial counsel moved to suppress the incriminating evidence obtained after the warrantless search and seizure. Petitioner claimed that without this evidence, the State could not obtain a conviction.

The lower court entered an order denying the motion to suppress on the authority of *Carroll v. United States,* 267 U.S. 132 (1925), holding that the police had probable cause to search the vehicle and that the vehicle was mobile so the automobile exception applied.

Petitioner proceeded to trial and was convicted. Petitioner appealed to the First District Court of Appeal.

On direct appeal, Petitioner argued that the denial of the motion to suppress was error that should be overturned because the automobile exception did not apply to vehicles that were located on the curtilage of a home. The State contested this, arguing that because the vehicle seized was the instrument of a felony and a very mobile repository of evidence that law enforcement could search the vehicle wherever it was located.

The First District Court of Appeal affirmed Petitioner's direct appeal without written opinion on July 23, 2012. See *Kerr v. State,* 95 So.3d 218 (Fla. 1st DCA 2012). Petitioner moved

for rehearing and it was denied.

Petitioner then raised the same issue on a motion for postconviction relief arguing that counsel was ineffective for failing to properly preserve the issue for appellate review. The trial court denied relief, concluding that the applicability of *Carroll* was addressed by Petitioner and the State on its merits on direct appeal and could not be re-litigated on a rule 3.850 motion under the guise of ineffective assistance of counsel. The court then adopted the arguments presented by the State on direct appeal to summarily deny Petitioner's ineffective assistance of counsel claims. Petitioner appealed and the appeal was affirmed without opinion on November 10, 2014. See *Kerr v. State,* 152 So.3d 569 (Fla. 1st DCA 2014) with rehearing also being denied.

On January 9, 2018, this Court decided *Collins v. Virginia,* 138 S. Ct. 1663, 201 L.Ed.2d 9 (2018). In *Collins,* this Court held that the automobile exception enunciated in *Carroll* does not apply when the vehicle searched is located within the curtilage of a residence. *Id.* at 1675 ("we conclude that the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein.")

Based on this holding, Petitioner filed an Amended Second (Successive) Motion for Postconviction Relief re-raising his argument that *Carroll* does not permit police officers to enter the curtilage of the residence to search his vehicle, resulting in a conviction that was procured by evidence seized in violation of his Fourth Amendment. The State argued that there were no manifest injustice exception to rule 3.850's two year time limit or successive motion bar. The lower court accepted the State's procedural bar arguments, denying relief.

Petitioner appealed, arguing that fundamental fairness and manifest injustice entitled him to relief on this claim. The State argued that *Collins* was an "evolutionary refinement" under

Carroll, and that the *Collins* decision does not warrant retroactive application.

Accepting this rationale, the First District Court of Appeal affirmed without written opinion on December 15, 2020, and denied rehearing on March 15, 2021. See *Kerr v. State,* Case No: 1D19-3597 (Fla. 1st DCA 2021).

STATEMENT OF THE FACTS

Police received information that a green Honda Accord was driving down the street when shots were fired from the driver's side window. Law enforcement subsequently located a green Honda Accord that was parked in the yard of a residence where Petitioner often stayed the night. The green Honda Accord was located, parked front in, inside of an attached, covered carport of the residence. It was uncontested that the green Honda Accord was located within the curtilage of the residence and that no one was in or around that vehicle at that time.

Police determined that the location of the vehicle and the color thereof provided sufficient probable cause to believe the vehicle contained evidence of the shooting. The officer then entered Petitioner's mother's house and arrested Petitioner without an arrest warrant.

Police did not obtain a warrant to seize or search the vehicle. Instead, law enforcement called a tow truck and had the vehicle towed to the police yard. It was subsequently searched by police without a warrant and a gun was found in the trunk of the car and marijuana was found located inside of the vehicle that was introduced into Petitioner's trial, resulting in his conviction and sentence.

This arrest and seizure of Petitioner's vehicle from the attached carport violated Petitioner's Fourth Amendment right prohibiting unreasonable arrests and seizure and search of Petitioner's property.

SUMMARY OF ARGUMENT

The warrantless search and seizure of Petitioner's vehicle while it was sitting, unoccupied, unattended, grill facing in, within the curtilage of the house – a covered and attached porch – violated Petitioner's Fourth Amendment of the United States Constitution.

This Court's own Fourth Amendment precedents have held that searches of a home and its curtilage, without a warrant, are presumptively unreasonable, unless an exception applies. *Florida v. Jardines,* 569 U.S. 1, 6 (2013).

Law enforcement received notification that shots were discharged from the driver's side of a green Honda Accord. Sometime thereafter, law enforcement located a green Honda Accord that was relatively close to where the complaints were received from. This green Honda Accord sat unoccupied, unattended, under the roof of an attached carport. The officer exited the main public thoroughfare and stepped onto the personal property of Petitioner's mother – where Petitioner routinely stayed the night. The officer then entered the residence without a warrant and arrested Petitioner. The officer additionally called for a tow truck to remove the green Honda Accord from the personal residence of Petitioner's mother without a search warrant. A search conducted later by police at another location revealed a firearm and marijuana within the confines of the green Honda Accord.

The officer's call for the tow truck and authorization for them to remove the green Honda Accord from the carport constituted a common law trespass under Florida law. Therefore, for the officer to obtain possession of the car, a warrant was necessary.

Petitioner's conviction on the evidence obtained from such a unconstitutional search and seizure and arrest violates due process, fundamental fairness, and Petitioner's Fourth Amendment rights.

Additionally, since Florida law recognized that the *Carroll* decision was limited to its facts and has held that the automobile exception only applied to automobiles that were "carrying" contraband while traveling on public thoroughfares and were "stopped" by police or parked in public areas, prior to the *Collins* decision, the *Collins* decision would not be retroactively applied, is not an evolutionary refinement off the *Carroll* decision, rendering Petitioner's conviction unconstitutional.

REASONS FOR GRANTING THE PETITION

In this case, the First District Court of Appeal – the highest court having jurisdiction to consider the issue - has considered and decided the question of whether the Fourth Amendment of the United States Constitution and prior precedents decided by this Court contrary to this Court's recent decision in *Collins v. Virginia,* 138 S. Ct. 1663, 201 L.Ed.2d 9 (2018). Specifically, the First District Court of Appeal held that *Carroll v. United States,* 267 U.S. 132 (1925), *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), and *California v. Carney,* 471 U.S. 386 (1985) held that the "automobile exception" is a categorical exception that permits officers to enter within the curtilage of a residence to search any vehicle therein as long as probable cause exits that the vehicle was involved in or contained evidence of illegal activities.

Petitioner specifically relies upon Rule 10(c) of the United States Supreme Court rules to show that this court should grant certiorari review and reverse Petitioner's conviction in this case where the evidence used to convict him was obtained as a direct result of the unconstitutional search. Therefore, under fundamental fairness, the Fifth Amendment Right to Due Process, the Fourth Amendment preclusion of illegal searches and seizures, and the Fourteenth Amendment Right to Equal Applicability of the laws, this case is ripe for review.

ARGUMENT

WHETHER PETITIONER'S FOURTH, FIFTH, AND FOURTEENTH AMENDMENT RIGHTS TO THE UNITED STATES CONSTITUTION REQUIRE THIS COURT TO VACATE PETITIONER'S CONVICTION THAT WAS OBTAINED BY THE STATE OF FLORIDA'S CONSISTENT MISINTERPRETATION AND MISAPPLICATION OF THIS COURT'S AUTOMOBILE EXCEPTION ESTABLISHED IN *CARROLL*?

I. The home and curtilage receive core Fourth Amendment protections.

"The Fourth Amendment 'indicates with some precision the places and things

encompassed by its protections': persons, houses, papers, and effects." *Florida v. Jardines,* 569 U.S. 1, 6 (2013) (quoting *Oliver v. United States,*466 U.S. 170, 176 (1984))

"[W]hen it comes to the Fourth Amendment, the home is first among equals. At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Jardines,* 569 U.S. 1, 6 (2013) (quoting *Silverman v. United States,* 365 U.S. 505, 511 (1961)).

The curtilage of the home is also entitled to Fourth Amendment protections. "We therefore regard the area "immediately surrounding and associated with the home" – what our cases call the curtilage – as "part of the home itself for Fourth Amendment purposes." *Ibid. (quoting Oliver v. United States,* 466 U.S. 170, 176 (1984)). This Court has previously recognized the importance the home's curtilage has. *See California v. Ciraolo,* 476 U.S. 207, 213 (1986) (This area around the home is "intimately linked to the home, both physically and psychologically," and is where "privacy expectations are most heightened.")

In addition, the boundaries of the curtilage is generally "clearly marked." Where it is not, "the concept[] defining the curtilage" is at any rate familiar enough that it is "easily understood from our daily experience." *Id.* at 7 (quoting *Oliver,* 466 U.S. at 182)

"It is clear, then, that the notion that the warrantless entry of a man's house in order to arrest him on probable cause is per se legitimate is in fundamental conflict with the basic principle of Fourth Amendment law that searches and seizures inside a man's house without a warrant are per se unreasonable in the absence of [] one of a number of well defined 'exigent circumstances.'" *Coolidge v. New Hampshire,* 403 U.S. 443, 478 (1971).

In this case, Petitioner was located in the interior of his mother's residence a substantial

amount of time after the alleged shooting occurred and the green Honda Accord was located by police. The Honda Accord was parked inside of a covered carport facing towards the rear of the carport and it was unoccupied and unattended. Further, when the police arrived, they observed the vehicle parked and no one around it. Instead of procuring a search and arrest warrant, the police trespassed onto Petitioner's mother's residential property and entered the house to effect a warrantless arrest of Petitioner. After this arrest, police called in a tow truck to remove the green Honda Accord from beneath the carport and to take it to the police station where it was searched and a firearm and marijuana was located.

II. The *Carroll* doctrine's applicability to only vehicles located and stopped on the highway or in a public place is apparent on the face of the *Carroll* decision itself and was highlighted by this Court in 1971.

"As we said in *Chambers,* 'exigent circumstances' justify the warrantless search of '*an automobile stopped on the highway,*' where there is probable cause, because the car is '*movable, the occupants are alerted, and the car's contents may never be found again if a warrant must be obtained.*'" *Coolidge v. New Hampshire,* 403 U.S. 443, 460 (1971) (quoting *Chambers v. Maroney,* 399 U.S. 42, 51 (1970)) (Emphasis added) Even this Court in *Carroll* held that law enforcement had the ability to search a car that they "*stopped and seized.*" *See Coolidge,* 403 U.S. at 458 n. 14 (quoting *Carroll v. United States,* 267 U.S. 132, 156 (1925) (Emphasis added).

Even in 1971, this Court in *Coolidge* limited the automobile exception to factors showing the automobile to be instantaneously mobile, with alerted occupants, on an open highway:

> The word "automobile" is not a talisman in whose presence the Fourth Amendment fades away and disappears. And surely there is nothing in this case to invoke the meaning and purpose of the rule of *Carroll v. United States,* - **no alerted criminal bent on flight, no fleeting opportunity on an open highway after a hazardous chase, no contraband or stolen goods or weapons, no confederates waiting to move the evidence, not even the inconvenience of a**

special police detail to guard the immobilized automobile.

Coolidge, 403 U.S. at 461-62 (Emphasis added).

In *Coolidge,* this Court considered and rejected the idea that an automobile could be seized and searched wherever it was located:

> If the police may, without a warrant, seize and search an unoccupied vehicle parked on the owner's private property, not being used for any illegal purpose, then it is hard to see why they need a warrant to seize and search a suitcase, a trunk, a shopping bag, or any other portable container in a house, garage, or back yard. ... If we were to agree with Mr. Justice White that the police may, whenever they have probable cause, make a warrantless entry for the purpose of making an arrest, and that seizures and searches of automobiles are likewise per se reasonable given probable cause, then by the same logic any search or seizure could be carried out without a warrant, and we would simply have read the Fourth Amendment out of the Constitution.

Coolidge, 403 U.S. at 480.

This case is almost indistinguishable from *Coolidge.* In *Coolidge,* the Petitioner was arrested without an arrest warrant while his vehicles were plainly visible from the street at night. This Court considering the *Carroll* case's application to that case found that to find the automobile exception to the warrant requirement applicable to that case this Court "would extend it far beyond its original rationale." *Id.* at 458. The Court specifically enumerated that it considered two other cases where the police had probable cause *to stop and search a vehicle for transporting contraband* and reaffirmed *Carroll* in those cases. This Court specifically enumerated that exigent circumstances exist under *Carroll* to justify the warrantless search of "an automobile stopped on the highway." This is the limitation placed on *Carroll* in *Coolidge,* 403 U.S. at 460. Based on this, if the vehicle is not moving or is not in a place open to the public, the police are unable to intrude upon a Petitioner's Fourth Amendment rights to seize and search a vehicle under the "automobile exception." And this was the law 40 years before Petitioner's

Fourth Amendment Rights were violated and Petitioner was convicted based upon evidence obtained in such a Constitutional violation.

III. Florida precedent has followed for many years *Carroll's* applicability to only vehicles that are located and stopped on the highway or in a public place prior to this Court's decision in *Collins v. Virginia*, invalidating the State's attempt to preclude retroactive application, arguing that the decision is an evolutionary refinement.

In this case, the only basis the State used to justify its warrantless seizure and search of the green Honda Accord was the automobile exception. This exception "is a narrow, situation-dependent exception which requires much more than the fact that an automobile is the object sought to be seized and searched. Critically, there must be probable cause to believe contraband is in the vehicle at the time of the search and seizure, and there must be some legitimate concern that the automobile "'might be removed and any evidence within it destroyed in the time a warrant could be obtained.'" See *White v. State,* 710 So.2d 949, 954 (Fla. 1998), cert. granted, 526 U.S. 559 (1999) (quoting U*nited States v. Lasanta,* 978 F. 2d 1300, 1305 (2nd Cir. 1992) ("Investigative agents could have held no realistic concern that the car, parked not in a public thoroughfare, but in Cardona's private driveway, might be removed and any evidence within it destroyed in the time a warrant could be obtained. Cardona was not operating the vehicle, nor was he in it or even next to it; when agents knocked on his door to arrest him, he was inside his house asleep."))

The Florida Supreme Court found in *White* that the automobile exception did not apply in that case because the vehicle was not stopped on a public thoroughfare but at his house, he was not even inside of the vehicle or anywhere around it, and he was inside of the house when officers knocked on the door to arrest him. *White,* 710 So.2d at 955 ("In the end, the maintenance

of an orderly society mandates that a citizen's property should not be taken by the government, in the absence of exigent circumstances, without the intervention of a neutral magistrate. Certainly the warrant requirement would have imposed no undue burden on the government here where the vehicle was parked safely at the petitioner's place of employment and the government had the keys and the petitioner in custody. Moreover, any inconvenience to the government pales in comparison to the consequences for our justice system and constitutional order if such abuses are left unchecked.")

Although in 1999 this Court reversed the Florida Supreme Court's decision in *White,* holding that the police's seizure and search of White's automobile did not violate the Fourth Amendment, it did so because the search and seizure of the car occurred while the car was parked in a place accessible to the public not on private premises. *Florida v. White,* 526 U.S. at 565 (quoting *Payton v. New York,* 445 U.S. 573, 587 (1980) (explaining that "we have drawn upon the established "distinction between a warrantless seizure in an open area and such a seizure on private premises.")

Numerous courts in Florida have also considered the application of *Carroll* to warrantless vehicle stops and each concluded that *Carroll* applies to allow police upon a showing of probable cause to "stop and search a vehicle" suspected of "carrying contraband." See *Gadsden v. State,* 498 So.2d 1339, 1341 (Fla. 2nd DCA 1986); *Beck v. State,* 181 So.2d 659 (Fla. 2nd DCA 1966) ("We must examine the record to determine whether the officers who made the search of the automobile had 'probable cause' to believe that appellant's automobile was the same car that assisted the robber's 'get-away' in order to determine if it contained the articles involved in the robbery."); *State v. Smith,* 193 So.2d 23, 25 (Fla. 3rd DCA 1966) ("However, when the vehicle is

immobile and cannot be quickly moved the reason for the distinction does not exist. In this case, it was quite obvious that the vehicle was immobile and that there was no danger that the vehicle could or would be moved by anyone. The arrest of an accused outside of an immobile vehicle will not justify a search of the vehicle without a search warrant.... Furthermore, the evidence was not admissible because a trespass was committed in order to remove the evidence from the vehicle.")

Based upon the foregoing, under the *Carroll* doctrine, Florida law required the vehicle to be traveling on a thoroughfare when it is stopped, probable cause must exist that the vehicle is transporting or carrying contraband or evidence from a crime for the stop to be valid, and that the vehicle be readily mobile. In addition, Florida's courts have determined that if in order to secure the evidence from the vehicle a trespass must occur, then the automobile exception does not apply. This was the State of Florida law for more than 12 years before Petitioner's Fourth Amendment Rights were violated by law enforcement and he was convicted by such unconstitutional police methods.

IV. The State's refusal to apply this Court's *Collins* decision to Petitioner's case because it is an alleged "evolutionary refinement" of *Carroll* logically fails.

The State in its answer brief argued that this Court's decision was merely an "evolutionary refinement" of *Carroll.* The State further argued that the fundamental fairness doctrine should not apply to give retroactive application to this Court's *Collins* decision.

Petitioner highlighted in his reply that he has consistently argued what this Court's *Collins* decision only reaffirmed *Coolidge* – the automobile exception under *Carroll* does not apply to automobiles parked and unattended in the curtilage of a residence. (RB, p. 5) Petitioner consistently cited to *Coolidge* to show this.

An evolutionary refinement of prior case decisions occurs when case decisions decided after that case clarifies previous decisions over time. Further, simply arguing that an "evolutionary refinement" occurred is insufficient. The State must "show" the evolution through case law at specific times relevant to Petitioner's case becoming final. See *Bunkley v. Florida,* 538 U.S. 835, 841-42 (2003). The State has failed to do this and cannot shoulder this burden.

Petitioner's conviction and sentence became final when the mandate issued on his direct appeal on August 21, 2012. See *Hughes v. State,* 901 So.2d 837, 839 (Fla. 2005) (citing *Smith v. State,* 598 So.2d 1063, 1066 (Fla. 1992) ("We have held that such decisions apply in all cases to convictions that are not yet final – that is convictions for which an appellate court mandate has not yet issued.")) Once the mandate issues on direct appeal, the State acquires an interest in the finality of the conviction. *Ibid.* However, researching this Court's precedents regarding the "automobile exception" and the applicability of this Court's *Carroll* decision reflects that Petitioner's convictions are a result of *Carroll's* misapplication to his case based upon decisions rendered by this Court more than 40 years prior to his case becoming final.

This Court's *Collins* decision merely reaffirmed its *Coolidge* holding that the automobile exception – the *Carroll* doctrine – does not apply to parked, unoccupied automobiles that are within the curtilage of one's home or where the person maintains a privacy interest.

Since Petitioner's case does not turn on whether this Court's *Collins* decision should apply retroactively and because the State of Florida has consistently misinterpreted and misapplied the automobile exception to Petitioner's case to maintain his unconstitutional conviction and incarceration, due process and fundamental fairness[1] concerns mandate the reversal and vacation

1 *Quill Corp v. North Dakota,* 504 U.S. 298, 333 n. 2 (1992) (the "touchstone of Due Process is fundamental fairness.")

of his conviction and sentence, with the concomitant order directing his immediate release.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Nicholas N. Kerr DC# N17237
Florida State Prison
P.O. Box 800
Raiford, Florida 32083

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 4272 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 26, 2021.

Nicholas N. Kerr DC# N17237