No. 22-5684

IN THE SUPREME COURT OF THE UNITED STATES

VICTOR GAVILLAN-MARTINEZ,
Petitioner,

vs.

SECRETARY, FLORIDA DEPARTMENT OF CORRECTIONS,
Respondent,

ON PETITION FOR A WRIT OF CERTIORARI TO THE
ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

Victor Gavillan-Martinez DC# 135908
(Your Name)

3189 Colonel Greg Malloy Road
(Address)

Crestview, Florida 32539
(City, State, Zip Code)

QUESTION(S) PRESENTED

Whether Petitioner's Fourth, Sixth, and Fourteenth Amendment Rights to the United States Constitution Require this Court to vacate Petitioner's conviction that was obtained directly by defense counsel's misunderstanding of the law and lack of investigation into petitioner's standing to file a meritorious motion to suppress evidence that was obtained during an illegal warrantless search.

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:

PARTIES

(a) Blasz, The Honorable Kevin, trial judge

(b) Calliel, Mark, Assistant State Attorney

(c) Dixon, Ricky – Secretary of the Florida Department of Corrections

(d) Duffy, Thomas – Assistance Attorney General

(e) McCallum, Linda – Postconviction Judge

(f) Moody, Ashley – Attorney General

(g) Nelson, Melissa – State Attorney

(h) Portis, Senovia – Petitioner's trial counsel

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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 from the Eleventh Circuit Court of Appeals that denied Petitioner's Certificate of Appealability request on December 3, 2021 is located at *Gavillan-Martinez v. Sec'y of the FDC,* 2021 U.S. App. LEXIS 35829 (11th Cir. 2021).

JURISDICTION

The Eleventh Circuit Court of Appeal entered judgment on December 3, 2021, wherein the court denied Petitioner a certificate of appealability. 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.

The Sixth Amendment of the United States Constitution reads:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for

obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

The right to the assistance of counsel includes the right to the effective assistance of counsel. *McMann v Richardson*, 397 US 759, 771, n 14, 25 L Ed 2d 763, 90 S Ct 1441 (1970).

Florida Statutes § 83.45, upon which Petitioner relied, reads in pertinent part:

> As used in this part, the following words and terms shall have the following meanings unless some other meaning is plainly indicated:
>
> (2) "Dwelling unit" means:
>
> (a) A structure or part of a structure that is rented for use as a home, residence, or sleeping place by one person or by two or more persons who maintain a common household.
>
> (b) A mobile home rented by a tenant.
>
> (c) A structure or part of a structure that is furnished, with or without rent, as an incident of employment for use as a home, residence, or sleeping place by one or more persons.
>
> (3) "Landlord" means the owner or lessor of a dwelling unit.
>
> (4) "Tenant" means any person entitled to occupy a dwelling unit under a rental agreement.
>
> (5) "Premises" means a dwelling unit and the structure of which it is a part and a mobile home lot and the appurtenant facilities and grounds, areas, facilities, and property held out for the use of tenants generally.
>
> (6) "Rent" means the periodic payments due the landlord from the tenant for occupancy under a rental agreement and any other payments due the landlord from the tenant as may be designated as rent in a written rental agreement.
>
> (7) "Rental agreement" means any written agreement, including amendments or addenda, or oral agreement for a duration of less than 1 year, providing for use and occupancy or premises.

Florida Statutes § 83.46, upon which Petitioner also relies, reads in pertinent part:

> (1) Unless otherwise agreed, rent is payable without demand or notice; periodic rent is payable at the beginning of each rent payment period; and rent is uniformly apportionable from day to day.
>
> (2) If the rental agreement contains no provision as to duration of the tenancy, the duration is determined by the periods for which the rent is payable. If the rent

is payable weekly, then the tenancy is from week to week; if payable monthly, tenancy is from month to month; if payable quarterly, tenancy is from quarter to quarter; if payable yearly, tenancy is from year to year.

Florida Statutes § 83.56, in pertinent part, reads:

(3) If the tenant fails to pay rent when due and the default continues for 3 days, excluding Saturday, Sunday, and legal holidays, after delivery of written demand by the landlord for payment of the rent or possession of the premises, the landlord may terminate the rental agreement. Legal holidays for the purpose of this section shall be court-observed holidays only. The 3-day notice shall contain a statement in substantially the following form:

> You are hereby notified that you are indebted to me in the sum of _____ dollars for the rent and use of the premises (address of leased premises, including county), Florida, now occupied by you and that I demand payment of the rent or possession of the premises within 3 days (excluding Saturday, Sunday, and legal holidays) from the date of delivery of this notice, to wit: on or before the _____ day of _____, (year).

(4) The delivery of the written notices required by subsections (1), (2), and (3) shall be by mailing or delivery of a true copy thereof or, if the tenant is absent from the premises, by leaving a copy thereof at the residence. The notice requirement of subsections (1), (2), and (3) may not be waived in the lease.

Florida Statutes § 83.57, reads in pertinent part:

A tenant without a specific duration, as defined in s. 83.46(2) or (3), may be terminated by either party giving written notice in the manner provided in s. 83.56(4), as follows:

(1) When the tenancy is from year to year, by giving not less then 60 days' notice prior to the end of an any annual period;

STATEMENT OF CASE

Petitioner was charged in the Fourth Judicial Circuit for Duval County, Florida with Second Degree Murder and Tampering with Evidence in Case Number: 2010-CF-011419.

On August 26, 2013, Petitioner plead guilty to Second Degree Murder and Tampering with Evidence pursuant to a negotiated plea agreement. In accordance with the negotiated plea, Petitioner was sentenced to 28 years' incarceration on the Second Degree Murder with adjudication of guilt and to 5 years' incarceration on the Tampering charge with adjudication of guilt. Both counts were ordered to be served concurrently.

Petitioner did not appeal either the judgment, plea, or sentence.

On April 19, 2014, Petitioner filed in the lower court his initial motion for postconviction relief under rule 3.850, Fla. R. Crim. P. wherein he raised two claims of ineffective assistance of counsel. Petitioner argued that his counsel was ineffective for failing to move for a "Stand Your Ground Hearing" and later another unrelated claim. In an amended motion for postconviction relief filed on September 28, 2015, Petitioner argued additional claims of ineffective assistance of counsel: Ground One argued that defense counsel was ineffective for failing to move for a "Stand Your Ground" hearing, Ground Two argued that defense counsel was ineffective for failing to file a motion to suppress the proceeds from an illegal search of Petitioner's rented residence, and Ground Three argued that defense counsel elicited a plea that was not knowingly and voluntarily entered based upon the PSI.

The lower court entered an order granting Petitioner an evidentiary hearing on the claims contained in his amended motion for postconviction relief.

On August 17, 2016, an evidentiary hearing was held on the aforementioned grounds, however, only the facts addressing the claim that counsel was ineffective for failing to

investigate and file a motion to suppress evidence seized during an illegal search of Petitioner's rented dwelling are relevant here.

After the evidentiary hearing testimony and argument was presented, the lower court issued an order denying postconviction relief.

Upon receipt of the denial, Petitioner filed a timely notice of appeal to the lower court. The State filed an Answer brief and Petitioner filed a Reply brief. On March 6, 2018, the First District Court of Appeal per curiam affirmed the denial of the motion for postconviction relief. See *Gavillan-Martinez v. State,* 257 So.3d 115 (Fla. 1st DCA 2018). The Mandate issued on December 5, 2018.

Petitioner filed his Petition for Writ of Habeas Corpus per the mailbox rule on August 12, 2018. Petitioner filed an additional amended petition for writ of habeas corpus. The court entered an order directing the State Attorney General to respond to the Petitioner's petition. Petitioner again requested that he be permitted to amend his petition which the district court granted. Petitioner filed his Second Amended Petition for Writ of Habeas Corpus and the Respondent filed a response to that petition.

Ultimately, the district court entered a Report and Recommendation that recommended that the district court deny relief on all claims. On April 27, 2021, Honorable Judge Marcia Morales Howard found that the lower court's acceptance of trial counsel's credibility over Petitioner's was not clearly erroneous nor was it a misapprehension of facts. In this order, Judge Howard preemptively denied certificate of appealability. See *Gavillan-Martinez v. Sec'y Fla. Dep't of Corr.,* 2021 U.S. Dist. LEXIS 79825 (M.D. Fla. April 27, 2021)

Petitioner followed the receipt of the order denying relief with a timely filed notice of

appeal that the Eleventh Circuit accepted and considered for the issuance of a Certificate of Appealability. On December 3, 2021, the Eleventh Circuit denied the issuance of a Certificate of Appealability. See *Gavillan-Martinez v. Sec'y, Fla. Dep't of Corr.*, 2021 U.S. App. LEXIS 35829 (11th Cir. December 3, 2021) (See Appendix A).

STATEMENT OF THE FACTS

In Petitioner's Amended Motion for Postconviction Relief, in Ground Two, Petitioner argued that defense counsel was ineffective for failing to investigate and file a motion to suppress the evidence seized during an illegal warrantless search of Petitioner's rented trailer. Petitioner averred that law enforcement's obtaining of a consent to search of the rented trailer was constitutionally impermissible since Petitioner had a valid rental contract that was still in effect.

The State, in response, argued that Petitioner abandoned any standing to challenge the search when he moved out of the trailer as to Ground Two.

The Court entered an order directing that an evidentiary hearing be held on the claims. The court held the evidentiary hearing on August 17, 2016. During the evidentiary hearing, Senovia Portis testified that she was Petitioner's defense counsel during the initial phases of this case. In relevant part as to Ground Two, Senovia Portis testified:

> Q: Were issues of search and seizure and the collection of evidence discussed during the course of your review of the evidence with Mr. Martinez:
> A: In reviewing the evidence, I didn't see any search and seizure issues, so it wasn't discussed as far as, hey, I see an issue with search and seizure.
> Q: At any point in time during your representation of Mr. Martinez did he ever bring to your attention or make a request of you to file any motions that dealt with the suppression of any evidence in this particular case?
> A: No.

(Appendix B, p. 28).

During cross-examination by Petitioner, Senovia Portis was questioned about the witness that allegedly called the police and told them that Petitioner killed the victim, burned the mattress in the back yard, and had moved out about a week prior to the call. There, Ms. Portis responded that no Category A witness list was alluded to who that witness was and that she does not know if she depositioned this witness (Appendix B, p. 32-34).

In response to the question about whether she recalled when she discussed the discovery with the Petitioner, she responded that "there are quite a few letters where Mr. Gavillan-Martinez wrote to me about his side of the story and what the information was." (Appendix B, p. 39). Petitioner inquired further on whether law enforcement had secured a warrant to search the residence. The following discussion occurred between Petitioner and Ms. Portis:

A: If I recall, the trailer was a rental, and Mr. Gavillan-Martinez didn't live there anymore, and so the trailer was not the residence at that time, if I recall.

The police - - as of 11-19, I believe Mr. Gavillan-Martinez and Ms. Roach were living with Ms. Roach's mother, and they had been evicted from the trailer where the alleged incident happened, and the police made contact with the owner of the trailer, and that was when the trailer was searched or looked at because they had been evicted.

Q: So you no investigate if they got the warrant to go to the trailer, you never investigate that part?

A: You have to have standing in order to - - you have to have standing over the particular property in order to file a - - I should clarify. I'm sorry. In order to say that a person can't search, you have to have control over that area or have to have standing to say the person can't search that. If it's not your property and you're not there and you don't have personal control and it belongs to someone else, then you wouldn't have standing to file such a motion if the person doesn't have standing for that.

Q: Do you recall that what you just say - - conversation with the defendant?

A: We did not have the conversation about filing a motion to suppress because we did not have standing to file a motion to suppress and review it - - okay. Sorry.

Q: What you can remember about discussion about police report with the defendant?

THE COURT: I'm sorry, what's your question, what can she remember about the discussion - -

BY MR. GAVILLAN-MARTINEZ:

Q: Yes, when you discuss the discovery with the defendant, do you recall go through

the police report with him?

A: Yes. We talked about the case. It was my general practice to make a summary of - - basically I do a running list of all the different supplemental reports and I start off with the most detailed ones, do a little short blurb of that one and kind of string them all together. So I would talk to my client about what the summary of those are. I provide a copy of that as well, but I also discuss with them the report. And once I and my client have had an opportunity to review the report after I've sent it over, I would ask that the client review the report, make notes on it, report - - reports, make notes on it and ask me any questions or provide me with any questions that they would want me to ask a particular witness or consider asking during the deposition.

If I recall from reviewing my file and also from my correspondence, Mr. Gavillan-Martinez did that. He took me up on that, went through the case and the information and would take the time to write letters to me and present his side of things or give me questions that he thought I should ask the witness. And if I recall correctly, there were specific questions he wanted to ask, and I believe I asked those at the end of the deposition after I did my questioning.

Q: Do you have those letters?

A: Yes.

Q: Can I see it?

A: Sure.

THE COURT: Do you have a way of making them available?

THE WITNESS: I believe so, Your Honor. If he'd just like to - - I can give him my service and he can look at his notes - - look at his letters. I don't have a tangible copy. I only have this or the file at the PD's office.[1]

During closing arguments, the State argued:

> The last thing that was the last claim made by this defendant was this alleged lack of a motion to suppress issue based upon the evidence in this particular case being seized from a trailer. As outlined with Ms. Portis today and documented within the police reports, Mr. Martinez had since been evicted and no longer lived in the trailer and had no standing to suppress any evidence that may have been obtained from that trailer, and so there was not a good-faith basis to file any motion to suppress based upon the evidence that was seized from that trailer. The police had gained consent to search the trailer by the owner of the trailer. This defendant had no right at that point in time, possessory or interest, in the trailer itself and so there was no grounds for any motion to suppress.

(See Appendix B, p. 72).

The notes and letters that were made part of the record during the evidentiary hearing

1 The Court subsequently directed that these letters and notes be made a part of the court file (See Evidentiary Hearing, p. 75).

disclosed that Petitioner was the person that signed the lease agreement to the trailer located at 10201 Normandy Blvd. #47. Prior the the search of the trailer in this case, both Petitioner and Erica Roach were interviewed by Detective Childers on November 5, 2012 and both provided their cell phone numbers to him (See Appendix B, p. 296)

On November 16, 2012 – three days before the search – Detective Childers interviewed Lasario Dominguez. This interview revealed that Erica Roach told him that Petitioner killed the victim and then cleaned the scene (See Appendix B, p. 296)

Three days later, law enforcement officers allegedly received a telephone call from a witness that supposedly lived in the area that stated that Petitioner and Ms. Roach had moved out of the trailer about one week ago. At no time was this witness ever identified.

On November 19, 2012 – the day of the search – Detective Childers contacted the Napoli Trailer Park and spoke with Glenn Napoli at 0918 hours. During this discussion, Napoli told Detective Childers that Petitioner and Ms. Roach had moved out of the trailer approximately one week ago because he was going to evict them for unpaid rent (See Appendix B, p. 298). After telling Mr. Napoli that the trailer could be a crime scene, Mr. Napoli provided written consent for him to search the residence.

At about 1430 hours, the search of the trailer was conducted with the assistance of Detective Bodine and Evidence Technician Smith. Blood evidence was located in the bedroom and the hallway area along with an area of ash along the wood line behind the trailer with scorched leaves above the ashy area (See Appendix B, p. 298).

The lower court denied relief after the evidentiary hearing on October 3, 2016. As to the decision on Ground Two, the court's denial was a single sentence: "Ms. Lance testified at the

time of the search of the Defendant's trailer he was no longer residing there. Therefore, she had not standing to file a motion to suppress (See Appendix C, p. 4).

On appeal, Petitioner argued that the lower court's denial regarding standing was erroneous since there was no evidence that Petitioner ever abandoned his rental. In fact, his tenancy agreement was a years' lease and was a month to month tenancy.

In response, the Appellee argued that he failed to carry his burden to produce evidence that he had standing to challenge the illegal search and seizure. Appellee argued that counsel was not ineffective and the court's finding of credibility was correct.

Petitioner filed his habeas petition arguing several grounds but only one is of relevance here – Ground Two.

The lower court's finding that she saw no standing where she could raise a meritorious motion to suppress the evidence obtained as a result of a warrantless search of Petitioner's rented residence was correct in the lower district court's opinion (See Appendix D, p. 20)(R&R, p. 20). Magistrate Judge Howard found that Petitioner failed to demonstrate "that the state court's adjudication of these claims was not contrary to clearly established federal law, did not involve an unreasonable application of clearly established federal law, and was not based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings." (See Appendix D, p. 20)(R&R, p. 20).

The Eleventh Circuit Court of Appeals denied Petitioner a Certificate of Appealability finding that "the state court's factual determination that Mr. Gavillan-Martinez was not residing at the mobile home when the search occurred was not clearly erroneous, as the record shows that witnesses informed the police that Mr. Gavillan-Martinez had moved out of the home. Further,

the state court's decision that Mr. Gavillan-Martinez lacked standing to challenge the search of the home was not unreasonable, given the evidence in the record that he had moved out of the home. Mr. Gavillan-Martinez did not point to any evidence in the record to support his allegations that, *inter alia,* his lease to the home remained in effect, and some of his property remained inside, and even if these allegations are taken as true, he could have abandoned his possessory interest in the mobile home while still retaining the lawful right of possession to the home."

Petitioner now seeks this Court to enter an order granting Certiorari and remand for the filing and consideration of the motion to suppress where Petitioner can provide evidence supporting his standing argument and lack of abandonment in addition to the lack of exigent circumstances to justify the warrantless search.

SUMMARY OF ARGUMENT

The Eleventh Circuit's denial of Certificate of Appealability finding that the state court's factual determinations were neither clearly erroneous or unreasonable determinations of fact is in fact erroneous. The state court's determination of facts regarding abandonment actually and completely fall short of the Fourth Amendment's requirements. In addition, the state court's determinations of fact failed to consider other relevant evidence of non-abandonment that was presented at the evidentiary hearing – namely, the attorney notes and letters, that conclusively show Petitioner's availability by telephone and that no exigent circumstances exist to permit the warrantless search that occurred in this case. Therefore, the evidence seized must be suppressed, the plea determined to be involuntarily and inadvisedly entered, returning the case back to the status quo.

REASONS FOR GRANTING THE PETITION

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 convince him to proffer the plea was seized in violation of the Fourth Amendment of the United States Constitution without the presence of definable exigent circumstances.. 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 Receives 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)).

II. Standing to Challenge Fourth Amendment Search and Seizure

"To assert a Fourth Amendment violation, an individual must establish he or she had a legitimate expectation of privacy in the place searched." *Ziegler v. Martin County School District,* 831 F. 3d 1309, 1320 (11th Cir. 2016) (citing *Rakas v. Illinois,* 439 U.S. 128, 148-49 (1978)) "Establishing a legitimate expectation of privacy is 'a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'" *Id. at* 1320-21 (quoting *United States v. Ford,* 34 F. 3d 992, 995 (11th Cir. 1994)(quoting *Katz v. United States,* 389 U.S. 347, 361 (1967)). "A reasonable expectation of privacy can be abandoned." *Ibid.* (citing *Abel v. United States,* 362 U.S. 217, 241 (1960)). "Abandonment is primarily a question of intent, and

may be inferred from words spoken, acts done and objective facts." *Ibid.* (quoting *United States v. Pirolli,* 673 F. 2d ____, 1204 (11th Cir. 1994)(quoting *United States v. Colbert,*474 F. 2d 174, 176 (11th Cir. 1973)(en banc)).

Petitioner has standing to challenge the illegal search of Petitioner's rental trailer. In June of 2012, Petitioner signed a years' rental lease with the Napoli Trailer Park. Erica Roach was also a signatory on this lease. According to the lease agreement and § 83.46(2), Fla. Stat., Petitioner's lease agreement was a month to month tenancy. Petitioner and Ms. Roach moved into lot #47 in June of 2012. Petitioner lived there continually until Petitioner was arrested on November 20, 2012. Ms. Roach, however, would come and go.

As for the standing issue and society's willingness to recognize that expectation as reasonable. Petitioner has done this. Petitioner rented dwelling unit from Mr. Napoli for a year. Petitioner moved into this dwelling unit and made it his home, placing his personal property inside of it, and sleeping in it. Only Petitioner, Ms. Roach, and Glenn Napoli – owner – had access to the keys for the trailer. As such, Petitioner had a subjective expectation of privacy in that dwelling unit; one that society would accept as reasonable or rented dwelling units would not be existence.[2] However, intentional abandonment of the residence could remove Petitioner's standing. See *Abel v. United States,* 362 U.S. 217, 241 (1960)

III. Abandonment considerations

"[W]hether abandonment occurred is a question of intent." *United States v. Ross,* 963 F. 3d 1056, 1066 (11th Cir. 2020)(quoting *United States v. Ramos,* 12 F. 3d 1019, 1022-23 (11th Cir. 1994))

"Fourth Amendment claims do not lie when the defendant has abandoned the searched

2 See *Chapman v. United States,* 365 U.S. 610 (1961)

property." *United States v. Sparks,*806 F. 3d 1323, 1342 (11th Cir. 2015), overruled on other grounds, *United States v. Ross,* 963 F. 3d 1056, 1057 (11th Cir. 2020) (en banc), (citing *United States v. Ramos,* 12 F. 3d 1019, 1024 (11th Cir. 1994)). "As our predecessor Court has explained, '[i]t is settled law that one has no standing to complain of a search or seizure of property he has voluntarily abandoned.'" *Ibid.*(quoting *United States v. Colbert,* 474 F. 2d 174, 175 (5th Cir. 1973) (en banc)).

"We assess objectively whether abandonment has occurred, based primarily on the prior possessor's intent, as discerned from statements, acts, and other facts.... As we have said, 'All relevant circumstances existing at the time of the alleged abandonment should be considered.'" *Sparks,* 806 F. 3d at 1342 (quoting *United States v. Colbert,* 474 F. 2d 174, 176 (5th Cir. 1973)).

"The issue is not abandonment in the strict property-right sense, but whether the person prejudiced by the search had voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search." *Colbert,* 474 F. 2d at 176 (citing *United States v. Edwards,* 441 F. 2d 749, 753 (5th Cir. 1971)). In addition, "the abandonment inquiry is an objective one using a common-sense approach, with the [petitioner's] intent 'discerned from statements, acts, and other facts.'" *United States v. Gascoigne,* 2019 U.S. Dist. LEXIS 187693 *9 (S.D.Fla. 2019) (quoting *Sparks,* 806 F. 3d at 1342). See also *Heyne v. State,* 214 So.3d 640, 647 (Fla. 2017).

In this case, the state offered no evidence that Petitioner abandoned either his possessory interest in the trailer or his expectation of privacy and it is their burden. See *K.W. v. State,* 183 So.3d 1123, 1129 (Fla. 5th DCA 2015) (citing *Kelly v. State,* 536 So.2d 1113, 1114-15 (Fla. 1st

DCA 1998) ("The State has the burden to establish abandonment by clear, unequivocal, and decisive evidence.")). The only evidence anywhere in the record appears in two witness statements – the manager of Napoli Trailer Park and an unnamed witness – that Petitioner abandoned the trailer. Yet, defense counsel took that as fact without ever questioning either.

When Petitioner was arrested after the search, law enforcement took possession of his keys. One of these keys was to the rented trailer. No evidence was presented that Petitioner turned in his key to the trailer to Glenn Napoli, removed his personal possessions from the trailer, or turned off the power or utilities to the trailer. See *Breen v. State,* 68 So.3d 365, 365 (Fla. 1st DCA 2011)).

In *Breen*, the First District Court of Appeal reversed his conviction and sentence because the evidence showed that Mr. Breen "entered the apartment he shared with his girlfriend, he was paying at least half of the bills and expenses for the apartment, and his belongings were still in the apartment." The First District found that while there was evidence that Mr. Breen intended to move out later that month, there was no evidence that he had abandoned the property yet. See *Whetstone v. State,* 778 So.2d 338, 342 (Fla. 1st DCA 2000)("[P]roof of abandonment of leased premises requires that there must be 'an intent to abandon and conduct by which the intention is carried into effect, or such a relinquishment by the tenant as will justify an immediate resumption of possession by the landlord.'").

Here, Petitioner informed Glenn Napoli that he intended to turn off the utilities to the trailer and to move out but that would not occur until December 1, 2012. He and Mr. Napoli agreed to this arrangement as he informed Mr. Napoli that he would pay him for any rent arrearages prior to moving out. This evidence, however, was never brought forth because defense

counsel failed to investigate this issue or to even speak with Petitioner about it.[3] And, yet, this agreement between Petitioner and Mr. Napoli explain why Florida Tenancy law was not complied with.

Petitioner agrees that the full monthly rent was in arrears by two months. However, Mr. Napoli did not initiate the requisite proceedings as required by § 83.56(3), Fla. Stat. The only explanation for this was because Mr. Napoli gave Petitioner a verbal extension lasting until Petitioner receives his first paycheck at his new job. Petitioner would move out on December 1, 2012. Petitioner would remit his initial down payment for late fees, Petitioner would provide to Mr. Napoli the keys to the trailer, and Petitioner would turn off the utilities. Accordingly, the State cannot prove abandonment irrespective of Mr. Napoli's allegation or this other unnamed witness's assertion. In fact, the record evidence shows the opposite. Petitioner's possession were still inside the trailer, the utilities were still connected, and Petitioner still had possession of the trailer's keys when he was arrested on the day after the search of Petitioner's dwelling unit. See also *Pineda v. Warden,* 802 F. 3d 1198, 1202 (11th Cir. 2015)("Reasonable jurists could conclude that Mr. Pineda had abandoned his apartment at the time the property manager opened the door because there was a smell of rotting food, the electricity was off, he had given away his garage access remote, he lived in another apartment, and there was almost no remaining furniture or property in the apartment."). In addition, Detective Childers' reliance on Glenn Napoli's assertion that Petitioner abandoned the trailer and receipt of consent from Mr. Napoli to search the trailer on that basis is unreasonable.

3 See *Gaines v. Hopper,* 575 F. 2d 1147, 1148 (5th Cir. 1978) ("Trial counsel, while aware of this version of the events, limited his pre-trial investigation to discussions with the prosecuting attorney and law enforcement officers. Although the names of thirteen potential witnesses were listed on the grand jury indictment and counsel was aware that the shooting took place in front of a crowd, counsel did not interview any of those persons named on the indictment or conduct an independent search for witnesses.")

IV. Validity of Landlord's Consent/ Good Faith Belief of Detective Childers

"While a landlord generally lacks common authority to consent to a search of a tenant's apartment, see *Chapman v. United States,* 365 U.S. 610 (1961), a tenant who abandons the premises loses any reasonable expectation of privacy once he does so. See *Abel,* 362 U.S. at 241. Petitioner has demonstrated that abandonment has not occurred in this case. Detective Childers, however, relies upon that he had an objectively reasonable belief that Petitioner abandoned the trailer when he sought consent to search from Mr. Napoli. This belief is flawed and entirely unreasonable.

Evidence exists in the record that on November 19, 2012 an unnamed witness contacted Detective Childers and informed him that Petitioner moved out of the trailer the day after officers interviewed him about the murder. Detective Childers then called Mr. Napoli who told him that Petitioner did abandon the trailer. Detective Childers then drove to the trailer on November 19, 2012 and obtained consent to search the trailer from Mr. Napoli. This is not the only relevant evidence in the record that shows the unreasonableness of Detective Childers' actions. For instance, during Plaintiff's interview on November 5, 2012, Petitioner and Ms. Roach provided to Detective Childers their cell phone numbers. And the day after the search was conducted, Detective Childers called Petitioner on his cell phone to ascertain his location.

Detective Childers could not have had a good faith belief in Mr. Napoli's consent to search based upon nothing more than his assertion that Petitioner had abandoned the trailer especially when he had Petitioner's cellphone number and could have contacted him to ascertain the truth.[4] If this was the Constitutional requirements, then any conscientious landlord who was

4 *United States v. Brazil,* 102 F.3d 1120, 1148 (11th Cir. 1997)(citing *Illinois v. Rodriguez,* 497 U.S. 177, 186 (1990)("And even if the consenting party does not, in fact, have the requisite relationship to the premises, there is no Fourth Amendment violation if an officer has an objectively reasonable, though mistaken, good-faith belief that the consent he has obtained valid consent to search the area.")).

told by police that evidence of a crime was located in a tenant's residence could aver that the tenant had abandoned their dwelling unit and consent to such a search of a tenant's home without having to present any evidence to show abandonment. Such a relaxation of Fourth Amendment proscriptions would eviscerate a tenant's Fourth Amendment Rights.

V. Exigent Circumstances to the Warrantless Search of Petitioner's trailer.

"Our 'analysis begins, as it should in every case addressing the reasonableness of a warrantless search, with this basic rule that "searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment – subject only to a few specifically established and well-delineated exceptions."'" *Thomas v. State,* 127 So.3d 658, 662 (Fla. 1st DCA 2013)(quoting *Katz v. United States,* 389 U.S. 347, 357 (1967)). "The warrant requirement is among the 'fundamental distinctions between our form of government, where officers are under the law, and the police-state where they are the law.'" *Ibid.* (quoting *Johnson v. United States,* 333 U.S. 10, 17 (1948)).

Here, the only possibly relevant exigent circumstances that could apply is the destruction of evidence exception. This exception is, however, inapplicable to justify the warrantless search of the residence and Detective Childers knew it at least three days before the search of the residence. On November 16, 2012, Detective Childers interviewed Lasario Dominguez. During this interview, Mr. Dominguez informed him that Erica Roach had told him that Petitioner had killed the victim and then cleaned up the blood. Accordingly, any destruction or disposal of evidence had already occurred and immediate access to preserve evidence was eliminated. Thus, exigent circumstances to justify the warrantless search cannot be used, rendering the search unconstitutional.

VI. Argument

The Eleventh Circuit denied issuance of a COA because it found the State court's could not clearly erroneous and that Petitioner's lack of standing to challenge the search was not unreasonable. Both findings are unsupported and clearly erroneous. Petitioner has shown that he had standing to challenge the search of his residence. By doing so, he has demonstrated that his defense counsel's belief otherwise was due to her lack of knowledge regarding standing combined with her adamant refusal to investigate the standing issue; even though, she had evidence in her possession showing that Petitioner had not abandoned the premises. Further, defense counsel simply accepted as true Mr. Napoli's assertion that Petitioner abandoned the property without ever inquiring into is constitutionality. Had she even minimally inquired as to its constitutional legitimacy, this argument would not now be before this Court for consideration. The State court's finding that defense counsel was therefore not ineffective was clearly erroneous and the Eleventh Circuit's denial of COA on this issue was also clearly erroneous. Accordingly, since jurists of reason could not debate that this search was unreasonable, the Eleventh Circuit's denial of a Certificate of Appealability was clearly erroneous and unreasonable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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