No. 23-5624

IN THE
SUPREME COURT OF THE UNITED STATES

CHARLES M. PORTER - *Petitioner*

VS.

Secretary, Department of Corrections,
Attorney General, State of Florida - *Respondent(s)*

on

PETITION FOR A WRIT OF CERTIORARI

to

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA - ORLANDO DIVISION

PETITION FOR A WRIT OF CERTIORARI

CHARLES M. PORTER

F.D.O.C. # 461843
Blackwater River Correctional Rehabilitation Facility
5914 Jeff Ates Road
Milton, Florida 32583

QUESTION(S) PRESENTED

The sole point of this petition is the fact that Petitioner was arrested without probable cause. Hence, therefore, the warrantless arrest was unlawful.

Point One

Whether the warrantless arrest is unlawful because the facts stated in the arrest affidavit was insufficient to establish probable cause?

Point Two

Whether the Trial Court abused its discretion by its departure from the essential requirements of the law in allowing additional time to find evidence of probable cause absent a showing of "Extraordinary Circumstances" by the State pursuant to Fla. R. Crim. P. Rule 3.133?

Point Three

Whether Trial Court erred in denying Defense Counsel's request for Petitioner to be released on his own recognizance for lack of probable cause?

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:

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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 to review the judgment below.

OPINIONS BELOW

[ ] For cases from **Federal Courts:**

The opinion of the United States Court of Appeals appears at Appendix ____ to the petition and is;
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[√] is unpublished.

The opinion of the United States District Court appears at Appendix ____ to the petition and is;
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[√] is unpublished.

[ ] For cases from **State Courts:**

The opinion of the highest State Court to review the merits appears at Appendix ___ to the petition and is;
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the _____ Court appears at Appendix ___ to this petition and is;
[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **Federal Courts:**

The date on which the United States Court of Appeals decided my case was July 11, 2023.

[√] No petition for rehearing was timely filed in my case.
[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix____.
[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___ A _____.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

[ ] For cases from **State Courts:**

The date on which the highest State Court decided my case was_____. A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, a copy of the order denying rehearing appears at Appendix _____.
[ ] An extension of time to file the Petition for a Writ of Certiorari was granted to and including _____ (date) on _____ (date) in Application No. __ A ____.

The jurisdiction of this court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional Amendment 4

U.S. Constitutional Amendment 5

U.S. Constitutional Amendment 6

U.S. Constitutional Amendment 14

Florida Rules of Criminal Procedure 3.133

STATEMENT OF THE CASE AND FACTS

This is an appeal from a final judgment adjudicating Appellant guilty after a plea of Nolo Contendre.

On April 18, 2018, Appellant was arrested by the Orange County Sheriff's Office for _____. (Appendix A)

On April 18, 2018, Appellant appeared before the Honorable Adam McGinnis for his first appearance hearing. (Appendix B)

At the hearing, the Honorable Adam McGinnis expressed concerns regarding the finding of probable cause. (no probable cause) (Appendix C, 3; 14-16).

The State requested an additional twenty-four (24) hours to supplement the information in the arrest affidavit. (Appendix C, 4; 12-13).

Defense Counsel objected to the allowance of additional time without a finding of "extraordinary circumstances" pursuant to Florida Rule of Criminal Procedure 3.133. (Appendix C, 4; 16-20).

The Honorable Adam McGinnis responded by citing the allegations made in the arrest affidavit as an extraordinary circumstance. (Appendix C, 4; 21-24).

Defense counsel maintained their argument that Florida Rule of Criminal Procedure 3.133(a) states that once the probable cause hearing has begun, that there must be a showing of extraordinary circumstances in order to continue the hearing. (Appendix C, 3; 21-25 and 4; 1-3).

The lower court incorrectly applied the law leading to a material injury that cannot be corrected on appeal. *Bd. of Regents v. Snyder,* 826 So. 2d 382, 387 (Fla. 2d DCA 2002).

In the present case, Porter's non-adversarial probable cause hearing was delayed in violation of Florida Rules of Criminal Procedure.

All defendants held in custody in the state of Florida are entitled to a non-adversarial probable cause hearing, except for those held pursuant to previously authorized and judicially review arrest warrants.

Florida Rules of Criminal Procedure 3.133(a)(1).

The non-adversarial probable cause hearing must occur within 48 hours of arrest, per Florida Rule of Criminal Procedure 3.133(a)(1). At the non-adversarial probable cause hearing, the judge hears evidence regarding the probable cause contained, i.e., arrest affidavits, to justify the incarceration of the defendant.

In the Ninth Judicial Circuit of Florida, non-adversarial probable cause hearings are routinely held at the same time as the initial appearance for defendants held in custody, as prescribed by FRCP 3.130. Not to be confused with the probable cause hearing, the initial appearance entitles defendant to be informed by the judge of the charges against them, to be appointed counsel if they so choose and qualify, and to the determination by the judge of the conditions of pretrial release, including monetary bond amounts. FRCP 3.130.

While the initial appearance must occur within 24 hours of arrest, the probable cause hearing may be held at any time within 48 hours. Specifically, once the non-adversarial probable cause hearing has begun at the same time as the initial appearance, the Court may not continue the non-adversarial probable cause hearing absent a showing of "extraordinary circumstances" by the State. Fla. R. Crim. P. 3.133(a)(1).

Although the Court made a finding of extraordinary circumstances related to the nature of the charge, the State provided no evidence that the additional information required could not have been previously obtained. The need for more time to acquire additional information from the Sheriff's Office does not qualify under the category of "extraordinary circumstances". Because the judge awarded the State a 24-hour continuance to gather more information to justify the arrest of Appellant and without the requisite showing of "extraordinary circumstances" by the State, the defense moved for the release of Appellant on his own recognizable for lack of probable cause.

REASONS FOR GRANTING THE PETITION

To prevent a Gravis Miscarriage of Justice

The decision and outcome of this legal proceeding is prejudicial and inconsistent with the substantial rights of Petitioner, as used in constitutional standard of reversible error, "miscarriage of justice" means a reasonable probability of a more favorable outcome for the defendant. *People v. Lopez,* 251 Cal. App. 2d 918, 60 Cal. Rptr. 72, 76. It is reasonably probable that result more favorable for Petitioner would have been reached in absence of the error. *People v. Bernhardt,* 222 C.A. 2d 567, 35 Cal. 401, 419. The result and decision in this State Court proceeding is contrary to and involved an objectively unreasonable application of clearly established Federal law as determined by the Supreme Court of the United States. See, *County of Riverside and Cois Byrd, Sheriff of Riverside County v. McLaughlin, et al.,* 500 U.S. 44 L. Ed. 2d 49 111 S. Ct. 1661 (1991) (holding a jurisdiction that provides judicial determination of probable cause within 48 hours or arrest will, as a general matter, comply with the promptness requirement of Gerstein... This is not to say that the probable cause determination in a particular case passes constitutional muster simply because it is provided within 48 hours. Such a hearing my nonetheless violate the Fourth Amendment if the arrested individual can prove that his or her probable cause determination was delayed unreasonably. Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delays sake. This is exactly what happened in the instant case at bar. Petitioner's probable cause determination was delayed unreasonably for the purpose of gathering additional evidence to justify the arrest. See, Petition for Writ for Certiorari filed on May 4, 2018, forcing Petitioner to bond out on June 1st, 2018, rendering the Petition for Certiorari denial on August 27, 2018, moot.

The fact that lead counsel, James Fisher, had his assistant, Sarah L. B. Jordan file a Petition for Writ of Certiorari proves they had knowledge of the unlawful arrest, including Nicole Ann Bamberski, who stated she considered filing a motion to suppress but chose not to do so, because she did not believe there was a good faith basis to file a motion to suppress because the Trial Court gave the State an opportunity to supplement the arrest affidavit, had she done her due diligence of research within the context of the Sixth Amendment's mandate for effective assistance of counsel she would have known in *Belsky v. State,* 831 So. 2d 803 (Fla. 4th DCA 2002) (holding that lack of probable cause meant arrest was unlawful. Evidence seized incident to unlawful arrest had to be suppressed. In the instant case Petitioner's court appointed counsel at first appearance moved for his release on his

own recognizance for lack of probable cause, he was not released making his detention unlawful. Therefore, the evidence seized incident to this arrest should have been suppressed. It was objectively unreasonable for Counsel not to file a motion to suppress, Counsel was not functioning as the "counsel" guaranteed the Petitioner by the Sixth Amendment. *Hodges v. State,* 885 So. 2d 338, 345 (Fla. 2004), (quoting *Strickland,* 466 U.S. at 687). Counsel should have followed up the Writ of Certiorari with a Motion to Suppress. The need for more information from the police station does not meet the category of extraordinary circumstances.

THE CONVICTION WAS OBTAINED THROUGH THE USE OF EVIDENCE OBTAINED PURSUANT TO AN UNLAWFUL ARREST.

The result and decision of counsel here is counsel's failure to competently litigate a Fourth Amendment claim, our analysis begins (295 So. 3d 879) with two cases: *Kimmelman v. Morrison,* 477 U.S. 365, 106 S. Ct. 2574, 91 L. Ed. 2d 305 (1986), and *Campbell v. State,* 271 So. 3d 914 (Fla. 2018). In *Kimmelman,* like here in the instant case, the allegation of ineffectiveness was the failure to seek suppression. Not only had counsel failed to timely file a suppression motion, but counsel had failed to ask for discovery. Pertinent to the instant case is the Supreme Court's discussion of the Fourth Amendment claim within the context of the Sixth Amendment's mandate of effective assistance of counsel. Our nation's highest court said: "Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the Defendant must also prove that his Fourth Amendment claim is meritorious... *Kimmelman,* 477 U.S. at 375. Focusing upon the Sixth Amendment's two prongs for determining ineffective assistance - performance and prejudice - the Supreme Court explained: "[M]ore importantly, it differs significantly from the elements of proof applicable to a straightforward Fourth Amendment claim. Although a meritorious Fourth Amendment issue is necessary to the success of a Sixth Amendment claim like the respondent's, a good Fourth Amendment claim alone will not earn" a moving party relief; Id at 382. A demonstration of prejudice as mandated by *Strickland,* 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed 2d 674, remains required. In the instant case, it is a reasonable probability that, but for counsel's errors, the Petitioner would have insisted on going to trial, without the evidence which has been suppressed the prosecutor will realize without that evidence a conviction at trial would be unlikely or impossible. Counsel's deficient performance prejudiced Petitioner's defense, had

counsel filed a motion to (suppressed) suppress the evidence obtained pursuant to an unlawful arrest the outcome would have been different.

MEMORANDUM OF LAW

If a Fourth Amendment arrest was effected, was there probable cause for the arrest? An arrest must be supported by "probable cause" in order to be considered lawful under the Fourth Amendment. If it is concluded that the arrest was made without probable cause, the analysis ends with the conclusion that the seizure of the person was unlawful. The conviction was obtained through the use of evidence obtained pursuant to an unlawful arrest.

This court's ruling is in clear conflict with *Schwebel v. State,* 295 So. 3d 877 (Fla. 2d DCA 2020) is submitted as authority in connection with the Petitioner's argument regarding counsel's ineffective assistance of counsel for failing to file a Motion to Suppress evidence obtained pursuant to an unlawful arrest. Since counsel had knowledge of the unlawful arrest; the principal allegation of ineffective assistance.

CONCLUSION

The judgment of the Circuit Court should be reversed and remanded with directions that Petitioner's convictions be set aside, and that he be discharged. See *Dees v. State,* 989 So. 2d 713 (Fla. 1st DCA 2008) (holding that because the arresting officer lacked probable cause to arrest appellant for burglary or any other offense, and the evidence incriminating appellant in these case was found following a search incident to the unlawful arrest, we reverse and remand with directions that appellant's convictions be set aside, and that he be discharged.) (*Delafield v. State,* 777 So. 2d 1020 (Fla. 2d DCA 2000) holding that the identity of a driver is similar to any other evidence obtained as a result of an unconstitutional stop. Therefore, the identity of defendant, which was essential to proving the charge of driving with suspended license, was tantamount to any other evidence seized without probable cause. As such defendant's conviction was reversed and remanded with instructions with the trial court to discharge the defendant.

In the response to petition which was submitted pursuant to *McBridge v. Sharpe,* which is relying solely upon the record clearly shows at Petitioner's first appearance hearing the presiding judge noted that the State had not established (probable cause) rendering arrest unlawful, then granting State additional time to supplement arrest affidavit clearly violates the Fourth Amendment to the United

States Constitution which has been in effect since 1791 or 232 years, which prohibits unreasonable search and seizures.

This issue is of importance beyond the particular facts and parties involved, the national importance of having the Supreme Court decide the questions involved, so other similarly situated will not be so unlawfully detained.

The Petition for Certiorari should be granted.

Respectfully submitted,

/s/ Charles Porter

Date: 9-8-23

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document has been placed into the hands of prison officials at Blackwater River Correctional Rehabilitation Facility for pre-paid First Class U.S. mailing to the following:

Clerk of Court
401 W. Central Blvd., Ste. 2100
Orlando, FL 32801

Office of Attorney General
444 Seabreeze Blvd., 5th Floor
Daytona Beach, FL 32118

Clerk of The Court (U. S. Supreme Court)
One First Street N.E.
Washington, D.C 20543

On this 8 day of September, 2023.

/s/ Charles Porter

Charles Porter
DC# 461843
Blackwater River Corr. Rehab Facility
5914 Jeff Ates Road
Milton, Florida 32583