No. 23-5807

IN THE

SUPREME COURT OF THE UNITED STATES

FARES MUSTAFA – PETITIONER
(Your Name)

vs.

STATE OF FLORIDA – RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

FARES MUSTAFA
(Your Name)

1599 SW 187th Avenue

Miami, Florida, 33194 – 2801

N/A PETITIONER IS IN THE CUSTODY OF THE FLORIDA DEPARTMENT OF CORRECTIONS
(Phone Number)

QUESTION(S) PRESENTED

1) Whether the State Court's ruling on Petitioner's claim that Trial Counsel was ineffective for failing to move to suppress Petitioner's inculpatory statements was an unreasonable application of *Strickland v. Washington*?

2) Whether the State Court permitting a lay witness to translate a conversation between that witness and Petitioner, deprived Petitioner of due process of law under the Fifth and Fourteenth Amendments of the United States Constitution?

3) Whether the Eleventh Circuit Court of Appeals should have granted Petitioner a Certificate of Appealability on either of these issues?

LIST OF PARTIES

[X] 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

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TABLE OF AUTHORITIES CITED

A. CASES

B. STATUTES AND RULES

C. OTHER

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

[X] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at 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[ ] is unpublished.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[ ] is unpublished.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 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.

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was June 28, 2023.

[ ] No petition for rehearing was timely filed in my case.

[ ] A timely petition 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 _____.

[ ] That Court ordered that no Motion for Rehearing or reinstatement will be entertained.

[ ] The deadline to file the Petition for Writ of Certiorari in this case is _____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1) FEDERAL

Fourth Amendment

Fifth Amendment

Sixth Amendment

Fourteenth Amendment

STATEMENT OF THE CASE

On June 23, 2011, in Palm Beach County, Mr. Mustafa was charged by Amended Indictment in Count One with First Degree Murder with a Firearm; in Count Two with Attempted First Degree Murder with a Firearm, in Count Three with Burglary While Armed with a Firearm, and in Count Four with Shooting into a Building.

Petitioner proceeded to trial on all counts.

On June 10, 2014, Petitioner was found guilty of the lesser included offense of Second Degree Murder on Count One, and guilty as charged on Counts Two and Four. With regard to Count Three the jury was unable to reach a verdict.[1]

Petitioner was adjudicated guilty and sentenced to a term of fifty (50) years in prison on Count One, thirty-five (35) years in prison on Count Two, and four-hundred seventy-four (473.8) months in prison[2] on Count Four. A fifty year minimum mandatory was included on Count One. All Courts were designated to run consecutively.

Petitioner appealed his Judgment and Sentence to the Florida

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1 On August 14, 2014, the State entered a nolle prosequi on this count.
2 This sentence was subsequently reduced to 15 years, the statutory maximum for a second degree felony.

Fourth District Court of Appeal.

On Direct Review, as relevant here, Petitioner argued that the Trial Court erred in permitting Petitioner's girlfriend, Ms. Halum, a state witness, to translate to the jury, a conversation that occurred between Ms. Halum and Petitioner. Petitioner's Direct Appeal was affirmed on October 27, 2016.

Petitioner filed a Motion for Postconviction Relief pursuant to Florida Rule of Criminal Procedure 3.850. In the Motion Petitioner raised one ground relevant here: trial counsel rendered ineffective assistance of counsel for failing to file a motion to suppress Petitioner's confession, which was derived from a warrantless arrest in South Carolina.

The Fifteenth Judicial Circuit Denied Petitioner's Motion for Postconviction Relief. Petitioner appealed and the Fourth District Court of Appeal affirmed the Lower Tribunal's Order.

On June 17, 2022, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

On October 3, 2022, the United States District Court entered an order denying Petitioner's § 2254 Petition. *Mustafa v. Florida Dept. of*

Corr., 2022 U.S. Dist. LEXIS 181202 (Fla. S.D. 2022).

Petitioner timely appealed this decision, and on March 23, 2023, Petitioner filed an Application for Certificate of Appealability with the United States Court of Appeals for the Eleventh Circuit. In his Application Petitioner argued that a COA should issue on two issues: 1) whether trial counsel provided ineffective assistance of counsel for failing to move to have Petitioner's confession suppressed, and 2) whether the trial court erred in permitting Ms. Halum to translate a conversation between her and Petitioner without the assistance of a certified court interpreter.

On June 28, 2023, the Eleventh Circuit found that none of Petitioner's claims were worthy of a Certificate of Appealability.

This timely Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE PETITION

Issue One

WHETHER THE STATE COURT'S DENIAL OF PETITIONER'S CLAIM THAT COUNSEL RENDERED INEFFECTIVE ASSISTANCE FOR FAILING TO MOVE TO SUPPRESS PETITIONER'S INCULPATORY STATEMENTS WAS AN UNREASONABLE APPLICATION OF STRICKLAND V. WASHINGTON

Petitioner was arrested in South Carolina by Detectives from Florida and Orangeburg South Carolina without a warrant. The law is well established that warrants issued for criminal defendants are only valid in the state they are issued. The record in this case makes clear that Petitioner was seized by South Carolina authorities, and those authorities did not have a South Carolina warrant. Petitioner contends that based upon these facts Trial Counsel had a viable avenue to move to suppress Petitioner's confession. Had Trial counsel moved for suppression of Petitioner's confession the Trial Court would have had little choice but suppress Petitioner's statements which would have resulted in a different outcome at Petitioner's trial, i.e. he would have been found not guilty of all offenses.

Under the circumstances of this case, police from two

jurisdictions, Florida and South Carolina, coming to Petitioner's place of business, armed, and arresting Petitioner, he was clearly seized for Fourth Amendment Purposes.

In *United States v. Mendenhall*, 446 U.S. 544, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980), the United Stats Supreme Court articulated the standard for determining whether a seizure has occurred:

> [A] person has been "seized" within the meaning of the Fourth Amendment only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave. Examples of circumstances that might indicate a seizure, even though the person did not attempt to leave, would be the threatening presence of several officers, the display of a weapon by an officer, some physical

Mendenhall, 446 U.S. at 554.

In *California v. Hodari D.*, 499 U.S. 621, 111 S.Ct. 1547, 113 L. Ed. 2d 690 (1991), the Court also held that in addition to circumstances indicating that a reasonable person would not feel free to leave, the person must either (a) in fact be physically subdued by the officer, or (b) submit to the officer's show of authority.

The "seizure" analysis does not depend on what the particular suspect believed, but on whether the officer's words and actions would

have conveyed to a reasonable, innocent person that he was not free to leave. *Florida v. Bostick*, 501 U.S. 429, 437-38, 111 S. Ct. 2382, 111 L. Ed. 2d 389 (1991) (citing *Florida v. Royer*, 460 U.S. 491, 497 at n.4, 103 S. Ct. 1391, 75 L. Ed. 2d 229 (1983) (Blackmun, J., dissenting); see also *Michigan v. Chesternut*, 486 U.S. 567, 574, 108 S. Ct. 1975, 100 L. Ed. 2d 565 (1988) ("This 'reasonable person' standard...ensures that the scope of the Fourth Amendment protection does not vary with the state of mind of the particular individual being approached.")

In this case, Petitioner was required, at gun point, to submit to the authority of police officers and any reasonable person under the circumstances would have done likewise. Therefore, it is clear that he was seized and under arrest for Fourth Amendment purposes.

However, at the time officers effectuated the arrest of Petitioner, they were not in possession of a South Carolina fugitive warrant for Petitioner's arrest. They had a *Florida* warrant, but no South Carolina warrant. Mustafa's seizure and arrest without a valid South Carolina fugitive warrant was an unconstitutional seizure in violation of the Fourth Amendment. This has been well settled law in Florida for many years.

> It is plain that this bench warrant and indictment only authorized an arrest by a United States Marshall, or his deputy within the territorial jurisdiction of the court issuing it, as indicated by its language, that is, within the District of Columbia. It is too well settled to require citation of authority that a warrant for arrest issued in one state may not be executed in another state, for it has no validity beyond the boundaries of that state by whose authority it was issued.

Passett v. Chase, 91 Fla. 522, 107 So. 689, 691 (1926)

This is well settled in state and federal courts:

> Congress has provided a method whereby fugitives may be apprehended in another state and returned to the state wherein they are changed with the commission of a crime. 18 U.S.C.A. § 663 (now found at 18 U.S.C. § 3182) The law of Oklahoma and the law generally is that a warrant of arrest in one state may not be executed in another state, for it has no validity beyond the boundaries of the state by whose authority it was issued. *Stuart et al. v. Mayberry et al, Thompson et. al v. Mayberry et al.*, 105 Okl. 13, 231 P. 491. To the same effect are the following: *Pasett v. Chase, Sheriff*, 91 Fla. 522, 107 So. 689; *Martin v. Newland, sheriff*, et al., 196 Ind. 58, 147 N.E. 141; *Boulin, Town Marshall, et al. v. Archer*, 157 Ky. 540, 163 S.W. 477; *Kendall et al. v. Aleshire*, 28 Neb. 708, 45 N.W 167, 26 Am. St. Rep. 367, *Carpenter v. Lord, State Agent et al.*, 88 Or. 128, 171 P. 577, L.R.A. 1918D, 674; *Tarvers v. State*, 90 Tenn. 485, 16 S.W. 1041; *Ex parte Sykes*, 46 Tex.Cr.R. 51, 79 S.W. 538. The sheriff of Latimer County, when he attempted to execute the warrant arresting plaintiff in Arizona, was acting beyond the scope of any authority conferred upon him as a sheriff under the Laws of the State of Oklahoma. He had no authority to direct that the plaintiff be detained in jail...

Kirkes v. Askew, 32 Supp. 802, 804 (E.D. Okla. 1940)

> The final issue for determination is whether the evidence through appellant's arrest should have been suppressed. Appellant claims that her arrest was illegal, because the Oklahoma officers travelled outside their jurisdiction to arrest her in Arkansas. As a consequence, it is contended that the gun, receipts, pictures, and *oral statements* of appellant should have been suppressed. (emphasis added)
> Generally, a warrant of arrest cannot be executed in another state if it was issued in Oklahoma, for it has no validity beyond the boundaries of the state whose authority it was issued. *See Kirkes v. Askew*, 32 F. Supp. 802 (E.D. Okla.1940). The Uniform Criminal Extradition Act found in 22 O.S. 1981, § 1141.1 et seq., provides specific procedures to be followed for the arrest and return of a criminal suspect who is outside the jurisdiction of this State. Where authorities comply with this Act, the risk of rendering inadmissible evidence seized due to the illegality of an arrest is minimized. The authorities here bypassed the procedures in an expedition the trial court characterized as "trickery" in regaining jurisdiction over the appellant.
>
> *Holbird v. State*, 1982 Ok. Cr. 1390 20-21, 650 P.2d 66, 70

South Carolina has a statutory mechanism for obtaining the arrest of a fugitive from another state, found at title 17, Section 9-10, South Carolina code of Criminal Procedure. That statute requires a warrant to be obtained from a South Carolina magistrate before the arrest may be made. That was not complied with in Petitioner's case. Petitioner's arrest was clearly illegal and the law enforcement officers took advantage of illegality by interrogating Petitioner and obtaining his confession.

The interrogation and confession which follow were therefore fruit of the poisonous tree of Petitioner's illegal Fourth Amendment seizure, and as such subject to suppression. If the State fails to prove seizure was reasonable under constitutional standards, any evidence obtained either directly or indirectly therefrom must be excluded from the defendant's criminal trial. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963). Evidence that is not obtained during a search, but which is obtained as a result of the unlawful search, must be suppressed under the "fruit of the poisonous tree doctrine. *See id.; Silverthorne v. Lumber Co. v. United States*, 251 US. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920). Evidence is not per se inadmissible "simply because it would not have come to light for the illegal actions of the police," but the evidence must be excluded from trial if "has been come at by exploitation of [the] illegality" and was not obtained "by means sufficiently distinguishable to be purged of the primary taint." *Wong Sun*, 371 U.S. 488, 83 S.Ct. 407 (Citation omitted.) Of course, it is the state's burden to show that the evidence sought to be suppressed was procured by appropriate means. To carry this burden, the State must show "an unequivocal break in the chain of illegality sufficient to

dissipate the taint of prior official illegal action" by clear and convincing evidence. *Norman v. State*, 379 So. 2d 643, 647 (Fla. 1980). When the defendant seeks to suppress statements, the mere fact that the defendant's statements were voluntary is insufficient, in itself, to meet this burden. *See Oregon v. Elstad*, 470 U.S. 298, 306, 105 S.Ct. 1285, 84 L. Ed. 2d 222 (1980) (stating that where a Fourth Amendment violation taints a confession, the State must meet the threshold requirement of showing that the confession was voluntary and then "show a sufficient break in the events to undermine the inference that the confession was caused by" the violation).

A reasonably competent criminal defense attorney would have known to challenge Petitioner's South Carolina confession, thus Trial Counsel's failure to move to suppress Petitioner's inculpatory statements constitutes deficient performance under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

As confessions are considered one of the most powerful pieces of evidence the government can introduce against an accused, had Petitioner's confession been suppressed these is a substantial probability that the outcome of Petitioner's trial would have been

different. Petitioner contends that the State Court's resolution of this claim against him constitutes an unreasonable application of *Strickland*, clearly established federal law determined by this Court in 1984. At the very minimum the Eleventh Circuit Court of Appeals should have granted a Certificate of appealability because the issue is debatable by jurist of reason. *Miller-El v. Cockrell*, 537 U.S. 322, 327, 123 S. Ct. 1029, 154 L. Ed. 2d 931 (2003).

ISSUE TWO

Petitioner's Due Process Rights Were Violated When the Trial Court Allowed a Lay Witness to Interpret a Conversation Between Petitioner and Herself

When a district court denies federal habeas relief on a procedural ground, a Habeas Petitioner seeking a COA must make a clear demonstration that he suffered the substantial denial of a constitutional right. *Miller-El, supra. See also Buck v. Davis*, 580 U.S. 100, 137 S. Ct. 759, 773, 197 L. Ed. 2d 1 (2017).

Petitioner argued during a police interview, Ms. Halum placed a controlled phone call to him. (T.T. 902) Throughout portions of the controlled call, Ms. Halum and Petitioner spoke in Arabic. While the controlled call was played during the trial, the state repeatedly stopped the recording to question Ms. Halum about the portions in Arabic and

made Ms. Halum translate them for the jury in English. (T.T . 910-913) Petitioner objected based upon Ms. Halum's lack of qualifications to provide official interpretation of the conversation. The objection was sustained. (T.T. 916) A CD of the controlled call was entered into evidence, over defense objection, as State exhibit 107 and published for the jury. The jury had a copy of the controlled call transcripts, not considered as part of the evidence in the jury room during deliberations violating Petitioner's state and federal constitutional rights. (T.T. 1234, Lines 17-25) (T.T. 1244, Lines 23-25) (T.T. 1245, Lines 6-25).

Petitioner raised this issue on direct appeal. During the 2254 proceedings, the Respondent was of the contention that this issue is procedurally defaulted because the issue was one of state law and not federal. This, at best, is an extremely tenuous argument. Petitioner couched this issue in terms of equal protection and due process, which is in line with federal laws not just the laws of Florida. This issue is constitutional in nature in line with federal laws.

This issue should have been decided on the merits and is ripe for federal habeas review.

It has long been held that inadequacies in translation can result

in a denial of due process. *See generally Valladares v. United States*, 871 F.2d 1564, 1565066 (11th Cir. 1989); *United States v. Osuna*, 189 F.3d 1289 (10th Cir. 1999), and *United States v. Ahn*, 794 F.2d 469 (9th Cir. 1986). Allowing a lay witness to make an official translation before a jury has never been found to be an acceptable method proving the contents of a recording in this country.

This is an issue that a jurist of reason could debate and a COA is necessary. Allowing a lay witness to translate Arabic to English for jurors states a valid claim of denial of a constitutional right and would be debated and a Certificate of Appealability issue.

Also, the District Court failed to address Petitioner's claim that *Martinez v. Ryan*, 566 U.S. 1 (2012) provides for cause to excuse any procedural default. In *Martinez*, this court held that when a litigant proceeds pro se, they have cause to excuse a procedural default, when he or she presents a substantial claim in a §2254 proceeding. As Petitioner's claim is based on inadequacies of translation, which amounts to an affirmative denial of due process, the claim is substantial and should be addressed on the merits.

At a minimum the Eleventh Circuit should have issued a

Certificate of Appealability so that the issue could have been considered on the merits, and the full implications on the denial of Petitioner's constitutional rights considered. *Miller-El, supra.*

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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Date: 9/13/23