No. 23-6957

ORIGINAL

FILED
FEB 12 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

Marcus Kelly– **PETITIONER**
(Your Name)

vs.

Ricky D. Dixon, Sec. Fla. Dept. of Corrections – **RESPONDENT(S)**

ON PETITION FOR A WRIT OF CERTIORARI TO

United States Court of Appeals for the Eleventh Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Marcus Kelly
(Your Name)

1599 SW 187th Avenue

Miami, Florida, 33194 – 2801

305-228-2000
(Phone Number) Warden

RECEIVED
MAR - 1 2024
OFFICE OF THE CLERK
SUPREME COURT, U.S.

RECEIVED
EVERGLADES C.I.
FEB 12 2024
STAFF INITIALS

QUESTION(S) PRESENTED

When a warrantless search of a vehicle is initiated, due to the odor of "burnt cannabis." Does dismantling the interior exceed the scope of the search?

LIST OF PARTIES

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

[X] 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:

Bauer, Sherwood Jr., Florida Circuit Court Judge;

Bondi, Pamela Jo. former Attorney General;

Boughner, Anette, Assistant Public Defender;

Calvello, Anthony, former Assistant Public Defender;

Cannon. Aileen M., United States Judge;

Ciklin, Corey J., Florida District Court Judge;

Conras, Cynthia, former Assistant Attorney General;

Damoorgian, Dorian K., Florida District Court Judge;

Forst, Alan O., Florida District Court Judge;

Greene, Steven T., Defense Attorney;

Haughwout, Carey, Public Defender;

Kelly, Marcus, Appellant;

Kuntz, Jeffrey, T., Florida District Court Judge;

Levin, Steven J., Florida Circuit Court Judge;

Litty, Diamond R., Public Defender;

Lustgarten, David Adam, Assistant State Attorney;

LIST OF PARTIES CONTINUED

May, Melanie G., Florida District Court Judge;

Metzger, Elizabeth A., Florida Circuit Court Judge;

Mirman, Lawrence M., Florida Circuit Court Judge;

Moody, Ashley, Attorney General;

Napodano, Luke R., Assistant Attorney General;

Reid, Lisette M., United States Magistrate Judge;

Roodhoof, Theodore, former Assistant State Attorney;

Taylor, Carole Y., former Florida District Court Judge;

Vasako, Matthew, Assistant Public Defender;

Ward, Jonathan, Co-Defendant;

Wilensky, Mark, Defense Counsel

TABLE OF CONTENTS

INDEX TO APPENDICES

TABLE OF AUTHORITIES CITED

CASES PAGE NUMBER

STATUTES AND RULES

OTHER: Constitutional Provisions

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

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

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

[X] reported at 2022 U.S. Dist. LEXIS 117934; 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 E to the petition and is

[X] reported at *Kelly v. State*, 224 So. 3d 235 (Fla. 4th DCA 2017); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the District Court of Appeal of the State of Florida 5th DCA appears at Appendix C to the 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 September 6, 2023.

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

[X] A timely petition rehearing was denied by the United States Court of Appeals on the following date: October 17, 2023, and a copy of the order denying rehearing appears at Appendix A.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including February 14, 2024 (date) on January 18, 2024 (date) in Application No. ___ A _____Appendix B.

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 Fourth District Court of Appeal, Florida. A copy of that decision appears at Appendix C.

[ ] A timely petition rehearing was thereafter denied 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. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment (4) Unreasonable Searches and Seizures

STATEMENT OF THE CASE

On February 3, 2014, Detective Croft and Deputy Dykes conducted a traffic stop on a black four-door Buick sedan, for allegedly committing two traffic moving violations, while on I-95 cutting across three lanes of traffic without signaling. Allegedly forcing several vehicles traveling behind it to brake heavily in order to avoid a collision. The vehicle then exited the highway and failed to stop at a stop sign before turning. No citations were ever issued.

Upon approaching the vehicle, when Deputy Dykes made contact with the driver co-defendant Jonathan Ward, Deputy Dykes testified that he detected the odor of "burnt cannabis" emitting from the interior of he vehicle. Deputy Dykes advised Mr. Ward of the odor, Mr. Ward explained that the vehicle was not his and stated that he was unaware of any odor of cannabis, nor has smoked any cannabis in the vehicle.

Base on this alleged odor of burnt cannabis, Deputy Dykes and Detective Croft had Mr. Ward and co-defendant Appellant Mr. Kelly exit the vehicle. Both were searched for weapons. After finding only cell phones on both men, Detective Croft stood at the rear of the vehicle with both occupants.

And Deputy Dykes and K-9 officer Deputy Peterson searched the

vehicle, without the assistance of his K-9.

Ultimately, neither officer discovered any narcotics in the front interior of the vehicle. As Deputy Peterson searched the back of the passenger compartment, nothing could be seen in plain view. Deputy Peterson then testified that he popped the rear back seat up of the vehicle without the use of tools. Deputy Peterson testified that he had no difficulty in completing this task, nor was noticeable damage sustained to the interior of the vehicle.

On cross examination Deputy Peterson was impeached by Attorney Vasko for stating this testimony as to he only popped out the rear back seat causing no damage to the interior of the vehicle. This testimony contradicted the testimony the officer had given during depositions where he stated that he in fact "pried" the rear back seat out. Noticeable damage was caused as a result of his actions. (Appendix "F" pg. 61-69).

After forcefully prying out the rear back seat, Deputy Peterson discovered concealed around the vehicle's battery two bags containing 31 ounces of cocaine.

Both occupants were arrested, and charged by Amended Information with trafficking cocaine (400 grams or more). Prior to trial, Appellant filed a Motion to Suppress the Evidence, arguing that the warrantless search of

the entire vehicle exceeded the scope of what was reasonable because probable cause was based on nothing more than residual smell of burnt marijuana, which constituted probable cause to search the vehicle.

The trial Court concluded the stench of the vehicle was supported by probable cause and denied the Motion to Suppress. On July 6, 2015, Petitioner entered an open plea of no contest for both charges, while retaining the right to appeal the denial of the Motion to Suppress. Petitioner thereafter moved to withdraw his plea, which the Court denied. Petitioner was adjudicated and sentenced to serve 25 years in prison with a 15 year mandatory minimum term. Petitioner appealed the denials of the Motion to Suppress and Motion to Withdraw Plea. The Fourth District Court of Appeal affirmed, without written opinion. See *Kelly v. State*, 224 So. 3d 235 (Fla. 4th DCA 2017). After unsuccessful collateral attacks on the judgment at the State level, Petitioner filed his § 2254 Petition in the Federal District Court. The Petition raised five substantive grounds for relief:

Claim One: The trial Court erred in denying Petitioner's Motion to Withdraw his no contest plea resulting in the denial of his right to a jury trial;

Claim Two: The trial Court erred in denying Petitioner's Motion to Suppress Physical Evidence because the search of his vehicle exceeded the permissible scope;

Claim Three: Petitioner's counsel provided ineffective assistance by failing to argue the case. *U.S. v. Ross*, 456 U.S. 798 (1982), on appeal as opposing the denial of his Motion to Suppress Evidence;

Claim Four: Trial counsel displayed deficient performance by failing to investigate and file a Motion to Suppress potential evidentiary tampering. As a consequence, the State Court's denial of Petitioner's Rule 3.800(a) is based on an unreasonable determination of the facts;

Claim Five: Trial counsel provided ineffective assistance by failing to challenge statements made by the prosecutor at sentencing.

Petitioner thereafter amended the Petition to add the following two claims:

Claim Six A: Petitioner's plea was involuntary due to the ineffective assistance of defense counsel and State Court coercion;

Claim Six B: Plea counsel was ineffective for failing to move to dismiss the trafficking charges.

The Appellee filed its Response to the Petition on May 10, 2021. Appellant submitted a Reply to the Response on August 18, 2021.

On June 10, 2022, the Magistrate issued a Report and Recommendation. With respect to Claim Two, the Magistrate determined the State Court's decision to deny the Motion to Suppress was reasonable

and aligned with Federal law in *United States v. Ross,* 456 U.S. 798 (1982) and *Florida v. Jimeno*, 500 U.S. 248 (1991).

Appellant argued the smell of burnt (as opposed to raw) marijuana would justify only the search of the vehicle's ashtray or the passenger's compartment and therefore law enforcement should have limited the scope of the search to those common areas. Rejecting this argument, the Magistrate concluded that the totality of the circumstances provided law enforcement with sufficient probable cause to search the entirety of the vehicle for narcotics because the area beneath the back seat could have contained evidence of the use of marijuana.

On July 5, 202, the District Court issued its Order accepting and adopting the Magistrate's Report and Recommendations and entered final judgment in favor of the Appellee.

On December 29, 2022, Petitioner filed a application for a Certificate of Appealability with the District Eleventh Circuit Court.

On September 6, 2023, Petitioner's application for a Certificate of Appealability was denied.

On September 26, 2023, Petitioner filed a Motion for Reconsideration.

On October 17, 2023, the Eleventh Circuit issued a denial for Reconsideration.

REASONS FOR GRANTING THE PETITION

The extreme importance of considering acceptance for review by this Honorable High Court. Is the existence of a conflict between the decision of which review is sought and a decision of another Appellate Court on the same issue. It has been held the important function of the Supreme Court is to resolve disagreement among lower Courts about specific legal questions.

The conflict among the Federal Circuits, defining the mandated holding established by the United States Supreme Court in *U.S. v. Ross*, 456 U.S. 798, 72 L. Ed 572, 102 S. Ct. 2157, delivered by the Honorable Justice Stevens, addressing to the Nation, the scope of a warrantless search of an automobile.

The reasoning in *Ross* was carefully explained by Justice Stevens, reflecting on the legal analysis viewed by the United States Supreme Court in *Carrol v. United States*, 267 U.S. 132, 69 L. Ed. 543, 45 S. Ct. 280.

It was stated:

> "The whisky that the prohibition agents seized was not in plain view. It was discovered only after an officer opened the rumble seat and tore open the upholstery of the lazyback. The Court did not find the scope of the search unreasonable." "The scope of the search was no greater than a Magistrate could have authorized by issuing a warrant [based on the probable cause that justified the search.] Since such a warrant could have

> authorized the agents to open the rear portion of the roadster and rip the upholstery in their search for concealed whisky, the search was constitutionally permissible." "As we have stated, the decision in *Carrol* was based on the Court's appraisal of practical considerations viewed in the perspective of history."

In the shadow of the above quoted, the Honorable Justice Stevens then delivers the opinion of the High Court in *Ross*. "The scope of a warrantless search based on probable is no narrower – and no broader – than the scope of search authorized by a warrant supported by probable cause. Only prior approval of the magistrate is waived, the search otherwise is as the Magistrate could authorize. The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, it is defined by the [object] of the search and the places in which there is [probable cause] to believe that it may be found."

The Honorable Justice Stevens did not wish to stop and leave any ambiguous understanding by the Nation, Courts or Officers as to the authority and meaning which was stated. Giving the fact and wisdom of knowledge, knowing that every search of an automobile would stand on its own unique individual facts constituting the probable cause that authorizes it. Thus, establishing the legal scope of the constitutional limits.

He goes on to address to the Nation "Just as probable cause to

believe that a stolen lawnmower maybe found in a garage will not support a warrant to search an upstairs bedroom, probable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab."

The conflict between Federal Courts is embodied in the above quote. The main focus and national importance needed for this Honorable High Court to address this conflict is of great importance, if the American people's constitutional rights are to be lawfully protected. The ruling in *United States v. Ross* directly effects every citizen in our country. Conflicts and ambiguous understand as to the legal constitutional scope reasonable under the 4th Amendment is not only frustrating in the judicial process, but also leaves a dangerous potential opening for the American people and citizens, constitutional rights to be violated, with no guidance. There is no one other than this Honorable High Court. The United States Supreme Court, of the United States of America. That can address and clarify with precision, giving unity and guidance for the Nation and all Courts.

The legal interpretation of the meaning:

"The scope of a warrantless search is defined by the object of the

search, and the places in which there is probable cause to believe that it may be found."

Being that the probable causes controls the searches permitted area scope. We have officers and Courts misapplying the mandate handed down by the High Court. The focus point of "the object of the search" and "probable cause to believe where it may be found." Is a commonsense distinction and legal approach. Not an all access exploratory pass to violate the protection afforded to every United States citizen under the 4th Amendment of the United States Constitution.

The Tenth Circuit in using this commonsense distinction and legal approach is in conflict with other Circuits. And has distinguished between the smell of "burnt cannabis" as opposed to "raw cannabis" on the imperative that the scope of a warrantless search "is defined by the object of the search and the places in which there is probable cause to believe that it may be found." *Ross*, 456 U.S. at 824.

The 10th Circuit recognized the smell of "burnt marijuana" (as opposed to raw cannabis) in the passenger compartment of a vehicle is indicative of personal use – not trafficking. *United States v. Downs*, 151 F. 3d 1301, 1303 (10th Cir. 1998). Since the "object of the search" would be a personal amount of marijuana, the reasonable scope of such a search may include

the ashtray, center console, glove box, etc. See e.g. *United States v. Nielson*, 9 F. 3d 1487, 1491 (10th Cir. 1993).

Other Supreme Judicial Courts in the United States have also grasped and acknowledged such a commonsense distinction and legal approach as to the scope of the search is defined by the express object of the search.

Commonwealth v. Garden, 451 Mass. 43, 833 N.E. 2d 905 (2008). Massachusetts Supreme Judicial Court held that: "The search of the trunk...exceeded the permissible scope of the search because [the officer] could not reasonably have believed that the source of the smell of burnt marijuana would be found in the trunk. *Id.* at 51, 883 N.E. 2d 905.

The Court continued:

> "There is no question that in may cases involving searches of automobiles, probable cause to search extends to very area within the vehicle, including the trunk. The facts of this case, however, requires a different conclusion, because the odor detected by the office was not the odor of raw marijuana, which might reasonably suggest the defendant was engaged in selling or transporting the drug, but, rather the odor of burnt marijuana, suggesting that the defendant, or others in the car, had been smoking marijuana in the not to distant past. *Id.* at 52,883, N.E. 2d 905.

In the instant case, as well as other numerous American citizens. The 11th Circuit among others basis that the smell of burnt marijuana gives law enforcement probable cause to search the entirety of the vehicle, without

limitation. The Court supported the District Court denial of the Appellant's § 2254 petition, which was determined based on the conclusion it was supported by the statement in *Ross*, that if a warrantless search of vehicle is supported by probable cause "it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross*, 456 U.S. at 825. The Court agreed with the State Court that "There is no reason to believe that any marijuana would be found only in the front compartment of the vehicle. "Burnt" marijuana can be stored, or hidden, in any part of the vehicle's interior, including under or behind the seats."

In reaching this conclusion, the Courts applied not only an overly expansive reading of *Ross*, but also failed to grasp the illustration given by the Supreme Court.

For example: "Probable cause to believe that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." *Id.* See also *California v. Acovedo*, 500 U.S. 565, 580 (1991)(Observing that where police had probable cause to believe the paper bag in the vehicle's trunk contained marijuana, "a search of the entire vehicle would have been without probable cause and unreasonable under the 4th Amendment.")

It is of great importance, for the American peoples Constitution rights, to be closely protected from such unreasonable actions produced by this conflict among Circuits, and legal view of law.

There is a constitutional scope, before a lawful search, thus becomes unreasonable in light of the 4th Amendment. Just as the 10th Circuit has acknowledged there is a commonsense distinction between "burnt and raw" cannabis. Is the odor of either probable cause to search, yes, but the scope of the search is different. Should you need to disassemble a vehicle's interior in search for the source of burnt cannabis, no. On the other hand, "raw cannabis" which indicated a large quantity and trafficking the drug will. "The scope is defined by the express object."

Bringing to the attention of this High Honorable Court, this is not a vehicle search based on a K-9 alert. Viewing the historical facts out of a nut shell, and examine things collectively as a totality. This Honorable Court can see how without guidance the holding in *Ross* over the years, by some is being abused, misapplied and mocked. Beyond the main focus of this petition of being a conflict among Circuits.

Ross does not permit a search without limitations. As in the instant case, the offices allegedly smelled the odor of "burnt cannabis" upon approaching the vehicle. The search was then based on the odor. In other

words, they believed the occupants are smoking or have consumed marijuana.

A search of the vehicle for this "burnt cannabis" was then conducted. Strangely, Deputy Dykes during deposition (AP-E) (Pg. 12, line 13-17) clearly testified when asked:

> Q: "Did either one of them appear to be impaired by marijuana?"
> A: "No, sir."
>
> Q: "Impaired by anything?"
> A: "No, sir."

Then affirms this once again during Court on June 2, 2015 (AP-"F")(Pg. 51, lines 7-14):

> Q: "Uh, did you believe them to be under the influence?"
> A: "no, I did not."
>
> Q: "Did you – they didn't appear to be under the influence of marijuana or any other substance?"
> A: "No, no neither the driver nor the passenger."

Officer Dykes also himself acknowledged this distinction and difference between the smell of "burnt cannabis" verses "raw cannabis." And what it means as far as your ability to search. (AP-F ")(Pg. 50-51, lines 12-25). But K-9 Officer Peterson, who arrived after the stop at a much later time. After a search had already been conducted. Despite testimony stating differently. (AP-I and 'J') will show the Court, Officer Peterson K-9 report

reflects the true actions of his arrival, and what vehicle he then searched. Deploying K-9 Sampson. CAD call history shows when contact was made and occupants of the vehicle checked, which is at a much later time, Officer Peterson then, conducts a consecutive search of the 4 door black Buick, without the use of K-9 Sampson, or being informed of why the vehicle was being searched, nor was he asked to assist searching other places that had already been searched. (A-P "K"). After not discovering anything in plain view within the passenger compartment, nor ashtray, center console, glove box, etc., commenced to "pry" apart the rear passenger seat of the vehicle. This is the compartment of the automobile that yes, is located within the passenger compartment. But is the primary housing for the vehicle's electronic components and battery. Not a place of storage. Which is supported by the use of force that the Officer Peterson had to use to "pry" the seat out to gain access.

Dismantling the vehicle's interior is beyond reasonable under the 4th Amendment, and beyond the scope of the search, which in the authority of *Ross*, is defined by express object. No officer could have reasonably believed that the source of the smell of the "burnt cannabis," would be found or located under the rear seat in the electrical compartment of the vehicle. Which required "prying" and forcing it to be removed to gain access.

Had this been an alert by say K-9 Sampson which was there to be utilized, and had gave probable cause to believe something was concealed beyond the scope of the search that was being conducted, then this case would stand on a total different set of facts, or as the 10th Circuit has displayed and distinguished. Been a smell of "raw marijuana," which indicate large sums for transportation of the drug. Guidance is needed to clarify this conflict of law.

It is beyond compelling the national importance of having the Supreme Court decide the conflict involved. The importance of this case is not only the matters at hand, but to others similarly situated, faced with warrantless searches of their vehicles on the highways traveling throughout the United States.

The holding in *United States v. Ross*, 456 U.S. 798, 72 L. Ed. 572, 102 S. Ct. 2157 is the law and guidelines for the Courts, officers and citizens of our country. There should not exist any disagreements of conflict or ambiguity as to its ruling. And the proper scope reasonable under the 4th Amendment. The Petitioner understands the great importance of this Honorable High Court, and the fact that there is not much time allowed to hear every petition that is presented, but if the power and authority is going to be entrusted to the agents and officers of this country, to decide and

make probable cause determinations, authorizing warrantless searches of vehicles. Holding the equivalent authorization that would be gained having to go before a Magistrate. The protection of the American peoples constitutional rights have to be guarded. The Justices wisdom and guidance is needed. I respectfully submit this request, and greatly appreciate your time. I pray this Petition for Writ of Certiorari will be granted.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Marcus Kelly, *pro se*
DC# L04838
Everglades Correctional Institution
1599 SW 187th Ave.
Miami, Fl. 33194–2801

Date: 2/12/24

RECEIVED
EVERGLADES C.I.
FEB 12 2024
STAFF INITIALS