No.

In the Supreme Court of the United States

LORENZO GOLPHIN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Police officers often canvass high crime neighborhoods, randomly stopping pedestrians – without any suspicion of criminal activity – in order to conduct "field interviews." The police officer typically initiates contact with a pedestrian and asks to see the pedestrian's identification, such as a driver's license. When the pedestrian complies, the officer does not examine and then promptly return the identification, but rather maintains possession of it for the purpose of running a warrants check, a process that often can take as long as fifteen minutes. If the officer discovers an outstanding warrant, the officer arrests the pedestrian and conducts a search of his or her person. The facts of this case conform precisely to this pattern.

This commonly employed investigatory technique generates two related questions of Fourth Amendment law that have deeply divided the more than one dozen state courts of last resort and federal courts of appeals that have addressed them:

1. Whether a pedestrian is seized within the meaning of the Fourth Amendment when a police officer maintains possession of his or her identification in order to conduct a warrants check.
2. Whether the officer's discovery of an outstanding warrant is an "intervening circumstance[]" (*Brown v. Illinois*, 422 U.S. 590, 603-04 (1975)) that removes the taint of an illegal detention initiated for the purpose of discovering outstanding warrants and permits the introduction of evidence obtained in a search incident to an arrest on the outstanding warrant.

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The opinion of the Florida Supreme Court (App. *infra*, 1a-47a) is reported at 945 So.2d 1174. The opinion of the Florida Fifth District Court of Appeal (App., *infra*, 48a-52a) is reported at 838 So.2d 705. The trial court's order denying the motion to suppress (App., *infra*, 53a) is unreported.

JURISDICTION

The judgment of the Florida Supreme Court was entered on December 14, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The rights 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.

STATEMENT

This case presents two frequently-recurring questions regarding the application of the Fourth Amendment to an increasingly common police investigatory technique – questions that have provoked broad disagreement among state high courts and federal courts of appeals. Police officers frequently initiate encounters with pedestrians in high crime areas. Typically, the police officer requests and the pedestrian relinquishes his or her driver's license or other official identification. Rather than examining and then promptly returning the identification – an item indispensable to myriad transactions in everyday life – the police officer retains the identification to use it to ascertain whether there are outstanding arrest warrants for the individual. The warrants check, which requires the officer either to make a request via radio or to

use his or her squad car computer, typically takes anywhere between a couple and fifteen minutes. If the officer discovers an outstanding warrant, the officer arrests the pedestrian and conducts a search of his person.

The facts of this case faithfully replicate this common scenario. The Florida Supreme Court's decision addresses two related issues. First, joining three state high courts or federal courts of appeals, and rejecting the view of seven others, the court below held that retention of identification to run a warrants check does not effect a seizure. Second, joining seven state high courts or federal courts of appeals, and rejecting the view of three others, the court below held that the discovery of an outstanding warrant is an intervening circumstance that dissipates the taint of an illegal detention for the purpose of a warrants check, and allows the introduction of evidence obtained during a search incident to an arrest on the outstanding warrant. Review by this Court of these issues that have divided the lower courts is plainly warranted.

A. Background

Lorenzo Golphin stepped outside his apartment one evening to smoke a cigarette before going to bed. While he was standing outside his apartment, chatting with a few other men, two uniformed Daytona Beach police officers, Maria Deschamps and Lindsey Doemer, approached him and began asking questions. App., *infra*, 2a. The officers did not suspect Mr. Golphin or any of his companions of criminal activity; they were conducting random "field interviews" throughout the neighborhood. *Ibid.* A few minutes after the officers began questioning Mr. Golphin, a third officer in a K9 unit joined them. *Ibid.*

Officer Doemer asked for Mr. Golphin's identification, and Mr. Golphin complied. Rather than simply confirming Golphin's name and address and returning his identification, Officer Doemer maintained possession of Mr. Golphin's ID while running a warrants check. App., *infra*, 2a. Mr. Golphin's identification was never returned to him.

A few minutes later, the dispatcher reported that there was an open warrant for Mr. Golphin, and Officer Doemer arrested him. App., *infra*, 2a. The male officer affiliated with the K9 unit performed a search, which revealed unlawful drugs and paraphernalia in Mr. Golphin's possession. *Ibid.*

B. Proceedings Below

1. Mr. Golphin was charged with possession of a controlled substance. He moved to suppress the evidence obtained in the search, arguing that he had been unlawfully seized when the officer retained his identification to conduct a warrants check.

The trial court denied the motion to suppress, holding that "the outstanding arrest warrant was discovered as a result of a 'consensual encounter.'" App., *infra*, 48a (quoting *State* v. *Golphin*, Case No. 01-36100 (7th Judicial Cir. Ct., Volusia County, Fla. May 31, 2002)). Following the denial of the motion, Mr. Golphin pleaded guilty to the charges against him, reserving his right to appeal.

The Fifth District Court of Appeal upheld the trial court's determination, concluding that a reasonable person in Mr. Golphin's position would have felt free to "withdraw his consent at any time by, for example, asking that his license be immediately returned." App., *infra*, 51a.

2. The Florida Supreme Court affirmed. It first addressed whether Mr. Golphin had been seized in violation of the Fourth Amendment. The court admitted that the "notion that a 'reasonable person' would feel free to end his encounter with the police and risk abandoning his identification is somewhat vulnerable to honest intellectual challenge and discourse" (App., *infra*, 24a), but nevertheless concluded that Mr. Golphin was free to disengage the police by "either request[ing] the return of the identification or simply end[ing] the encounter by walking into the apartment in which he was staying." *Id.* at 21a. Notwithstanding its recognition of the "growing disconnect between the evolution of the reasonable

person standard and the realities of modern society" (*id.* at 23a), the court concluded that Mr. Golphin's "constitutional safeguards were not implicated when Officer Doemer utilized the identification that Golphin voluntarily provided to check for outstanding warrants." *Id.* at 25a.[1]

The court went on to hold that "even if the encounter had constituted a seizure, suppression of the evidence discovered during the search of Golphin would not have been required." App., *infra*, 25a. The court reasoned that when an officer discovers a warrant, the causal link between the unconstitutional seizure and the discovery of the evidence is broken, because any subsequent search is "'incident to the outstanding warrant and not incident to the illegal stop.'" *Id.* at 27a (quoting *State* v. *Frierson*, 926 So.2d 1139, 1144-45 (Fla. 2006)). In the court's view, the discovery of an arrest warrant serves as an "'intervening circumstance'" that "'purge[s]'" any seized evidence of the "'"primary taint" of the illegal stop'" (*id.* at 27a (quoting *Frierson*, 926 So.2d at 1144)), even when the purpose of the initial illegality was to discover the outstanding warrant.[2]

Justice Pariente, joined by Justices Anstead and Quince, concurred in the result only. They concluded that "retaining an individual's identification for a warrants check transforms a street encounter into a detention." App., *infra*, 40a (concur-

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[1] The court below noted that Mr. Golphin "made a statement that he might have an open warrant" (App., *infra*, at 2a), but expressly declined to rely on that fact in determining that Mr. Golphin was not seized. Indeed, because that statement was made only *after* Officer Doemer had retained Mr. Golphin's identification and initiated the warrants check, the statement could not retroactively authorize any seizure of Mr. Golphin that occurred as a consequence of the officer's retention of the identification for purposes of conducting a warrants check.

2 Justice Cantero concurred (App. *infra*, 30a-35a), agreeing with the court's rationale but arguing in addition that the seizure issue was controlled by a prior decision of the Florida Supreme Court.

ring opinion). Observing that "government-issued identification [is a necessity] to navigate contemporary American life," the disserting justices disagreed with the majority's "suggestion that [a reasonable person would] feel[] free to simply walk away from a police officer who has the person's identification and is attempting to ascertain if grounds exist to arrest the person for past conduct" as "a fiction divorced from the realities of everyday life." *Id.* at 38a, 44a. These Justices concurred in the result because they viewed themselves to be bound by Florida Supreme Court precedent holding that discovery of a warrant is an "intervening circumstance" that attenuates the illegality of a seizure effected to enable a warrants check. See *id.* at 35a n.14.

REASONS FOR GRANTING THE PETITION

This case squarely presents two frequently-recurring questions of Fourth Amendment law with respect to the widespread police practice of retaining individuals' official identification in order to conduct a check for outstanding warrants. The first is whether the suspicionless retention of identification for purposes of conducting a warrants check effects a seizure under the Fourth Amendment. In direct conflict with seven state high courts and federal courts of appeals, but in agreement with three other such courts, the Florida Supreme Court ruled that it does not.

The second question is whether the discovery of a warrant is sufficiently distinct from the unconstitutional detention effected for the very purpose of discovering the warrant, so that evidence seized in a search incident to arrest is admissible notwithstanding the unconstitutional detention. In direct conflict with three state high courts and federal courts of appeals, but in agreement with seven other courts, the court below held that the discovery of a warrant during the course of such an unconstitutional detention is an "intervening circumstance" that purges the evidence seized of the taint of the illegal stop.

These two deep divisions among the lower courts are producing intolerable conflicting outcomes. Today, the answer to the question whether States may utilize at trial the evidence resulting from suspicionless retentions of official identification is "it depends" – it depends on the State in which the investigatory technique is used, on the forum in which a case is ultimately prosecuted, and in some cases even on the side of the street on which the defendant was arrested.

For the benefit of police officers who must conform their conduct to constitutional rules, of the courts that must administer those rules, and of citizens whose liberty is protected by them, this Court should grant review in order to clarify this frequently recurring constitutional issue.

I. THE FLORIDA SUPREME COURT'S DECISION DEEPENS CLEAR CONFLICTS AMONG STATE HIGH COURTS AND FEDERAL COURTS OF APPEALS REGARDING TWO RELATED QUESTIONS OF FOURTH AMENDMENT LAW.

The decision below exacerbates exceptionally deep and irreconcilable divisions among both state high courts and federal appellate courts on the two questions presented for review. Review by this Court is necessary to resolve these clear, well-established disagreements.

A. The Lower Courts Are Divided On Whether The Suspicionless Retention Of Identification To Conduct A Warrants Check Effects An Investigative Detention Of The Identification's Owner.

When police officers use their authority to limit an individual's freedom to go about his or her business, that individual has been seized within the meaning of the Fourth Amendment. *California* v. *Hodari D.*, 499 U.S. 621, 627-28 (1991) (citing *Michigan* v. *Chesternut*, 486 U.S. 567, 573 (1988); *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980)). For such seizures, or "investigative detention[s]," to

pass constitutional muster, the officer must have an articulable suspicion that a crime has been or is about to be committed. *Florida* v. *Royer*, 460 U.S. 491, 498 (1983) (citing *Terry* v. *Ohio*, 392 U.S. 1 (1968)).

Here, the Florida Supreme Court held that when a police officer retains a pedestrian's license to conduct a warrants check, no seizure occurs. Because Mr. Golphin could have "either requested the return of the identification or simply ended the encounter by walking into the apartment in which he was staying," Fourth Amendment safeguards "were not implicated" when Officer Doemer retained his identification to conduct the warrants check. See App., *infra*, 21a, 25a.

Two other state high courts and one federal court of appeals have reached the same conclusion. See *State* v. *Smith*, 683 N.W.2d 542, 547-48 (Iowa 2004) (no seizure when officer retained a passenger's license during a traffic stop, because "a reasonable person would have felt free to decline the deputy's request for his ID" and the defendant nevertheless "voluntarily complied with the deputy's request"; the defendant "allowed the deputy to check for outstanding warrants"); *United States* v. *Weaver*, 282 F.3d 302, 312-13 (4th Cir. 2002), *cert. denied*, 537 U.S. 847 (2002) (no detention based on retention of the defendant's license because the defendant "was free * * * to request that his license be returned to him so that he could end the encounter. For whatever reason, [the defendant] chose not to do this. Instead, [the defendant] chose to stay and have a dialogue with" the police); *McCain* v. *Commonwealth*, 545 S.E.2d 541, 545 (Va. 2001) (ruling that "the Court of Appeals erred in concluding that Officer Thomas effected a seizure of [the defendant] when he requested identification from [the defendant] and conducted a check for outstanding warrants").

Seven state courts of last resort and federal appellate courts have reached the opposite conclusion, holding that an officer's retention of identification to conduct a warrants check *does* effect a seizure of the individual. See *United*

States v. *Lopez*, 443 F.3d 1280 (10th Cir. 2006); *State* v. *Markland*, 112 P.3d 507 (Utah 2005); *State* v. *Page*, 103 P.3d 454 (Idaho 2004); *United States* v. *Johnson*, 326 F.3d 1018 (8th Cir. 2003); *People* v. *Jackson*, 39 P.3d 1174 (Colo. 2002); *State* v. *Daniel*, 12 S.W.3d 420 (Tenn. 2000); *State* v. *Holmes*, 569 N.W.2d 181 (Minn. 1997).

In *State* v. *Daniel*, *supra*, for example, a police officer observed a group of four men in a parking lot and approached them. The officer asked the men to provide identification, and they complied. Rather than simply verifying the men's identities and then returning the identification, the officer retained possession of the licenses in order to run a computer check for outstanding warrants. The Tennessee Supreme Court held that

> when an officer retains a person's identification for the purpose of running a computer check for outstanding warrants, no reasonable person would believe that he or she could simply terminate the encounter by asking the officer to return the identification. Accordingly, we hold that a seizure within the meaning of the Fourth Amendment [took place] when Officer Wright retained [the defendant's] identification to run a computer warrants check.

12 S.W.3d at 427. The Tennessee court recently explained that "asking to see [someone's] identification d[oes] not amount to a seizure. [A] consensual encounter bec[omes] a seizure, however, when the officer retain[s] the defendant's identification to run a warrants check." *State* v. *Nicholson*, 188 S.W.3d 649, 657 (Tenn. 2006) (citing *Daniel*).

In *People* v. *Jackson*, *supra*, the Colorado Supreme Court also reached a result that conflicts with the decision of the Florida Supreme Court here. The police officer in *Jackson* retained a passenger's identification during a traffic stop. Rather than examining the license and then returning it, the police officer maintained possession of the license while running a warrants check. The court reasoned that

> [t]he need for identification is pervasive in today's society, and a reasonable person would not consider abandoning his identification a practical option. Thus, even though Defendant's identification was not technically or legally required to leave the scene, as a practical matter, a reasonable person in his position would not have felt free to leave without it.

39 P.3d at 1189.

The Florida court's decision is also at odds with the Idaho Supreme Court's holding in *State* v. *Page*, *supra*. In that case, a police officer observed the defendant walking in a roadway in the early morning. The officer stopped his car, stepped out, and approached the defendant. The officer asked for and received the defendant's identification. Rather than examining and returning the defendant's license, the officer retained it while he radioed for a warrants check. The court ruled that the "request for the license," retention of the license, "and action in running it through dispatch" amounted to a seizure. In other words, "a limited detention does occur when an officer retains a driver's license or other paperwork of value." 103 P.3d at 457.

Likewise in conflict with the Florida Supreme Court (and with the decisions of the Fourth Circuit and the Iowa and Virginia high courts), the Utah Supreme Court has ruled that retention of identification amounts to an investigatory detention. In *State* v. *Markland*, *supra*, a police officer observed the defendant walking alone early in the morning. The officer engaged him in a conversation and asked for identification, which the defendant voluntarily produced. As in the other cases, the officer maintained possession of the identification and used it to conduct a warrants check by radio. The court assumed without discussion that "the police officer [had] detained [the defendant] in order to run a five-minute warrants check." 112 P.3d at 508.

In *State* v. *Holmes*, *supra*, the Minnesota Supreme Court also concluded, again contrary to the decision of Florida Su-

preme Court in this case, that retention of identification amounts to a seizure. There, a police officer arrived on the scene of a parking dispute and requested identification from the defendant. The defendant handed the officer his university-issued ID card. The officer did not examine and return the card, but maintained possession of it. The court held that "[i]t is undisputed that the officer in the case at bar made * * * an investigative stop of Holmes when she asked for, received and then retained possession of Holmes' University of Minnesota identification card." 569 N.W.2d at 185. The Minnesota Court of Appeals more recently clarified that when a police officer retains possession of an individual's identification, "the test is not whether [the defendant] would have been allowed to leave, but whether a reasonable person would believe they were free to leave." *State* v. *Johnson*, 645 N.W.2d 505, 509 (Minn. App. 2002). That court concluded that "given the need for identification to conduct everyday business, it is unrealistic in today's society that a reasonable person would leave their identification behind." *Ibid.*[3]

The opinion below also conflicts with the holdings of at least two federal courts of appeals. In *United States.* v. *Johnson*, *supra*, three police officers approached the defendant, who was yelling at his girlfriend on the lawn in front of their apartment building. One of the officers asked him for identification, which the defendant provided. As with the other cases, the officers retained his identification for several minutes in order to run a warrants check. The Eighth Circuit held that "a reasonable person would not believe that he was free

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[3] An unreviewed decision of the Appellate Court of Illinois is also in direct conflict with the Florida Supreme Court's decision below. See *People* v. *Mitchell*, 824 N.E.2d 642 (Ill. App. Ct. 2005), *appeal denied*, 833 N.E.2d 7 (Ill. 2005). Adopting the Tennessee Supreme Court's analysis in *Daniel*, the Appellate Court ruled that retention of the defendant's identification was a seizure because "[a] reasonable person simply would not leave his identification behind and go about his business." *Id.* at 647.

to leave a scene where three uniformed officers * * * took possession of his personal property—here, his driver's license—while conducting a brief interrogation." 326 F.3d at 1022.

The Tenth Circuit considered a similar scenario in *United States* v. *Lopez*, *supra*. A police officer observed the defendant and another man standing next to a car on the street. The officer approached the men and asked for and received identification. Rather than examining and then returning the identification, the officer retained possession in order to run a warrants check. The court ruled that "'the retention of [the defendant's] license was unjustified after the agents were able to verify his identity with it,'" and that the encounter "was not consensual at the time of the warrants check and, thus, [the defendant] was seized." 443 F.3d at 1286 (quoting *United States* v. *Lambert*, 46 F.3d 1064, 1069 n.3 (10th Cir. 1995) (characterizing retention of identification as a seizure)).

The disagreement among the eleven courts just discussed does not rest on differences in the facts before these courts or on differences in inferences from facts. The facts are remarkably consistent. The divergent results rest on the courts' differing legal determinations based on those facts: what a reasonable person would believe when an officer retains possession of his or her license. The courts sharply contrasting views on that question of law have created this deep and irreconcilable division of authority.

B. The Lower Courts Disagree On Whether The Discovery Of A Warrant Is An Intervening Circumstance That Removes The Taint Of An Illegal Detention Initiated For The Purpose Of Discovering That Warrant.

Most courts that have addressed whether a police officer's retention of a pedestrian's identification in order to conduct a warrants check amounts to a Fourth Amendment seizure also have addressed a second, related question:

whether any resulting discovery of a warrant is an "intervening circumstance" that removes any taint of illegality associated with the unlawful seizure, even though the seizure occurred for the very purpose of discovering any outstanding warrants. State high courts and federal courts of appeals are deeply divided on this issue as well.

This Court has long held that evidence may not be admitted against a defendant when the evidence has been obtained through unconstitutional means. See, *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471 (1963). Although "evidence is [not] 'fruit of the poisonous tree' simply because it would not have come to light *but for* the illegal actions of the police," evidence will be inadmissible if it "has been come at by exploitation of that illegality." *Hudson* v. *Michigan*, 126 S.Ct. 2159, 2164 (2006) (emphasis in original; quoting *Wong Sun*, 371 U.S. at 487-88). Evidence is not considered an exploitation of an illegality if the connection between the illegality and the seizure of the evidence "'become[s] so attenuated as to dissipate the taint.'" *Brown* v. *Illinois*, 422 U.S. 590, 608 (1975) (quoting *Wong Sun*, 371 U.S. at 491).

The Florida Supreme Court held that even if Officer Doemer's retention of Mr. Golphin's identification for the purpose of running a warrants check effected an unconstitutional seizure, "'the outstanding arrest warrant was an intervening circumstance'" that was "'sufficiently distinguishable from the illegal stop'" to "'purge[the evidence seized] of the "primary taint" of the illegal stop.'" App., *infra*, 27a (quoting *Frierson*, 926 So.2d at 1144-45).

The Florida court's holding that the evidence seized from Mr. Golphin was admissible notwithstanding a constitutional violation squarely conflicts with the holdings of at least three other state high courts and federal appellate courts. In *Daniel*, for instance, after ruling that the defendant was seized in violation of the Fourth Amendment, the Tennessee Supreme Court concluded that because "the officer lacked the reasonable suspicion required to justify a seizure * * * the drugs

found in [the defendant's] pocket [after discovery of the arrest warrant] must be suppressed as tainted 'fruit of a poisonous tree.'" 12 S.W.3d at 422 n.2 (quoting *Wong Sun*, 371 U.S. at 488). In *Lopez*, the Tenth Circuit likewise affirmed the district court's order granting the defendant's motion to suppress notwithstanding discovery of the arrest warrant because the seizure of evidence had been an exploitation of the unconstitutional detention. *Lopez*, 443 F.3d at 1286.

Similarly, in *Sikes* v. *State*, 448 S.E.2d 560 (S.C. 1994), the Supreme Court of South Carolina found that police officers had illegally detained the passenger of a vehicle when they retained possession of his license to run a warrants check and placed him in the back seat of the officers' patrol car. The officers discovered an outstanding forgery warrant for the defendant and arrested him. They then conducted a search and discovered drugs. The court ruled that because the detention that led to the discovery of the warrant had been unlawful, "the evidence of the Petitioner's possession of crack cocaine [was] inadmissible as fruit of the poisonous tree" notwithstanding the discovery of the unrelated warrant. *Id.* at 563.[4]

Two other state high courts reached the opposite result on the same facts as in this case, agreeing with the Florida Su-

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[4] Two intermediate state appellate court decisions also conflict with the Florida court's opinion below. On facts essentially identical to those in this case, the New Mexico Court of Appeal concluded that "[t]he unlawful detention tainted the evidence obtained from the patdown search [conducted pursuant to arrest] and that evidence should have been suppressed." *State* v. *Affsprung*, 87 P.3d 1088, 1095 (N.M. App. 2004), *cert. denied*, 88 P.3d 262 (N.M. 2004). In *Mitchell*, the Appellate Court of Illinois likewise held that because the officer had illegally detained the defendant by retaining his license to run the warrants check, the discovery of the warrant and the ensuing search subsequent to arrest were exploitations of the initial illegality. It affirmed the trial court's order suppressing the evidence. *Mitchell*, 824 N.E.2d at 650.

preme Court that the discovery of an arrest warrant dissipates the taint of an unlawful seizure effected for the purpose of finding a warrant. In *Cox* v. *State*, No. 39-2006, 2007 WL 414336 (Md. Feb. 8, 2007), the Maryland Court of Appeals considered a fact pattern essentially identical to this case. Rather than ruling on the defendant's claim that he was seized in violation of the Fourth Amendment, the Maryland court concluded that the constitutional status of the encounter was irrelevant because "the discovery of the outstanding warrant and arrest pursuant thereto constituted an intervening circumstance that attenuated the taint of the arguably illegal stop." *Id* at *4 (citing *Myers* v. *State*, 909 A.2d 1048 (Md. 2006) (illegal traffic stop)). The Louisiana Supreme Court reached the same result on nearly identical facts. See *State* v. *Hill*, 725 So.2d 1282, 1286-87 (La.1998) (holding that "[t]he interim discovery of the existence of the two outstanding arrest warrants provided the sole basis for the defendant's arrest and constituted an intervening circumstance" that rendered the unconstitutionality of the initial detention irrelevant).

Five other state courts of last resort and federal courts of appeals have similarly concluded that the unconstitutionality of a seizure is cured by the "intervening circumstance" of the discovery of an outstanding arrest warrant, although in varying factual scenarios. See *Jacobs* v. *State*, 128 P.3d 1085, 1089 (Okla. Crim. App. 2006) (evidence seized during an unconstitutional traffic stop in which a police officer ran a warrants check on a passenger admissible because "discovery of outstanding warrants is a significant intervening event which gives police probable cause to arrest a defendant independent from an illegal stop and seizure"); *United States* v. *Simpson*, 439 F.3d 490, 496 (8th Cir. 2006) (evidence seized following discovery of a warrant during an illegal physical detention ruled admissible because "[the defendant's] outstanding arrest warrant constitutes an extraordinary intervening circumstance that purges much of the taint associated

with the officers' unconstitutional conduct"); *Page*, 103 P.3d at 459-60 (discovery of an outstanding warrant was an intervening circumstance that dissipated the taint of an illegal stop because the officer "had effectuated a lawful arrest" and "was clearly justified in conducting a search incident to that arrest for the purpose of officer or public safety or to prevent concealment or destruction of evidence"); *State* v. *Jones*, 17 P.3d 359, 360 (Kan. 2001) (unconstitutionality of detention to conduct a warrants check on a passenger was irrelevant because "once [the police officer] determined there was a warrant out for [the defendant's] arrest, [the police officer] had a right to arrest [the defendant], whether he had been lawfully or unlawfully detained at that point in time. Once [the police officer] had a right to lawfully arrest [the defendant] on the outstanding warrant, [the police officer] had a right to search him incident to the arrest"); *United States* v. *Green*, 111 F.3d 515, 527 (7th Cir. 1997) (evidence seized during an illegal detention in which a police officer ran a warrants check ruled admissible because the discovery of the arrest warrant was an "intervening circumstance[]" which "dissipate[d] any taint caused by the illegal stop").

Although these decisions did not involve situations in which the officer retained the defendant's identification to conduct a warrants check – but rather involved other sorts of unconstitutional detentions for the purpose of conducting a warrants check – the logic of their holdings with respect to the admissibility of evidence obtained in a search incident to an arrest on an outstanding warrant applies broadly to all illegal detentions. The court below, for example, based its intervening circumstance decision on its prior ruling in *Frierson*, a decision issued in respect to an illegal traffic stop. App., *infra*, 25a-29a (citing *Frierson*, 926 So.2d at 1144-45). See also *Cox*, 2007 WL 414336 (applying its intervening circumstance holding from *Myers*, an illegal traffic stop case, to *Cox*, a suspicionless identification retention case).

Granting review in this case, therefore, would not only permit this Court to resolve the division of authority on whether discovery of a warrant "attenuates" any illegality associated with suspicionless retention of identification to perform a warrants check. It also would enable the Court to clarify the significance generally of the discovery of a warrant during an unlawful seizure for the purpose of conducting a warrants check.

II. THIS CASE SQUARELY PRESENTS ISSUES OF CONSIDERABLE PRACTICAL IMPORTANCE.

The two interrelated questions presented in this case reflect deep disagreement about the constitutionality of an investigatory technique that is used frequently by police departments throughout the country. The lower court conflict described above therefore produces very substantial disparities and uncertainties in the administration of criminal justice. This Court should grant review to provide much-needed guidance to lower courts and police officers.

A. Suspicionless Retention of Official Identification To Conduct Warrants Checks Is A Widespread Police Practice.

The factual scenario presented in this case recurs with great frequency throughout the country. As Justice Pariente noted in her concurrence, police "view a warrants check as a routine feature of almost any citizen encounter." App., *infra*, 46a (citing *People* v. *Bouser*, 32 Cal.Rptr.2d 163, 164 (Cal. App. 1994) (describing a records check as standard procedure); see also *Mitchell*, 824 N.E.2d at 644 (noting that officer testified that "whenever he meets someone on the street, he runs a warrant check on that individual"); *Wilson* v. *State*, 874 P.2d 215, 222 (Wyo. 1994) (noting that officer testified that his department's policy is to conduct national and local warrants checks of everyone police "contact" late at night).

Courts frequently reference testimony by police officers acknowledging that officers routinely retain official identifi-

cation in order to conduct a warrants check. See, *e.g.*, *State* v. *Baez*, 894 So.2d 115, 116 (Fla. 2004) (policy during police-initiated encounters is to "ask for identification and take the identification to the police car to run a *routine* warrant check") (emphasis added)); *State* v. *Topanotes*, 76 P.3d 1159, 1160 (Utah 2003) (police testimony that obtaining identification during police-initiated encounters with pedestrians to "perform a warrants check" is "part of '*routine* procedure' or '*common* practice'") (emphasis added)); *Magee* v. *State*, 759 So.2d 464, 466 (Miss. App. 2000) (describing a "warrants check" as "routine" during police-initiated encounters with pedestrians); *Hill*, 725 So.2d at 1288 (Lemmon, J., concurring) (describing police policy to obtain "identification and [run a] check for outstanding warrants" during consensual police-pedestrian encounters as "*routine* police procedure[]")(emphasis added)).

The sheer frequency with which intermediate state appellate courts address this factual scenario confirms the commonplace nature of the technique. See, *e.g.*, *State* v. *Harper*, 105 P.3d 883, 892 (Or. App. 2005) ("[A]n officer's retention of a person's identification for investigatory purposes during questioning restrains the person from leaving and, therefore, constitutes a stop."); *Perko* v. *State*, 874 So.2d 666, 666-67 (Fla. App. 2004) (ruling that the defendant "had been effectively seized" when the "deputy [retained the defendant's identification and] conducted a warrant check"); *Hornberger* v. *Am. Broad. Cos.*, 799 A.2d 566, 587 (N.J. Super. 2002) (ruling that a request for identification from a passenger was unconstitutional, citing "the prophylactic purpose of discouraging the police from turning a routine traffic stop into a 'fishing expedition for criminal activity unrelated to the stop'"); *Piggott* v. *Commonwealth*, 537 S.E.2d 618, 619 (Va. App. 2000) ("By retaining [the defendant's] identification, Detective Langford implicitly commanded [the defendant] to stay. Thus, for Fourth Amendment purposes, [the defendant] was then 'seized' by Detective Langford.") (citations omit-

ted)); *Salt Lake City* v. *Ray*, 998 P.2d 274, 277 (Utah Ct. App. 2000) ("Our inquiry focuses first on whether [the defendant] was seized for purposes of the Fourth Amendment * * * at the time Officer Eldard requested her identification, and when he retained the identification, stepped aside, and conducted the warrant check that lasted approximately five minutes."); *People* v. *Cole*, 627 N.E.2d 1187, 1191 (Ill. App. 1994) (ruling that a "reasonable person would think the police were holding his identification card, not as a coercive measure, but merely as a convenience, fully intending to return it when the person's hands were free"); *State* v. *Crespo Aranguren*, 711 P.2d 1096, 1098 (Wash. App. 1985) ("When the officer retained the appellants' identification cards in order to determine the existence of any outstanding warrants, the encounter matured into an investigatory stop.").

B. The Conflicting Lower Court Decisions Regarding The Questions Presented Produce Arbitrary Differences In Judicial Decisions And Unacceptable Uncertainty For Policy Officers.

The pervasive uncertainty surrounding the questions presented in this case create unseemly and divergent outcomes within the nation's courts and intolerable confusion in the policing of the nation's streets. These inconsistencies warrant immediate resolution by this Court.

The practical result of the divergent views of the lower courts with respect to the questions presented is that Fourth Amendment protections today vary from State to State. Police in Tennessee, for instance, have since 2000 operated under the clear constitutional rule that they may not detain citizens by maintaining possession of their licenses in the absence of articulable suspicion of criminal activity. If this rule is violated, any evidence that the police find will be suppressed. In Virginia, by contrast, police officers have operated since 2001 under the rule that retaining a pedestrian's license to run a warrants check is not a detention, and such checks may be conducted at any time without suspicion.

The confusion surrounding the constitutionality of this police practice has also generated intra-state conflicts between state and federal courts. In Iowa, for instance, the applicable Fourth Amendment standard depends entirely on the forum in which the offense is prosecuted. Under *United States* v. *Johnson*, 326 F.3d 1018 (8th Cir. 2003), a *federal* court will conclude that the practice is unconstitutional; under *State* v. *Smith*, 683 N.W.2d 542, 547 (Iowa 2004) *state* courts will conclude that it is not. Because it is difficult to know in advance whether evidence that might be found incident to an arrest will lead to a federal or state prosecution, police officers in Iowa have no way to determine whether retaining official identification in order to conduct a warrants check is a permissible form of investigation.

A similar division has arisen in Minnesota. There, unlike Iowa, both state and federal courts will conclude that an illegal detention occurred. But if the officer conducts a search following discovery of an arrest warrant and finds evidence supporting an offense chargeable in either state or federal court, the evidence will be suppressed in state court under *State* v. *Holmes*, 569 N.W.2d 181 (Minn. 1997), and *State* v. *Johnson*, 645 N.W.2d 505, 509 (Minn. App. 2002). On the other hand, it will be admissible in federal court under the Eight Circuit's decision in *United States* v. *Simpson*, 439 F.3d 490 (8th Cir. 2006).

The disagreements regarding the questions presented in this case can even generate different results in cases that arise across the street from one another. Kansas City, for instance, straddles the border between the Eighth Circuit and the Tenth Circuit. As a result of the divergent results reached by these courts, the Fourth Amendment means one thing on the west side of the city and another thing on the east side. In fact, if a citizen were unconstitutionally detained on the *east* corner of Southwest Boulevard and West 31st Street, and an arrest warrant were discovered in his name, evidence subsequently seized in support of a federal crime would be admissible

against him at trial. If the very same citizen were standing just across the street on the *west* side of the same intersection, then the evidence against him would be suppressed.

This Court should not tolerate continued application of these conflicting legal standards with respect to an issue that recurs so frequently. The Fourth Amendment should apply similarly throughout the country. Review by this Court is necessary to achieve that uniformity.

C. This Case Is An Ideal Vehicle For Resolving The Questions Presented.

The decision below provides an ideal vehicle for this Court to resolve the uncertainty over the constitutionality of the practice of retaining official identification to conduct warrants checks. The officers in this case admittedly lacked reasonable, articulable suspicion of criminal activity when they retained possession of Mr. Golphin's identification for the admitted purpose of conducting a warrants check. The Florida Supreme Court clearly decided both of the issues that are involved in the pervasive conflict surrounding the constitutionality of this practice. The Court should take this opportunity to clarify its Fourth Amendment jurisprudence on this issue.

III. THE FOURTH AMENDMENT BARS INTRODUCTION OF THE EVIDENCE OBTAINED IN THE SEARCH OF MR. GOLPHIN.

The holdings of the court below with respect to both of the issues presented for review are sharply inconsistent with this Court's precedents.

A. Retention Of An Individual's Official Identification To Conduct A Warrants Check Effects A Seizure Of That Individual.

A police officer seizes a person within the meaning of the Fourth Amendment whenever "a reasonable person would [not] feel free 'to disregard the police and go about his business.'" *United States* v. *Drayton*, 536 U.S. 194, 201 (2002)

(quoting *Hodari D.*, 499 U.S. at 628). See also *Mendenhall*, 446 U.S. at 554 (plurality opinion) (holding that a seizure takes place when "a reasonable person would have believed that he was not free to leave"). Unless justified by articulable suspicion that criminal activity has occurred or is about to occur, such seizures violate the Fourth Amendment. *Terry*, 392 U.S. at 21-22.

The Florida Supreme Court held that Officer Doemer's retention of Mr. Golphin's official identification did not limit Mr. Golphin's freedom to disengage from the encounter and go about his business. It reached this conclusion because "theoretically, retention of Golphin's identification would not have constrained his ability to either request the return of the identification or simply end the encounter by walking into the apartment in which he was staying." App., *infra*, 21a. Therefore, "Golphin's encounter with the police was consensual in nature, and did not mature into a seizure on the facts presented simply by virtue of Officer Doemer retaining and using Golphin's identification to conduct a warrants check." *Id.* at 20a.[5]

As other courts have recognized, however, a reasonable person would neither "believe that he or she could simply terminate the encounter by asking the officer to return the identification" (*Daniel*, 12 S.W.3d at 427), nor "consider abandoning his identification [as] a practical option." *Jackson*, 39 P.3d at 1189. See also *Royer*, 460 U.S. at 501 (plurality opinion) (holding that "retaining [the defendant's] ticket and driver's license and without indicating in any way that he was free to depart" amounted to a seizure). In fact, the Florida court admitted the error in its application of the reasonable person test when it confessed that "if reasonable members of the public were asked whether they believed that they could terminate an encounter with a law enforcement officer by simply insisting that the officer return their license or

identification, we suggest most would respond in the negative." App., *infra*, 24a.

"[A]n initially consensual encounter between a police officer and a citizen" becomes a seizure "within the meaning of the Fourth Amendment, 'if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *INS* v. *Delgado*, 466 U.S. 210, 215 (1984) (quoting *Mendenhall*, 446 U.S. at 554); accord, *Drayton*, 536 U.S. at 201. By acknowledging that its "reasonable person" standard did not reflect the actual views of "reasonable members of the public," the court below admitted that its decision rests on a "fiction divorced from the realities of everyday life" (App., *infra*, 44a (concurring opinion)) – and therefore cannot be sustained under this Court's precedents.

B. The Discovery Of A Warrant Is Not An Intervening Circumstance That Removes The Taint Of A Prior Illegal Detention When The Illegal Detention Was Initiated For The Very Purpose Of Discovering A Warrant.

The court below held that even if Officer Doemer had unconstitutionally seized Mr. Golphin, the evidence obtained as a result of that seizure nonetheless was admissible against him at trial. This conclusion is logically flawed and encourages police officers to conduct illegal searches—the exact outcome the exclusionary rule was intended to avoid.

This Court has long held that "[i]n order to make effective the fundamental constitutional guarantees of sanctity of the home and inviolability of the person, * * * evidence seized during an unlawful search [can] not constitute proof against the victim of the search." *Wong Sun*, 371 U.S. at 484 (citing *Boyd* v. *United States*, 116 U.S. 616 (1886); *Weeks* v. *United States*, 232 U.S. 383 (1914)). The exclusionary rule is "a judicially created means of deterring illegal searches and seizures." *Pennsylvania Bd. of Probation and Parole* v. *Scott*, 524 U.S. 357, 363 (1998). See also 6 Wayne LaFave,

Search and Seizure: A Treatise on the Fourth Amendment § 11.4(a), at 260 (4th Ed. 2004) (describing the deterrent effect of the exclusionary rule as its "most fundamental point").

If the connection between the illegality and the seizure of the evidence "'become[s] so attenuated as to dissipate the taint,'" however, then the exclusionary rule will not apply. *Brown*, 422 U.S. at 608 (1975) (quoting *Wong Sun*, 371 U.S. at 491). The concept of attenuation has developed to avoid the suppression of evidence in circumstances in which suppression would not deter unconstitutional police conduct. As Justice Powell suggested in his concurring opinion in *Brown*, "[t]he notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action become so attenuated that the deterrent effect of the exclusionary rule no longer justifies its cost." *Brown*, 422 U.S. at 609 (Powell, J., concurring).

The attenuation doctrine recognizes two different circumstances in which application of the exclusionary rule would serve little or no deterrent effect. First, the exclusionary rule does not apply when the illegality is not the "but for" source of the evidence sought to be excluded. See, *e.g.*, *Nix* v. *Williams*, 467 U.S. 431 (1984); *Murray* v. *United States*, 487 U.S. 533 (1988). Suppression of evidence that would have been discovered notwithstanding the illegal conduct will not succeed in deterring the illegal conduct.

Second, the exclusionary rule does not apply when the officers could not have foreseen that they would gain evidence through their illegal conduct. In *Wong Sun*, for example, this Court declined to apply the exclusionary rule to a confession even though it would not have been made but for the illegal arrest at issue in that case. *Wong Sun*, 371 U.S. at 486. The Court held that three days and an "intervening independent act of a free will" on the part of the defendant had broken the connection between the initial illegal arrest and the defendant's confession. *Ibid.* Because the officers could not have foreseen ex ante that the illegal arrest would result

in a confession three days later, suppressing the confession would not have deterred future illegal police conduct. The unforseeability vitiated the deterrent value of excluding the evidence.

The Florida Supreme Court's decision is wholly inconsistent with this Court's attenuation jurisprudence. The lower court held that the discovery of a warrant is an intervening circumstance that dissipates the taint of a suspicionless seizure *even though the seizure was effected for the very purpose of discovering a warrant.* If police illegally detain someone to conduct a warrants check, then it is obviously foreseeable to them that they might discover a warrant. Allowing the admission of evidence obtained incident to the arrest on the warrant gives officers an extremely strong incentive to engage in suspicionless seizures for the purpose of warrants checks. For that reason, discovery of a warrant cannot logically be viewed as attenuating illegality in the manner contemplated by this Court's decisions.

As the *Hudson* Court noted just last Term, "the value of deterrence depends upon the strength of the incentive to commit the forbidden act." *Hudson*, 126 S. Ct. at 2161. By holding the exclusionary rule inapplicable in this case, the Florida court has invited officers to canvass entire neighborhoods, subjecting anyone to an illegal detention. If the person detained has an outstanding warrant for even an unpaid parking ticket, the illegality of the detention becomes irrelevant because any evidence discovered upon arrest will be purged of the taint of the illegality. Police officers thus have a powerful incentive to conduct unconstitutional fishing expeditions for open warrants.

* * * * *

The courts below are deeply divided on the questions presented. As a result the Fourth Amendment is being applied inconsistently with respect to legal issues that recur with considerable frequency. This Court should grant review

to provide the guidance so clearly needed in this important area of Fourth Amendment law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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