No. 06-1251

IN THE SUPREME COURT OF THE UNITED STATES

LORENZO GOLPHIN, *Petitioner*,

v.

STATE OF FLORIDA, *Respondent.*

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner frames two questions to this Court as follows:

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, 603-604 (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.

Respondent restates these questions as:

Whether this Court should exercise its jurisdiction to review a state court opinion which did not address the two questions presented by Petitioner - with the lower court specifically writing that it was not addressing the legality of the detention of the Petitioner's identification for purposes of running a computer check, and given the court's holding that the encounter was not a seizure, any analysis concerning the subsequent discovery of a warrant was *dicta*?

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Respondent, the State of Florida, respectfully asks this Court to deny the petition for writ of certiorari seeking review of the opinion of the Supreme Court of Florida.

OPINIONS BELOW

The opinion of the Supreme Court of Florida which is reported at 945 So. 2d 1174, is included as Appendix A. (App. A). The opinion of the Fifth District Court of Appeal of Florida is included as Appendix B. (App. B). The order of the trial court denying the motion to suppress was unreported and is included as Appendix C. (App. C).

JURISDICTION

Petitioner seeks review under 28 U.S.C. §1257. However, pursuant to Rules of the Supreme Court of the United States Rule 10, Petitioner cannot invoke jurisdiction as a matter of right. Given that neither issue presented by Petitioner was directly addressed by the lower court, given that Petitioner has failed to show conflict with case law from this Court, and given that Petitioner has failed to show a compelling reason for Florida's decision to be reviewed, this Court should not exercise jurisdiction.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner is seeking review under the Fourth Amendment of the Unites States Constitution. The Fourth Amendment to the United States Constitution and section 12 of Florida's Declaration of Rights guarantee citizens the right to be free from unreasonable searches and seizures. Additionally, Florida's constitutional protection expressly provides that the right shall be construed in conformity with the Fourth Amendment to the United States Constitution, as interpreted by this Court. See art. I, §12, Fla. Const.

STATEMENT OF THE CASE AND FACTS

On November 13, 2002, Petitioner was standing with a group of about five men on a public sidewalk in front of an apartment building when two uniformed police officers approached - Officers Maria Deschamps and Lindsey Doemer. (A 1-2). Although some of the individuals walked away as the two officers approached, Petitioner made no attempt to leave the area. (A-2). When Officer Doemer asked Petitioner for his identification, he voluntarily relinquished it. Id. Officer Doemer testified that she ran a computer check on the identification to determine whether there were any outstanding warrants. After Officer Doemer had initiated the computer check, Petitioner voluntarily told the officer that he had a history of arrests and that he probably had an "open warrant." (B-1). The computer check confirmed Petitioner's statement within minutes that he was the subject of an outstanding warrant, and he was arrested. Id. A search

incident to arrest resulted in the discovery of drugs and paraphernalia, which led Petitioner to file a motion to suppress. Id.

Petitioner filed an appeal relying on the holding in Baez v. State, 814 So. 2d 1149 (Fla. 4th DCA 2002), quashed, 894 So. 2d 115 (Fla. 2004). In Baez, the Fourth District Court of Appeal created a bright line rule when faced with facts similar to those of the instant case, and the Fourth District held that a consensual encounter becomes a seizure even if the totality of the facts show that a person voluntarily provided identification to an officer. When addressing this holding, the Fifth District Court of Appeal wrote:

> In sum, we believe Baez to be wrongly decided first, because it creates a per se rule, which the Supreme Court in Bostick[1] rejected in favor of the "totality of the circumstances" test, and second, because it reaches what we believe to be the wrong conclusion when the proper test is applied. ...

Golphin, 838 So. 2d at 708. The court also wrote:

> In applying the Bostick test to the instant case, we conclude that the trial court properly denied the motion. The police behavior in approaching the men obviously failed to communicate an intent to restrict the men. Indeed, some of the men walked away from the police without incident. There was no indication that police sought out Appellant or threatened him or intimidated him in any way. Appellant was fully cooperative and volunteered information about his arrest history. Finally, Appellant did not manifest any desire to leave, nor did he request that his identification be returned. The police communicated nothing, by word or act, to lead Appellant to reasonably conclude that he was not free to leave.

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[1] Florida v. Bostick, 501 U.S. 429 (1991).

> The trial judge found that Appellant consented to the encounter with police, and we concur that Appellant's consent, when all circumstances are considered, was not the product of intimidation or harassment as viewed from the position of a reasonable person.

Id.

The Supreme Court of Florida accepted jurisdiction of this case based on the certified conflict with Baez. The Court conducted a detailed review of search and seizure law related to facts similar to those found in the instant case, and, included in that analysis was a thorough discussion of several cases from this Court. Ultimately, the Florida Supreme Court applied law from this Court which holds that the outcome is dependent on the totality of the circumstances, and based upon this law, the court affirmed the rulings of the trial court and the Fifth District Court of Appeal.[2]

Of special relevance, the Court also wrote:

> Implicit in the reasonable person standard is the notion that if a reasonable person would feel free to end the police encounter, but does not, and is not compelled by the police to remain and continue the interaction, then he or she has consented to the encounter. It is on that basis that both the trial court and district court below determined that Golphin's encounter with Officer Doemer, including his act of providing her with his identification, was consensual in nature. Golphin did not preserve and we have not been asked to separately consider, and indeed do not decide, whether or not Golphin after consensually and voluntarily producing identification specifically consented to Officer Doemer using that identification in his presence to conduct a warrants check or how

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[2] The Court had already reversed Baez, but, it evidently retained jurisdiction to address this issue in more detail.

> the lack of any such consent might impact the analysis in this case. Golphin did not argue below that any consent implied by the production of his identification extended only to the examination of its validity, which was undermined or eviscerated when the officer used the identification for the further purpose of conducting a warrants check in his presence. Circumstances may exist in which an officer's conduct exceeds the scope of consent that reasonably can be implied by the act of handing over one's identification, and such circumstances may indicate that a seizure has occurred. That is not, however, an issue currently before this Court.

Golphin, 945 So. 2d at 1182-1183. Additionally, in the above quote, the Court added in a footnote, "It was not until submission of his reply brief to this Court that Golphin argued that once Officer Doemer ascertained that the picture on the identification he had provided matched his appearance, she had no legal basis for any further retention of the identification to check for outstanding warrants." Id. at 1183, fn. 6.

Furthermore, in *dicta*, the Court also noted the evidence would still be admissible even if the consensual encounter had been found to have become a seizure. Specifically, the Court wrote:

> In addition to the foregoing conclusion that the encounter was consensual, we further 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. The United States Supreme Court has stated that not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Rather, the High Court has concluded that in such a situation, the issue to be determined is "whether, granting establishment of the primary illegality, the

> evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Id. at 488. In State v. Frierson, 926 So. 2d 1139 (Fla. 2006), we held that "[t]o properly undertake the inquiry mandated by Wong Sun, we must consider three factors: "(1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." Id. at 1143 (quoting United States v. Green, 111 F.3d 515, 521 (7th Cir. 1997), wherein the United States Circuit Court of Appeals for the Seventh Circuit relied on the factors explicitly noted in Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)).

Golphin, 945 So. 2d at 1190-1191.

REASONS FOR DENYING THE WRIT

THE SUPREME COURT OF FLORIDA NEVER REACHED THE TWO ISSUES RAISED BY PETITIONER

Petitioner is correct that citizens and law enforcement officers are involved in encounters on a daily basis in our country. However, he is incorrect that the holding of the Supreme Court of Florida addressing those encounters is one that conflicts with case law from this Court, state courts of last resort, or federal circuit courts. The reason there is no conflict is because the two questions presented by Petitioner were not directly addressed by the lower court. Therefore, this case is not the proper vehicle for additional review of these issues. See New York v. Uplinger, 467 U.S. 246 (1984) (This Court dismissed jurisdiction as being improvidently granted given that the precise constitutional issue decided by the state court was subject to various interpretations.)

Petitioner's initial argument is that "retention of identification to conduct a warrants check" creates a seizure and that there is conflict in the case law on this issue. However, the issue Petitioner seeks this Court to review was expressly found not to be before the Supreme Court of Florida. The Court specifically wrote in its opinion:

> Implicit in the reasonable person standard is the notion that if a reasonable person would feel free to end the police encounter, but does not, and is not compelled by the police to remain and continue the interaction, then he or she has consented to the encounter. It is on that basis that both the trial court and district court below determined that Golphin's encounter with Officer Doemer, including his act of providing her with his identification, was consensual in nature. **Golphin did not preserve and we have not been asked to separately consider, and indeed do not decide, whether or not Golphin after consensually and voluntarily producing identification specifically consented to Officer Doemer using that identification in his presence to conduct a warrants check or how the lack of any such consent might impact the analysis in this case.** Golphin did not argue below that any consent implied by the production of his identification extended only to the examination of its validity, which was undermined or eviscerated when the officer used the identification for the further purpose of conducting a warrants check in his presence. Circumstances may exist in which an officer's conduct exceeds the scope of consent that reasonably can be implied by the act of handing over one's identification, and such circumstances may indicate that a seizure has occurred. **That is not, however, an issue currently before this Court.**

Golphin, 945 So. 2d at 1182-1183 (emphasis added). In fact, in the above quote, the Court added in a footnote, "It was not until submission of his reply brief to this Court that Golphin argued that

once Officer Doemer ascertained that the picture on the identification he had provided matched his appearance, she had no legal basis for any further retention of the identification to check for outstanding warrants." Id. at 1183, fn. 6.

The issue addressed by the Supreme Court of Florida was a limited one legally and was clearly dependent on the facts before it in which the trial court specifically rejected Petitioner's version of the events of his encounter, accepted the testimony of the two law enforcement officers, and found consent existed when Petitioner handed his identification to the officer. Whether retaining that identification for purpose of a computer search escalated a consensual encounter into a detention was not an issue before Florida's Supreme Court.

The state courts of Florida simply applied the law from this Court that these types of encounters are reviewed as to the totality of their circumstances. After a hearing by the trial court during which the disputed facts were resolved, the judge found that the evidence showed a consensual encounter. The intermediate appellate court affirmed but did certify conflict with another appellate court. The Supreme Court of Florida granted review to resolve that conflict, and it retained jurisdiction to reiterate to one of its state intermediate appellate courts that the Florida Constitution requires Florida courts to follow case law from this Court when it exists. Such case law did exist, and it was that law that was followed by the trial court, the Fifth District Court of Appeal, and the Supreme Court of Florida.

The second reason offered by Petitioner to accept this case is whether the discovery of an outstanding warrant during the consensual retention of a party's identification constitutes an intervening circumstance removing any taint from the officer's action. Again, like the first issue, this question was never directly addressed by the Supreme Court of Florida. While Petitioner submits that the opinion from Florida's Supreme Court is in conflict with other case law, it is the position of Respondent that the referenced analysis was *dicta* incidental to the specific holding below. Therefore, no real conflict exists, and Petitioner has failed to show that this Court should address this issue.

In its opinion, the Supreme Court of Florida wrote:

> In addition to the foregoing conclusion that the encounter was consensual, we further 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. The United States Supreme Court has stated that not "all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police." Wong Sun v. United States, 371 U.S. 471, 487-88, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963). Rather, the High Court has concluded that in such a situation, the issue to be determined is "whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint." Id. at 488. In State v. Frierson, 926 So. 2d 1139 (Fla. 2006), we held that "[t]o properly undertake the inquiry mandated by Wong Sun, we must consider three factors: "(1) the time elapsed between the illegality and the acquisition of the evidence; (2) the presence of intervening circumstances; and (3) the purpose and flagrancy of the official misconduct." Id. at 1143 (quoting United States v. Green, 111 F.3d 515, 521 (7th Cir. 1997), wherein the United States Circuit Court of Appeals for the Seventh Circuit relied on the factors explicitly noted in Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975)).

Golphin, 945 So. 2d at 1190-1191 (emphasis added).

As noted above, in order for this Court to accept jurisdiction and resolve conflict, the issue should be one directly addressed and relied upon by the lower court. The Supreme Court of Florida had already found that the encounter was not a seizure; therefore, the

presence of the warrant was not legally controlling. Clearly, this was *dicta* set out to guide courts in Florida but was not necessary for the resolution of the case.[3]

Like with the first question, Petitioner has failed to show this second issue was directly addressed and found controlling by the Supreme Court of Florida. Further, like with the first question, Petitioner has failed to show any conflict with decisions from this Court.

The opinion of the Florida Supreme Court simply applied well established case law from this Court. This Court has held that "[I]nterrogation relating to one's identity **or a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure.**" Immigration & Naturalization Service v. Delgado, 466 U.S. 210, 216 (1984) (emphasis added). In fact, this Court found that I.N.S. agents could individually approach workers in a factory and ask for proof of residency and citizenship without implicating the Fourth Amendment. Id. at 217-218. No seizure was found even though factory workers would have to walk away from the inspecting officers and past two more officers standing at the door of the factory in order to leave. Id.

Furthermore, in Florida v. Bostick, 501 U.S. 429 (1991), this Court rejected a *per se* rule and found no stop under facts where law enforcement approached an individual on a bus who they had no suspicion of having committed a crime, asked him questions, asked to examine his identification, and asked to search his luggage. Such conduct would be legal so long as mandatory compliance with these requests was not conveyed to a reasonable person by the officers' actions. See also, United States v. Drayton, 536 U.S. 194 (2002) (This

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[3] While admittedly not dispositive, Respondent would also note that the issue was directly addressed in the recent case of Frierson 926 So. 2d 1139 (Fla. 2006), and this Court declined to accept jurisdiction when review was sought. State v. Frierson, 926 So. 2d 1139 (Fla. 2006), cert. denied, Frierson v. Florida, 127 S. Ct. 734, 166 L. Ed. 2d 570 (2006).

Court again rejected a *per se* rule and, instead, held that a court should consider all the facts to determine if the encounter is consensual.)[4]

It was Bostick which was relied upon by the Supreme Court of Florida when it wrote:

> Applying the reasonable person standard to determine whether a seizure has occurred is a fact-intensive analysis in which the reviewing court must consider the totality of the circumstances. As stated by the United States Supreme Court in Florida v. Bostick, 501 U.S. 429, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991):
>
> > We adhere to the rule that, in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers' requests or otherwise terminate the encounter.
>
> Id. at 439.

Golphin, 945 So. 2d at 1183. In applying the totality of the circumstances test, the Supreme Court of Florida affirmed the lower courts and reversed the bright light rule set out in Baez. Respondent respectfully submits that Petitioner has failed to show that either question presented by Petitioner was addressed by the opinion below and, therefore, has failed to show conflict.

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[4] Drayton was cited and followed by the court. Golphin, 945 So. 2d at 1183-1184.

CONCLUSION

For these reasons, Respondent respectfully asks this Court to deny the petition for writ of certiorari

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Respectfully submitted,

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