No. 06-1251

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

REPLY BRIEF FOR PETITIONER

DAN KAHAN
BRETT DIGNAM
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

NOEL A. PELELLA
Assistant Public Defender
444 Seabreeze Blvd., Suite 210
Daytona Beach, FL 32114
(386) 252-3367

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTE

REPLY BRIEF FOR PETITIONER

At least ten state high courts and federal courts of appeals have divided on two logically related questions: whether retaining a voluntarily produced identification for purposes of running a warrants check constitutes a Fourth Amendment "seizure"; and whether the resulting discovery of a warrant is an "intervening circumstance" that removes the "taint" of any illegality associated with retaining the identification.

Respondent does not dispute the existence of this conflict. Nor does it dispute that the facts of this case present a clean example of the commonly employed investigatory technique that generates these two related questions.

Respondent's sole argument is that the Florida Supreme Court did not actually decide either of the questions presented. That assertion is manifestly incorrect.

A. The Florida Supreme Court Expressly Decided The Question Whether Retention Of A Voluntarily Produced Identification For The Purpose Of A Warrants Check Effects A Seizure.

1. Respondent's assertion that the Florida Supreme Court did not "expressly address" the first question presented is mistaken. "We hold," the court stated,

> that in light of the totality of the circumstances presented in this case, Golphin's encounter with police was consensual, and *this otherwise consensual encounter did not mature into a seizure simply because the police retained Golphin's identification which he had consensually and voluntarily produced for the purpose of conducting the computerized check for warrants* in his presence at that location.

Pet. App. 29-30a (emphasis added). The court repeatedly characterized the issue presented in these terms. See, *e.g.*, Pet. App. 8a (Florida argued "that the retention of the identification as it occurred here for purposes of conducting a warrants check did not elevate the encounter into an investigatory stop").

The separate concurring opinions, joined by a majority of the Florida court, also characterized the court's decision as addressing and deciding the question whether retention of a voluntarily produced identification for purposes of running a warrants check constitutes a seizure. See Pet. App. 30a ("[A]gree[ing] with the majority" that "Golphin was not seized when a police officer held his identification and conducted a brief check for outstanding warrants") (Cantero, J., specially concurring, joined by Wells, J.); Pet. App. 35a ("I disagree with the majority's conclusion that this was a consensual encounter. Once the officer retained Golphin's identification to run a warrants check, Golphin was unlawfully detained in violation of the Fourth Amendment.") (Pariente, J., concurring in result only, joined by Anstead and Quince, JJ.).

Finally, the Florida Supreme Court recently confirmed that its holding in this case resolved the question presented in the petition by applying that holding in a subsequent case seeking review of the issue "whether police may retain an individual's identification to run a warrants check when there is no reasonable suspicion of criminal activity." *Mays* v. *State*, No. SC04-2149, 2007 WL 1628269, at *1 (Fla. June 7, 2007) (Pariente, J., joined by Anstead and Quince, JJ., specially concurring in summary dismissal in light of *Golphin*)). The Florida court stated that "[t]he issue presented by the decision under review is controlled by our recent decision in" *Golphin*; the court "exercise[d] [its] jurisdiction to grant the petition for review, and, in accordance with *Golphin*, * * * approve[d] the decision below." *Ibid.* (majority opinion); see also *ibid.* (concurring opinion) ("[A] 4-3 majority of this Court concluded [in *Golphin*] that retaining the license of a pedestrian to run a warrants check did not in itself turn a consensual encounter into an unlawful detention.").

2. Through a misleading characterization of the intermediate appellate opinion and selective quotation from the Florida Supreme Court opinion, respondent intimates that petitioner did not effectively present to the Florida Supreme

Court the question whether the retention of his identification for purposes of running a warrants check constituted a seizure. See Br. in Opp. 7-8.

There is no need for this Court to determine whether the scattered pieces of this argument form a coherent whole (in fact, respondent's argument is wrong). It is well established that this Court has "the power to review '[f]inal judgments or decrees rendered by the highest court of a State in which a decision could be had * * * where any * * *' federal claim 'was *either* addressed by *or* properly presented to the state court that rendered the decision we have been asked to review.'" *Howell* v. *Mississippi*, 543 U.S. 440, 443 (2005) (emphasis added) (quoting 28 U.S.C. § 1257(a)); *Adams* v. *Robertson*, 520 U.S. 83, 86 (1997) (per curiam)). See also *Illinois* v. *Gates*, 462 U.S. 213, 218 n.1 (1983) (tracing this disjunctive principle back to *Crowell* v. *Randell*, 35 U.S. (10 Pet.) 368 (1836), and *Owings* v. *Norwood's Lessee*, 9 U.S. (5 Cranch) 344 (1809)). The only issue, then, is whether the Florida Supreme Court *addressed* whether retention of an identification to conduct a warrants check constitutes a seizure. As we have shown, that court indisputably did.[1]

B. Nothing In This Case Turns On Whether Petitioner "Specifically Consented" To The Warrants Check.

1. Respondent places central reliance on this passage from the Florida Supreme Court opinion:

> [W]e 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

[1] Respondent repeats (Br. in Opp. 2) the Florida court's observation that petitioner stated that he might have an open warrant, but does not rely on that observation in opposing certiorari. Nor could it. As we explained in the petition (Pet. 4 n.1), the lower court expressly declined to rely on that fact in rejecting petitioner's Fourth Amendment claim.

> identification in his presence to conduct a warrants check or how the lack of any such consent might impact the analysis in this case.

Pet. App. 11a. On the basis of this passage, respondent—ignoring the numerous statements in the opinion to contrary—contends that "[w]hether retaining [Golphin's] identification for purpose of a computer search escalated a consensual encounter into a detention was not an issue before Florida's Supreme Court." Br. in Opp. 8. Respondent is plainly wrong.

The court below, like every other lower court to address this issue, recognized that under this Court's precedents a police officer's request for a pedestrian's identification does not effect a seizure. Pet. App. 14a-15a. The issue that the parties argued, and that the Florida Court decided, was whether the transaction "mature[d] into a seizure simply because the police *retained Golphin's identification* which he had consensually and voluntarily produced *for the purpose of conducting the computerized check for warrants*." Pet. App. 29a (emphasis added). The court expressly answered that question—the one now presented for review in the petition—in the negative.

The passage of the opinion cited by respondent expressly adverts to a "separate[]" issue: "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*." Pet. App. 11a (emphasis added). The court there was observing that even if the officer's retention of the warrant effected a seizure, petitioner's "specific[]" consent to that seizure would eliminate any claim under the Fourth Amendment. The court made clear that its decision did not address the effect on the Fourth Amendment determination of a pedestrian's words or actions either (1) specifically consenting to the warrant check; (2) manifesting consent *limited* to confirmation of a pedestrian's identity and address; or (3) manifesting *noncon-*

sent to a warrants check. See Pet. App. 12a ("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.").

The court's reservation of these issues concerning "specific[]" consent did not mean that it was avoiding the question whether a Fourth Amendment seizure occurs when "police retain[] * * * identification * * * voluntarily produced for the purpose of conducting [a] computerized check for warrants." Pet. App. 29a. On the contrary, because the "specific consent" issue identified and reserved by the court arises only if a seizure has taken place, the court's very mention of that issue *confirms* what is clear from the plain language of the opinion—that the court addressed and decided the issue presented in the petition.

2. Moreover, the "specific consent" issue reserved by the Florida Supreme Court does not distinguish this case from any of the conflicting decisions cited in the petition. See Pet. 6-11. In *none* of those cases did a court consider whether or how manifestation of either consent or non-consent to the *warrants check* would impact the constitutionality of the discrete police-citizen exchange at issue here.

Indeed, the Florida Supreme Court itself plainly acknowledged the square conflict between its decision and the "decisions from other jurisdictions in which courts have determined that retention of identification for the purposes of conducting a warrants check elevates an otherwise consensual encounter into an investigatory stop." Pet. App. 23a. (citing *State* v. *Daniel*, 12 S.W.3d 420 (Tenn. 2000)). In *State* v. *Daniel*, 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 identifi-

cation." *Id*. at 427. On the basis of this conclusion, the court held "that a seizure within the meaning of the Fourth Amendment [takes place] when [an officer] retain[s] [an individual's] identification to run a computer warrants check." *Ibid*.

Like the Florida court, the Tennessee court did not reach the question of how the defendant's "specific[]" consent or non-consent would have impacted the analysis. So too of every other case with which the instant case conflicts. The disagreement among those other courts and the Florida court below rests neither on differences in facts nor on differences in inferences from facts. The facts are consistent. The legal inquiries are consistent. The only inconsistency among these cases is the legal conclusions based on those facts.

C. The Florida Supreme Court's Alternate Holding Is Properly Before This Court.

The Florida Supreme Court expressly addressed and decided the second issue presented, holding that "[t]he discovery of Golphin's outstanding arrest warrant, arrest, and subsequent search incident to that arrest were not the fruits of an illicit seizure." Pet. App. 30a. Respondent's claim (Br. in Opp. 9) that the Florida Supreme Court's suppression analysis was dicta is absurd. To be sure, it was not necessary for the court below to decide the second question presented to dispose of the case. Nonetheless, the Florida Supreme Court reached out to answer the question in an alternative holding, stating

> 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.

Pet. App. 25a-26a (emphasis added).

This Court has long held that "where there are two grounds, upon either of which an appellate court may rest its

decision, and it adopts both, 'the ruling on neither is obiter, but each is the judgment of the court, and of equal validity with the other.'" *United States* v. *Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (quoting *Union Pacific R. R. Co.* v. *Mason City & Ft. Dodge R. R. Co.*, 199 U. S. 160, 166 (1905)). See also *Massachusetts* v. *United States*, 333 U.S. 611, 623 (1948) (concluding that when a court issues more than one holding and the disposition of the case can "rest[] as much upon the one determination as the other," then "the adjudication is effective for both"); *Richmond Screw Anchor Co.* v. *United States*, 275 U.S. 331, 340 (1928) (the fact that a given holding is "only one of two reasons for the same conclusion" does not render the holding "dictum;" in fact, it must be "regarded as authority"); *Hamdan* v. *Rumsfeld*, 126 S. Ct. 2749, 2844 (2006) (Thomas, J., joined by Alito and Scalia, JJ., dissenting) (an "alternative holding is no less binding than if it were the exclusive basis for the Court's decision"). The Florida court issued its second holding as an independently sufficient basis for affirming the trial court's denial of petitioner's motion to suppress. The Florida court's second holding is therefore binding precedent.

* * * * *

Respondent does not, indeed cannot, dispute that more than one dozen courts across the nation are divided on the constitutionality of a frequently-employed investigative technique cleanly presented and explicitly examined in this case. Respondent's claim that the Florida Supreme Court did not address either of the two questions presented is simply unfounded. Lower courts in Florida, even the Florida Supreme Court itself, have already embraced both of *Golphin*'s binding holdings, effectively "invit[ing] police officers to stop [pedestrians] regardless of probable cause or reasonable suspicion of anything illegal," a result similar to the situation this Court recently decried in *Brendlin* v. *California*, 127 S. Ct. 2400, 2410 (2007). This "powerful incentive to run the

kind of 'roving patrols' that would still violate the * * * Fourth Amendment * * *" (*ibid.*), must not continue without the Court's guidance.[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DAN KAHAN
BRETT DIGNAM
Yale Law School
Supreme Court Clinic
127 Wall Street
New Haven, CT 06511
(203) 432-4800

NOEL A. PELELLA
Assistant Public Defender
444 Seabreeze Blvd., Suite 410
Daytona Beach, FL 32114
(386) 252-3367

ANDREW J. PINCUS
Counsel of Record
CHARLES A. ROTHFELD
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

JULY 2007

---

[2] The recent decision in *Brendlin*, holding that a passenger in a car is seized within the meaning of the Fourth Amendment during a traffic stop, provides no basis for denying review here. The Court's analysis in that case rested on its precedents regarding traffic stops, precedents with little applicability to the pedestrian context. Because *Brendlin* provides no basis for the lower courts to reconsider their conflicting views of the seizure issue presented here, and did not address any question regarding the applicability of the exclusionary rule, plenary review of the two questions presented in this case is plainly warranted.