IN THE SUPREME COURT OF FLORIDA

CASE NO: SC09-2163

Lower Tribunal Case Number(s): 3D08-1094; 07-16793

ALFREDO MORENO-GONZALEZ,

Petitioner/Appellant

-vs-

THE STATE OF FLORIDA,

Respondent/Appellee.

ON PETITION FOR DISCRETIONARY REVIEW
FROM THE DISTRICT COURT OF APPEAL
OF FLORIDA, THIRD DISTRICT

BRIEF OF PETITIONER ON JURISDICTION

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II. THE THIRD DISTRICT COURT OF APPEALS ERRED IN RULING THAT ARTICLE I, SECTION 12 OF THE FLORIDA CONSTITUTION PROHIBITS A COURT FROM EXCLUDING EVIDENCE OBTAINED BY A WARRANT ISSUED UPON AN APPLICATION THAT WAS NOT SIGNED BY THE APPLICANT AS REQUIRED BY FLORIDA STATUTE SECTION 933.06, INVOKING JURISDICTION UNDER RULE 9.120, FLA. R. APP. P.

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INTRODUCTION

Appellant, Alfredo Moreno Gonzalez, was the Appellee before the District Court of Appeal and was the Defendant in the Trial Court. The State of Florida was the prosecution in the Trial Court and the Appellant before the District Court of Appeal.

STATEMENT OF THE CASE

The Defendant was arrested in his home on May 16, 2007 and subsequently charged with trafficking in Marijuana over 25 pounds. A motion to suppress was filed raising various issues including (1) how probable cause was obtained, (2) material false statements or omissions in the warrant application, and (3) the failure of the affiant/applicant to have signed the application for the search warrant, contrary to Fla. Stat. § 933.06.

The motion to suppress was presented to the Trial Court. After an evidentiary hearing the Court ruled the search unlawful and ordered suppression, on the ground that the failure of the applicant to sign the warrant application rendered the search unlawful. The Court based its ruling on the requirements set forth in Fla. Stat. § 933.06 which reads in applicable part as follows:

> The judge must, before issuing the warrant, have the application of some person for said warrant duly sworn to and subscribed, and may receive further testimony from witnesses or supporting affidavits, or depositions in writing, to support the application…

The Trial Court declined to rule on the other issues raised, which it deemed as raising constitutional issues and confined its ruling to the statutory violation of Fla. Stat. § 933.06.

The Third District Court of Appeals reversed the Trial Court finding that

Article I, Section 12 of the Florida Constitution rendered Fla. Stat. § 933.06 invalid, or, alternatively that application of the exclusionary rule to a Section 933.06 violation was prohibited by the 1982 Amendment to Article I, Section 12 of the Florida Constitution.

After denial of a motion for rehearing a notice to invoke this Court's discretionary jurisdiction was filed. Admittedly, the Defendant/Appellant is uncertain whether Fla. Stat. § 933.06 has been explicitly declared invalid, which would clearly vest jurisdiction under Fla. R. App. P. 9.030 (a)(1)(A)(ii); or whether only application of the exclusionary rule was ruled inapplicable to a Section 933.06 violation, which would allow for discretionary review under Rule 9.120, Fla. R. App. P. Finding Fla. Stat. § 933.06 invalid is implicit if not explicit under either analysis.

Defendant/Appellant determined the most prudent approach was to brief jurisdiction and await the determination of the Court regarding its jurisdiction in this cause.

SUMMARY OF ARGUMENT

The Third District Court of Appeal erred in finding that the 1982 Amendment to Article I, Section 12 of the Florida Constitution prohibited the Trial

Court from applying the exclusionary rule to remedy a violation of Fla. Stat. § 933.06. The statute requires that there be a signed and sworn application before a Judge prior to issuance of a warrant.

ARGUMENT

The majority 2-1 decision points out that with the 1982 Amendment to Article I, Section 12 of the Florida Constitution "Florida Courts became bound to follow the interpretations of the United States Supreme Court with relation to the Fourth Amendment…" at page 4, decision of the District Court of Appeals.

The decision of the District Court majority advances the position that the United States Supreme Court, in United States v. Ventresca, 380 US 109 (1965) provides precedent and controlling authority requiring reversal of the Trial Court. The District Court sets forth the ruling in Ventresca as follows:

> [T]he Fourth Amendment's Commands, like all constitutional requirements, are practical and not abstract. **If the teachings of the Court's cases are to be followed and the constitutional policy served, affidavits for search warrants, such as the one involved here, must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in the area.** (emphasis in original)

Ventresca, 380 U.S. at 108 (emphasis added).

Decision of the District Court, p. 7. Ventresca should have no bearing on this case unless an affiant's signature to an affidavit is deemed by this Court to be a "technical requirement of elaborate specificity…" Ventresca at 108

As pointed out in the dissent at page 16, the failure to sign the application/affidavit is not technical. Rather, it is substantive. Article I, Section 12 of the Florida Constitution States that a search warrant cannot be issued except upon probable cause "supported by affidavit[.]" Pursuant to Fla. Stat. § 933.06 (2007) the affidavit must be signed. Fla. Stat. § 933.18 also requires sworn proof by affidavit prior to a search of a dwelling.

Fla. Stat. § 933.06 was amended by the legislature in 1997 and in 2004, each time leaving in the requirement that an application for search warrant be signed. These amendments are after the 1982 amendment to Article I, Section 12 of the Florida Constitution.

Florida follows the rule that warrant requirements "must conform strictly to the constitutional and statutory provisions authorizing their issue." Jackson vs. Sate, 99 So. 548, 542 (Fla. 1924); cf. State v. Vargas, 667 So.2d 175, 176-177 (Fla. 1995).

No remedy, other than the exclusionary rule in Article I, Section 12, exists as a part of Florida criminal procedure to address or remedy unlawful searches and

seizures. The 1982 amendment to Article I, Section 12, referred to as the "Conformity Clause" never should come into play in this case since there is no United States Supreme Court case factually and legally on point. The Supreme Court cases referenced in the majority decision are not factually similar to this case.

This is not a situation where a Trial Court has ruled in contravention of United States Supreme Court precedent. The Trial Court's decision was consistent with the Florida constitutional and statutory requirements that an affidavit in support of a warrant be signed. The United States Supreme Court has never considered this issue and Florida law requires strict construction of warrant requirements. Therefore this Court has jurisdiction to review the District Court's decision which renders Fla. Stat. § 933.06 invalid.

CONCLUSION

Wherefore, the Defendant respectfully requests the Florida Supreme Court to determine and accept jurisdiction of this appeal and allow the parties to brief this issue in full.

Respectfully submitted,

By: \s\ *Martin L. Roth, Esq.*
MARTIN L. ROTH, ESQ.

CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Jurisdictional Brief of Petitioner complies with the font requirements set forth in Fla. R. App. P. 9.210(2) as well as Administrative Order No. AOSC04-84, Mandatory Submission of Electronic Copies of Documents, dated September 13, 2004.

By: \s\ *Martin L. Roth, Esq.*
MARTIN L. ROTH, ESQ.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served *via* U.S. Mail: Office of the Attorney General: Nikole Hiciano, Esq., 444 Brickell Ave., Suite 650, Miami, FL 33131 on this 4th day of December 2009.

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