18-6646

NO 18-

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN EDWARD DAVIS,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE FLORIDA FIFTH DISTRICT COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

Respectfully submitted,

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Pro Se

QUESTIONS PRESENTED

Question #1: Whether the Florida Court of Appeals unreasonably applied this Court's precedent when it upheld the denial of a post-conviction claim alleging ineffective assistance of trial counsel on a juvenile offender's motion to suppress as involuntary, inculpatory statements made by the juvenile, under the influence of alcohol and illegal drugs, without an attorney or guardian present, after a night of trauma and intimidation, coercion and deception by police who feigned inability to reach his mother, when the juvenile indicated repeatedly that he wanted to talk to her?

Question #2: Whether the Florida Court of Appeals unreasonably applied this Court's precedent when it upheld the denial of a post-conviction claim alleging ineffective assistance of trial counsel for failure to properly advise a juvenile offender re: his constitutional right to testify in his own defense and/or coercion not to testify?

Question #3: Whether the Florida Court of Appeals unreasonably applied this Court's precedent when it upheld the denial of a post-conviction claim alleging ineffective assistance of trial counsel for failure to show a juvenile offender graphic autopsy photographs of the victim before the juvenile rejected the State's plea offer(s)?

LIST OF PARTIES

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The unpublished *per curiam* affirmed opinion of the Florida Fifth District Court of Appeal, dated March 6, 2018, is provided in Appendix A. The unpublished opinion denying rehearing, rehearing en banc, certification and/or written opinion of the Florida Fifth District Court of Appeal, dated April 25, 2018 is provided in Appendix B. The unpublished interim order of the Florida Circuit Court dated October 27, 2008, is provided in Appendix C. The unpublished interim order of the Florida Circuit Court, dated September 11, 2009 is provided in Appendix D. The unpublished order of the Florida Circuit Court, dated November 24, 2009, is provided in Appendix E. The unpublished order denying rehearing, etc., of the Florida Circuit Court, dated March 21, 2016, is provided in Appendix F.

JURISDICTION

The date on which Florida's Fifth District Court of Appeals decided Petitioner's case was March 6, 2018. A copy of that decision is provided in Appendix A. A timely petition for rehearing, rehearing *en banc*, certification and/or written opinion was denied by Florida's Fifth District Court of Appeals on April 25, 2018. A copy of that order denying rehearing, etc., is provided in Appendix B. The jurisdiction of this Court is invoked under 28 U.S.C. s. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in relevant part, "[n]o State shall ... deprive any person of life, liberty, or property without due process of law." U.S. Const. Amend. XIV, s. 1.

The Fifth Amendment provides, in relevant part, that no person "shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. Amend. 5.

A copy of the Sixth Amendment appears at Appendix G hereto.

STATEMENT OF THE CASE

On or about December 13 or 14, 2003, the 16-year-old Petitioner was charged as an adult by grand jury indictment with the First Degree Murder and Armed Robbery of Paul Prescott. *See* Davis v. State, 922 So.2d 438, 440 (Fla. 5th DCA 2006). The indictment alleged that Petitioner killed Prescott by shooting him several times, acting from a premeditated design to kill or while engaged in robbing Prescott. Id. at 441. On the night of the murder, Petitioner and Prescott were hanging out together. Id. After the shooting, Petitioner claims, he told his 13-year-old brother, Torrey Davis, that he had acted in self-defense, *i.e.*, that Prescott had "tried him he had to do it." Id. Prescott, an adult friend approximately 6'2" in height and weighing about 200 lbs., was significantly taller and heavier than the juvenile. Petitioner claims that he and Prescott were ingesting cocaine and Xanax, smoking marijuana, and drinking alcohol immediately prior to the shooting.

Shortly after the shooting, the police chased Petitioner with a K-9 dog. Petitioner was attacked by the dog and wounded as a result. Thereafter, Petitioner

was transported to the Sheriff's operations center in a police vehicle that had a device capable of recording conversations, which was not turned on. During transport, a white, older male officer, later identified as Lt. Brodie Hughes, questioned Petitioner, asking him what he wanted. In response, Petitioner cried, and he claims, told the officer unequivocally, "I just want to talk to Mom" In response, the officer promised to make that happen. After his arrival at the operations center, police interrogated the traumatized, wounded Petitioner without the knowledge or presence of his parents and coerced him, he claims, into a so-called "confession." *See* Davis, 922 So.2d at 441-442. At the time of his "confession," Petitioner claims, he remained in pain from the injuries inflicted by the dog and under the influence of alcohol and illegal drugs. Petitioner also claims that police continually lied to him, saying they were making ongoing efforts to contact his mother and/or that they did not know how to reach her, which was false.

Although law enforcement tape recorded portions of the interrogation, Petitioner claims that they did not record all of the communications that occurred prior to his "confession," including his response to the officer during transport. Also, Petitioner claims that in another non-recorded exchange at the operations center, prior to his "confession," he told police in no uncertain terms that he needed to speak to his mother right away before proceeding with any interrogation, and that in response, a detective told him "allright." Petitioner claims that he told his lawyer about the prior, unrecorded communication(s) but that his counsel failed to

properly raise these and other matters in his suppression motion. Petitioner also claims that his lawyer did not show him certain graphic autopsy photographs of the victim prior to Petitioner's rejecting the State's plea offer(s).

A jury trial was held from May 2 - 5, 2005. (R. at 11-12). Petitioner did not testify in his own defense at trial, although he claims that he told his lawyer that he wanted to to testify and that his lawyer misadvised and coerced him not to testify. (R. at 375). After trial, Petitioner was found guilty as charged on both counts. (R. at 11-12) On June 20, 2005, Petitioner was sentenced by the Court to life in prison without the possibility of parole for the crime of First Degree Murder (Count I) and to thirty (30) years imprisonment for Armed Robbery (Count II). (Id.).

On June 28, 2005, Petitioner filed a Notice of Appeal. (R. at 10). His case was affirmed in part and reversed in part by the Fifth District Court of Appeal in an opinion dated March 10, 2006. *See* Davis, *supra*. The Mandate was issued by the District Court on March 29, 2006. Subsequently, Count II was *nolle prosequi'd*.

Thereafter, on June 7, 2007, Petitioner filed a Motion for Post-Conviction Relief. (R. at 9). On June 21, 2007, the Court below issued an Order Granting State's Motion to Dismiss Unsworn Motion for Post-Conviction Relief and Memorandum of Law Without Prejudice. (Id.). Thereafter, the Court's Order was affirmed without opinion by the Fifth District. (Id.). Subsequently, Petitioner re-filed a Motion for Post-Conviction Relief on or about March 28, 2008. (Id.). On October 27, 2008, the Court below issued an Interim Order on Motion for Post-

Conviction Relief, striking certain grounds, with leave to amend. (R. at 8). On September 11, 2009, the Court below issued a second interim Order on Petitioner's pending post-conviction motion. (R. 2d Order at 468 *et seq.*). In that second interim Order, the Court granted an evidentiary hearing on parts of Grounds I, II, and III, to the extent they involved Petitioner's claim(s) that trial counsel was constitutionally ineffective with respect to Petitioner's allegation that he told a transport deputy he wanted to speak to his mother before questioning. Id. The Court also granted an evidentiary hearing on Petitioner's claim that trial counsel was constitutionally ineffective for failing to properly advise Petitioner of his right to testify and coercing him not to do so. Id. The Court further granted an evidentiary hearing on Petitioner's claim that defense counsel was constitutionally ineffective for failing to present Petitioner with all the State's evidence (including certain graphic autopsy photographs) prior to Petitioner's rejection of plea offer(s). Id. The remainder of the claims in Grounds I, II, and III were summarily denied. Id. Ground XIV (cumulative error) was held in abeyance until after the hearing. Id.

On November 19, 2009, the Court below held an evidentiary hearing before the Hon. Patrick Kennedy on Petitioner's subclaim(s) in Grounds I, II and III, and on Grounds IV, V(A), V(B), and VII. (R. at 21 *et seq.*). The Court took judicial notice of the record including the complete transcript of the suppression hearing in this case, and reviewed both prior to the hearing. (R. at 27). At the conclusion of

the evidentiary hearing the Court took the matter under advisement. (R. at 146). Thereafter, on or about November 25, 2009, an Order was issued denying Petitioner's post-conviction motion in its entirety. (R. at 6). On or about December 4, 2009, Petitioner filed a timely motion for rehearing and a motion for order to show cause also was filed. (R. at 6). However, the rehearing motion was never ruled on by Judge Kennedy, and the case was reassigned. (R. at 6). Thereafter, at a status hearing on on January 14, 2016, in front of a successor Judge, Petitioner indicated that a ruling was needed on the rehearing motion and that a new evidentiary hearing was warranted; and the successor Judge questioned his ability to rule on the rehearing motion. (R. at 5). On or about March 21, 2016, the rehearing motion and motion for order to show cause were denied by the successor Judge. (R. at 5). A timely appeal followed. (R. at 5). Petitioner's case was affirmed *per curiam* by the Fifth District Court of Appeal in an opinion dated March 6, 2018. Thereafter, the Fifth District denied rehearing etc., in an opinion dated April 25, 2018.

REASONS FOR GRANTING THE PETITION

This Court has repeatedly held that courts must employ special care in juvenile cases. These repeated holdings have since been thoroughly validated by science and their importance underscored. It has been recognized that "special concerns ... are present when young persons, often with limited experience and education and with immature judgment, are involved. Fare v. Michael C., 442 U.S.

707, 725 (1979). This is because many minors are "easy victim[s] of the law." Haley v. Ohio, 332 U.S. 596, 599 (1948) (plurality); *see also* J.D.B. v. North Carolina, 564 U.S. 261, 289 (2011). Additionally, most minors "lack the experience, perspective, and judgment to ... avoid choices that could be detrimental to them." Belloti v. Baird, 443 U.S. 622, 635 (1979), and "are more ... susceptible to ... outside pressures" than adults, Roper v. Simmons, 543 U.S. 551, 569 (2005). At the same time, the lower courts have often failed to follow this Court's holdings. These circumstances warrant the Court's attention. And this case is the right vehicle.

To establish ineffective assistance of counsel in violation of the Sixth Amendment of the U.S. Constitution, a claimant must prove that his counsel performed deficiently resulting in actual prejudice. Strickland v. Washington, 466 U.S. 668 (1984). Petitioner submits that both prongs of this ineffectiveness inquiry were met here on each and every one of his ineffectiveness claims. Under these facts, Petitioner should not face the risk of spending his entire adult life in prison, notwithstanding that he now awaits resentencing pursuant to Miller v. Alabama, 567 U.S. 460 (Fla. 2012). This is particularly true where, as here, the post-conviction court's summary denial of Grounds I-III was improper; its denial of relief on the remaining issues in this Petition, after hearing, was unsupported by substantial competent evidence in the record; and a successor Judge could not rehear. Hence, this Court should grant review.

I. The Decision Below Is Wrong

A. Question #1 should be answered in the affirmative.

Petitioner was 16 when police interrogated him. He had no attorney, and no parent present either. Petitioner's age, consumption of alcohol and illegal drugs, and experience of trauma made him highly susceptible to intimidation, coercion and deception by police. There were grounds for concern that both the Petitioner and his mother lacked the mental capacity necessary to voluntarily waive his rights. Petitioner claimed that he shot the victim in self-defense.Given the interplay between the police's tactics and the vulnerabilities of Petitioner and his mother, his confession was not voluntary in any meaningful sense. Such a conclusion is particularly appropriate where, as here, police deceived Petitioner, failed to record all conversations, and had an incredible recovery of recall at the evidentiary hearing when Lt. Hughes remembered nothing years later outside the courtroom.

The Florida Court of Appeal's contrary conclusion, ratifying without opinion the lower court's order summarily denying Petitioner's ineffectiveness claim, flowed from an objectively unreasonable application of this Court's precedent. It is well-settled that a defendant's waiver of the Fifth Amendment constitutional right to remain silent is valid only when "made voluntarily, knowingly and intelligently." Miranda v. Arizona, 384 U.S. 436, 444 (1966); U.S. Const. Amend 5. There are two elements to a voluntary, knowing, and intelligent waiver: (1) it must be "voluntary in the sense that it was the product of free and

deliberate choice rather than intimidation, coercion, or deception," and (2) it must be "made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Ramirez v. State, 739 So.2d 568, 575 (Fla. 1999) (*quoting* Moran v. Burbine, 475 U.S. 412, 421 (1986)). Whether these elements are present depends on the totality of the circumstances, an analysis that requires examination of "all the circumstances surrounding the interrogation." Fare, 442 U.S. 707, 725. Both prongs of the Ramirez test, could have and indeed should have been litigated successfully by trial counsel in this case.

Here, the totality of the circumstances include consideration of the "juvenile's age, experience, background, and intelligence, and into whether he has the capacity to understand the warnings given him." Fare, 442 U.S. at 725. After all, it is the State's burden to prove that, under the totality of the circumstances, a Miranda waiver is knowing, voluntary, and intelligent by a preponderance of the evidence. Colorado v. Connelly, 479 U.S. 157, 167-68 (1986). A trial court's findings of the historical facts relevant to this issue are sustained if supported by competent substantial evidence. Thomas v. State, 894 So.2d 126, 136 (Fla. 2004). Whereas, whether under those historical facts a Miranda waiver is knowing, voluntary, and intelligent is a question of law that is independently reviewed *de novo* on appeal. Id.

In the case at bar, the Florida court system and defense counsel utterly failed, as part of their totality-of-the-circumstances analysis, to afford Petitioner's

confession the "special care" this Court requires for juvenile confessions. Gallegos v. Colorado, 370 U.S. 49, 53 (1962). Such care is particularly critical where, as here, the minor's recent experience includes injury and trauma of an inherently intimidating, coercive nature; the minor is under the influence of alcohol and illegal drugs; the minor has asked to speak to his mother; and the minor has been deceived by police. Notwithstanding this, in the instant case, the kind of in-depth meaningful "evaluation" of Petitioner's attributes this Court's precedent "mandates," Fare, 442 U.S. 707, 725, did not happen. Nor was there competent substantial evidence to refute the juvenile's testimony at the evidentiary hearing that he asked to speak to his mother before questioning, *e.g.*, during transport. In light of all the evidence that could and should have been presented by trial counsel at the suppression motion, Petitioner's confession was involuntary, and this Court should grant review and reverse.

It is "axiomatic that a defendant ... is deprived of due process ... if his conviction is founded ... upon an involuntary confession." Jackson v. Denno, 378 U.S. 368, 376 (1964). Voluntariness "turns ... on whether the techniques for extracting the statements, as applied to this suspect," were unduly coercive. Miller v. Fenton, 474 U.S. 104, 116 (1985). Courts evaluating voluntariness thus consider "all of the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." Dickerson v. United States, 530 U.S. 428, 434 (2000). It has been recognized that interrogation tactics that "would leave a man

cold and unimpressed can ... overwhelm a lad in his early teens." J.D.B., 564 U.S. at 272. These concerns are magnified when, as here, a juvenile is intimidated, coerced and deceived. Tactics that "might be utterly ineffective against an experienced criminal," this Court has explained, "would be overpowering to the weak of will or mind." Stein v. New York, 346 U.S. 156, 185 (1953), overruled on other grounds by Jackson, *supra*. Indeed, "as interrogators have turned to more subtle forms of psychological persuasion, ... mental condition" has become "a more significant factor in the `voluntariness' calculus." Connelly, 479 U.S. at 164. In this case, the persuasion used was not limited to subtlety, insofar as it is difficult to imagine a more intimidating and coercive experience.

In the juvenile context, this Court has held that assessing the voluntariness of minors' confessions requires "special caution" and "special care—indeed, "the greatest care." In re: Gault, 387 U.S. 1, 55; Gallegos, 370 U.S. at 53. This precedent, which applies with special force here, "mandates ... evaluation of [a] juvenile's age, experience, background and intelligence" as part of the voluntariness analysis. Fare, 442 U.S. at 725. Recent social science research confirms the correctness of these decisions. Minors' decision-making is also hampered by immature judgment that engenders impulsiveness, pursuit of immediate gratification, and difficulty perceiving long-term consequences. Owen-Kostelnik *et al.*, Testimony and Interrogation of Minors, 61 Am. Psychologist 286, 292-293 (2006). Given these vulnerabilities, tactics that might constitute

"acceptable and useful tools to obtain *reliable* confessions" from adults "seem to increase the likelihood of *false* confessions" among minors. Scott-Hayward, *supra*, at 69 (emphasis added). In short, social-science research strongly supports this Court's "special concer[n]" about confessions by juveniles. Fare, 442 U.S. at 725. The Court has repeatedly relied on similar recent research in explaining the vulnerabilities associated with youth in other criminal justice contexts. *See* Graham v. Florida, 560 U.S. 48, 68 (2010); Miller v. Alabama, 567 U.S. 460, 472 n. 5 (2012); Atkins v. Virginia, 536 U.S. 304, 318 (2002). Here, the research underscores the need to ensure that lower courts adhere to this Court's precedent and apply it not only in the first instance but also relative to Strickland claims.

Notwithstanding this, in the case at bar, there is no indication that either trial counsel or the courts below ensured that "special care" be taken given Petitioner's youth, Gallegos, 370 U.S. at 53, or that an actual "evaluation" of Petitioner was performed in connection with his suppression motion. Fare, 442 U.S. at 725. Reference was made to the totality of the circumstances standard. But stating a standard and repeating a defendant's argument is not "evaluation," Fare, 442 U.S. at 725, let alone taking the "greatest care," Gault, 387 U.S. at 55, especially where, as here, Petitioner confessed under the influence of illegal drugs and alcohol, without the benefit of an attorney or guardian, after a night of trauma in which the juvenile was intimidated and bitten by a police K-9, and was deceived by police who pretended to be attempting to contact his mother (who was ill) when

they were in contact. Neither trial counsel nor the courts meaningfully evaluated whether Petitioner's youth, under the facts and circumstances of this case, affected his (in)ability to withstand the police's tactics, *i.e.*, made the police's "techniques for extracting the statements, as applied to this suspect," unduly coercive, Miller, 474 U.S. at 116. The analysis of trial counsel and the courts, unmoored from Petitioner's situational vulnerabilities, is so far from the "special care" and "greatest care" that this Court's precedent requires—and from an actual "evalution" which this Court also requires—that it is objectively unreasonable here. Thus, the Florida Court of Appeal's *per curiam* affirmed opinion is untenable.

B. Question #2 should be answered in the affirmative.

At the evidentiary hearing, defense counsel admitted this violation for all practical purposes. Because Petitioner's statements and confession to police were played at trial, there was no particular advantage to not testifying, aside from the order of closing argument. Where, as here, Petitioner had a claim of self-defense, and his statements to police were played at trial, he had nothing to lose and everything to gain by testifying at trial. Simply put, Petitioner was misadvised not to testify without respect for his right to make the ultimate decision, and coerced by counsel. Such a Sixth Amendment violation is particularly troubling in the juvenile context. Once more, the analysis of trial counsel and the courts, unmoored from Petitioner's situational vulnerabilities, is so far from the "special care" and "greatest care" that this Court's precedent requires, that it is objectively

unreasonable. Thus, the Florida Court of Appeal's *per curiam* affirmed opinion is untenable.

C. Question #3 should be answered in the affirmative.

At the evidentiary hearing, defense counsel admitted that he did not show Petitioner certain graphic autopsy photographs of the victim before Petitioner rejected the State's plea offer(s) and proceeded to trial. Whereas Petitioner testified that if he had seen these photographs pre-trial, he would have pled and had the opportunity for a lesser sentence than what he received, *i.e.*, life without parole. Although the immature Petitioner shied away from being traumatized by seeing photographs of the deceased he had hung out with in the courtroom at trial this does not excuse trial counsel from his duty to meaningfully communicate pre-trial.

Nothing in defense counsel's testimony reflects this Court's concern that "special care" be taken given Petitioner's youth, Gallegos, 370 U.S. At 53. Although defense counsel's failure to take any additional action in response to his client's reluctance might be acceptable in the case of an adult, for a juvenile representation it fell below the Strickland standard. Given that minors' decision-making is hampered by immature judgment and by difficulty perceiving long-term consequences, a defense counsel representing a juvenile offender who reacts emotionally so as to avoid seeing graphic autopsy photographs needs to do more to satisfy Strickland than simply shrug his shoulders. This is especially true where, as

here, the juvenile offender was facing the possibility of life without parole after an unsuccessful trial, there was a confession, and defense counsel advised his client not to testify. The position of counsel and the court below is so far removed from this Court's emphasis on "special care" it is objectively unreasonable.

Simply put, defense counsel admitted his juvenile client did not see key discovery, but successfully shifted the blame for this lapse onto his emotionally compromised client in the court below. But as this Court has pointed out, juveniles are not just miniature adults, and they must not be treated as such within the criminal justice system. Absent a clear articulation of the Strickland standard in the juvenile context, the constitutional rights of these vulnerable offenders are in peril. Hence, the Florida Court of Appeal's *per curiam* affirmed opinion is untenable.

II. Lower Courts Commonly Disregard This Court's Precedent And Treat Juveniles Like Miniature Adults, In The Same Way That The State Court Did Here.

The Florida Court of Appeals' departure from this Court's precedent is no isolated incident. Since this Court decided Gallegos, Gault, and Fare, lower courts have often failed to follow these decisions. The consequences of those failures have been illustrated by research (discussed above), demonstrating just how vulnerable juveniles are. Certiorari is warranted not only to reaffirm this Court's holdings re: involuntary confessions and Fifth Amendment jurisprudence, but also

this Court's holdings re: the Sixth Amendment right to counsel, and to further clarify the need for "special caution" and "special care" in representing juvenile offenders.

III. THIS CASE IS AN EXCELLENT VEHICLE

As noted above, this case would allow the Court to provide guidance on Fifth Amendment's safeguards against involuntary confessions, and the Sixth Amendment's guarantee of effective assistance of counsel, in the juvenile context, to state and federal courts applying its precedent in the first instance, and to habeas courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

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