Case No: 18-9445

IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL

VOLVICK VASSOR
Petitioner,

vs.

STATE OF FLORIDA
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. DOES THE HOLDING IN *GRIFFIN V UNITED STATES*, 502 U.S. 46, 112 S.CT 466 (1992), WHICH MODIFIED *YATES V. UNITED STATES*, 354 U.S. 298, 77 S.CT 1064 (1957), ALLOW A CONVICTION BASED ON ALTERNATE THEORIES OF OFFENSE WHEN ONLY ONE THEORY IS SUPPORTED BY THE EVIDENCE, BUT THE STATE PRESENTED NO EVIDENCE ON THE OTHER THEORY?

2. DOES IT VIOLATE DUE PROCESS AND/OR EQUAL PROTECTION FOR A DEFENDANT TO BE CONVICTED AS A PRINCIPAL TO A CRIME WHEN THE ACTUAL PERPETRATOR, IN THE SAME TRIAL, IS ACQUITTED OF THE CRIME?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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JURISDICTION

The jurisdiction of this court is invoked under 28 U.S.C. §1257(b) and (c). Petitioner took a direct appeal to the Fourth District Court of Appeals on September 11, 2015. That court denied the appeal with an opinion on May 16, 2018. (Appendix A) Thereafter, the Petitioner sought discretionary review in the Florida Supreme Court. That court declined review on December 18, 2018. (Appendix C). Petitioner filed his petition within 90 days of the order from the Florida Supreme Court. The Fourth District Court of Appeals decided an important question of federal law when it decided that the dual theories being presented to the jury, despite the absence of any evidence supporting one theory, was harmless error.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions involved in this petition is the 14th Amendment's Due Process Clause and the Equal Protection Clause, which provides in pertinent part,

- "nor shall any State deprive any person of life, liberty, or property, without due process of law...;"

- "nor deny to any person within its jurisdiction the equal protection of the laws."

Florida Statutes

777.011, 782.04(1), 775.087

STATEMENT OF THE CASE

A Florida grand jury indicted Petitioner Vassor and a named co-defendant, Rivky Tamar, on charges of first degree murder and burglary. Both defendants attended a joint trial. Vassor was found guilty under an aiding and abetting theory while Tamar was acquitted of the charges. Vassor was sentenced to life in prison. Vassor appealed the conviction and sentence to Florida's Fourth District Court of Appeals. That Court denied the appeal. (App.A 1-9) He then sought discretionary review in the Florida Supreme Court. That Court declined to exercise jurisdiction. (App. C). Vassor now seeks certiorari review in this Court.[1]

A jury found Vassor guilty of first degree murder, as a principal, and the court sentenced him to life in prison, where the State contended Vassor was lookout for a burglary, while acquitting Tamar, who the State alleged was the gunman who murdered the homeowner. (App.E 2238). Vassor's Co-Defendants, Zetrenne and Jean-Baptise, made deals with the State. (App. E1469-70) Zetrenne was never indicted, and Jean-Baptise, who testified for the State, pled to a reduced charge of manslaughter.

At the time of Vassor's arrest, he was 18 years old, a standout cornerback on Northeast High's football team, and an excellent student, who was being recruited

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[1] The following facts are reiterated from the facts in the Petitioner's state court briefs. These facts are not in dispute.

by Division I schools, including the United States Military Academy at West Point (App. B 2034-46).

On December 22, 2011, the Grand Jury indicted Vassor for Murder in the First Degree, alleging premeditation and/or felony murder, in violation of Fla. Stat. §§ 782.04(1), 775.087, and 777.011. (App D 22-25) The indictment alleged that on November 15, 2011, Vassor shot Nelson Heck by premeditated design to kill or Vassor and unknown persons committed a burglary and Heck died as a consequence. Id

The Night of the Incident

On the evening g November 15, 2011, Fort Lauderdale Police responded to a 911 call describing a dead man lying in the foyer of his house with the door open (App. E 1026-38) The 911 caller described his neighbor, Nelson Heck, as the deceased lying a pool of blood with a firearm in his hand. Id. Police arrived, set up a perimeter, and canvassed the area. (App. E 1061-1067) Police soon learned a citizen, who lived a few blocks down the street, had a video camera setup outside his apartment (App. E 1137-43) The citizen told police he recorded a video around the time of the incident of two cars that pulled up in the parking lot of his building. The video showed two men getting out of one car and into the other car, one of the men donning rubber or latex gloves, and the cars leaving together. Id. Several minutes later, the video captured the sounds of apparent gunshots. Id. Police viewed the video an issued a BOLO. Officer Good responded to the BOLO

when he pulled over Vassor and arrested him as the car and person matched the description. Id.

The Police Station

Police detained Vassor and took him to their station. (App F. 90-131) There, Detectives took his phone away and kept him in a locked room. During the ninety minutes that he was in custody, Detective Dejesus noticed that someone named "Gator Tom" was calling Vassor's phone with the phone number displayed with the name Gator Tom. *Id.*

Vassor asked for a lawyer, and in response, Detective Dejesus told him he needed to call someone to come pick him up and gave him his cellphone, but impounded his clothes. *Id.* The detectives kept Vassor in a locked room while he made the phone call, and surveilled and recorded his phone call. *Id.* Vassor's ride picked him up. Police held his vehicle to obtain a search warrant. Id.

Autopsy

In ruling Heck's death a homicide, the Medical Examiner concluded Heck died of three gunshot wounds to the torso and blunt force injuries to the head. (App F 1333-65)

The Ford

Homicide detectives learned a Ford Fusion was a bowtie was spotted the next morning in the parking lot of Northeast High School and was being driven by Zetrenne. (App. F 1-11) Police learned from Zetrenne's sister that Zetrenne had

cleaned the car earlier that day, *Id.* Detectives brought Zetrenne to the station and interrogated him. *Id.* After being shown photographs from the subject video of the vehicles, Zetrenne identified himself as the driver of the Taurus and acclaimed Vassor was the driver of the Altima. *Id.* He denied involvement on the burglary and murder, stating they were only there in the nearby to smoke marijuana. Detectives released Zetrenne. *Id.*

Cellphone Records

Through cell tower data received from MetroPCS, police obtained records showing numerous calls between the cell phones purportedly associated with Zetrenne and Vassor on the night of the incident. (App. F 1-11) Police arrested Zetrenne and Vassor in December 6, 2011. *Id.* Detectives obtained more records on Zetrenne's phone showing numerous calls during the night of the incident to a number associated with a juvenile named Jaquan Jean Baptise, who has a criminal record for burglary and carjacking. *Id.*

Zetrenne identified Jean Baptise in a lineup as the person involved with the burglary. *Id.* Specifically, Zetrenne told police that he picked up Zetrenne on the night of the incident at NW 8th Avenue and 16th Street, at the direction of Vassor. *Id.* And he said Jean Baptise had a firearm in his waistband and was bleeding profusely from his hand. *Id.* Zetrenne further confirmed that Vassor and Tamar also met up with them when he picked up Jean Baptiste. *Id.* Zetrenne was never charged and did not testify at trial.

Detectives arrested Jean Baptiste and observed an injury to his right hand consistent with a gunshot wound, as described by Zetrenne. *Id.* Blood from the victim's home matched Jean Baptiste's DNA (App.C 33) Jean Baptiste told police he and another unknown black male were dropped off at the victim's residence to commit a burglary. (App C.28) According to Jean Baptiste, they rang the doorbell to verify no one was home. But Heck answered the door—armed with a firearm—and a struggle ensued. *Id.* Jean Baptiste claimed that Heck pulled out a firearm and it went off and shot Jean Baptiste in the hand. *Id.* Jean Baptists then claimed he ran away after being shot, but as he ran away, he stopped, turned around and saw the other black male shoot Heck. *Id.* Jean Baptiste later testified for the State at trial. *Id.* After learning that Gator Tom, who was calling Vassor's cell phone at the police station, was Tamar. *Id.* Police arrested Tamar. *Id.*

Trial

After almost four years since Vassor's arrest, the case proceeded to trial. (App.D 148-51) During trial, the State contended Tamar killed Heck during their tussle and Jean Baptiste's hand was shot by Heck. (App. G 1462-95) The State also introduced the evidence of cell phone call Vassor while in custody, and his statement when he was held in a locked room, but told to call for a ride. (App.G 1698-1721; 1944-2011) Most of the testimony centered on Jean Baptiste (App. App. G 1462-95)

Although not promised anything for testifying, the State had already reduced Jean Baptiste's charge to manslaughter. *Id.* Baptiste testified he hoped to get youthful offender sanctions, which are capped at six years. *Id.* The court denied Vassor's motion for judgment of acquittal after the State rested. (App H. 128)

The defense objected to the court instructing the jury on dual theories of premeditation and felony murder where there was no evidence of premeditation.

Mr. Vassor then took the stand in his defense. He testified that he was only handling a marijuana transaction in the parking lot and had not had any involvement in the robbery. (App. H 2034-59) He also denied making the statements and phone calls while in custody. *Id.* The State played the police tape of his phone calls while in custody in an effort to impeach him *Id.* Vassor had earlier moved, during the State's case in chief, to suppress the in-custody phone call and the information the detectives observed in his phone while he was being held in custody. (App. H 130) The court denied Vassor's motion. *Id.*

The jury instructions used both theories of first degree murder, premeditation and felony murder. (App. I 2070-79) The jury came back with a question asking if they could see the power point of cellphone locations used in FBI Special Agent Mugnuson's testimony, which the court of course did not allow because it was only a demonstrative aid. (App. I 2228-29) Although the court used separate verdict forms for Tamar and Vassor, the court used "and/or" using both defendants in the actual elements of the crime and the lesser. The jury

returned a verdict of guilty to Vassor, and not guilty as to Tamar. Tamar's verdict form contained the special findings related to firearm usage, if they found him guilty of the main crime. (App. I 182-206)

REASONS FOR GRANTING THE WRIT

Question One: The State convicted Petitioner Vassor using an indictment and verdict form that gave the jury two alternative theories of first degree murder, premeditation and felony murder. The premeditation theory was void of any supporting evidence, and the jury acquitted the actual perpetrator of the alleged felony murder while finding Vassor guilty as a non-acting principal in the same felony murder. Under these unique circumstances, the rule in *Griffin v. United States*, 502 U.S. 46, 112 S.CT 466 (1992), that a lack of evidence to support an alternative theory of offense does not amount to legal insufficiency, cannot apply in this case.

In other words, *Griffin's* modification of *Yates v. United States*, 354 U.S. 298, 77 S.CT 1064 (1957), does not provide an answer for the present circumstances, nor does *Yates* address the current situation either. Yet to allow this conviction to stand when the actual shooter and the other three active participants are currently (or soon to be) released violate all notions of fundamental fairness or the right to due process.

Question Two: This Court should review the second question because Florida's principal statute, as applied in this case, violates due process under the

14th Amendment. Although Florida precedent seems to hold otherwise, *See Potts v. State*, 430 So.2d 900 (Fla.1983), *cf. State v. Marks & Marks, P.A.*, 833 So.2d 249 (Fla.2002), said precedent is not binding on this Court's interpretation of the constitution. Under Florida's principal statute, § 777.011, Fla. Stat. (2011), each participant in a crime is guilty of the acts of each co-perpetrator. *Staten v. State*, 519 So. 2d 622, 624 (Fla.1988) ("Under our law, both the actor and those who aid and abet in the commission of a crime are principals in the first degree.") Vassor was convicted under the aiding and abetting theory; he was not on scene when the alleged burglary/murder occurred. Instead, he was charged as being a lookout some distance away. This Court should find that due process required a jury finding that the predicate crime occurred before Vassor could be an aider or abettor to it. *Rosemond v. United States*, 572 U.S. 65, 134 S.Ct 1240, 188 L Ed 2d 248 (2014)("The prosecutor must show the use or carriage of a gun; *so too he must prove the commission of a predicate...offense.*"). Given the facts of this case, the jury's acquittal of the charged gunman is, as a matter of law, a binding, *de facto* resolution that the burglary/murder did not occur. Doing otherwise would give meaning and effect to a jury's pronouncement of innocence despite the co-defendants' clear evidence of guilt, while, on that same evidence, sentencing a man to life on an abstract legal theory the jury obviously misunderstood. To sustain Mr. Vassor's convictions and sentences under these circumstances would constitute "a wholly arbitrary deprivation of liberty." *Thompson v. Louisville*, 362

US 199, 80 SCt 624(1960). Therefore, Mr. Vassor should not be held responsible for aiding or abetting the acquitted offenses as a matter of law. Thus, this court should review this case via certiorari.

CONCLUSION

Based on the foregoing, the Petitioner urges this court to grant certiorari review.

Respectfully submitted,

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