No.

IN THE SUPREME COURT OF THE UNITED STATES

JOHN CONNOLLY,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the Third District Court of Appeal
State of Florida

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the due process clause requires a state court adjudicating a federal claim to set forth the reasons for its adjudication?

PARTIES TO THE PROCEEDING

Parties to the proceeding include John Connolly (Appellant/Petitioner), Dane K. Chase, Esquire (Appellant/Petitioner's Counsel), and Ashley Moody (Attorney General, State of Florida).

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PETITION FOR WRIT OF CERTIORARI

OPINION BELOW

The decision of the Third District Court of Appeal, State of Florida, *infra*, is attached as Appendix A.

JURISDICTION

The Judgment of the Third District Court of Appeal was entered on February 6, 2019. However, a timely motion for rehearing was filed on February 19, 2019, and not denied until July 2, 2019. This Court's jurisdiction is invoked under Title 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

> **Section 1.** All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; 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.

U.S. Const. amend. XIV.

STATEMENT OF FACTS

Petitioner, John Connolly, was the defendant in Criminal Case No. F-01-8287 in the Eleventh Judicial Circuit in and for Miami-Dade County, State of Florida. In said case, Mr. Connolly was charged by Indictment on May 4, 2005, with First Degree Murder (Count I) and Conspiracy to Commit First Degree Murder (Count II). Count I specifically charged as follows:

> The Grand Jurors of the State of Florida, duly called, impaneled and sworn to inquire and true presentment make in and for the body of the County of Miami-Dade, upon their oaths, present that on or between the 31st day of July, 1982, and the 2nd day of August, 1982, within the Counties of Miami-Dade and Broward, State of Florida, JAMES J. BULGER, STEPHEN J. FLEMMI, JOHN V. MARTORANO AND JOHN J. CONNOLLY, JR., did unlawfully and feloniously kill a human being, to wit: JOHN B. CALLAHAN, from a premeditated design to effect the death of the person killed or any human being, by shooting the said JOHN B. CALLAHAN with a firearm, in violation of s. 782.04(1), s. 775.087 and s. 777.011, Florida Statutes, to the evil example of all others in like cases offending and against peace and dignity of the State of Florida.

Mr. Connolly ultimately proceeded to trial on the aforementioned charges, with said trial lasting approximately eight (8) weeks. Although the trial proceedings in Mr. Connolly's case are voluminous, the facts germane to the instant petition can be briefly stated as follows.

The state's witnesses collectively testified that in the 1970s and 1980s a gang known as the "Winter Hill Gang" operated in Boston Massachusetts. The leaders of the gang at various times included James "Whitey" Bulger, Stephen Flemmi, John Martorano, Howie Winter, Joe McDonald, and Jimmy Sims. The gang engaged in various crimes and split the profits from its crimes amongst its members.

Throughout the 1970s and 1980s, Mr. Connolly was a special agent with the FBI and worked as part of an organized crime strike force seeking to eliminate organized crime in the Boston area. As part of his duties, Mr. Connolly engaged Mr. Bulger as a confidential informant who provided information concerning the Boston Mafia. According to the state's witnesses, Mr. Connolly would also pass information to Mr.

Bulger and the other members of the Winter Hill Gang concerning ongoing investigations into the gang.

In the 1970s, John Callahan, a businessman, established contact with the members of the Winter Hill Gang. In the early 1980s, Mr. Callahan was seeking to purchase a business known as World Jai Alai from another businessman, Roger Wheeler. Having failed in his bid to purchase World Jai Alai, Mr. Callahan asked Mr. Martorano to kill Mr. Wheeler, in the hopes that he would then be able to purchase the business from Mr. Wheeler's widow. On May 27, 1981, Mr. Martorano shot and killed Mr. Wheeler in Tulsa, Oklahoma at the request of Mr. Callahan.

According to the state's witnesses, following the murder of Mr. Wheeler, Mr. Connolly notified Mr. Bulger that the FBI was investigating the murder and would be putting "a lot of pressure on Callahan." Mr. Connolly notified Mr. Bulger that "They are going to put so much pressure on him, he's going to fold" and "We're all going to end up going to jail for the rest of our lives if he doesn't hold up." Mr. Bulger, Mr. Flemmi, and Mr. Martorano ultimately agreed to kill Mr. Callahan. Although Mr. Martorano could not recall the exact date, he testified he shot and killed Mr. Callahan on July 30th, July 31st, or August 1st, 1982. Mr. Callahan's body was found on August 2, 1982.

After the state rested, a preliminary charge conference and a charge conference were held. During the preliminary charge conference, defense counsel requested that no lesser included offenses be submitted to the jury as to the charge of first degree murder. The parties and the court recognized that the statutes in place at the time of the offense, 1982, governed the case. The state theorized that the offense of second

degree murder was only a first degree felony barred by the statute of limitations, but when the charge is reclassified for the use of a firearm it becomes a life felony not barred by the statute of limitations.

Thereafter, during the charge conference, defense counsel specifically objected to the giving of a jury instruction on the charge of second degree murder, arguing that the charge was time barred under the applicable statute of limitations. Nonetheless, the court elected to instruct the jury on the offense of second degree murder with a firearm and noted it was doing so over defense counsel's objection.

The jury was ultimately instructed on the lesser included offense of second degree murder with a firearm. The jury returned a verdict of guilty as to the lesser included offense of second degree murder with a firearm (Count I), and not guilty of conspiracy to commit first degree murder (Count II). Mr. Connolly was then sentenced to forty (40) years imprisonment.

Mr. Connolly appealed to the Third District Court of Appeal, State of Florida, and his appellate counsel, Manuel Alvarez, raised the following issues in his Initial Brief in Case No. 3D09-280:

I. THE DEFENDANT'S SECOND DEGREE MURDER CONVICTION CANNOT BE RECLASSIFIED TO A LIFE FELONY BECAUSE THE INDICTMENT DID NOT CHARGE THE DEFENDANT WITH ACTUAL POSSESSION OR USE OF A FIREARM.

II. THE DEFENDANT'S SECOND DEGREE MURDER CONVICTION CANNOT BE RECLASSIFIED TO A LIFE FELONY BECAUSE THE JURY VERDICT FAILED TO MAKE A SPECIFIC FINDING THAT THE DEFENDANT ACTUALLY POSSESSED OR USED A FIREARM DURING THE COMMISSION OF THE HOMICIDE.

III. THE DEFENSE ATTORNEYS WERE INEFFECTIVE ON THE FACE OF THE RECORD WHERE THE DEFENDANT'S CONVICTION WAS NOT VACATED DUE

TO THE ATTORNEYS' FAILURE TO FILE A TIMELY MOTION FOR ARREST OF JUDGMENT.

IV. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ADMITTING DAMAGING HEARSAY EVIDENCE WHICH DID NOT FALL WITHIN THE SCOPE OF THE CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE AND WHICH VIOLATED THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONTATION.

V. THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN ALLOWING THE INTRODUCTION OF A HOMICIDE, WHICH OCCURRED ALMOST SIX YEARS PRIOR TO THE CHARGED OFFENSE, AS COLLATERAL CRIMES EVIDENCE.

On March 2, 2011, the court per curiam affirmed. Appellate counsel then filed a "Motion for Rehearing En Banc, or in the alternative, for the issuance of a written opinion." On May 28, 2014, the motion was granted and Mr. Connolly's Judgment and Sentence were reversed. On June 12, 2014, the state filed a "Motion for Rehearing and Rehearing En Banc, Clarification, and Certified Question." On November 4, 2014, the court ordered the case to be heard en banc. On November 12, 2014, the court entered an order permitting the parties to file supplemental briefs. On January 12, 2015, appellate counsel filed an "En Banc Brief" raising the following issue:

> THE APPELLANT'S SECOND-DEGREE MURDER CONVICTION CANNOT BE RECLASSIFIED BECAUSE HE WAS AN AIDER AND ABETTER, HE WAS NOT PRESENT WHEN THE VICTIM WAS MURDERED BY A CODEFENDANT, THE INDICTMENT DID NOT ALLEGE THAT HE WAS ARMED, THE STATE DID NOT PROVE THAT HE WAS ARMED WHEN THE CODEFENDNAT SHOT THE VICTIM, AND THE JURY DID NOT FIND THAT HE POSSESSED, OR USED A FIREARM.

On July 29, 2015, the court withdrew its May 28, 2014 opinion, and entered a new opinion affirming Mr. Connolly's Judgment and Sentence. On August 27, 2015, appellate counsel filed a "Notice to Invoke Discretionary Jurisdiction," seeking to invoke

the jurisdiction of the Florida Supreme Court. However, on January 19, 2016, the Florida Supreme Court entered an order declining to review Mr. Connolly's case.

On October 24, 2016, Mr. Connolly filed a Petition for Writ of Habeas Corpus Alleging Ineffective Assistance of Appellate Counsel in the Third District Court of Appeal, State of Florida. In the petition, Mr. Connolly argued he was deprived of his right to the effective assistance of counsel under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) by his appellate counsel's failure to argue on appeal that the trial court erred by instructing the jury as to the lesser included offense of second degree murder, as the state was barred from prosecuting said offense by the applicable statute of limitations.

On April 10, 2017, Mr. Connolly filed a complaint with the Florida Judicial Qualifications Committee asserting misconduct on the part of Judge Leslie Rothenberg – the author of the en banc opinion which denied Mr. Connolly relief on direct appeal by a vote of 5-4. Over 80 former FBI agents lent their names in support of the complaint, including 2 former Deputy Directors of the FBI, Weldon L. Kennedy and Bruce J. Gebhardt, Special Agent Joseph Pistone a.k.a. Donnie Brasco, and a number of other highly regarded special agents.

On January 24, 2019, 2 years and 3 months after the filing of his petition, the court entered an order holding the petition in abeyance pending the outcome of a motion for post-conviction relief Mr. Connolly had filed in the trial court asserting his trial counsel had performed ineffectively. On February 4, 2019, Mr. Connolly filed a motion to vacate the order holding his petition in abeyance in which he explained the

outcome of his motion for post-conviction relief would have no bearing on his petition. Two days later, on February 6, 2019, the court entered an order granting Mr. Connolly's motion to vacate the order holding his petition in abeyance, and further denying his petition for writ of habeas corpus.

On February 19, 2019, Mr. Connolly filed a motion for rehearing. On June 24, 2019, the state filed a response. On July 1, 2019, Mr. Connolly filed a reply. One day later, on July 2, 2019, the court entered an order denying Mr. Connolly's motion for rehearing.

This Petition follows.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT REVIEW TO ESTABLISH THAT A STATE COURT DECIDING A FEDERAL CLAIM CANNOT DISPOSE OF THE CLAIM WITHOUT EXPLANATION UNDER THE FOURTEENTH AMENDMENT.

At issue in this Petition is whether the Due Process Clause of the Fourteenth Amendment requires a state court deciding a federal claim to provide an explanation for its adjudication.

In *Wolff v. McDonnell*, 418 U.S. 539, 94 S. Ct. 2963, 2979, 41 L. Ed. 2d 935 (1974), in the context of a state prison disciplinary proceeding which may result in the loss of good time credits, this Court held that in order to afford the inmate due process, the inmate must receive: (1) written notice of the disciplinary charges; (2) an opportunity to call witnesses and present documentary evidence in his defense; and (3) a written statement by the factfinder of the evidence relied on and the reasons for the disciplinary action. *Wolff*, 418 U.S. at 563-67, 94 S. Ct. at 2978-80. With respect to the requirement of written findings, this Court explained:

> ... that there must be a 'written statement by the factfinders as to the evidence relied on and reasons' for the disciplinary action. [*Morrissey v. Brewer*, 408 U.S. 471, 489, 92 S. Ct. 2593, 2604, 33 L. Ed. 2d 484 (1972)]. Although Nebraska does not seem to provide administrative review of the action taken by the Adjustment Committee, the actions taken at such proceedings may involve review by other bodies. They might furnish the basis of a decision by the Director of Corrections to transfer an inmate to another institution because he is considered 'to be incorrigible by reason of frequent intentional breaches of discipline,' Neb.Rev.Stat. s 83—185(4) (Cum.Supp.1972), and the certainly likely to be considered by the state parole authorities in making parole decisions. Written records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding.

> Further, as to the disciplinary action itself, the provision for a written record helps to insure that administrators, faced with possible scrutiny by state officials and the public, and perhaps even the courts, where fundamental constitutional rights may have been abridged, will act fairly. Without written records, the inmate will be at a severe disadvantage in propounding his own cause to or defending himself from others. It may be that there will be occasions when personal or institutional safety is so implicated that the statement may properly exclude certain items of evidence, but in that event the statement should indicate the fact of the omission. Otherwise, we perceive no conceivable rehabilitative objective or prospect of prison disruption that can flow from the requirement of these statements.

Wolff, 418 U.S. at 564–65, 94 S. Ct. at 2979 (Footnotes omitted).

The due process concerns that require written findings concerning a disciplinary proceeding involving an inmate likewise require findings before a state court may deny a criminal defendant relief on a federal constitutional claim, and Mr. Connolly's case is the ideal vehicle for this Court to establish that the due process clause requires a state court resolving a federal claim to provide an explanation for its adjudication.

In the state court proceedings Mr. Connolly argued that under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) he was deprived of his right to the effective assistance of counsel by his appellate counsel's failure to argue on appeal that the trial court erred by instructing the jury as to the lesser included offense of second degree murder, as the state was barred from prosecuting said offense by the applicable statute of limitations. Although limited, a state court's adjudication of an inmate's federal claim is ultimately subject to review in federal court. 28 U.S.C. § 2254. Conversely, "federal habeas corpus relief does not lie for errors of state law." *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S. Ct. 3092, 3102, 111 L. Ed. 2d

606 (1990) (citations omitted). This Court has observed that Section 2254 does not by its terms require a state court to dispose of a federal claim by way of a written explanation. *Harrington v. Richter*, 562 U.S. 86, 98, 131 S. Ct. 770, 784, 178 L. Ed. 2d 624 (2011). Instead, "under § 2254(d), a habeas court must determine what arguments or theories supported or...could have supported, the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court." *Harrington*, 562 U.S. at 102, 131 S. Ct. at 786. However, the *Harrington* Court was not asked to consider whether the due process clause itself compels state courts deciding federal claims to provide an explanation for their adjudication, and, for the reasons explained in *Wolff,* this Court should now establish that it does so.

As in *Wolff*, the actions taken in state court proceedings involving federal claims may involve review by other bodies, namely federal courts. *See*, 28 U.S.C. § 2254. As in *Wolff*, "[w]ritten records of proceedings will thus protect the inmate against collateral consequences based on a misunderstanding of the nature of the original proceeding." *Wolff*, 418 U.S. at 565. For instance, in Mr. Connolly's case, should he pursue his ineffective assistance of counsel claim through the filing of a Section 2254 petition, the federal court tasked with reviewing the claim will be left to simply guess at the basis of the state court's denial. Because of the silent denial, the reviewing court may conclude that because the claim contained a state law component, *i.e.*, whether the state statute of limitations period had expired, the state court must have decided that issue against Mr. Connolly and he is thus not entitled to relief, when the reality may be that the state

court concluded that the limitations period had expired but appellate counsel's failure to brief the issue did not rise to the level of ineffective assistance of counsel. The "collateral consequence" would be the erroneous denial of Mr. Connolly's federal petition based on a "misunderstanding of the nature of the original proceeding," because if the state court concluded that the limitations period had expired but nonetheless denied Mr. Connolly's claim on the basis that the failure to brief the limitations issue did not rise to the level of ineffective assistance of counsel Mr. Connolly would unquestionably be entitled to federal relief. *See, e.g., Stogner v. California*, 539 U.S. 607, 615, 123 S. Ct. 2446, 2452, 156 L. Ed. 2d 544 (2003)("a statute of limitations reflects a legislative judgment that, after a certain time, no quantum of evidence is sufficient to convict.")(citations omitted); *Heath v. Jones*, 941 F.2d 1126, 1130-32 (11th Cir. 1991) (Observing that where appellate counsel neglects a claim which had a reasonable probability of success on appeal counsel would be ineffective). In short, without an explanation concerning the denial of his federal claim, an inmate is "at a severe disadvantage in propounding his own cause to or defending himself from others." *Wolff*, 418 U.S. at 565.

Furthermore, "the provision for a written record" would help to insure that state courts, "faced with possible scrutiny by state officials and the public, and perhaps even [other] courts...will act fairly." *Id.* For instance, in Mr. Connolly's case he, and the FBI agents who support him, have grave concerns as to whether the state court has treated Mr. Connolly fairly, and to that end a complaint was filed with the Florida Judicial Qualifications Committee. Moreover, the state court's handling of Mr. Connolly's case

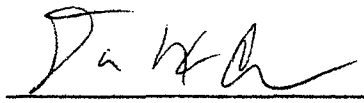
(*i.e.*, after his petition remained pending for over 2 years with no action by the court, the court entered an order holding his case in abeyance and within 2 days of Mr. Connolly requesting the court vacate the order the court denied his petition, and likewise denied his motion for rehearing 1 day after he filed his reply to the state's response) does not satisfy the mandate that "justice must satisfy the appearance of justice." *See, Offutt v. United States*, 348 U.S. 11, 14, 75 S. Ct. 11, 13, 99 L. Ed. 11 (1954). These concerns, as well as any inmate's concerns regarding the fairness of a legal proceeding can only be alleviated by what due process commands; transparency. Without an explanation for the denial of an inmate's claim there simply is no assurance that his claim was acted upon fairly, and there is no meaningful way for the inmate to seek redress in the event that it wasn't. The primary reason for permitting state courts to continue to deny federal claims without explanation is efficiency, but a justice system which favors efficiency over transparency is no justice system at all. The Founding Fathers recognized this fact, which is why the Sixth Amendment guarantees the right to a public trial. This Court should now take this opportunity and establish that the due process clause holds the state courts to the same standards it does prison officials, and establish that due process requires a state court deciding an inmate's federal claim to set forth its reasons for its adjudication of the claim.

Consequently, this Court should accept jurisdiction and ultimately vacate the order denying Mr. Connolly's state habeas corpus petition, and direct the Third District Court of Appeal to enter a written explanation concerning its adjudication of Mr. Connolly's claim. *See, Wolff*, 418 U.S. at 564–65, 94 S. Ct. at 2979.

CONCLUSION

For the reasons stated above, this Court should grant Mr. Connolly's Petition for Writ of Certiorari, and establish that the due process clause requires a state court deciding an inmate's federal claim to set forth its reasons for its adjudication of the claim.

Respectfully Submitted,



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APPENDIX A

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

FEBRUARY 06, 2019

JOHN CONNOLLY,
Appellant(s)/Petitioner(s),
vs.
THE STATE OF FLORIDA,
Appellee(s)/Respondent(s),

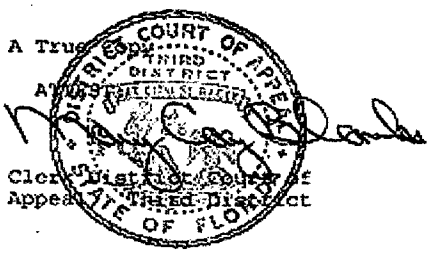
CASE NO.: 3D**16-2388**

L.T. NO.: 01-8287

Upon consideration, petitioner's motion to vacate January 24, 2019 court order is granted.

Following review of the petition for writ of habeas corpus alleging ineffective assistance of appellate counsel, and the response and reply thereto, it is ordered that said petition is hereby denied.

EMAS, C.J., and SCALES and LINDSEY, JJ., concur.



cc: Linda S. Katz
James E. McDonald
Dane K. Chase
Hon. Yvonne Colodny
Office Of Attorney General

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APPENDIX B

IN THE DISTRICT COURT OF APPEAL

OF FLORIDA

THIRD DISTRICT

JULY 02, 2019

JOHN CONNOLLY
Appellant(s)/Petitioner(s),
vs.
THE STATE OF FLORIDA
Appellee(s)/Respondent(s),

CASE NO.: 3D**16-2388**

L.T. NO.: 01-8287

Upon consideration, petitioner's pro se motion for rehearing, certification, and request that the Court issue a written opinion is hereby denied.

EMAS, C.J., and SCALES and LINDSEY, JJ., concur.

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Mercedes M. Prieto
CLERK
DISTRICT COURT OF APPEAL
THIRD DISTRICT

cc: Linda S. Katz
Office Of Attorney General

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