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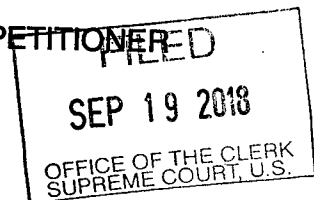
19-6200

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL SCOTT SMITH — PETITIONER
(Your Name)

vs.

STATE OF FLORIDA — RESPONDENT(S)



ON PETITION FOR A WRIT OF CERTIORARI TO

FIRST DISTRICT COURT OF APPEALS, FLORIDA
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Michael S. Smith, DC# A50419
(Your Name)

Liberty Correctional Institution
11064 N.W. Dempsey Barron Rd
(Address)

Bristol, Florida 32321
(City, State, Zip Code)

N/A
(Phone Number)

QUESTION(S) PRESENTED

Can a State Court indict an accused on one charge and take him to trial on another in the guise of the tried crime merely being a theory of prosecution for the charged crime although each have different factual elements, each are found in different subsections of the Florida Statutes, and each are completely independant of the other?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- ☐ All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

RELATED CASES

NONE

TABLE OF CONTENTS

OPINIONS BELOW.....	1
JURISDICTION.....	2
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	8
CONCLUSION.....	13

INDEX TO APPENDICES

APPENDIX A *Opinion of the First District Court of Appeals*

APPENDIX B *Order Denying Defendant's Motion
to Correct Illegal Sentence*

APPENDIX C *Criminal Indictment*

APPENDIX D *Portion of March 30, 2010 Trial Transcript*

APPENDIX E

APPENDIX F

TABLE OF AUTHORITIES CITED

CASES

PAGE NUMBER

Alleyne v. United States, 570 U.S. 99 (2013)
Cole v. Arkansas, 333 U.S. 196 (1948)
Mathis v. United States, 136 S.Ct 2243 (2016)
McCarthy v. United States, 394 U.S. 459 (1969)
Richardson v. United States, 526 U.S. 813 (1999)
Watson v. Jago, 558 F.2d 330 (6th Cir. 1977)
Young v. State, 579 So.2d 721 (Fla. 1991)

STATUTES AND RULES

Florida Statute § 782.04 (1)
Florida Statute § 782.04 (1)(a) 1
Florida Statute § 782.04 (1)(a) 2
Iowa Code § 702.12 (2013)

Florida Rules of Criminal Procedure, Rule 3.800 (a)

Standard Jury Instructions § 7.2 Murder- First Degree
Standard Jury Instructions § 7.3 Felony Murder- First Degree

OTHER

1 J. Bishop, Criminal Procedure 50 (2d ed. 1872)
Black's Law Dictionary (10th ed. 2014)

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☐ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the United States district court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

☒ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the Fourteenth Judicial Circuit court appears at Appendix B to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

JURISDICTION

☐ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☐ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☒ For cases from **state courts**:

The date on which the highest state court decided my case was 06/28/2019.
A copy of that decision appears at Appendix A.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment 14, § 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.

STATEMENT OF THE CASE

On July 1, 2009, Mr. Smith was charged by indictment with First Degree Premeditated Murder pursuant to §782.04(1) Florida Statutes (2008). The indictment read:

... Michael Scott Smith, on or about the 22nd day of May, 2009, in Bay County, Florida, did unlawfully from a premeditated design to effect the death of a human being, Diana L. Shafer, did kill and murder said Diana L. Shafer by striking her in the head with a hammer in violation of section 782.04(1), Florida Statute, in such case made and provided against the peace and dignity of the State of Florida.

(Appx. C).

No other felony was charged in the indictment at that time or any point thereafter.

Mr. Smith and his attorney structured their defense based on allegations of premeditation.

The first day of trial began on March 30, 2010. On that morning, defense counsel reviewed the prosecutor's proposed jury instructions and discovered that felony murder was included in them. This was the first time that the defense was put on notice that the State of Florida was pursuing a charge of Felony Murder in the First Degree. The first thing Mr. Smith's attorney did

in open court that morning was make objections to the inclusion of Felony murder in the jury instructions. Specifically, counsel stated:

We have reviewed the state's proposed jury instructions and we have an objection to the inclusion of the felony murder instruction in the alternative for premeditated murder. And, Judge, the basis for our objection is that they didn't allege felony murder in the indictment, they didn't allege any underlying felony.

(Appx D, p. 6)

All throughout that day and on April 1, 2010, while preparing the final jury instructions, defense counsel vigorously objected to the inclusion of Felony murder in the jury instructions.

The trial court overruled the objections and the jury was allowed to be instructed on felony murder. The verdict form did not provide for the jury to elaborate between premeditation and felony murder. The jury returned a verdict that Mr. Smith "is guilty of First Degree Murder, as charged."

On June 4, 2018, Mr. Smith filed a Florida Rules of Criminal Procedure, Rule 3.800(a) Motion to Correct an Illegal Sentence. The motion alleged:

The Defendant's right to Equal Protection and Due Process of Law under the Fourteenth Amendment to the U.S. Constitution and Article 1 Section 9 of the Florida Constitution was violated when the trial court erred and committed fundamental error when it illegally imposed a sentence of natural life for a crime that the charging indictment did not charge the essential element of the crime of felony first degree murder (an underlying felony). The defendant could only be sentenced to a term of imprisonment not exceeding life for the crime of second degree murder or a lesser degree of murder.

Specifically, Mr. Smith alleged that he was indicted for Premeditated First Degree Murder but was prosecuted and sentenced for Felony First Degree Murder.

An "Order Denying Defendant's Motion to Correct Illegal Sentence" was issued on September 25, 2018. The order of denial stated:

...the Florida Supreme Court has clearly and specifically stated that "the state may proceed on theories of both premeditated and felony murder when only premeditated first-degree murder is charged. Also, a special

verdict form demonstrating which theory the jury based its verdict on is not required." *Young v. State*, 579 So.2d 721, 724 (Fla 1991).

(Appx B, p. 1)

Mr. Smith filed a timely Notice of Appeal in the State District Court of Appeals and argued that the cases relied on by the trial court were bad law or didn't address the exact issues presented. On June 28, 2019, the State District Court of Appeals issued an order affirming the trial court without a written opinion. (Appx A)

REASONS FOR GRANTING THE PETITION

THE STATE COURT'S OPINION IS CONTRARY TO THE PRINCIPLES ARTICULATED BY THIS COURT AND DIRECTLY CONFLICTS WITH THE DECISION RENDERED BY THE SIXTH CIRCUIT IN *WATSON v. JAGO*, 558 F.2d 330 (6th Cir 1977).

It is "a well-established practice of including in the indictment, and submitting to the jury, every fact that was a basis for imposing or increasing punishment." *Alleyne v. United States*, 570 U.S. 99, 109 (2013). See also *Cole v. Arkansas*, 333 U.S. 196, 201 (1948).

This Court has determined that "various treatises defined 'crime' as consisting of every fact which 'is in law essential to the punishment sought to be inflicted,' 1 J. Bishop, *Criminal Procedure* 50 (2d ed. 1872) (hereinafter *Bishop*), or the whole of the wrong 'to which the law affixes...punishment,' *id.*, 80, at 51." *Alleyne*, 570 U.S. at 109.

Thus, a fact that is essential for a court to impose punishment or increase punishment is an element.

This case turns on whether a fact is an element of the crime, and thus must be charged in the indictment and submitted to the jury, or merely a means of committing the alleged crime. (i.e., a theory of committing the crime)

In *Mathis v. United States*, 136 S.Ct. 2243 (2016), this Court determined that "[e]lements" are the 'constituent parts' of a crime's legal definition - the things the 'prosecution must prove to sustain a conviction.' Black's Law Dictionary 634 (10th ed. 2014). At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant, see *Richardson v. United States*, 526 U.S. 813, 817, 119 S.Ct. 1707, 143 L.Ed.2d 985 (1999); and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty, see *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969)." *Id.* at 2249. In contrast, this Court explained that factual means of committing a single element "are mere real-world things - extraneous to the crime's legal requirements. (We have sometimes called them 'brute facts' when distinguishing them from elements. *Richardson*, 526 U.S., at 817, 119 S.Ct. 1707, 143 L.Ed.2d 985.) They are 'circumstance[s]' or 'event[s]' having no legal effect [or] consequence'; In particular, they need neither be found by a jury nor admitted by a defendant." *Id.*

Since at least 1991, Florida has determined that premeditated murder and felony murder are merely different theories (or means) of committing the same crime. The Florida Supreme Court has thus held that if an indictment charges premeditated murder, the prosecution may proceed to trial on

either premeditated murder or felony murder.
Young v. State, 579 So.2d 721 (Fla. 1991).

Mr. Smith alleges that the above reasoning is contrary to this Court's rationale because premeditated murder and felony murder each has elements independent of each other. These factual elements that differentiate the crimes does not fall under a single umbrella term to make them merely brute facts.

Premeditated First-Degree Murder is found under § 782.04(1)(a) 1. To convict the defendant of this crime, the State must prove:

- 1.) (victim) is dead;
- 2.) The death was caused by the criminal act of (defendant); and
- 3.) There was a premeditated killing of (victim).

See Standard Jury Instructions § 7.2 Murder-First Degree.

However, First-Degree Felony Murder is found under § 782.04(1)(a) 2 Fla Stat. To convict the defendant of this crime, the State must prove:

- 1.) (victim) is dead;
- 2.) While engaged in the commission of a[n] felony; and
- 3.) (defendant)... actually killed (victim).

See Standard Jury Instructions § 7.3 Felony Murder, First Degree.

The third element of Premeditated Murder and the second element of Felony Murder has no common link to bring them together as a single element. These two crimes has separate elements that should be charged in an indictment independant of each other.

In giving examples relating to the means-element question, this Court stated that "Iowa's [burglary] statute ... reaches a broader range of places: 'any building, structure, [or] land, water, or air vehicle.'" Iowa Code 702.12(2013). And those listed locations are not alternative elements, going towards the creation of separate crimes. To the contrary, they lay out alternative ways of satisfying a single locational element." Mathis, 136 S.Ct. at 2251. Again, this Court stated that the alternative facts of "burgling a 'building, structure, or vehicle'" are merely brute facts that falls under "a single umbrella term like 'premises.'" Mathis, 136 S.Ct. at 2257.

Unlike the above examples, the two distinguishing facts in Florida's Felony Murder and Premeditated Murder statutes does not have a single term to unite them together. Thus, Florida's almost 30 years contrary holding goes against the spirit of this Court's rulings.

Additionally, Florida's rational is in conflict with the United States Sixth Circuit Court of Appeals. In Watson v. Jago, 558 F.2d 330 (6th Cir. 1977), the Sixth Circuit addressed the same situation relating to

statutes almost identical to Florida's Felony Murder and Premeditated Murder statutes. In *Watson*, the defendant was indicted for "deliberate and premeditated murder in the first degree." *Id.* at 331. On the first morning of trial, the prosecutor revealed that they were going to argue felony murder. *Id.* at 332. Defense counsel objected and averred that "the indictment specified only a charge of first degree murder with deliberate and premeditated malice and did not include a charge of felony murder." *Id.* The trial court denied the objection and made defense counsel oppose the charge of felony murder at trial. *Id.*

On habeas corpus, the United States Sixth Circuit Court of Appeals stated that "[n]o principle of procedural due process is more clearly established than that of notice of the specific charge, [and is] among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Id.* at 338 (quoting *Cole*, 333 U.S. at 201). The court concluded:

To allow the prosecutor to amend the indictment at trial so as to enable the prosecution to seek a conviction on a charge not brought by the grand jury unquestionably constituted a denial of due process by not

giving appellant fair notice of
criminal charges to be brought
against him.

Id. at 339.

CONCLUSION

Florida's almost 30 years worth of rulings are
contrary to the holdings of this Court and the 6th Circuit.
The petition for a writ of certiorari should be granted.

Respectfully submitted,

Michael Scott Smith 150419
Michael Scott Smith

Date: 9-19-19