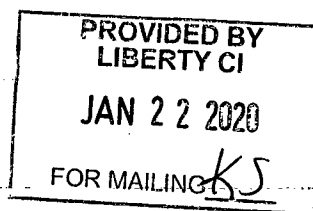


No. 19-6200



M.S

In The
SUPREME COURT OF THE UNITED STATES

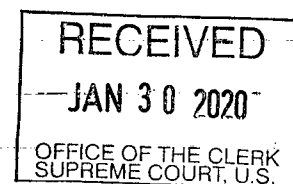
MICHAEL S. SMITH, Petitioner

v.

STATE OF FLORIDA, Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE FIRST DISTRICT COURT OF APPEALS IN
THE STATE OF FLORIDA

REPLY BRIEF TO THE BRIEF IN OPPOSITION



Michael S. Smith, prose
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QUESTION 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.

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CITATION OF OPINIONS

- The opinion of the First District Court of Appeals for the State of Florida appears at Appendix 'A' of the Petition for Writ of Certiorari and it is an unpublished opinion. This is the highest state court to review the merits of this case.
- The opinion of the Fourteenth Judicial Circuit, in and for Bay County in the State of Florida appears at Appendix 'B' of the Petition for Writ of Certiorari and it is an unpublished opinion.

JURISDICTION

The date on which the highest state court decided the case was June 28, 2019, and a copy of that decision appears at Appendix 'A' of the Petition for Writ of Certiorari. The Petition for Writ of Certiorari was timely filed on September 19, 2019. Mr. Smith invokes this Court's jurisdiction under 28 U.S.C. §1257.

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 AND PROCEDURAL HISTORY

Mr. Smith incorporates by reference all facts laid out in the Petition for Writ of Certiorari and further states the following.

On January 13, 2020, the State of Florida filed a "Brief in Opposition to Petition for Writ of Certiorari." The State of Florida presented three arguments as to why this Court should deny certiorari,

First they argued that Mr. Smith's case does not conflict with the Sixth Circuit's decision in *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977) or any decision by this Court because Florida's felony murder is merely a means of committing premeditated murder; and because *Watson v. Jago* was decided based on whether there was a variance or amendment to the indictment.

Next they argued that because Mr. Smith improperly used the Florida Rules of Criminal Procedure, Rule 3.800(a) motion to present this claim to the State court, the claim is not procedurally proper before this Court.

Lastly, the State of Florida argued that because there was an overwhelming amount of evidence establishing premeditation, any error was harmless.

REASON FOR GRANTING CERTIORARI

CERTIORARI IS WARRANTED BECAUSE THE CASE IS PROPERLY BEFORE THIS COURT FOR REVIEW, CONFLICTS WITH THE SIXTH CIRCUIT AND THIS COURT, AND IS NOT HARMLESS.

- Florida's First Degree Felony Murder is a Crime Independent of First Degree Premeditated Murder.

The State of Florida dedicates many pages of its brief in opposition attempting to argue that first degree felony murder is not a crime but merely a means of committing first degree premeditated murder. However, the State has conveniently ignored one aspect of Florida jurisprudence that negates every argument put forth on this point. This jurisprudence is Florida's standard jury instruction on first degree felony murder.

Standard Jury Instructions § 7.3 is titled Felony Murder - First Degree and is found under the section of the Standard Jury Instructions called "Instructions on Crimes." The State wishes this Court to believe that first degree felony murder is not a crime; however, § 7.3 of Florida's jury instructions refers to it as a "crime." See Standard Jury Instructions § 7.3 ("To prove the crime of First Degree Felony Murder, the State must prove the following three elements beyond a reasonable doubt").

The State's biggest allegation is that felony murder simply creates a presumption of premeditation. During the early and middle parts of the twentieth century, this was a true allegation. However, with the inception of the current jury instruction for first degree felony murder in 1981, this is no longer true. The adoption of § 7.3 in 1981 evolved felony murder from a presumption of premeditation into a full blown crime with its own essential elements. Standard Jury Instructions § 7.3 ("the State must prove the following three elements beyond a reasonable doubt"). Most significant is the instructions' language which makes felony murder independent of premeditated murder. Section 7.3 states:

"In order to convict the defendant of First Degree Felony Murder, it is not necessary for the State to prove that the defendant had a premeditated design or intent to kill."

The jury instruction then ends, like all other jury instructions for crimes in the State of Florida, with a list of "Lesser Included Offenses." A list which is different than the lesser included offenses found in § 7.2 for premeditated murder.

Nowhere in § 7.2 and § 7.3 does the jury instructions state that felony murder creates a presumption of premeditation.

While there are several cases out of the Florida Supreme Court since 1981 addressing this issue, none of those decisions delve

into the adoption of the 1981 jury instructions for felony murder. Instead, these decisions merely uphold the pre-1981 case law addressing the issue.

This Court has clearly held that each essential element of the crime must be charged in the indictment in order to try and convict a defendant. *Alleyne v. United States*, 570 U.S. 99, 109 (2013) and *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). An "element" is "what the jury must find beyond a reasonable doubt to convict the defendant". *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

Section 7.3 list three elements the State must prove "beyond a reasonable doubt" in order to convict the defendant of first degree felony murder. However, relying on over 100 years of outdated case law, Florida has determined that these elements need not be charged in the indictment as long as the elements for first degree premeditated murder found in § 7.2 are charged. The elements for § 7.2 and § 7.3 are fundamentally different. This rational directly conflicts with the decisions of this Court addressing the same significant legal issue.

The State also argues that Mr. Smith's case does not conflict with the Sixth Circuit's decision of *Watson v. Jago*, 558 F.2d 330 (6th Cir. 1977) because the question in *Watson* was whether there was a variance or amendment to the indictment. However, anytime a defendant is indicted on

one charge but tried on another, it is considered a "constructive" amendment to the indictment.

Stirone v. United States, 361 U.S. 212, 217 (1960).

The State also ignores the fact that the Sixth Circuit determined that the constitutional prohibition against amendments to the indictment "has never been incorporated into the Fourteenth Amendment and hence is not applicable to the states."

Watson, 558 F.2d at 337. Instead, the Sixth Circuit granted habeas corpus relief based on the criminal defendant's right to "fair notice of criminal charges" against him as determined in *In re Oliver*, 333 U.S. 257, 273 (1948) and *Cole v. Arkansas*, 333 U.S. 196, 201 (1948). *Watson*, 558 F.2d at 338. The very argument that Mr. Smith now presents to this Court.

The State's argument that Mr. Smith was on constructive notice that he would have to defend against felony murder due to Florida case law is unreasonable. The grand jury failed to return an indictment on robbery and the State filed a "No Information" on the charge. (Appendix A. to Brief in Opposition, pg. 16). No attorney would ever feel the need to prepare a defense against felony murder under these circumstances.

-Mr. Smith's Case is Procedurally Proper Before this Court.

The State's argument that the case is not procedurally proper for this Court to review because Mr. Smith presented his claim in a

motion to correct illegal sentence is flawed.

First and foremost, the State trial court addressed Mr. Smith's constitutional claim on the merits even though it was presented in a motion to correct an illegal sentence, and the State appellate court affirmed that ruling on the merits. The State is not at liberty now to argue the claim was procedurally barred when the State courts obviously thought otherwise.

When presented with claims that a defendant has been tried and convicted of a charge not included in the information or indictment, Florida courts has brushed aside procedural necessities and ruled the claim can be brought at "any time." *Figueroa v. State*, 84 So.3d 1158, 1161 (Fla. 2d DCA 2012). The State trial court was well aware of this principal of law as it cited the *Figueroa* decision in addressing the merits of Mr. Smith's constitutional claim.

As such, Mr. Smith's case is procedurally proper before this Court to review on the merits.

- The Error in Mr. Smith's Case was not Harmless as there was no Overwhelming Evidence of Premeditation.

The State relies on several decisions of this Court applying a harmless error analysis to claims of "instructional errors." Mr. Smith does not argue an instructional error. The claim presented is that Mr. Smith was tried and convicted for a charge not made in the

indictment. A claim more akin to the error in *Stirone v. United States*, 361 U.S. 212 (1960) and which several courts has determined is prejudicial per se. *United States v. Bryan*, 483 F.2d 88, 96 (3rd Cir. 1973); *United States v. DeCavalcante*, 400 F.2d 1264, 1271 (3rd Cir. 1971); *Gaither v. United States*, 413 F.2d 1061, 1072 (D.C. Cir. 1969).

Even if this case was examined under a harmless error analysis, the State falls woefully short in its burden. The few pieces of "evidence" the State mentions does not prove premeditation beyond a reasonable doubt. The evidence was not overwhelming to prove premeditation and was all circumstantial. It was highly disputed as to whether the hammer was outside or in the house. The same witness who testified the hammer was outside also testified the hammer was inside the house most of the time and could have been in the house that day. The testimony that Mr. Smith placed a shirt over the victim's face and continued to hit her was also questionable.

There is no direct evidence that Mr. Smith had a premeditated design to kill. The evidence in this case is not sufficient to sustain a finding of harmless error.

Florida jurisprudence has clearly created a crime of First Degree Felony Murder with elements independent of premeditated murder. These elements should be charged in the indictment before a defendant is tried and convicted of felony murder. The case is properly before this Court and the error is not harmless.

CONCLUSION

The petition for writ of certiorari should be
GRANTED.

1s/ Michael S. Smith A50419

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