No.

IN THE

SUPREME COURT OF THE UNITED STATES

SPENCER ALTSCHULER,
Petitioner,

v.

STATE OF FLORIDA,
Respondent.

On Petition for Writ of Certiorari to the Florida Fifth District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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A. QUESTION PRESENTED FOR REVIEW

Whether – in a case involving the charge of vehicular homicide – the Due Process Clause of the United States Constitution requires the prosecution to prove beyond a reasonable doubt that the driver, in an intentional, knowing and purposeful manner, was driving at the time of the incident in a manner demonstrating a conscious and intentional indifference to consequences and with knowledge that damage is likely to be done to persons or property (i.e., reckless driving) – as opposed to mere negligent or careless driving.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

C. TABLE OF CONTENTS AND TABLE OF AUTHORITIES

1. TABLE OF CONTENTS

2. TABLE OF CITED AUTHORITIES

a. Cases

b. Statutes

c. Other Authority

The Petitioner, SPENCER ALTSCHULER, requests the Court to issue a writ of certiorari to review the opinion/judgment of the Florida Fifth District Court of Appeal entered in this case on June 18, 2019 (rehearing denied on July 25, 2019). (A-3, A-4).[1]

D. CITATION TO ORDER BELOW

Altschuler v. State, 277 So. 3d 109 (Fla. 5th DCA 2019).

E. BASIS FOR JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. § 1257 to review the final judgment of the Florida Fifth District Court of Appeal.[2]

F. CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of United States Constitution requires the prosecution to prove guilt beyond a reasonable doubt. *See* U.S. Const. amends. V and XIV; *In re Winship*, 397 U.S. 358, 361 (1970).

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[1] References to the appendix to this petition will be made by the designation "A" followed by the appropriate page number.

[2] Because the state appellate court did not issue a written opinion, the Petitioner was not entitled to seek review in the Florida Supreme Court. *See Jenkins v. State*, 385 So. 2d 1356, 1359 (Fla. 1980).

G. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

1. Statement of the case.

The Petitioner was charged in Florida state court with one count of vehicular homicide, one count of reckless driving causing serious bodily injury, and one count reckless driving causing injury. The charges stemmed from a vehicle accident that occurred on February 15, 2015. Ivery Walker died as a result of the accident, Armonie Pitts was seriously injured in the accident, and Rodrick Burke was injured in the accident.

Prior to trial, the Petitioner filed a motion to dismiss the charges in this case, arguing that the undisputed facts in this case do not rise to the level of "recklessness" that is necessary to support criminal convictions. (A-5). A hearing on the motion was held on April 17, 2017. (A-12-33). At the conclusion of the hearing, the trial court acknowledged that "[i]t is a – in – in this Court's view, a very close call based on the cases that I've reviewed." (A-361). However, the trial court denied the motion to dismiss (A-31) and the case proceeded to a jury trial. At trial, defense counsel moved for a judgment of acquittal and again argued that the facts in the light most favorable to the State do not demonstrate that the Petitioner acted with the criminal intent (A-278, A-281-282), but the trial court denied the motion. (A-288).[3] At the conclusion of the trial, the Petitioner was convicted as charged of all three counts. The trial court sentenced the Petitioner to five years' imprisonment (a downward departure sentence).

[3] During the trial, the trial court again noted that "[i]t's a closer call than many of the cases cited." (A-287).

(A-376-378). At the conclusion of the post-trial release hearing, the trial court granted the Petitioner's request for bail pending appeal, stating:

> But the one [appellate issue] that is critical, and – and the one of which I think the case would likely be decided, is the sufficiency of the driving pattern in this case to support a – a jury finding of reckless driving sufficient to support a – a verdict of guilty of vehicular homicide, and whether the facts were sufficient to have been allowed to go to the jury. And that is a real close call. I mean, there's – there's one case that the Court hung its hat on pretty much that had very, very similar facts, but I could see how that could go either direction.
>
> So the Court does find that the appeal is taken grounds that are fairly debatable.

(A-369-370). The Florida Fifth District Court of Appeal subsequently *per curiam* affirmed the Petitioner's convictions without discussion. (A-3).

2. Statement of the facts.

Rodrick Burke. Mr. Burke, who was thirteen years old at the time of his testimony, stated that in 2015, he and his cousin (Armonie Pitts) were sitting in the backseat of a car driven by his aunt (Ivery Walker) and he said that the car was subsequently involved in an accident. (A-77-79). Mr. Burke testified that just prior to the accident, his aunt screamed because a car was driving in their lane, and he said that his aunt hit the brakes and swerved into the other lane in an attempt to avoid the car. (A-79-80). Mr. Burke stated that his aunt's car and the other car collided, causing his aunt's car to flip. (A-80). Mr. Burke testified that after accident, people at the scene assisted in removing him from his aunt's car because the car was on fire. (A-80-81). Mr. Burke stated that the person who was driving the other car approached him after the accident and offered him water and allowed him (Mr. Burke) to use a cell

phone so that Mr. Burke could call his mother. (A-82).

Karen Bellis. Mrs. Bellis stated that on the morning of February 15, 2015, she, her husband, and two children were traveling westbound in a car on State Road 60,[4] and she said that she was driving the car. (A-88-89). Mrs. Bellis testified that it was "sunny" that morning, and she said that the traffic on the road was "moderate." (A-88-89). Mrs. Bellis stated that the speed limit on State Road 60 is sixty-five miles per hour, and she said that she was traveling at sixty-eight miles per hour. (A-89). Mrs. Bellis testified that at one point during the morning, she passed a slower moving car, and she said that a black car behind her (i.e., the Petitioner's car) proceeded to pass her. (A-89-92). Mrs. Bellis stated that the Petitioner's car stayed in the eastbound lane for approximately thirty seconds, and she said that the following occurred:

> Q. [by the prosecutor] . . . What else do you see?
>
> A. Um, I eventually see a car coming towards the car driving the wrong way.
>
> Q. Okay. Do you remember what kind of car it was?
>
> A. I think it was, like, a bluish greenish color.
>
> . . . .
>
> Q. Okay. So you saw this bluish green car turn the wheels?
>
> A. Yeah.
>
> Q. Turn the wheel towards which way?
>
> A. Towards the westbound lane.

[4] State Road 60 is a two-lane road. (A-104-105).

Q. Okay. And what do you see the black car do?

A. Um, about three seconds after she turned her wheel, the black car turned his wheel to get back into the westbound lane.

Q. And you said a few seconds after the blue – bluish greenish vehicle turned?

A. Yeah. Probably – probably about three seconds.

Q. Three seconds. And then what happens next?

A. Um, then they hit each other.

Q. Head-on?

A. Yeah.

(A-92-93). Mrs. Bellis testified that after she observed the oncoming car in the eastbound lane, she honked her horn to get the attention of the Petitioner's car. (A-94). Mrs. Bellis stated she believed there was enough room ("probably, like, six car lengths") for the Petitioner's car to pull back into the westbound lane prior to the collision. (A-95).

On cross-examination, Mrs. Bellis testified that at the time that the Petitioner's car passed her, the conditions were safe for the car to pass (i.e., the road was flat and she could not see any oncoming traffic). (A-100-101).

Steven Bellis. Mr. Bellis stated that on the morning of February 15, 2015, he, his wife, and two children were traveling westbound in a car on State Road 60. (A-102-103). Mr. Bellis testified that his wife was driving and he was looking at his phone, and he said that he looked up when he heard his wife say "[w]hat is he doing." (A-103-104). Mr. Bellis stated that when he looked up, he observed a car "k[a]tty-corner from

us driving" (i.e., the car was passing their car). (A-104-105). Mr. Bellis stated that he subsequently observed an oncoming car in the eastbound lane and said that he saw the following occurred:

> Okay. So – all right. At this time we're slowing down. The car's next to us. He's gotten in front of us maybe 20 feet, roughly 20, 30 feet. My wife had honked. The other car had been swerving back and forth. It actually – the car in the eastbound lane swerves into our lane and is about 45 degrees into our lane. The car that was passing us in the westbound lane, for some reason, at the – two seconds after she swerved over to avoid the accident, the guy – the gentleman passing us also swerved over and they both locked on their brakes and met at an angle at the guardrail and it's the craziest thing. But it was just – I mean, she went to severe, the gentleman passing, I think – I don't even know. It just looked like he realized what was going on and he also swerved and they met at an angle at the guardrail, both locking on the brakes as it's happening. And then my wife just kind of skirted around the accident.
>
> Q. Prior to the accident, was there room enough for this car that you saw passing you – and I think you said 45 degrees, was there enough space for this car to move over?
>
> A. Yes, ma'am.

(A-108).

Angel Lendic. Angel Lendic stated that on the morning of February 15, 2015, he and his son were traveling in a car from Miami to Orlando on State Road 60, and he said that he was driving the car. (A-116-117). Angel Lendic testified that the speed limit on the road was sixty miles per hour. (A-117). Angel Lendic stated that several cars passed him as he was driving that morning, and he said that one of the cars that passed him "stayed on the – on the opposite lane" and he said that the car was subsequently involved in a collision. (A-117-121).

Jacob Lendic. Jacob Lendic stated that on the morning of February 15, 2015,

he was a passenger in a car driven by his father on State Road 60. (A-133). Jacob Lendic testified that during the time that they were traveling on State Road 60, several vehicles passed them, and he said that one car in particular "continued westbound in the eastbound lane for quite some time." (A-134-135). Jacob Lendic stated that he subsequently observed an oncoming car traveling eastbound, and he said that he later observed a collision. (A-136-137).

Brian Gensler. Mr. Gensler, a corporal with the Florida Highway Patrol, testified that he responded to the scene of the accident on February 15, 2015. (A-150). Corporal Gensler stated that there were two cars involved in the accident – a Hyundai (the car driven by Ivery Walker) and a Volkswagen (the car driven by the Petitioner),[5] and Corporal Gensler said that following the accident, the Hyundai caught fire and burned. (A-156, A-186). Corporal Gensler testified that when he arrived at the scene of the accident, he photographed the scene and took measurements, and during Corporal Gensler's testimony, the State introduced the photographs of the scene. (A-153-162). Corporal Gensler stated that the collision in this case occurred seventy-four feet west of the point in the road where the no passing zone started, and Corporal Gensler said that State's Exhibit 3 (A-373) is a diagram of his reconstruction analysis which depicts the travel paths of the two cars and point in the road where the collision occurred. (A-162-163). Corporal Gensler testified that he was unable to calculate the speeds that the cars were traveling at the time of the accident. (A-180-181).

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[5] Corporal Gensler said that the Volkswagen was registered to Rhonda Altschuler (the Petitioner's mother). (A-205)

On cross-examination, Corporal Gensler conceded that prior to the point in the road where the accident occurred, there were no road signs warning drivers that they were about to enter a no passing zone. (A-196). Corporal Gensler also agreed that it was legal for a car to pass on State Road 60 at the point in the road where the Petitioner began his pass. (A-197). Corporal Gensler stated that his reconstruction analysis established that the Petitioner's car started braking and started to turn back into the westbound lane five feet prior to the start of the no passing zone. (A-199).[6] Corporal Gensler testified that at the point of the road where the collision occurred, the grade of the road was zero (i.e., the road was flat – there were no hills or rises). (A-204).

Kevin Hildreth. Mr. Hildreth, a corporal with the Florida Highway Patrol, testified that he assisted with the investigation in this case (i.e., he obtained a DNA sample from the Petitioner and he issued a subpoena for phone records). (A-207-213).

Sheena McCaskill. Ms. McCaskill, a senior crimes analyst with the Osceola County Sheriff's Office, testified that she conducted a "cell phone path" on the Petitioner's cell phone. (A-217-218). Ms. McCaskill opined that based on her analysis, on February 15, 2015, the Petitioner's cell phone utilized two cell phone towers that were in the vicinity of the accident. (A-228).

Laura Wenz. Ms. Wenz, a senior crime laboratory analyst with the Florida

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[6] Corporal Gensler said that the Petitioner's car traveled approximately fifty feet into the no passing zone before fully crossing the centerline back into the westbound lane. (A-201).

Department of Law Enforcement, stated that she conducted DNA testing on an air bag and a door handle obtained from the Volkswagen that was involved in the accident in this case. (A-250-251). Ms. Wenz testified that there was insufficient DNA on the air bag for her to reach any conclusions, and she said that the Petitioner's DNA was found on the door handle. (A-252).

Gary Lee Utz. Dr. Utz, a medical examiner, testified that he conducted the autopsy on Ivery Walker. (A-266). Dr. Utz opined that the cause of Ms. Walker's death was "multiple traumatic injuries" and the manner of death was "[a]ccident." (A-269-270).

Mary Farrell. Dr. Farrell, a medical doctor specializing in pediatric care, testified that she came into contact with Armonie Pitts at the hospital on February 15, 2015. (A-272). Dr. Farrell stated an MRI was performed on Ms. Pitts, and she said that the MRI revealed that Ms. Pitts had a ligamentous injury of her cervical spinal cord, fractures of her lumbar vertebrae, and a fracture of her pelvis. (A-274-275). Dr. Farrell testified that Ms. Pitts' injuries resulted in paralysis from the neck down. (A-276).

At the conclusion of Dr. Farrell's testimony, the State rested. (A-277). The defense rested without calling any witnesses. (A-292).

H. REASON FOR GRANTING THE WRIT

The question presented is important.

Pursuant to section 782.071, Florida Statutes, vehicular homicide is "the killing of a human being . . . caused by the operation of a motor vehicle by another in a reckless manner likely to cause the death of, or great bodily harm to, another." To find a defendant guilty of vehicular homicide, the State must prove beyond a reasonable doubt that: (1) the victim is dead; (2) the death was caused by the operation of a motor vehicle by the defendant; and (3) *the defendant operated the motor vehicle in a reckless manner likely to cause the death of or great bodily harm to another person. See* Fla. Std. Jury Instr. (Crim.) 7.9 (emphasis added).

By definition, the crime of vehicular homicide cannot be established without also proving the elements of reckless driving. *See State v. Del Rio*, 854 So. 2d 692, 693 (Fla. 2d DCA 2003). Reckless driving is defined as driving with a willful or wanton disregard for safety. *See D.E. v. State*, 904 So. 2d 558, 561 (Fla. 5th DCA 2005). "Willful" means "intentional, knowing, and purposeful," and "wanton" means with a "conscious and intentional indifference to consequences and with knowledge that damage is likely to be done to persons or property." *Id.* (citation omitted). Merely proving careless driving, *see* § 316.1925, Fla. Stat., is insufficient to sustain a conviction. *See Del Rio*, 854 So. 2d at 693. In *McCreary v. State*, 371 So. 2d 1024, 1026 (Fla. 1979), the Florida Supreme Court described the level of culpability required for vehicular homicide as one that falls short of culpable negligence but that is more than a mere failure to use ordinary care.

Furthermore,"culpable negligence is not equivalent to the commission of a traffic infraction;" rather, the commission of a traffic infraction constitutes only simple negligence. *Logan v. State*, 592 So. 2d 295, 298 (Fla. 5th DCA 1991). "Simple negligence cannot by itself give rise to criminal liability . . . something more is required." *Werhan v. State*, 673 So. 2d 550, 554 (Fla. 1st DCA 1996).

During the trial in this case, the State presented evidence and testimony establishing the following facts:

- The accident occurred on State Road 60, and at the point where the accident occurred, State Road 60 is a two-lane undivided highway running in an east to west direction. The area where the accident occurred is rural and the road is flat and straight. At the time of the accident, the weather was clear and sunny, the road was dry, and visibility was unrestricted.
- While traveling westbound on State Road 60, the Petitioner's car (a Volkswagen) came up behind a car being driven by Karen Bellis. Mrs. Bellis stated she was driving approximately sixty-eight miles per hour when she first noticed the Volkswagen in her rearview mirror. The Volkswagen moved into the eastbound lane and started to pass Mrs. Bellis' car. As she was being passed, she slowed down and the Volkswagen did as well. The Volkswagen remained in the eastbound lane for what Mrs. Bellis estimated to be approximately thirty seconds.

- It was safe to pass at the time the Volkswagen started to pass Mrs. Bellis' car – the road was flat and straight, visibility was unrestricted by weather or road conditions, there was segmented centerline indicating it was legal to pass, and there were no oncoming cars in the eastbound lane.
- Mrs. Bellis started honking her horn at the Volkswagen because it remained in the eastbound lane and she saw another vehicle coming towards them in the eastbound lane.
- The westbound vehicles approached a portion State Road 60 with a double yellow centerline indicating a no passing zone in either direction.
- Prior to the no passing zone, there were no signs or other indications warning of an upcoming no passing zone.
- The Volkswagen started to leave the eastbound lane *before* reaching the no passing zone. The Volkswagen traveled approximately fifty feet into the no passing zone before fully crossing the centerline back into the westbound lane, or approximately one half of a second, and then returned to the westbound lane of State Road 60.
- Before the Volkswagen had returned to the westbound lane, the oncoming eastbound car (driven by Ivery Walker) swerved into the westbound lane and collided with the Volkswagen in the

westbound lane.

- No alcohol or drugs were involved in the accident. There was no evidence of texting or other phone use at the time of the accident.

These facts are insufficient to establish beyond a reasonable doubt the element of "recklessness" required to sustain the three convictions in this case. These facts prove – at most – negligent or careless driving.

As explained above, when denying the motion to dismiss and the motion for judgment of acquittal, the trial court acknowledged that this case was "a very close call." (A-30). But the trial court based its denial(s) on one case that it believed was analogous:

> The closest case I saw factually on point is *State vs. DePriest*, which is at 180 So. 3d 1099, which is a First District Court of Appeals case. In that case, *DePriest*, the defendant, was on U.S. Highway 331, which, like the highway in this case, was a two-lane undivided highway. There's a speed limit of 55 miles an hour. It's a rural area with limited traffic. And the defendant was driving south and – and came upon a slower moving van and proceeded to pass it in a legal passing area, which was, again, some of what we have here.
>
> According to the appellate court, a witness traveling southbound behind DePriest also passed the van. The witness estimated they're both traveling around the speed limit of 55 miles an hour and increased to around 60 miles an hour while passing.
>
> After passing the slower moving van, the witness returned to the southbound lane but DePriest remained in the northbound lane, traveling in the wrong lane for approximately one-half a mile, until the head-on collision with the victim's car, killed the driver of the – of the victim's car. The witness saw the victim's headlights and stated that DePriest took no evasive action. Investigator determined that both vehicles were traveling at approximately 55 miles an hour at the time of the collision.
>
> . . . .
>
> It is a – in – in this Court's view, a very close call based on the cases that I've reviewed. It's clear that speed alone is not sufficient. And

> in this case speed is not the – really the issue. But a – a mere violation of traffic laws by itself is not – not sufficient to arise to the level of recklessness that is required for a vehicular homicide charge.
>
> Again, the – the Court finds that the facts as set forth in *State v. DePriest* would be fairly analogous to the facts in this case. And the First District Court of Appeals found that those facts were sufficient to support a – a finding of – or a charge of vehicular homicide. In that case they reversed the order dismissing the charge on a (c) (4) motion to dismiss.
>
> . . . .
>
> Now, there is a difference in that case. And I – I think the facts will have to come out at trial more clearly. But in *DePriest* it's clear that the defendant was just staying in the left-hand lane the – the whole half-mile when he could've gone over back into the proper lane. It's unclear in this case, although there is apparently some evidence that there is room for him to get over and he stayed in the eastbound lane for about 30 seconds; which, again, if he were driving 60 miles an hour would be a half-mile.
>
> So based on the – *State v. DePriest*, I'm going to deny the motion to dismiss.

(A-28-31).

There are at least two key facts that distinguish the instant case from *State v. Depriest*, 180 So. 3d 1099 (Fla. 1st DCA 2015). First, the defendant in *Depriest* "took no evasive action" prior to the collision, *id.* at 1100, and Corporal Brian Gensler testified that his reconstruction analysis established that the Volkswagen started braking and started to turn back into the westbound lane prior to the collision and prior to the start of the no passing zone. (A-199). Second – and more importantly – in *Depriest*, the defendant gave a statement to law enforcement officials wherein he admitted that purposefully/intentionally remained in the wrong lane for "his convenience":

> In Depriest's recorded statement to the police, he asserted that he did not see the victim's vehicle or headlights. He acknowledged he

> traveled in the opposite lane *to avoid having to pass any potential slower-moving vehicles*, none of which were observed by the witness. *In other words, Appellant drove the wrong way for one-half mile for his convenience should he need to pass another car.*

Id. (emphasis added). A review of the *Depriest* court's decision reveals that the defendant's statement to law enforcement officials was the key reason for the court's reversal of the trial court's order granting the motion to dismiss:

> We find that the undisputed facts of this case are not like the cases cited by Depriest. Depriest was not briefly distracted. *He made a calculated and willful decision to travel in the wrong lane* for one-half mile at a speed which was very likely to kill or seriously maim in the event of a head-on collision, which occurred.

Id. at 1101 (emphasis added). Unlike *Depriest*, in the instant case, there is *no evidence* that the Petitioner intentionally and willfully remained in the opposite lane for the mere convenience of not having to go through the exercise of passing other potential slower-moving vehicles. Rather, the facts of instant case are consistent with "an error of judgment" (i.e., either the Petitioner's mistaken belief that he could safely pass Mrs. Bellis' car or his failure to realize that he had sufficient room to pull back in front of Mrs. Bellis' car prior to the collision).

In *W.E.B. v. State*, 553 So. 2d 323, 327 (Fla. 1st DCA 1989), the court stated the following:

> [I]t does not follow, however, that every fatality, regrettable as it may be, is accompanied by and results from conduct warranting a criminal conviction. . . . Before one can be so condemned it must be established beyond and to the exclusion of every reasonable doubt that the defendant has been guilty of negligence of the character heretofore defined.

(Citation omitted). Even if it can be said that the Petitioner's actions amounted to "negligence" or "careless driving," the facts of this case do not demonstrate the type of

"willful" and "wanton" "recklessness" required to sustain convictions for vehicular homicide and reckless driving. *See also Stracar v. State*, 126 So. 3d 379, 382 (Fla. 4th DCA 2013) ("[What is] missing from the State's proof in this case is evidence that the appellant, in an intentional, knowing and purposeful manner, was driving at the time of the incident in a manner demonstrating a conscious and intentional indifference to consequences and with knowledge that damage is likely to be done to persons or property.").

By granting the petition for writ of certiorari in the instant case, the Court will have the opportunity to consider this important question.

I. CONCLUSION

The Petitioner requests the Court to grant the petition for writ of certiorari.

Respectfully Submitted,

/s/ Michael Ufferman

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