No. _____

In The
Supreme Court of the United States

DAVID J. TATARA,

Petitioner,

v.

SECRETARY, DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL, STATE OF FLORIDA

Respondents.

On Petition For A Writ Of Certiorari To The United States Court of Appeal for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

David Tatara stood trial on charges of first-degree felony murder and aggravated child abuse in state court. He moved for judgment of acquittal after the prosecution rested. Tatara argued that the State failed to prove the charged offenses because the evidence was insufficient to prove aggravated battery, the predicate offense for the felony murder charge. The court announced that it would grant his motion.

In granting the motion, the court expressed its belief that the evidence as to both offenses was insufficient. The trial court also advised the jury that it had made a legal ruling that would obviate the need to consider the two charged offenses. However, instead of concluding the proceedings after acquitting Tatara, the court permitted the State to file a new Information containing a previously uncharged crime—second-degree murder—that contained a new mens rea element—depraved mind. The trial court submitted the case to the jury the next day. The jury convicted Tatara of second-degree murder. After exhausting his state court remedies, Tatara petitioned the federal courts for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, arguing that his conviction violated due process and the prohibition against Double Jeopardy.

1. Does a conviction of a crime submitted to the jury through a superseding information filed after jeopardy attached and after the court granted judgment of acquittal on the original charged offenses violate the prohibition against Double Jeopardy?

2. Does the submission to the jury of a previously-uncharged crime containing a new element after the close of evidence violate a defendant's right to due process?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those named in the caption of the case.

STATEMENT OF RELATED PROCEEDINGS

- *State of Florida v. David J. Tatara*, Case No. 2009-CF-000612 (Fla. 5th Cir. Ct. 2009) (Judgment and Sentence issued on December 21, 2011)
- *David J. Tatara v. State of Florida*, Case No. 5D12-271 (Fla. 5th DCA 2013) (mandate issued on September 18, 2013)
- *State of Florida v. David J. Tatara*, Case No. 2009-CF-000612 (Fla. 5th Cir. Ct. 2009) (order denying motion for post-conviction relief issued on October 9, 2015)
- *David J. Tatara v. State of Florida*, Case No. 5D15-4151 (Fla. 5th DCA 2016) (order per curiam affirming denial of motion for post-conviction relief issued on September 13, 2016)
- *David Tatara v. Secretary, Department of Corrections*, Case No. 5:17-cv-00039-WFJ-PRL (M.D. Fla. 2020) (order denying petition for writ of habeas corpus filed under 28 U.S.C. § 2254 entered on January 16, 2020)
- *David J. Tatara v. Secretary, Department of Corrections*, Case No. No. 20-10379 (11th Cir. 2021) (opinion affirming denial of petition for writ of habeas corpus issued on March 17, 2021)

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, David J. Tatara, respectfully petitions the Court for a writ of certiorari to review the Opinion of the Eleventh Circuit affirming the denial of his federal habeas petition filed under 28 U.S.C. § 2254.

DECISIONS BELOW

The unpublished order denying Petitioner's Motion to Vacate filed pursuant to 28 U.S.C. § 2254 is reproduced in the appendix at App. 11.

The Eleventh Circuit issued a certificate of appealability on Mr. Tatara's double jeopardy claim but denied him a certificate of appealability on his claim that his conviction violated his federal due process rights. *See* App. 6. The Eleventh Circuit's unpublished opinion denying Mr. Tatara's double jeopardy claim is reproduced in the appendix at App. 1.

STATEMENT OF JURISDICTION

The district court had subject matter jurisdiction over Mr. Tatara's federal habeas petition pursuant to 28 U.S.C. § 2254. The Eleventh Circuit issued its Order on March 17, 2021. App. 1.

Pursuant to this Court's March 19, 2020 Order relating to filing deadlines and the ongoing public health concerns relating to COVID-19, this Petition is timely, as it is filed within 150 days of the opinion affirming the denial of Mr. Tatara's habeas petition. This Court has jurisdiction. 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides that no person shall be "subject for the same offence to be twice put in jeopardy of life or limb" or "deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

STATEMENT OF THE CASE

The State of Florida filed an Indictment in April 2009 charging Tatara with two counts of child abuse (Counts 1 and 2); one count of aggravated child abuse (Count 3); and first-degree felony murder (Count 4). App. 2. Tatara proceeded to trial on Counts 3 and 4 after the two counts of child abuse were severed from the Indictment. Concerning the felony murder count, the Indictment alleged:

> [T]he Grand Jurors, under oath, further present that the said DAVID J. TATARA, in the County of Lake and the State of Florida, on or about the 15th day of December in the year of Our Lord two thousand-eight, did unlawfully, while engaged in the perpetration of a certain felony, to-wit: Aggravated Child Abuse, kill [B.R.], a human being who at the time was under the age of 18, by inflicting blunt trauma to his head, thereby causing death, in violation of Section 782.04(1)(a)2, Florida Statutes . . . .

(Doc. 2-1 at 2-3).[1] The count for aggravated child abuse charged Mr. Tatara with "maliciously punishing" B.R. by "willfully commit[ing] child abuse upon him by inflicting severe trauma to his head and causing him to suffer great bodily harm." App. 2.

During trial, Tatara moved for a judgment of acquittal at the close of the State's case. App. 3. He argued that under *Brooks v. State*, 918 So. 2d 181 (Fla.

[1] Citations to docket entries refer to the materials filed in the federal district court along with Mr. Tatara's federal habeas petition in *David Tatara v. Secretary, Department of Corrections*, Case No. 5:17-cv-00039-WFJ-PRL (M.D. Fla. 2020).

2005), the prosecution was required to present evidence of multiple acts of child abuse or multiple blows in order for aggravated child abuse to serve as the underlying felony for the felony murder offense:

> And what the *Brooks* case from the Florida Supreme Court says is that in a felony murder case involving aggravated child abuse, aggravated battery of a child, as the felony murder predicate, if there is only one blow, if that's the testimony in the case, then that proof of felony murder is insufficient to support a first-degree murder conviction. That in order for it to be aggravated battery of a child sufficient to qualify as felony murder predicate, that you must have two or more blows, or two or more stab wounds, but one will not do it.

(Doc. 2-2 at 3-4).

The trial court took the motion under advisement and reserved ruling. App. 4. Tatara renewed his motion after resting, and the court then announced that it would grant the motion: "At this time I'm going to grant the Motion for Judgment of Acquittal on the first-degree felony murder. The jury will be able to consider second-degree murder and child abuse." (Doc. 2-2 at 16).

The trial court explained its "plans" for the remainder of the proceedings as follows:

> Here are my plans. I am going to instruct the jury that I have ruled that as a matter of law that they will not be considering first-degree felony murder or aggravated child abuse, and that they should disregard any instructions or the reading of the indictment as to first-degree felony murder and aggravated child abuse, and that they will only be able to consider second-degree murder and the lesser of second-degree murder.

(Doc. 2-2 at 18).

The trial court advised the jurors during the jury instructions that it made a "legal ruling" that precluded consideration of the two charged offenses:

> Members of the jury, I want to instruct you at this time that the Court has made a ruling, a legal ruling, that you will no longer be considering the charge of first-degree felony murder. You will be considering the charge of second-degree murder and any lesser included offense of that charge.
>
> . . . .
>
> The aggravated child abuse count, also as a matter of law, will not be -- you will not consider that charge, as well. The only charge that you will be considering is second-degree murder and any lesser included offense of second-degree murder, okay?

(Doc. 2-2 at 19-20).

After both sides presented closing arguments, the court adjourned the proceedings for the day. (Doc. 2-2 at 22). The next morning, the State announced its intention to submit the uncharged crime of second-degree murder to the jury through a new Information:

> [H]im and I were trying to figure out what do we do about this indictment, because it's got two counts . . . if we send this thing back [to the jury] - - so, my first plan was to just block out Count I, because it doesn't apply anymore, which was the ag child abuse, and just go with Count II, but its murder in the first-degree . . . Felony murder . . . Well, Kim, as she is prone to do, stuck around last night and prepared - - I guess as a service to the community, a dummy information for just second-degree murder, which is what I would suggest you send [the jury].

(Doc. 2-2 at 23-24). Tatara objected to the proposed procedure, arguing that he had not been arraigned on the new charge, and that jeopardy had attached. App. 4.

The new Information, which was sworn to by the prosecutor and filed with the clerk, complied with all the requirements governing charging documents set forth in Florida Rule of Criminal Procedure 3.140. (*Compare* Doc. 2-3 at 2 *with* Fla. R. Crim. P. 3.140(c)-(o)). It alleged the entirely new offense of second-degree

murder, which contained an entirely new mens rea element not contained in the original Indictment: Tatara committed second-degree murder "by an act imminently dangerous to another and *evincing a depraved mind*." (*Compare* Doc. 2-1 at 3 *with* Doc. 2-3 at 3) (emphasis added).

The jury found Tatara guilty of second-degree murder, and the court sentenced him to life imprisonment. (Doc. 2-4 at 2, 2-5 at 2). Tatara timely appealed his conviction and sentence. During the pendency of the appeal, he discovered a relevant Florida Supreme Court case, *Coicou v. State*, 39 So. 3d 237, 241-43 (Fla. 2010). The case, which was published well before the trial, expressly held that second-degree murder was not a necessary lesser included offense of first-degree felony murder under Florida law. Tatara informed his trial counsel of the decision, and his attorney admitted in a subsequent filing that he was unaware of the case. (Doc. 2-6 at 2, Doc. 2-7 at 2-3).

The state appellate court per curiam affirmed Tatara's final judgment and sentence without a written opinion. App. 6. Tatara then filed a motion for post-conviction relief pursuant to Florida Rule of Criminal Procedure 3.850 in the state post-conviction court. App. 6. He raised several claims, including the two questions presented to this Court. (*See* Doc. 2-11 at 7).

The state post-conviction court denied the motion and rejected Tatara's Double Jeopardy claim:

> The Defendant's contention that he was acquitted of both charges is incorrect. This Court found the State could only prove one blow and, therefore, acquitted him of the first-degree felony murder charge. As this Court discussed above, it finds the State adequately pled counts

> IV and III to put the Defendant on notice that he may have to defend on the charge of second-degree murder. Thus, it properly considered the permissive lesser included offense of second-degree murder.
>
> This Court did not acquit the Defendant of aggravated child abuse but merged that count with the second-degree murder charge. Merger and acquittal are not the same.
>
> Contrary to the Defendant's assertion, the State did not file a new and separate offense when it prepared the 'dummy' Information. At the evidentiary hearing, Mr. Gross testified that he prepared the Information so the jury could consider it when they went to deliberate. . . . Florida Rule of Criminal Procedure 3.400(a)(1) specifically allows the trial court to take to the jury room a copy of the charges against the Defendant. The Information was not a substantive amendment but simply a statement of the charge against the Defendant. Thus, this issue is DENIED.

(Doc. 2-11 at 16).

Tatara appealed the court's decision to the state appellate court, which per curiam affirmed the decision without a written opinion. App. 5.

He subsequently filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Mr. Tatara argued that the state court ruled contrary to and unreasonably applied *Evans v. Michigan*, 568 U.S. 313 (2013) by determining that his acquittal for first-degree murder did not bar his continued prosecution. According to Mr. Tatara, his conviction violated clearly established law because the State filed a new information after jeopardy attached, which had the legal effect under Florida law of entering nolle prosequi on the indictment for which he stood trial. App. 6. In addition, Mr. Tatara maintained that his conviction violated due process because the State obtained a conviction based on a previously uncharged crime that contained a new element not alleged in the original indictment.

The district court denied the petition and declined to issue a certificate of appealability. (Doc. 15 at 29-30). With respect to Tatara's Double Jeopardy claim, the district court noted that the state trial court acquitted him of first-degree felony murder and aggravated child abuse, but not second-degree murder, and it concluded that the state trial court's findings and conclusions were in accord with clearly established federal law. (Doc. 15 at 23).

The Eleventh Circuit granted Tatara a certificate of appealability only on the issue of whether his second-degree murder conviction violated the Double Jeopardy Clause. App. 6. On appeal, Mr. Tatara renewed his argument that filing a new information operated as a nolle prosequi of the original indictment after jeopardy attached in violation of the prohibition against double jeopardy. He also maintained that his conviction, which came after the entry of the judgment of acquittal on the only two charges for which he stood trial, violated clearly established precedent of this Court, namely, *Evans v. Michigan*.

The Eleventh Circuit affirmed the district court's ruling. Even though the information was signed by the prosecutor and filed with the trial court, the appellate court concluded it was a "dummy" information designed to assist the jury in their deliberations on the new second-degree murder charge. It further held that any violation in the amendment of the information was an issue of state law that required deference under the Antiterrorism and Effective Death Penalty Act of 1996.

For the reasons that follow, this Court should grant this petition and issue a writ of certiorari to the Eleventh Circuit.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition, which presents two issues of paramount importance related to the scope of protection afforded criminal defendants under the double jeopardy and due process clauses of the United States Constitution.

1. **This Court should Clarify whether Mr. Tatara's Conviction for Second-degree Murder Violates the Prohibition against Double Jeopardy**.

The Fifth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, guarantees that no person shall be "twice put in jeopardy" for the same offense. U.S. CONST. AMEND. V; *Benton v. Maryland*, 395 U.S. 784, 787 (1969) (The "Double Jeopardy Clause of the Fifth Amendment is applicable to the States through the Fourteenth Amendment").

In *Evans v. Michigan*, 133 S. Ct. 1069 (2013), this Court reaffirmed its longstanding jurisprudence related to the finality of judgments of acquittal and principles of double jeopardy. The defendant, Evans, who was charged with arson, moved for a directed verdict of acquittal at the close of the evidence. *Id.* at 1073. Defense counsel incorrectly asserted that the state had the burden of proving a fourth element of the charge, that is, the building burned was not a dwelling house. *Id.* The trial court found that the state failed to prove this element and therefore acquitted the defendant of the charged offense. *Id.*

The state appealed. *Id.* The Michigan Court of Appeals, finding the trial court misperceived the elements of the offense, reversed and remanded, notwithstanding Evans' argument that the Double Jeopardy Clause precluded retrial. *Id.* at 1073-1074. The Supreme Court of Michigan affirmed that decision. *Id.* at 1074.

This Court granted certiorari review and reversed the decision of the Michigan Supreme Court:

> There is no question the trial court's ruling was wrong; it was predicated upon a clear misunderstanding of what facts the State needed to prove under State law. But that is of no moment. *Martin Linen, Sanabria, Rumsey, Smalis,* and *Smith* all instruct that an acquittal due to insufficient evidence precludes retrial, whether the court's evaluation of the evidence was 'correct or not,' . . . and regardless of whether the court's decision flowed from an incorrect antecedent ruling of law. Here Evans' acquittal was the product of an 'erroneous interpretatio[n] of governing legal principles,' but as in our other cases, that error affects only 'the accuracy of [the] determination' to acquit, not 'its essential character.'

Id. at 1075-76 (emphasis added) (citations omitted). Hence, it was irrelevant that the trial court was incorrect in determining the State was required to establish a fourth element of the charge; all that mattered was that the trial court entered a judgment of acquittal.

The *Evans* Court explained that precedent has long held an acquittal to be unreviewable. *Id.* at 1074. This is true regardless of whether the acquittal is entered by the jury at the close of all the evidence, or by the judge, at the close of the state's case. *Id.* at 1074-1075. The Court reiterated, "'[t]he law attaches

particular significance to an acquittal,' so a merits-related ruling concludes proceedings absolutely." *Id.* at 1074 (citation omitted).

Here, the proceedings against Mr. Tatara should have concluded absolutely the very moment the state trial court entered a judgment of acquittal. During his motion for judgment of acquittal, at the close of the State's case, Mr. Tatara argued the State had the burden of proving multiple acts of child abuse, in order to support the felony murder charge. The state trial court took the motion under advisement and reserved ruling. At the close of the defense's case, Mr. Tatara renewed his motion for judgment of acquittal. Mr. Tatara once again argued that the State failed to prove felony murder because the evidence did not demonstrate multiple "blows." The trial court agreed and ultimately granted his motion for judgment of acquittal.

The trial court must have concluded that, in the absence of multiple blows, the aggravated child abuse, which was the predicate for felony murder, was unsustainable as well. Had it not done so, the trial court would have instructed the jury on aggravated child abuse, instead of the second-degree murder, a charge which it (erroneously) believed was a lesser-included offense. In addition, the Court told the parties that it would instruct the jury that they "should disregard any instructions or the reading of the indictment as to first-degree felony murder and aggravated child abuse." (Doc. 2-2 at 19-20).

This means that the trial court made a merits-based finding that the evidence in support of both charged offenses was insufficient to sustain a conviction,

which explains the entry of a judgment of acquittal. *See Evans*, 133 S. Ct. at 1074-75 ("[A]n 'acquittal' includes 'a ruling by the court that the evidence is insufficient to convict,' a 'factual finding [that] necessarily establish[es] the criminal defendant's lack of criminal culpability,' and any other 'rulin[g] which relate[s] to the ultimate question of guilt or innocence.'").

It is true, as the post-conviction court noted, that the judgment of acquittal was predicated on an incorrect theory of law. However, under *Evans*, the rationale underlying the acquittal is of no moment; all that matters is that the trial court entered a merits-based judgment of acquittal on every charge brought in the original indictment. That happened here. At that very moment, the proceedings should have concluded, and Mr. Tatara should have been discharged.

Compounding this error, the State filed a new information with the trial court, which, under Florida law, had the legal effect of a *nolle prosequi* of the original information and triggered double jeopardy. *See State v. Thomas*, 714 So. 2d 626, 627 (Fla. 5th DCA 1998) ("[T]he filing of an amended information, at least after the jury is sworn, has the legal effect of a *nolle prosequi* of the original information."). The Fifth District Court of Appeal reasoned in *Thomas* that it "would be inconsistent with the principles of double jeopardy if, after the defendant is placed in jeopardy for one crime, [it] permitted the State to amend the information to substitute another. The jury having been sworn before the filing of the amended information herein, jeopardy had attached." *Id.*; *see also Scaife v. State*, 764 So. 2d 827, 828 (Fla. 2d DCA 2000) (same). Since lesser-included offenses

constitute the "same offense" for purposes of double jeopardy, *Brown v. Ohio*, 432 U.S. 161, 169 (1977); *Rutledge v. United States*, 517 U.S. 292, 297 (1996), the trial court should not have permitted the State to initiate a successive prosecution the following day under a newly filed Information.

Mr. Tatara's acquittal did not provide the trial court with the authority to submit a new, uncharged offense of second-degree murder simply because the state failed to prove the offenses alleged in the original Indictment. Nor could his acquittal be used as a sword to sever a single offense into two distinct crimes – first-degree felony murder and second-degree murder, particularly since the latter charge contained a new element that was not alleged in the original indictment.

In sum, the moment the state trial court acquitted Tatara of the offenses charged in the indictment, it should have freed him and prohibited him from being put in jeopardy yet again by another prosecution for the same offense under a new Information. This Court has a duty to vacate the constitutionally defective conviction and discharge Mr. Tatara from custody immediately.

2. **This Court should Clarify whether Due Process Permits a State to Convict a Defendant of a Previously-Uncharged Crime through an Information Filed after the Close of Evidence, where the New Crime Contains an Element not Alleged in the Original Indictment.**

Even if Mr. Tatara's conviction did not contravene the guarantees enshrined in the Double Jeopardy Clause, it would still violate his right to Due Process. "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process." *Jackson v. Virginia*, 443 U.S. 307, 314 (1979); *Cole v. Arkansas*, 33 U.S. 196 (1948).

In *Cole*, the defendants were charged in state court with "a violation of § 2 of Act 193 of the 1943 Arkansas Legislature," which made it illegal "to assemble at or near any place where a 'labor dispute' exists and by force or violence prevent . . . any person from engaging in any lawful vocation, or ... to promote, encourage or aid any such unlawful assemblage." *Cole,* 333 U.S. at 198. Section one of the same act made it "unlawful for any person by the use of force or violence, or threat of the use of force or violence, to prevent or attempt to prevent any person from engaging in any lawful vocation." *Id.* at 199.

After the trial court instructed the jury on the elements of § 2, the jury returned a guilty verdict. *Id.* On appeal, the Arkansas Supreme Court held that the facts alleged in the information—which accused the petitioners of "using force and violence to prevent [a certain individual] from working"—related to § 1, and affirmed a conviction under § 1 in lieu of addressing the constitutional challenges to § 2. *Id.* at 200.

This Court roundly rejected the approach of the Arkansas Supreme Court:

> [The state court] affirmed [petitioners'] convictions as though they had been tried and convicted of a violation of § 1 when in truth they had been tried and convicted only of a violation of a single offense charged in § 2, an offense which is distinctly and substantially different from the offense charged in § 1. To conform to due process of law, petitioners were entitled to have the validity of their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court.
>
> We are constrained to hold that the petitioners have been denied safeguards guaranteed by due process of law—safeguards essential to liberty in a government dedicated to justice under law.

Id. at 202. The *Cole* Court explained that "[i]t is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id.* at 201.

To the extent that the post-conviction court evaded dismissal for double jeopardy by finding that the new Information was simply a "dummy" document that had no legal effect (a ruling that is at odds with the fact that the state attorney signed, swore to, and filed the Information with the clerk of court), then Mr. Tatara was convicted of a crime with which he was never charged, a violation of his federal due process rights under *Cole*.

This due process violation cannot be explained away as a conviction of a lesser included offense, because second degree murder is neither a necessary nor a permissive lesser included offense of first-degree felony murder. As explained above, a conviction for second-degree murder requires a finding of "depraved mind." The original Indictment, however, did not allege that Mr. Tatara committed the act in question with a "depraved mind."

The post-conviction court seized on the inclusion of the allegation that Mr. Tatara "maliciously punished" the child, but that language originated from a *different count*. Under Florida law, the propriety of instructing the jury on a permissive lesser-included offense turns on whether the *specific count* charging the greater offense contains all the elements of the lesser offense. *Wilson v. State*, 749 So. 2d 516, 519 (Fla. 5th DCA 1999) (citing *Cave v. State*, 613 So. 2d 454, 455 (Fla.

1993)). Language from one count may not be imported into another. *Id.* The trial judge, moreover, expressly ruled that the language from the original Indictment be disregarded as to its instruction and reading following the judgment of acquittal. Thus, the language from the original Indictment could not be imported into the new Information.

Equally important, Mr. Tatara prepared a defense based on *Brooks*, and that defense depended upon the State's inability to prove multiple blows. Having prevailed on that defense, it was a violation of his right to due process to charge him with a *new offense*, containing a *new element*, in a *new Information* that was filed *after the close of evidence*, without giving Mr. Tatara any opportunity to offer evidence in opposition to the charge. "The rights to confront and cross-examine witnesses and to call witnesses in one's own behalf have long been recognized as essential to due process." *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973). By substantively changing the nature of the charges without giving Mr. Tatara the opportunity to defend against the new accusations, the trial court deprived him of due process. Accordingly, this Court should grant this petition and vacate Mr. Tatara's unconstitutional state court conviction

CONCLUSION

This Court grant this petition, issue a writ of certiorari to the Eleventh Circuit Court of Appeals, and remand this matter for further proceedings.

Respectfully submitted on this 4th day of August, 2021.

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