

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

ZACHERY KEESEE,
Petitioner,

v.

STATE OF ARKANSAS,
Respondent.

On Petition For A Writ Of Certiorari
To The Arkansas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Arkansas Supreme Court violated due process by affirming Keesee's capital-murder conviction based on a nonjurisdictional argument that was never by the State at either the trial level or on direct appeal.
2. And, whether Arkansas Supreme Court violated due process and separation of powers by refusing to construe Keesee's sufficiency-of-the-evidence and other arguments related to Arkansas's felony-delivery-murder statute, an issue of first impression in Arkansas.

PARTIES TO THE PROCEEDING

Petitioner Zachery Keesee is a prisoner at the Varner Unit in Gould, Arkansas.

Respondent is the State of Arkansas, who maintains custody of the Varner Unit, represented by Assistant Attorney General Joseph Luebke with the Arkansas Attorney General's Office.

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PETITION FOR A WRIT OF CERTIORARI

Zachery Keesee respectfully petitions for a writ of certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (App. 1) is reported at 641 S.W.3d 628. The Arkansas Supreme Court's denial of Keesee's petition for rehearing (App. 27) was not reported.

JURISDICTION

The Arkansas Supreme Court entered its opinion on March 31, 2022. Keesee filed a petition for rehearing, which was denied on May 12, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fifth Amendment, as applied to the states through the Fourteenth Amendment: “No person shall be held to answer for a capital, or otherwise infamous crime . . . nor be deprived of life, liberty, or property, without due process of law”

STATEMENT OF THE CASE

This case arises from Zachery Keesee's conviction for capital murder. The Arkansas Supreme Court affirmed his capital-murder conviction and life-without-parole sentence based on an unpreserved nonjurisdictional argument that was not raised by the State at the trial level or on direct appeal. The Arkansas Supreme Court violated separation of powers and due process by refusing to construe Arkansas's felony-delivery-murder statute—an issue of first impression for Arkansas—because it affirmed on other grounds.

The case presents the question of whether appellate courts may affirm a criminal conviction based upon an unpreserved nonjurisdictional argument that an Appellant never had a chance to address.

It also presents the question of whether a State court may avoid construing an ambiguous criminal statute in an issue of first impression merely because there is another basis for affirmance.

1. Keesee's Trial

Keesee was charged with capital murder as an accomplice under two alternative theories, first that he caused the death with premeditation and deliberation and second that the death was caused in the course and furtherance of an actual drug delivery ("felony-deliver-murder").

Jaylin McBride testified he was working at the Days Inn in Conway on May 8, 2018. Around 4:00am, he heard 4-5 gunshots. He saw one man in a gray hoodie

go to a BMW and then take off. He saw another person leaving in a U-Haul truck. McBride saw the BMW arrive shortly before the shooting, but saw that the U-Haul truck was already in the parking lot.

Cole Fitzsimmons was staying at the Days Inn on May 8, 2018, and was walking his dogs between 4:30am and 5:00am when he saw a U-Haul truck drive down the alley between the hotel and neighboring car dealership. Fitzsimmons saw a 5'10" or 5'11" skinny man weighing around 150 pounds get out of the passenger side of the truck. Fitzsimmons saw someone wearing a ballcap sitting in the driver's seat, but could not tell if it was a man or a woman.

Law enforcement recovered surveillance footage from Days Inn that showed a BMW and a U-Haul truck entering the hotel parking lot around 4:45am. Bobby Patel, the owner of the Days Inn, reviewed the footage before providing it to officers, and testified that Keesee was not in any of the footage.

Law enforcement found Leonel Panduro's corpse in Room 106 at the Days Inn, dead from multiple gunshots. Officers located two firearms in the room, a semiautomatic handgun on top of the bed and a revolver under the desk. Both weapons were loaded, and the revolver had Panduro's blood on its damaged handle.

All the bullets recovered from Panduro's body were fired from the same gun, which was neither of the two weapons recovered from the hotel room. Panduro was shot at a distance of closer than two feet. The bullets matched the ammunition later recovered inside the BMW. Further, law enforcement

recovered jeans in the BMW that contained both Andrew Morstain's and Panduro's blood. Someone who left Room 106 had been injured and left a blood trail in the direction they fled, which was consistent with officer finding several drops of Morstain's blood in the parking lot.

Prior to the start of the second day of Keesee's trial, the State noted that it would attempt to introduce several statements it alleged were made during the course and in furtherance of a conspiracy.

Prior to the testimony of State's witness Julie Holister, Keesee objected to her testifying to statements attributed to Morstain as hearsay. Keesee also objected that such statements were not made in furtherance of the conspiracy since the purported coconspirators were not enlisting Holister to assist in the conspiracy. Keesee argued statements boasting about a conspiracy are not made in furtherance of that conspiracy. Keesee asked that Holister be prohibited from testifying about statements made by Bynum and Morstain. The trial court found the statements were "in furtherance of the conspiracy even in light of my hesitation. But I'm going to stick with my ruling. I'll let her testify" pursuant to Ark. R. Evid. 801(d)(2)(v).

Holister was Morstain's girlfriend in May 2018, and drove with Morstain to Mexico around that time, where they met up with friends Keesee, Bynum, Halsey, and Lexie. Holister testified Morstain had gunshot wounds to his hand and knee. Holister remembered Morstain telling her before they went to Mexico "that a lot of drugs had gotten stolen and they needed to go to Arkansas and he was going to kill" Panduro. Holister confirmed that Morstain and Bynum traveled from Texas to

Arkansas, but not Keese. Holister did not know who—if anyone—requested that Morstain travel to Arkansas to kill Panduro. Holister left Mexico with Keese, and Keese was then arrested when he identified himself at a border crossing.

Keese was convicted of capital murder and sentenced to life imprisonment without parole.

2. The Arkansas Supreme Court Opinion

Keese appealed, and the Arkansas Supreme Court affirmed. (App. 1). Three justices found that Holister’s statement attributed to Keese’s codefendant Morstain were admissible under Ark. R. Evid. 803(3) as “a statement of a declarant’s then-existing state of mind such as intent, plan, and motive.” (App. 12).

The majority found the trial court abused its discretion by admitting a purported drug-ledger purportedly associated with the decedent, but found such error was harmless. (App. 9). The majority found that “[b]ecause the State presented sufficient evidence on the premeditated-and-deliberated capital-murder conviction, we need not decide whether the felony-murder conviction was factually deficient.” (App. 6).

Three dissenting justices found that Holister’s statement should not have been admitted as co-conspirator nonhearsay. (App. 24). A fourth justice agreed the statement was admitted improperly, but found such error was harmless and concurred in the result. (App. 19). The concurrence found the

“majority opinion’s decision to raise a nonjurisdictional argument on behalf of the State is remarkable.” (App. 18). The concurrence wrote:

This court regularly refuses to raise arguments on a party’s behalf. . . . Not only did the State fail to argue on appeal that Morstain’s statement was admissible as evidence of a “declarant’s then existing state of mind,” Ark. R. Evid. 803(3), but also, the State never presented this theory to the circuit court. This court likewise does not entertain nonjurisdictional arguments that a party did not raise before the circuit court. . . . Yet it appears the majority opinion is making an exception when the State is a party. The State already enjoys certain procedural advantages—for example, being able to sue but not be sued. *See, e.g.*, Ark. Const. art 5, § 20. This court should not go out of its way to craft others.

Importantly, only a minority of this court endorses the majority opinion’s approach. Four of the seven justices recognize that the majority opinion’s analysis is a departure from this court’s typical practice—and that of nearly all appellate courts. An appellate court may only find that a circuit court came to the right result, albeit for the wrong reason, *if* a party has argued the alternative reason. . . . As a result, it remains the law in Arkansas that parties must raise nonjurisdictional arguments if they want this court or the court of appeals to entertain them. Parties should not rely on this court to do their lawyering for them.

(App. 18-19).

The dissent found that Holister’s statement was not co-conspirator hearsay. (App. 24). Specifically, the dissent found:

Yet, out of whole cloth, the majority raises the Rule 803(3) exception-to-hearsay argument to support its leap to affirm the circuit court. However, this not only deprives Keesee of an opportunity to defend the argument but also departs from fundamental principles of appellate law. We have been resolute in stating that we will not make a party’s argument for that party or raise an issue *sua sponte* unless it involves the circuit court’s subject-matter jurisdiction, which we will raise on our own. . . . Further, “absent an issue of subject-matter jurisdiction, an appellate court will not address an issue if it was not presented to

the trial court, ruled upon by the trial judge, and argued by the parties on appeal. . . . Finally, we have explained that “this court may affirm a circuit court when it has reached the right decision, albeit for the wrong reason, so long as the issue was raised and a record was developed below.

(App. 24). The dissent noted that Keesee was not afforded the opportunity to address or defend that the statement may have been a statement of the declarant’s then existing state of mind. (App. 26).

The dissent found admission of this evidence was prejudicial given the circumstantial nature of the State’s case, and would have reversed for a new trial. (App. 26).

REASONS FOR GRANTING THE WRIT

The Arkansas Supreme Court violated due process by finding the trial court right for the wrong reason despite the State never having argued that reason at either the trial or appellate levels. The Court’s “tipsy coachman” approach gives the State an improper procedural advantage that departs from the practice of nearly all appellate courts. The Arkansas Supreme Court affirmed Keesee’s capital-murder conviction and life-without-parole sentence based on an unpreserved nonjurisdictional argument that was not raised by the State at any time.

Further, the Arkansas Supreme Court violated the separation of powers and due process by refusing to construe the ambiguous felony-delivery-murder statute given it was an issue of first impression. *See, e.g., United States v. Davis*, 139 S. Ct. 2319 (2019).

I. THE ARKANSAS SUPREME COURT VIOLATED KEESEE'S DUE-PROCESS RIGHTS BY AFFIRMING KEESEE'S CAPITAL-MURDER CONVICTION AND LIFE-WITHOUT PAROLE SENTENCE BASED ON AN UNPRESERVED NONJURISDICTIONAL ARGUMENT THAT WAS NEVER MADE BY THE STATE TO THE TRIAL COURT OR ON APPEAL.

The Arkansas Supreme Court did not simply find the trial court was right for the wrong reason; it found the trial court was right for a wrong reason that was *never* argued by the State at the trial level or on appeal. This is an incorrect application of Arkansas law, as the four-justice majority on this issue makes clear. *Keesee*, 2022 Ark. 68, at 19 (Baker, J., dissenting) (“Four of the seven justices recognize that the majority opinion’s analysis is a departure from this court’s typical practice—and that of nearly all appellate courts.”).

A state declining to follow its own laws constitutes a Fourteenth Amendment due-process violation. *See Hicks v. Oklahoma*, 447 U.S. 343 (1980). The Court affirmed Keesee’s conviction in a radical departure from Arkansas law, and even as a majority of the Court actually rejected the majority opinion’s “tipsy coachman” approach. *See Lee v. Porter*, 63 Ga. 345 (1879); *Carraway v. Armour & Co.*, 156 So.2d 494 (Fla. 1963).

Further, denying a party an opportunity to be heard violates that party’s procedural due-process rights. *See* H. Michael Muñoz, *Tipping the Ole Tippy Coachman Over in His Grave—An Inequity of Appellate Review*, 81 FLA. BAR J. 7 (2007); *Delissio v. Delissio*, 821 So. 2d 350, 355 (Fla. Dist. Ct. App. 2002) (Browning, J., dissenting) (“[W]hen a cases involves an issue unnoticed to the parties, serious due process considerations are raised.”).

In *Blumberg Assocs. Worldwide v. Brown & Brown of Conn., Inc.*, the Supreme Court of Connecticut held:

[W]ith respect to the propriety of a reviewing court raising and deciding an issue that the parties themselves have not raised, that the reviewing court (1) must do so when that issue implicates the court's subject matter jurisdiction; and (2) has the discretion to do so if (a) exceptional circumstances exist that would justify review of such an issue if raised by a party, (b) the parties are given an opportunity to be heard on the issue, and (c) there is no unfair prejudice to the party against whom the issue is to be decided.

84 A.3d 840, 848 (2014). This standard should be uniform throughout the States in order to satisfy due process.

"[T]his Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by [an] appellant not pressed or passed upon the courts below." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940) (citations omitted); *see also Cameron v. EMW Women's Surgical Ctr., P.S.C.*, 142 S. Ct. 1002, 1010 (2021) ("if a non-jurisdictional argument was not raised below, we generally will not consider it as an alternative ground for affirmance"); *Granfinanciera v. Nordberg*, 492 U.S. 33, 39-40 (1989); *Heckler v. Campbell*, 461 U.S. 458, 468 n.12 (1983) (citing *McGoldrick*).

Given that Arkansas does not conduct plain-review error, *Sales v. State*, 289 S.W.3d 423, 429 (Ark. 2008), it is especially unfair to permit the State to prevail without getting a ruling below on a point of evidentiary law on which a case might turn. The Arkansas Supreme Court denied due process by depriving Keesee of an opportunity to defend the argument and departed from fundamental principles of

appellate law in the process. The Court's "tipsy coachman" approach is inconsistent with due process and must be reversed.

II. THE ARKANSAS SUPREME COURT VIOLATED SEPARATION OF POWERS AND DUE PROCESS BY REFUSING TO CONSTRUE ARKANSAS'S AMBIGUOUS FELONY-DELIVERY-MURDER STATUTE, AN ISSUE OF FIRST IMPRESSION FOR THE STATE.

The opinion violates the separation of powers and due process by refusing to construe the ambiguous felony-delivery-murder statute that was a matter of first impression for the State. *See, e.g., United States v. Davis*, 139 S. Ct. 2319 (2019).

After finding sufficient evidence of premeditated and deliberated capital murder, the Arkansas Supreme Court refused to assess the sufficiency of the alternate charged theory of felony-delivery-murder or any of Keesee's other arguments related to the felony-murder charge. (App. 6-7). However, in *Smith v. State*, the State of Arkansas conceded error and yet the Arkansas Supreme Court proceeded to construe the matter because there were "important statutory interpretations essential to the result" in the case. 575 S.W.2d 677, 679 (Ark. 1979); *see also Williams v. State*, 67 S.W.3d 548 (Ark. 2002) (construing escape-felony-murder statute as issue of first impression despite affirming on robbery-felony murder). The same was true in this case, and yet the Arkansas Supreme Court refused to act similarly.

As this Court recently held in *Davis, supra*: "Employing the avoidance canon to expand a criminal statute's scope would risk offending the very same due process and separation-of-powers principles on which the vagueness doctrine itself rests." 139 S. Ct. at 2333. "Respect for due process and the separation of powers suggests a

court may not, in order to save Congress the trouble of having to write a new law, construe a criminal statute to penalize conduct it does not clearly proscribe.” *Id.* The rule of lenity requires applying constitutional avoidance to narrow a criminal statute rather than to broaden it. *Id.*

Vague laws violate both separation of powers and due process. *Id.* at 2323. “They hand off the legislature’s responsibility for defining criminal behavior to . . . prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct.” *Id.* The prohibition of vagueness in criminal statutes is an “essential” of due process required by both “ordinary notions of fair play and the settled rules of law.” *Johnson v. United States*, 576 U.S. 591, 595 (2015). The void-for-vagueness doctrine “guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges,” and thus “is a corollary of the separation of powers” *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018).

Under Arkansas law, a person commits felony-delivery-murder if acting alone or with one or more other person the person commits or attempts to commit a felony violation of the Uniform Controlled Substances Act codified at Ark. Code Ann. §§ 5-64-101 — 5-64-508, involving an actual delivery of a controlled substance, and in the course of and in furtherance of the felony or in immediate flight from the felony, the person or an accomplice causes the death of a person under circumstances manifesting extreme indifference for the value of human life. Ark. Code Ann. § 5-10-

101(a)(1)(A)(x). “Delivery” means the actual, constructive, or attempted transfer from one person to another of a controlled substance or counterfeit substance in exchange for money or anything of value. Ark. Code Ann. § 5-65-101(6).

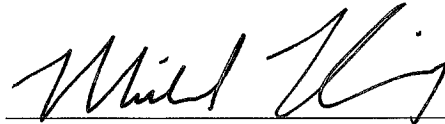
Given that Ark. Code Ann. § 5-10-101(a)(1)(A)(x) requires an “*actual*” delivery of a controlled substance,” it follows that a constructive or attempted transfer of drugs would not suffice for purpose of the delivery-felony-murder statute. *Expressio unius est exclusio alterius* is a fundamental principle of statutory construction that the express designation of one thing may properly be construed to mean the exclusion of another. Pursuant to this principle, the inclusion of the term “actual” in Ark. Code Ann. § 5-10-101(a)(1)(A)(x) makes clear that an attempted or even constructive delivery is not covered by the statute.

The State argued at trial and on appeal that the underlying delivery occurred one day prior to the charged act, and made no argument as to how a killing one day after a purported drug delivery was in the course of or in furtherance of that delivery. The Arkansas Supreme Court’s refusal to construe the sufficiency of the evidence required to violate this statute or the construction of this ambiguous statute constituted a violation of separation of powers and due process. This Court must grant certiorari accordingly.

CONCLUSION

For the foregoing reasons, the Writ should be granted.

Dated, this the 11th day of July, 2022.

A handwritten signature in black ink, appearing to read "Michael Kaiser", written over a horizontal line.

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