No. 22-5942

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

DAVID G. WIGGINS — PETITIONER
(Your Name)

vs.

DAVID SHINN, ATTORNEY GENERAL OF ARIZONA —

RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS NINTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

David G. Wiggins 280834
(Your Name)

ARIZONA STATE PRISON – CIBOLA UNIT
P.O. Box 8909
(Address)

San Luis, AZ 85349
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

As reasonable jurists would have disagreed that the Felony Murder Statute as applied to this Petitioner is unconstitutional, denying this Petitioner his rights guaranteed by the Sixth and Fourteenth Amendments, the Certificate of Appealability should have been issued.

LIST OF PARTIES

[X] 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.

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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

[X] For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A tothe petition and is

[ ] reported at_____; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.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[ ] is unpublished.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_____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[ ] is unpublished.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_____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[ ] is unpublished.

JURISDICTION

[X] For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was March 30, 2022. Appendix A

[ ] No petition for rehearing was timely filed in my case.

[X] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: July 25, 2022, and a copy of the order denying rehearing appears at Appendix E.

[ ] 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_____. A copy of that decision appears at Appendix_____.

[ ] 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

6th Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

14th Amendment

Sec. 1 [Citizens of the United States.] "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 protections of the laws.

Arizona Revised Statute 13-1105
First Degree Murder; classification

A. A person commits First degree murder if:

1. Intending or knowing that the person's conduct will cause death, the person causes the death of another person, including an unborn child, with premeditation or, as a result of causing the death of another person with premeditation, causes the death of an unborn child.

2. Acting either alone or with one or more other persons the person commits or attempts to commit sexual conduct with a minor under Section 13-1405, sexual assault under Section 13-1406, molestation of a child under Section 13-1410, terrorism under section 13-2308.01, marijuana offenses under Section 13-3405, Subsection A, paragraph 4, dangerous drug offenses under Section 13-3407, subsection A, paragraphs 4 and 7, narcotics offenses under Section 13-3408,

Subsection A, paragraph 7 that equal or exceed the statutory threshold amount for each offense or combination of offenses, involving or using minors in drug offenses under Section 13-3409, drive by shooting under Section 13-1209, kidnapping under Section 13-1304, burglary under Section 13-1506, 13-1507, or 13-1508, arson under Section 13-1703 or 13-1704, robbery under Section 13-1902, 13-1903, or 13-1904, escape under Section 13-2503 or 13-2504, child abuse under Section 13-3623, subsection A, paragraph 1, or unlawful flight from a pursuing law enforcement vehicle under Section 28-622.01 and, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person.

3. Intending or knowing that the person's conduct will cause death to a law enforcement officer, the person causes the death of a law enforcement officer who is in the line of duty.

Arizona Revised Statute 28-622.01 (As on 10/8/2011)
Unlawful Flight from Pursuing Law Enforcement Vehicle; Classification; Marking Required.

A driver of a motor vehicle who willfully flees or attempts to elude a pursuing official law enforcement vehicle that is being operated in a manner described in 28-624, subsection C is guilty of a Class 5 Felony. The law enforcement vehicle shall be appropriately marked to show that it is an official law enforcement vehicle.

Arizona Revised Statute 28-622.01 (As on 8/22/22)
Unlawful Flight from Pursuing Law Enforcement Vehicle; Classification; Marked and Unmarked Vehicles

A driver of a motor vehicle who willfully flees or attempts to elude a pursuing official law enforcement vehicle is guilty of a Class 5 Felony if the law enforcement vehicle is either:

1. Being operated in the manner described in Section 28-624, Subsection C and is appropriately marked to show that it is an official law enforcement vehicle.

2. Unmarked and either of the following applies:

   (A) The driver admits to knowing that the vehicle was an official law enforcement vehicle.

(B) Evidence shows that the driver knew that the vehicle was an official law enforcement vehicle.

Arizona Revised Statute 28-624

Subsection C

The exemptions authorized by this section for an authorized emergency apply only if the driver of the vehicle while in motion sounds an audible signal by bell, siren or exhaust whistle as reasonably necessary and if the vehicle is equipped with at least one lighted lamp displaying a red or red and blue light or lens visible under normal atmospheric conditions from a distance of five hundred feet to the front of the vehicle, except that an authorized emergency vehicle operated as a police vehicle need not be equipped with or display a red or red and blue light or lens visible from in front of the vehicle.

STATEMENT OF THE CASE

1. On February 17, 2019, Petitioner filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254, raising several grounds for relief for violations of his constitutional rights. These included ineffective assistance of both trial and appellate counsel in violation of his Sixth and Fourteenth Amendment rights; the impropriety of a denial of his right to present evidence that would have shown his innocence on a charge of fleeing from law enforcement, used in order to convict him of first degree murder and received a maximum sentence because of the unconstitutional applicability of the felony murder statute.

2. On December 17, 2020, a Report and Recommendation was filed by Magistrate Bibles.

3. On January 15, 2021, Petitioner filed Objections to the Report and Recommendation which were overruled, the Report and Recommendation was accepted and adopted, Petitioner's Petition for Writ of Habeas Corpus denied, and a Certificate of Appealability denied.

4. On October 8, 2011, when the Petitioner was drinking and driving home, an off-duty plain clothes officer decided to follow him for a time, suspecting impairment. However, the Petitioner initially continued to drive at approximately 45 miles per hour and might have swayed within his own lane of traffic as he was driving, but there was no report of his corrsing the lane lines.

5. It is undisputed that Petitioner was initially pursued when the plain clothes officer called for a patrol officer to take over the pursuit and possible stopping of the vehicle. It is also undisputed that the "pursuit" had stopped prior to the accident that caused the death of the minor victim.

6. The major issue is whether the Petitioner was properly charged with felony murder, when there was no pursuit at the time of the crash. The testimony was clear that the uniformed officer lost sight of the vehicle being driven by Petitioner (*See* testimony of Det. Kelly – R.T. 3/13/13, p. 13, lines 6-9) (*See* testimony of Officer Holmes – R.T. 3/13/13, pp. 114-115, lines 24-3; p. 152, lines 20-22). Once Officer Holmes lost sight of the vehicle, he deactivated his lights and siren, and ended his pursuit. (R.T. 3/13/13, p. 153, lines 9-10). He did not see the vehicle again until after the crash. At the time of the crash, he **was no longer in active pursuit**. (R.T. 3/13/13, p. 154, lines 7-8; p. 157, lines 10-12).

7. When Officer Holmes was asked about the meaning of "pursuit", he indicated that it means "actively pursuing" a vehicle and a person "actively eluding" police officers. (R.T. 3/13/13, p. 157, lines 5-9).

8. Defense counsel in this case was deficient in many areas. The summary denial of Petitioner's petition for post-conviction relief was unreasonable under the circumstances.

9. Petitioner's Counsel failed to pursue investigation of the case, and specifically relating to the hiring of a qualified accident reconstructionist, whose final conclusions were in disagreement with the State's presentation of the accident. The Petitioner's family had offered to hire a highly experienced and qualified expert to testify on the Petitioner's behalf.

10. There was no "reasonable tactical choice" made by Petitioner's Counsel. A tactical choice or a "strategy" can only be asserted when there has been a "reasonable investigation" conducted from which Petitioner's Counsel would have been able to decide whether further investigation was necessary or not. *Strickland v. Washington*, 466 U.S. at 691. This, Mr. Kazan's failure to do whatever he could to counter the testimony by learning what information the accident reconstructionist possessed, was not a "reasoned strategy."

11. Had Mr. Kazan "allowed" Petitioner to testify on his own behalf, it is highly likely that the result of the proceedings would have been different. This would have surpassed the necessary threshold of a "reasonable probability", which is less than a preponderance of the evidence. *Strickland v Washington*, 466 at 693, 104 S.Ct. at 2068. Petitioner wanted to testify on his own behalf, but he was never informed by either his counsel or the court that it was his decision and his decision alone. Petitioner was the only other person who had personal and direct information that related to his "intent."

12. Petitioner would have testified as follows: I would have testified to not knowing I was being "pulled over" by a law enforcement officer or that a law enforcement officer was even behind me. I have no history of eluding law enforcement.

13. The information held by Petitioner substantively and materially challenged the story told by the State. The information could, and most likely would, have changed the outcome of the case, but for Mr. Kazan's failure to follow through with the proper investigation to determine the specific facts of the case and/or to have his client testify.

14. Mr. Kazan was deficient in his performance in his representation of Petitioner. As a result, Petitioner was denied his right to effective assistance of counsel as provided by the Sixth Amendment to the United States constitution. Mr. Kazan did not meet the standard for attorney performance. In other words, his representation of Petitioner was not "reasonably effective."

15. The very nature of the adversarial process is protected by the Sixth Amendment and requires that the accused have "counsel acting in the role of an advocate." *Anders v California*, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). "If the process loses its character . . . the constitutional guarantee is violated." *United States v Cronic*, 466 U.S 648, 656-67, 104 S.Ct. 2039, 2045-46, 80 L.Ed. 2d 657 (1984).

A. The Petitioner's Vehicle Was Not "Turbo-charged."

16. A basic issue demonstrating Mr. Kazan's ineffectiveness occurred when, without objection, Mr. Kazan allowed the prosecutor and its witnesses to mischaracterize the ability of Petitioner's vehicle to purportedly outrun a police patrol vehicle. From a question from a juror, without objection over the lack of foundation, Det. Holmes erroneously stated that the vehicle driven by Petitioner was "turbo-charged" making it impossible for him to catch up to it. (R.T. 3/13/13, p. 163, line 8). Yet, in his state proceedings, Petitioner presented conclusive information that the vehicle was not, in fact, "turbo-charged." Testimony, including his own, at an evidentiary hearing would have allowed this evidence to be put on the record to undermine the State's witnesses and demonstrate prejudice.

17. This was information that could, and should, have been refuted by defense counsel to show that Det. Holmes' testimony was misrepresented. The defendant's testimony could have supported documentation relating to that particular vehicle to show that the excessive speeds to which Det. Holmes testified were incorrect. This information went to the very crux of the defense. Yet, Mr. Kazan failed to pursue this line of investigation.

B. Expert Accident Reconstruction Was Necessary

18. The Petitioner's family spoke to two different accident reconstruction experts, and Petitioner presented their affidavits to the state court to demonstrate that his counsel failed to effectively challenge the testimony of the State's witnesses. The experts, who the family wanted to retain, were never given the documentation from defense counsel that they needed to make a

final conclusion. However, they are certain that the State's witness relating to accident reconstruction, who was very inexperienced, did not use the proper methods in order to render adequate and reliable conclusions. These experts would have shown that Petitioner's alleged excessive speed was not consistent with the facts of the case.

19. Petitioner should have been granted a hearing in order to present this evidence. By being precluded from presenting these issues on the merits on review, Petitioner was denied the right to show that he was denied the right to present a cogent defense.

20. Not only did defense counsel fail to consult with these experts, he failed to consult with any other expert. He never even visited the accident scene himself. This was deficient performance that dealt with the most important material issue in the case. There is no question that a qualified expert in the area of accident reconstruction could and would have presented information that would have questioned Officer Loren Reeves' opinions. Officer Reeves' qualifications were questionable. He had only done two or three reconstructions (most probably only two) prior to this one. (R.T. 3/25/13, p. 104, lines 23-24). Additionally, his training was not extensive, and it was easily distinguished as being inadequate in a case of this nature by an experienced and qualified expert.

2. UNCONSTITIONALITY OF FELONY MURDER AS APPLIED

21. The challenge in this case is not to the felony murder rule in general, but it is challenged as the rule is applied to this case. An "as applied" challenge assumes that the standard statute is constitutional under most circumstances, but challenges that it is unconstitutional as it is used in a particular manner to a particular person. *Korwin v Cotton*, 234 Ariz. 549, 559, 323 P.3d 1200 (App. 2014); *Boddie v Connecticut*, 401 U.S. 371, 379, 92 S.Ct. 780, 787, 28 L.Ed.2d 113 (1971); *Dahnke-Walker Milling Co. v Bondurant*, 257 U.S. 282, 289, 42 S.Ct. 106, 66 L.Ed. 239 (1921) (a statute might be invalid as applied to a specific set of facts).

22. A felony murder conviction requires the defendant to have committed or attempted to commit one of the enumerated felonies, and in the course and "in furtherance of" that felony caused the death of any person. A.R.S. §13-1105(A)(2). Arizona case law has long held that the lack of intent to murder does not deprive a defendant of due process, because all that is needed is the proper mental state for the underlying felony. *State v Herrerra*, 174 Ariz. 372, 850 P.2d 85 (1993). This rule eludes the basic standards of fairness and justice in a case such as this, when there was no intentional or knowing fleeing at the point at which the accident occurred.

23. The charge of felony murder is contrary to the clear language of the statute, which states that the person charged with felony murder must be in the commission of the predicate felony. In this case, the testimony at trial was conclusive that there was no pursuit at the time and, therefore, no fleeing from which the "intent" may be used to support felony murder. Petitioner was not either committing nor attempting to commitg felony fleeing. *Evanchyk v Stewart*, 202 Ariz. 476, 47 P.3d 1114 (2002).

24. The United States Supreme Court pointed out in *Enmund v Florida* , 458 U.S. 782, 798-801 (1982), that "American law has long considered a defendant's intention . . . and, therefore, his moral guilt – to be critical as a 'degree of his criminal culpability,' and the court has found criminal penalties to be unconstitutionally excess in the absence of intentional wrongdoing." *Mullaney v Wilbur*, 421 U.S. 686, 698 (1975).

25. One of the felonies that fits within the felony murder statute is "unlawful flight from a pursuing law enforcement ehicle under section 28-622.02 **and**, in the course of and in furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person." A.R.S. §1105(A)(2). Yet, there was no real offense from which Petitioner was fleeing to provide the "furtherance" element. In order for him to be convicted of felony murder with the predicate felony of fleeing, he had to have committed another felony from which he was fleeing. It makes no sense that he was seemingly fleeing from the fleeing. Notwithstanding the fact the officers who were following the defendant totally gave up the purported "pursuit," there is no crime from which the defendant was purportedly fleeing.

26. The law is clear that Petitioner should not have been convicted of felony murder when it was not and cannot be proven the Petitioner was in the process of fleeing once the police pursuit ended. Even assuming *arguendo* that the defendant was impaired as the result of intoxicants, the officers gave no indication that there was any impairment noticed by the driving patterns. During the entire time Det. Kelley was following the white Toyota vehicle, it was traveling approximately 45 miles per hour. (R.T. 3/13/13, p. 88, line 2; p. 92, line 23; p. 140, lines 10-12).

27. The State must prove that Petitioner was actually impaired as the result of the use of alcohol, and not as the result of some other medical and/or physical problem that caused him to be unaware of the fact that he was running the red light. In other words, the only reason that the officer had to begin to chase the defendant occurred as the result of his own suspicions or

hunches. Clearly, if the officers had more concrete information, the stop would have been made immediatey when Petitioner was traveling, at the most, 50 miles per hour, and the officers were directly behind him.

28. The speed of Petitioner's vehicle at the time of the accident was important. The testimony on which the State relied was deficient and misinformative to show, most importantly, that Petitioner was not eluding or evading police at the time, and he was not traveling at such a high rate of speed that a conclusion that he was fleeing from police could be presumed.

29. The issue of felony fleeing was unconstitutionally utilized by the State to lower its burden in proving that the Petitioner had committed felony murder. The crux of the case against Petitioner was that he had the intent to flee from police and, therefore, the intent for the fleeing was utilized as the intent for the charge. Under the circumstances of this case, the felony murder law as applied was unconstitutional.

REASONS FOR GRANTING THE PETITION

The standard set forth by this court in *Barefoot v Estelle*, 460 U.S. 800 (1983) as elaborated in *Slack v. McDaniel*, 529 U.S. 473 (2000) is when reasonable jurists would differ, the Certificate of Appealability should issue.

This court has held structural errors are errors that affect the fundamental fairness of the proceedings, *Arizona v Fulminate*, 499 U.S. 279 (1991) and they trigger automatic reversal. *Weaver v Massachusetts*, 137 S. Ct. 1899 (2017).

As the principles in this case can only be given meaning through the application of the facts to the law, the court erred in giving the state court determination the presumption of correctness. *Miller v Fenton*, 464 U.S. 104 (1985). They were incorrect.

This court has stated in some "criminal cases (situations) will arise where the only reasonable and available defense strategy requires consultation with experts." *Harrington v Richter*, 562 U.S. 211 (2011). As set forth in the statement of the ase, counsel should have hired an accident reconstructionist.

Specifically, whether or not Petitioner's vehicle was turbocharged, whether or not the accident reconstructionist was necessary, the unconstitutionality of the felony murder statute as applied, involve mixed questions of law and fact which are not afforded the presumption of correctness. *Strickland v Washington*, 466 U.S. 668 (1984). *Wiggins v Smith*, 539 U.S. 510 (2003). *See* also, *Bell v Cone*, 543 U.S. 447 (2005).

As applied to this case, the felony murder statute lacked the "commonsense core of meaning . . . that criminal juries should be capable of understanding." *Walton v Arizona*, 497 U.S. 639 (1990).

The failure of counsel to subject the State's case to meaningful adversarial testing as set forth herein, was plain error. *United States v Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

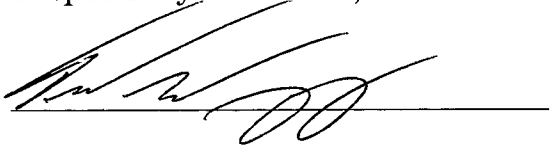
This error was clear and obvious, *United States v Plano*, 507 U.S. 725 (1983), affecting the substantial rights of Petitioner, *Rosales-Mireles v. United States*, 135 S. Ct. 1897 (2018). This error is informed by the entire state record, *United States v Dominguez-Benitez*, 542 U.S. 74 (2002). This has affected the fairness, integrity, and public reputation of these proceedings, *United States v Marcus*, 506 U.S. 258 (2010).

Hence this court should grant certiorari with instructions issue the Certificate of Appealability as required by *Slack v McDaniel*, 529 U.S. 473 (2000). The record in this case shows there are errors of constitutional magnitude "adequate to deserve encouragement to proceed further." They violate clearly established law as decided by this court, *Williams v Taylor*, 529 U.S. 362 (2000).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 10/12/22