

FEB 02 2023

OFFICE OF THE CLERK

NO. 22-6021
UNITED STATES SUPREME COURT
GEORGE GUO, petitioner pro se

v.

STATE OF TEXAS, respondent

MOTION FOR REHEARING OF DENIAL OF PETITION FOR A
WRIT OF CERTIORARI.

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COMES NOW, George Guo, petitioner pro se in the above described cause and files this Motion for Rehearing of Petition for a Writ of Certiorari to the Fifth Appellate Court of Texas. In support of this motion, Guo would show the following:

I.

Guo filed the Petition for a Writ of Certiorari on October 25, 2022, and it was denied by this Court on January 9, 2023.

II.

Guo believes there are issues of significance to the general public and to jurisprudence of the country, and would respectfully request the Court to reconsider the denial of the Petition for a Writ of Certiorari by considering the grounds as plain errors contributing to fundamental unfairness and miscarriage of justice.

age of justice, and resulted from ineffectiveness of counsel if they were not properly preserved. *U.S. v. Young*, 1, 15-16; *KIMMELMAN V. MORRISON*, 477 U.S. 365, 381 (citing *MURRAY V. CARRIER*, 477 U.S. 478, 488, procedural default resulted from ineffective assistance of counsel imputed to the State); *MASSARO V. U.S.*, 538 U.S. 500.

In the case, there was constructive denial of counsel in both trial and appellate stages, as both Counsel Bradley Kollar and Micheal Mowla were deliberately but subversively ineffective. *Chronic v. U.S.*, 466 U.S. 648, 659 (presumed prejudice with constructive denial of counsel); *PENSON V. OHIO*, 488 U.S. 75, 87 (presumed prejudice extends to appeal). Both not only failed to raise meritorious defenses, but acted deceptively to allow the conviction and affirmance. *STRICKLAND V. WASHINGTON*, 466 U.S. 668, 692 (defense counsel failed to subject the prosecution's case to meaningful adversarial testing); *SATTERWHITE V. TEXAS*, 486 U.S. 249, 256 (pervasive denial of counsel). Both conceded to the prosecution against Guo's specific and repeated requests regarding meritorious defenses. *McCoy v. LOUISIANA*, 138 S. Ct. 1500 (Counsel conceded guilt over defendant's intransigent objections); *Appel v. HORN*, 250 F.3d 203, 213 (3rd Cir. 2001) (

wavier of counsel not effective if not voluntary and knowing); *MILLER V. DORMIRE*, 310 F.3d 600 (8th Cir. 2002) (trial counsel waived right to jury without client's consent or understanding).

III.

As the result of counsel's constructive absence, the proceedings were not a confrontation between adversaries or a vigorous debate. The trial was a fictional stage show in which both the trial judge and the defense counsel were mostly bystanders, if not the prosecution's proponents. *APPEL*, 250 F.3d 303 (defense counsel acted more like a bystander); *LYELL V. RENICO*, 470 F.3d 1177 (6th Cir 2006) (Trial judge "made fair trial impossible" by assisting the prosecution); *BROWN V. LYNAGH*, 843 F.2d 849, 850 (5th Cir 1988) (denial of due process due to the Trial judge's non-neutral role and failure of system). Neither interceded in the prosecutor's flagrant and persistent misrepresentations and prejudicial comments. *DERDEN V. WAINWRIGHT*, 938 F.2d 605, 609, 615 (cumulative errors, flagrant prosecutorial misconducts resulting in denial of due process); *U.S. V. ENZOR*, 820 F.2d 684, 685-686 (5th Cir 1987) (prejudicial testimony purposed to trigger the jury's punitive instincts); *WALBERGER V. ISREAL*, 766 F.2d 1071, 1076 (6th Cir. 1985) (when the State is the

cause of inept defense, the burden of showing prejudice is lifted).

IV.

Without making proper investigation about meritorious defenses, trial counsel Lollar made the asinine decision long before trial to forgo defenses. *ADAM V. BERTRAND*, 453 F.3d 428 (7th Cir. 2006) (counsel ineffective for committing to a pre determined strategy without reasonable investigation); *HIGGINS V. KENICO*, 470 F.3d 426 (6th Cir. 2006) (counsel's claim of tactical judgment too implausible to accept); *GERSTEN V. SENKOWSKI*, 426 F.3d 588 (2nd Cir. 2005) (counsel's failure to investigate and present exculpatory evidence can not be excused by a claim of "strategic decision.").

A defense counsel can not make a reasonable strategic decision without proper investigation and consultation without experts. *PAVEL V. HOLLINS*, 462 F.3d 1099 (9th Cir. 2006). There were numerous exculpatory threads that were conspicuous during trial which Lollar should have known and pursued before trial even without Guo's repeated requests. *ANDERSON V. JOHNSON*, 338 F.3d 382 (5th Cir. 2003) (counsel's decision to forgo defense unreasonable); *LINSTADT V. KENNA*, 239 F.3d 191 (2nd Cir. 2001); *DeSHIELD V. SHANNON*, 2009

U.S. App. LEXIS 15410 (3rd Cir.); GOODMAN V. BERTRAND, 467 F.3d 1022 (7th 2006).

Significantly, Lollar's secrecy and lack of communication with Guo was problematic throughout the case, especially during the trial when Guo tried to alert him about falsity and lack of evidence in the State's case. HERNANDEZ V. PERRY, 141 S. Ct. 2231, 2236 (denial of counsel due to lack of communication during a critical stage); DANIEL V. WOODFORD, 428 F.3d 1189 (9th Cir. 2009) (Constructive denial of counsel due to breakdown of communication); MITCHELL V. MASON, 325 F.3d 732 (6th Cir. 2003); MOORE V. PURKETT, 275 F.3d 685 (8th Cir. 2001) (no opportunity to talk with counsel in courtroom). In effect, Lollar's conduct during the trial amounted to waiving trial to fall asleep. TIPPINS V. WALKER, 77 F.3d 682 (2nd 1996); BURDINE V. JOHNSON, 262 F.3d 336 (5th Cir. 2001).

V.

On appeal, counsel MOWLA did not raise any colorable challenge to the State's case, did not cite any effective authority, ignored Guo's detailed notes with relevant case citations, and, worse, repeatedly made claims in his briefs unfavorable to the defense without basis and against Guo's objections. EVITT V. LUCEY, 469 U.S. 3870 (ineffec-

tive assistance of counsel on appeal); *McFarland v. Yukins*, 356 F.3d 688 (6th Cir. 2004) (appellate counsel failed to raise arguments that likely would have prevailed); *U.S. v. Bass*, 310 F.3d 321 (5th Cir. 2001). In the end, Mowla filed a PETITION FOR DISCRETIONARY REVIEW (PDR) that was doomed to fail, despite Guo's detailed notes with specific questions and citations for the PDR. *DEGRATE v. ST.*, 712 S.W.2d 755 (Tex. Crim. App. 1986) (PDR that is a duplicate of the appellate brief is subject to summary refusal). Mowla, as was Hollar, was purposely ineffective.

VI.

The outcome of the case reflected "extreme malfunction of the state criminal justice system," as each pillar of due process safeguard failed. *ELMORE v. OZMINT*, 661 F.3d 783 (4th Cir. 2010) (citing *HARRINGTON v. RICHTER*, 131 S.Ct. 770, 786, quoting *JACKSON v. VIRGINIA*, 443 U.S. 307, 332). The fatal flaws of the prosecution's case: limitations' bar, invalid charge-constructive amendment, no evidence, and false theories of identity and causations of the eventual death should have precluded the prosecution and made conviction impossible, but cumulative errors and systemic

failure resulted in the miscarriage of justice. WATT V. NORRIS, 356 F.3d 937 (7th Cir. 2005) (miscarriage of justice is an excuse for procedural default); FRANKLIN V. Mc CAUGHTRY, 398 F.3d 955, 960 (7th Cir. 2005) (circumstantial evidence to prove judicial bias); WALBERGER V. ISREAL, 766 F.2d at 1076 (the State causing inept defense); Derden v. WAINWRIGHT, 938 F.2d at 609 (cumulative errors).

The state appellate court's rulings contradicted federal courts's decisions on every issue; and the fact that the judgment in vast majority of the federal circuit court cases cited in this motion were reversed reflected how seriously flawed the affirmation in this case is. Most of the circuit court cases have less error and/or more competent evidence than this case.

a. TIME BAR. The limitations bar began in 1993 in this case and EX POST FACTO CLAUSE forbids resurrection of a time-barred prosecution. STOGNER V. CALIFORNIA, 539 U.S. 607, 616; ROGERS V. TENNESSEE, 532 U.S. 451, 462 (retrospective alteration of law violate fair warning principle). Criminal statute are to be liberally construed in favor of the defendant and repose. U.S. v. Habig, 390 U.S. 222, 227; U.S. v. RIVERA-VENTURA, 72

F.3d 277 (2nd Cir. 1995); U.S. v. LOE, 248 F.3d 449, 473 (5th Cir. 2001). The no limitations of murder can not be applied back to 1988 with death in 2018. U.S. v. GILBERT, 136 F.3d 1451, 1453 (11th Cir. 1998); TAVAREZ - LEVARIO, 788 F.3d 433, 436 (5th Cir. 2015) (citing TOUSSIE v. U.S., 397 U.S. 112, 115, quoting PENDERGAST v. U.S. 317 U.S. 412, 418, statute of limitations normally begins when the crime is complete). Due process further protects a defendant from oppressive pre-indictment delay by the state to gain tactical advantage - here, K.B.'s death is an unquestionable tactical advantage for the state to claim resurrection of a time-barred prosecution. U.S. v. GOUVEIA, 467 U.S. 180, 192; U.S. v. LOVASCO, 431 U.S. 788, 789; U.S. v. MARION, 404 U.S. 307, 325.

b. CONSTRUCTIVE AMENDMENT OF INDICTMENT - INVALID CAPITAL MURDER CHARGE.

A defendant can not be tried or convicted on a charge not on the indictment. U.S. v. LENT, 524 F.3d 501, 511 (4th Cir. 2008) (citing STIRONE v. U.S., 361 U.S. 212, 216); U.S. v. CHAMBERS, 408 F.3d 237, 241 (5th Cir. 2005); U.S. v. PACHEO, 913 F.2d 297, 304 (9th Cir. 1990) (citing U.S. v. POWELL, 469 U.S. 57); APPRENDI v. NEW JERSEY, 530 U.S. 466, 490 (Anything increasing the range of punishment constitute an ingredient of the offense). ^{THE} § 19.03(a)(2) capital murder charge is invalid on the indictment because the alleged aggre-

rated sexual assault could not be an aggravating factor to elevate K.B.'s death to capital punishment level with a time gap of 30 years between the two events. But the indictment was constructively amended to enlarge the description "in the course of" to allow the 30-year time gap, and that is a *per se* reversible error. *U.S. v. McKee*, 506 F.3d 225, 229 (3rd Cir. 2007); *U.S. v. Floresca*, 38 F.3d 706, 714 (4th Cir. 1994) (citing *U.S. v. Oland* 507 U.S. 725, 731-34); *U.S. v. Leightnam*, 948 F.2d 370, 378 (7th Cir. 1991); *Chambers*, 408 F.3d at 241.

C. NO EVIDENCE - FALSE PROOF

In comparison with the federal court decisions in this motion, the state court's decision "this case represented 'guessing' or 'conjecture' by the court. The prosecution has no competent evidence on the charge because the State's theories as to the causations of K.B.'s brain injury, chronic deterioration, death, and Guo's culpability were all false. *Fiore v. White*, 531 U.S. 227, 228 (No evidence of basic element of the charge); *Langston v. Smith*, 630 F.3d 310, 317 (2nd 2010) (evidence too speculative); *Newman v. Metrish*, 543 F.3d 793, 796-797 (6th Cir. 2008); *O'Laughlin v. O'Brien*, 568 F.3d 287, 308 (1st Cir. 2008). The judgment is not supported by "substantial and competent" evidence but by conjectures and speculations. *McKen-*

ZIE V. SMITH, 326 F.3d 721, 727-728 (6th Cir. 2003);
BROWN V. PALMER, 441 F.3d 347 (6th Cir. 2006); PARKER V.
RENICA, 506 F.3d 444, 452 (6th Cir. 2007).

FALSE PROOF

The state appellate court claimed as proof the circular illogic of superficial correspondence between the non-expert hearsay of "responding hospital staff" and extrinsic Rule 404(b) evidence. TAYLOR V. CAIN, 545 F.3d 327 (5th Cir. 2008) (trial court violated the Confrontational Clause by permitting hearsay identification of the defendant); LILLY V. VIRGINIA, 527 U.S. 116. The fact that two rumors sounded alike does not make the rumors truth. The state courts impermissibly render the judgment of "guilty by reputation" based on propensity / character evidence. Gov't of V. I. V. ARCHIBALD, 987 F.2d 180, 187 (8th Cir. 1993) ("guilty by reputation"); GARBAKEE V. STEELE, 792 F.3d 991 (8th Cir. 2015) ("inadmissible propensity evidence"); U.S. V. NICHOLS, 169 F.3d 1255, 1272 (10th Cir. 1999) (citing OLD CHIEF V. U.S., 519 U.S. 172, 179-181, unfair prejudice); PAYNE V. TENNESSEE, 510 U.S. 808, 825 (unfair evidence). There was never even any competent evidence about what happened in K.B. To allow valid claim of the Rule 404(b) evidence, which therefore were false evidence. MAXWELL V. ROE, 628 F.3d 486, 499-500 (9th Cir. 2009); DOE V. BUSBY, 661

F.3d 1001 (9th Cir. 2011); OWENS v. DUNCAN, 781 F.3d 360, 362 (9th Cir. 2015) (citing HOLBROOK v. FLYNN, 475 U.S. 560, 567).

The prosecutor himself actually supplied most of the corroborative statements of essential elements of the charge to distort actual testimony as supportive of his claims. MILLER v. PATE, 386 U.S. 1, 15-16; GILIO v. U.S., 405 U.S. 150, 154; NAPUE v. ILLINOIS, 360 U.S. 264, 269; KYLE v. WHITLEY, 514 U.S. 419, 434; U.S. v. AGURS, 427 U.S. 97, 103. The state courts also interpreted their own evidence and misread the records to support the judgment. OWENS, 781 F.3d, at 364;

Richey, 498 F.3d 344; PATE v. RUNNEL, 505 F.3d 22 (9th Cir. 2007) ("cumulative effects of multiple evidentiary errors violated due process"); MONTANA v. EGGLESTON, 518 U.S. 37, 53 (certiorari denied by sub-argument to due process violation). At the same time, defense counsel ably failed to object to egregious prosecutorial misconduct. ZAPATA v. VASQUEZ, 788 F.3d 1106 (9th Cir. 2015); HOOGE v. HURLEY, 426 F.3d 368 (6th Cir. 2005).

INTENT.

As there was no evidence that Gao harmed K.B. and her death occurred 30 years after the alleged

assault, there can not be any valid evidence of intentionality of murder. *DONAHUE V. CAIN*, 231 F.3d 1000, 1004 (5th Cir. 2000); *GUIDRY V. DRETKE*, 397 F.3d 306, 331 (5th Cir. 2005); *ROBERTSON V. CAIN*, 324 F.3d 297 (5th Cir. 2003); *RICHEY*, 498 F.3d 344 (No transfer of intent from arson to felony murder); *U.S. V. BAILEY*, 819 F.3d 92, 93-95 (4th Cir. 2010) (citing *HOLLOWAY V. U.S.*, 526 U.S. 1, specific intent to kill or seriously harm the victim not proven without proving he actually possessed a gun in car jacking).

In comparison with the cases cited here, there is no way that any rational trier of fact could find that Guo could have intent to cause K.B.'s death without any evidence that Guo even harmed K.B. and with the causes of her brain injury, deterioration, and immediate cause of death not affirmatively attested to by any competent witness. Cf. *BOX V. DONNALLY*, 482 F.3d 388 (2nd Cir. 2005) (unconstitutional jury charge on intent to kill); *EVERETT V. BEARD*, 290 F.3d 500 (3rd Cir. 2002) (failure of counsel to object to lack of jury charge on intent to kill); *REAGAN V. NORRIS*, 365 F.3d 616 (8th Cir. 2004).

CAUSATION DEFENSE AS ALIBI DEFENSE

As the State's purported proof of Guo's culpability is mainly the supposed "similarity" between K.B. and F.M.'s "attacks," especially strangulation, contradicting the State's

false claim that strangulation caused K.B.'s brain injury and eventual death would invalidate the prosecution's false claim of the Rule 404(b) evidence as identity evidence. Causation defense would have the effect of alibi defense, and it was obvious during trial that the prosecution's claims about the causations of K.B.'s injuries, deterioration, and death were all false. But LOLLAR never properly investigated causation defense. COUCH V. BOOKER, 632 F. 3d 241 (6th Cir. 2011) (Causation defense); SHOWER V. BEARD, 635 F. 3d 241 (3rd Cir. 2011) (Suicide V. Homicide); SMITH V. JENKINS, 2015 U.S. APP. LEXIS 6835 (6th Cir.) (preexisting condition); Thomas V. CLEMENTS, 789 F. 3d 760 (7th Cir. 2015) (intentionality in strangulation).

CLINICALLY UNDIAGNOSABLE ENCEPHALOPATHY

It is obvious from K.B.'s clinically dramatic decline and autopsy results that ~~th~~ her brain very severely degenerated over several decades. She was afflicted with a chronic, progressive encephalopathy similar to CTE (chronic traumatic encephalopathy) which can not be diagnosed without an autopsy even today. So it is not unexpected that she did not have a separate diagnosis from her degenerative brain condition; such diagnosis could not be made while the patient, K.B. was alive.

Dr. Shelton, who made the homicide ruling and was the state's almost exclusive witness on cause of death testified that if K.B. had another diagnosis that

could cause death, his ruling on the manner of death would have been "undetermined." That was a disingenuous remark by Dr. Stelton - it was up to him to make the diagnosis of the degenerative brain pathology at autopsy because it could not be made before K.B.'s death and would not be in the medical records. Counsel Lollar should have obtained an expert to explain such fact to the jury. K.B. had a progressive degenerative brain condition similar to CTE and it could not have been caused by a single episode of trauma or asphyxiation.

K.B.'s death was not a homicide, and that was also evident in a video clip that K.B.'s father, A.B., showed in trial. K.B. was seen giddily and gigglingly walking five to ten feet unsteadily but without assistance as A.B. tried to train her to walk after her brain injury. Anyone who saw the video would believe that K.B. was supposedly "murdered" many months before. But Lollar irrationally screamed loudly and angrily at A.B. in objection through the video to frighten the old man, distract the jury, and make the defense seem cruel and mindless.

EQUAL PROTECTION, RETROACTIVITY, FAIR WARNING ISSUES

To obtain this conviction that should have been impossible, the state courts applied many new rules that did not exist in 1988 or even now, and violated EQUAL PROTECTION, EX POST FACTO, AND FAIR WARNING principles. *PYLER V. DOE*, 457 U.S. 202, 206 (Equal Protection); *VASCO V. QUILL*, 117 S.Ct. 2293, 2297 ("like cases alike"); *ROGERS V. TENNESSEE*, 532 U.S. at 462 (fair warning).

The new rules include for admission of Rule 404 (b) evidence, use of hearsay medical records as proof of relevance of Rule 404 (b) evidence, construction of § 19.03 (a)(2) capital murder charge, definition of delayed death homicide, presumption of guilt paradigm of proof, application of statute of limitations of murder before death, resurrection of time-barred prosecution, and abrogation of reasonable hypothesis analysis in circumstantial evidence cases (Compare CARMELL V TEXAS, 529 U.S. 513, 530-31).

PRAYER

WHEREFORE, Guo prays that the Court would grant this motion for rehearing.

RESPECTFULLY SUBMITTED,

George Guo, 3-3-2023

GEORGE GUO

02348097

899 F.M. 632

KENEDY, TX 78119

CERTIFICATE OF SERVICE

I, George Guo, certify that a copy of this Motion for Rehearing is being sent to the State's Counsel, Mr. Joshua Vandervelie at DALLAS County D.A.'s Office by first class mail.

George Guo 3-3-2023

NO. 22-6021
UNITED STATES SUPREME COURT
GEORGE GUO, petitioner pro se
V.
STATE OF TEXAS, respondent

RULE 44 CERTIFICATE

COMES NOW, George Guo, petitioner pro se and files this RULE 44 Certificate. Guo would aver in compliance with the rule that:

I.

Guo is filing the Motion for Rehearing of the Petition for a Writ of Certiorari to the Fifth Appellate Court of Texas in good faith and not for delay.

II.

The grounds are limited to intervening circumstances of substantial or controlling effect, or other substantial grounds not previously presented.

RESPECTFULLY SUBMITTED,

George Guo, 3-3-2023
02348097
899 F.M. 632

