No. _____ ORIGINAL

In the Supreme Court of the United States

JOHN G. CALHOUN,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the inaccurate jury instruction on Manslaughter by Act so infused the trial with unfairness as to deny the Petitioner's right to Due Process of Law as recognized in Lisenba v California, 314 US 219, 228, (1941); Donnelly v DeChristoforo, 416 US, at 643. See also Estelle v. McGurire, 502 U.S. 62, 71-75 (1991).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner John G. Calhoun, respectfully petitions for a Writ of Certiorari to review the judgment of the Florida Second District Court of Appeal.

OPINIONS BELOW

The unexplained opinion of the Second District Court of Appeal of Florida. (Appendix A)

JURISDICTION

The judgment of the Second District Court of Appeal of Florida was entered on February 6, 2023. This Court has jurisdiction pursuant to 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

I. The Fourteenth Amendment to the United States Constitution provides

Amendment 14 Rights of the accused.

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 protection of the laws.

II. 28 U.S.C. § 2254 provides in relevant part:

State custody; remedies in Federal courts

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(d) An application for writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

STATEMENT OF THE CASE

A. Florida's judicial response to the giving of an inaccurate jury instruction.

In Reed v. State, 837 So.2d 366 (Fla. 2002), the Florida Supreme Court held in pertinent part: "Inaccurate definition of . . . provided in the standard jury instruction for . . . , which defined . . . , reduced the state's burden of proof on an essential element of the offense charged." Id. at 369. The court proceeded on to observe "It is fundamental error if the inaccurately defined . . . element is disputed, and the inaccurate definition "is pertinent or material to what the jury must consider in order to convict." Id.

By the Reed ruling essentially, any inaccurate definition of a jury instruction that reduced the state's burden of proof on an essential element of the offense the jury is being instructed on is fundamental error if the inaccurate definition "is pertinent or material to what the jury must consider in order to convict."

In Estelle, 502 U.S. at 71-75, the U.S. Supreme Court observed that a jury instruction on prior injury evidence given in second-degree murder prosecution . . . did not improperly direct jury to find that defendant had caused prior injuries, ... Evidence . . . was sufficient to establish that defendant had caused victim's prior injuries;. . . . Jury instruction on prior injury evidence given . . . did not constitute "propensity" instruction, ... This Court concluded that the jury instruction did not "so infused the trial with unfairness as to deny due process of law."

At the time (June 7, 2004) of the charged offense in this case manslaughter, a lesser included offense of both first-degree and second-degree murder, was defined as the killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification in cases in which such killing shall not be excusable homicide or murder. 782.07(1), Fla. Stat. (2004). Section 782.07(1) states as follows: (1) The killing of a human being by the act, procurement, or culpable negligence of another, without lawful justification according to the provisions of ch. 776, Fla. Stat., and in cases in which such killing shall not be excusable homicide or murder, according to the provisions of this chapter, is manslaughter, a felony of the second degree, punishable as provided in 775.082, 775.083, or 775.084, Fla. Stat. 782.07(1), Fla. Stat. (2005). Section 782.07(1) establishes three forms of manslaughter, by act, by procurement, or by culpable negligence. The statute did not impose a requirement that the Petitioner intend to kill the victim. Instead, it plainly provided that where one commits an act that results in death, and such an act is not lawfully justified or excusable, it was manslaughter. Needless to say, the jury was not instructed accordingly.

Manslaughter is a category one lesser included offense of first-degree murder. At trial, the jury must be instructed on category one lesser included offenses; whether the jury is instructed on category two lesser included offenses depends on the trial judge's determination of whether the elements of category

crimes may have been alleged and proved. A necessarily lesser included offense is, as the name implies, a lesser offense that is always included in the major offense. The trial judge has no discretion in whether to instruct the jury on a necessarily lesser included offense. Once the judge determines that the offense is a necessarily lesser included offense, an instruction must be given.

Second-degree murder as a lesser included offense is one step removed from first-degree murder, and manslaughter as a lesser included offense is two steps removed from first-degree murder. The law as clarified in State v. Montgomery, 39 So. 3d 252 (Fla. 2010),

> "When the trial court fails to properly instruct on a crime two or more degrees removed from the crime for which the defendant is convicted, the error is not per se reversible, but instead is subject to a harmless error analysis. The significance of the two-steps-removed requirement is more than merely a matter of number or degree. A jury must be given a fair opportunity to exercise its inherent pardon power by returning a verdict of guilty as to the next lower crime. If the jury is not properly instructed on the next lower crime, then it is impossible to determine whether, having been properly instructed, it would have found the defendant guilty of the next lesser offense. The lesser included offense of manslaughter is just one step removed from second-degree murder."

Id. at 259.

In Montgomery, the jury was instructed on Manslaughter as follows:

> To prove the crime of Manslaughter, the State must prove the following two elements beyond a reasonable doubt:
> . . . .
>
> However, the defendant cannot be guilty of manslaughter if the killing was either justifiable or excusable homicide as I have previously explained those terms.
>
> In order to convict of manslaughter by intentional act, it is not necessary for the State to prove that the defendant had a premeditated intent to cause death.
>
> 1. (Victim) is dead.
>
> 2. a. (Defendant) intentionally caused the death of (victim).Fla. Std. Jury Instr. (Crim.) 7.7 (2006) (emphasis added).

The State and the First District agreed that this jury instruction required the jury to find that the defendant intended to kill the victim in order to convict Montgomery of manslaughter. The focus of the Florida Supreme Court's analysis was admittedly on the second element of the jury instruction, which provided that the State must prove that the defendant intentionally caused the death of the victim. It was noted, although the instruction also provided that "it is not necessary for the State to prove that the defendant had a premeditated intent to cause death," the court concluded that this language was insufficient to erode the import of the second element: that the jury must find that the defendant intended to cause the death of the victim. The court agreed with the First District's observation in Montgomery that a reasonable jury would believe that in

order to convict Montgomery of manslaughter by act, it had to find that he intended to kill Ellis. The district court stated:

> The average juror would likely interpret the instruction as requiring an intent to kill, as there is no direct language regarding an intentional act. The word "intentionally" in the instruction modifies the word "caused." Thus, the instruction would be naturally understood as requiring a finding that the defendant intended for the victim to die. The likelihood of such an interpretation is illustrated by the fact that the phrase "intentionally caused the death of" is commonly associated with first-degree murder in charging documents. Montgomery, 2009 Fla. App. LEXIS 1092 at *12, 34 Fla. L. Weekly at D361. Additionally, we agree with the district court's assessment that "[t]he subsequent instruction that manslaughter does not require a premeditated design does not cure its defect, as both the court system and the average reasonable person recognize a distinction between a premeditated design and an instantaneous formation of intent." 2009 Fla. App. LEXIS 1092 at *13, 34 Fla. L. Weekly at D362.

Id. at 256-257.

Since the Petitioner's and Montgomery's trial, the court has approved an amendment to the standard jury instruction on Manslaughter by Act. The amendment, approved in December of 2008, added additional language to **clarify** that the requisite intent for Manslaughter by Act is the intent to commit an act that caused the death of the victim:

> "In order to convict of manslaughter by intentional act, it is not necessary for the State to prove that the defendant had a premeditated intent to cause death, only an intent to commit an act which caused death. See Hall v. State, 951 So. 2d 91 (Fla. 2d DCA2007). In re Standard Jury Instructions in Criminal Cases-- Report No. 2007-10, 997 So. 2d 403, 403 (Fla. 2008). Thus, the relevant intent is

> the intent to commit an act which caused death, and the State is not required to prove that the defendant intended to kill the victim."

Id. at 257.

Thus, the Petitioner is currently in State Prison serving a life sentence with no eligibility for parole predicated upon a conviction in which he exercised his constitutional rights to a jury of his peers to determine his guilt or innocence as the law required. Subsequent, to his conviction becoming final, the law was **clarified** (not changed) that the requisite intent for Manslaughter by Act is the intent to commit an act that caused the death of the victim and that the average juror would likely interpret the Manslaughter instruction as requiring an intent to kill, as there was no direct language regarding an intentional act. The word "intentionally" in the instruction modified the word "caused." Thus, the instruction would be naturally understood as requiring a finding that the Petitioner intended for the victim to die. The likelihood of such an interpretation was illustrated by the fact that the phrase "intentionally caused the death of" is commonly associated with first-degree murder in charging documents, which the jury obviously rejected. The Manslaughter by Act instruction in this cause "so infused the trial with unfairness as to deny due process of law." Estelle, 502 U.S. at 71-75.

B. The decision below conflicts with Estelle and this Court's longstanding practice in federal habeas cases of not reaching the merits of the case.

This Court routinely cautions in Anti-Terrorism and Effective Death Penalty Act cases ("AEDPA") that it has not reached the merits of the underlying federal claim. Sexton v. Beaudreauzx, 138 S.Ct. 2555, 2560 n. 3 (2018) ("Because our decision merely applies 28 U.S.C. § 2254(d)(1), it takes no position on the underlying merits and does not decide any other issue."). This is because in order to prevail on federal habeas review, the defendant must prove that the state court's decision "involved an unreasonable application of" clearly established federal law. Harrington v. Richter, 562 U.S. 86, 100 (2021). In other words, the question for the federal court to resolve is not whether the state court's interpretation of a constitutional provision was correct, but rather whether it was clearly unreasonable. See Renico v. Lett, 559 U.S. 766, 779 (2010). This Court's decisions noting that its federal habeas precedent does not reach the merits of the underlying constitutional claim are legion.[1]

1 Dunn v. Madison, 138 S.Ct. 9, 12 (2017) ("We express no view on the merits of the underlying question outside of the AEDPA context."); Kernan v. Cuero, 138 S.Ct. 4, 8 (2017) ("We shall assume purely for argument's sake that the State violated the Constitution when it moved to amend the complaint. But we still are unable to find in Supreme Court precedent that 'clearly established federal law' demanding specific performance as a remedy."); Kernan v. Hinojosa, 136 S.Ct. 1603, 1606 (2016) (stating it was expressing "no view on the mertits" of the claim); Woods v. Etherton, 136 S.Ct. 1149, 1152 (2016) ("Without ruling on the merits of the court's holding that counsel had been ineffective, we disagree with gthe determination that no fairminded jurist could reach a contrary conclusion, and accordingly reverse."); Wood v. Donald, 135 S.Ct. 1372, 1378 (2015) ("Because we consider this case only in the narrow context of federal habeas review, we express no view on the merits of the underlying Sixth Amendment principle.") (quotation simplified); White v. Woodall, 572 U.S. 415, 420-21 (2014) ("We need not decide here, and express no view on, whether the conclusion that a no adverse inference instruction was required would be correct in a case not reviewed through the lens of § 2254(d)(1)."); Marshall v. Rodgers, 569 U.S. 58, 64 (2013) ("The Court expresses no view on the merits of the underlying Sixth Amendment principle the respondent urges. And it does not

The reaching of the underlying federal claim is precisely what this Court did in Kernan v. Cuero, 138 S.Ct. 4, 8 (2017). That case involved a defendant who initially pleaded "not guilty." and subsequently changed his plea to "guilty." On his plea form the maximum sentence as a result of his plea was 14 years, 4 months in State Prison, $10,000 fine and 4 years parole. However, the State was allowed to amend the information which resulted in the defendant's sentence being a minimum of 25 years and a maximum sentence being 25 years to life. The defendant entered a plea to the amended information and was sentenced to 25 years to life. The defendant then filed a petition for federal habeas relief in the United States District Court for the Southern District of California. The court denied the petition, but the the Ninth Circuit Court of Appeal reversed. Cuero v. Cate, 827 F.3d 879 (2016). On appeal the court concluded that "[i]n this context, specific performance" of the that plea agreement—i.e., sentencing Cuero to no more than the roughly 14-year sentence reflected in the 2005 guilty-plea form—was "necessary to maintain the integrity and fairness of the criminal justice system." Id., at 890, n. 14. This Court disagreed with the Ninth Circuit by concluding "that the Ninth Circuit erred when it held that "federal law" as interpreted by this Court "clearly" establishes that specific performance is constitutionally required here." This Court reversed the judgment of the Ninth

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suggest or imply that the underlying issue, if presented on direct review, would be insubstantial."); Smith v. Spisak, 558 U.S. 139, 149 (2010) ("Whatever the legal merits of the rule or the underlying verdict forms in this case were we to consider them on direct appeal, the jury instructions at Spisak's trial were not contrary to 'clearly established Federal law."). (quoting 28 U.S.C. § 2254(d)(1)).

Circuit and remand the case for further proceedings consistent with this opinion. Cuero, 138 S.Ct. at 9.

The Florida Supreme Court in Reed never acknowledged the clear language of an inaccurate jury instruction "so infused the trial with unfairness as to deny due process of law." The Reed court did hold similarly "Inaccurate definition of . . . provided in the standard jury instruction for . . . , which defined . . . , reduced the state's burden of proof on an essential element of the offense charged." Id. at 369. The court proceeded on to observe "It is fundamental error if the inaccurately defined . . . element is disputed, and the inaccurate definition "is pertinent or material to what the jury must consider in order to convict." Id. 837 So.2d at 369. This Court's ruling in Estelle, 502 U.S. at 71-75, provides clarification that if a jury instruction is inaccurate defining a disputed element of a crime that is pertinent or material to what the jury must consider in order to convict, consequently, so infused the trial with unfairness as to deny due process of law.

REASONS FOR GRANTING THE PETITION

I. This Court should grant certriorari since the jury instruction on Manslaughter by Act "so infused the trial with unfairness as to deny due process of law," as this Court recognized in Estelle, 502 U.S. at 71-75.

The Florida Supreme Court has decided an important federal question in a way that conflicts with decisions of this Court and decisions of other state high courts. It improperly determined the scope of a constitutional right to an accurate jury instruction on an element of a crime in dispute at trial by concluding that a defendant does not have a constitutional right to a jury pardon. See e.g. Knight v. State, 286 So.3d 147, 151-152 (Fla. 2019) (Most importantly, we erred by transforming the unreviewable pardon power of the jury into a fundamental right of the defendant. And we further erred by treating the deprivation of the defendant's nonexistent right to the availability of a jury pardon as a structural defect that vitiates the fairness of the trial. We thus recede from our precedents to the extent they found fundamental error based on an erroneous jury instruction for a lesser included offense one step removed from the offense of conviction.) In Knight, the Florida Supreme Court receded from Montgomery, to the extent that the jury instruction issue could no longer be raised on direct appeal as fundamental error to circumvent the contemporaneous objection rule as follows:

> In the cases on which Knight relies, we erred in out fundamental error analysis. Most importantly, we erred by transforming the unreviewable pardon *power* of the jury into fundamental *right* of the the defendant. And we further erred by treating the deprivation of the defendant's nonexistent right to the availability of a jury pardon as a structural defect that vitiates the fairness of the trial. We thus recede from our precedents to the extent they found fundamental error based on an erroneous jury instruction for lesser included offenses one step removed from the offense of conviction.

Id. at 151-152. (Emphasis added) This Court should remand this case to the Florida Supreme Court for consideration on the Manslaughter by Act instruction in Florida as recognized in Montgomery, "so infused the trial with unfairness as to deny due process of law." clearly misapplying the scope and significance of Estelle, 502 U.S. at 71-75.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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