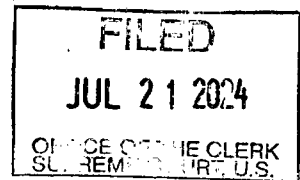


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No. 24-5294



IN THE
SUPREME COURT OF THE UNITED STATES

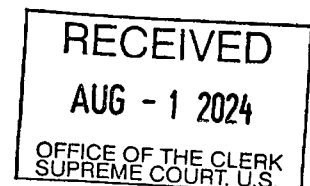
TOMMY J. MAY — PETITIONER

VS.

THOMAS WILLIAMS, WARDEN — RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF KANSAS
PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. WHETHER TOMMY J. MAY WAS ENTITLED TO A JURY INSTRUCTION ON THE LESSER OFFENSE OF ATTEMPTED VOLUNTARY MANSLAUGHTER ON THE ATTEMPTED FIRST-DEGREE MURDER OF YARBROUGH?

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IN THE
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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the Kansas Supreme Court to review the merits appears at Appendix A to the petition.

The opinion of the Kansas Court of Appeals is cited at *State v. May*, No. 123,622 (Kan. App. Unpub. Dec. 22, 2023).

JURISDICTIONAL STATEMENT

The decision of the Kansas Supreme Court was entered on April 26, 2024. Rehearing was not sought. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fourteenth Amendment Section 1, United States Constitution provides:

"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."

The statute under which Petitioner seeks post conviction relief 28 U.S.C. § 1257(a) provides:

"Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court by Writ of Certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any state is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States."

STATEMENT OF THE CASE

I. COURSE OF PROCEEDINGS IN THE SECTION 1257 CASE NOW BEFORE THIS COURT

On July 2, 2018, in a cause pending in the Kansas District Court, Douglas County, entitled STATE OF KANSAS v. TOMMY JOHN MAY, criminal no. 18CR728 petitioner was charged with the crimes of: (1) attempted first-degree murder against Yarbrough; (2) attempted second-degree murder against Jones; (3) aggravated battery against a law enforcement officer; (4) possession of methamphetamine; (5) criminal possession of a firearm by a felon; (6) fleeing or attempting to elude a police officer; (7) interference with law enforcement; and (8) three counts of criminal damage to property.

Petitioner's first day of trial was on December 9, 2019 and after eight days, a jury found petitioner guilty of all charges against him. Petitioner filed a motion for new trial and received an evidentiary hearing on the matter. However, the district court denied the motion for new trial and imposed a sentence of 679 months of imprisonment. This judgment was affirmed by the Kansas Supreme Court in a mandate filed on April 26, 2024. See Appendix A.

II. RELEVANT FACTS CONCERNING THE UNDERLYING CONVICTION

The relevant facts are contained in petitioner's direct appeal brief and testimony at trial. Petitioner was fifty-eight at the time charges

were filed against him. He has an associate's degree in psychology and is a pilot. He served four and a half years in the military and served in Afghanistan as a paratrooper in the Special Forces. He was honorably discharged.

On July the 2nd of 2018, at about one p.m. petitioner drove to Michael Jordan's to take him to work. Petitioner planned to pick him up at 9:30 pm when Jordan got off work. Petitioner returned to his apartment around 9pm. Ms. Marzetta Yarbrough knocked his door and he let her in. The first thing she did was ask him for money. He refused her request. Yarbrough then asked May if she could have some pills that she saw lying on the table, and May again refused and told her she wasn't getting anything but out of his apartment. Yarbrough then asked to use the bathroom and told him she did not want to use at home. He told her she could not shoot up in his house. During cross-examination, she admitted she had a syringe in her bag, used to inject drugs. May offered that she could sit in his car. She went to the car and May sat back down in his apartment.

May had to pick up his friend Jordan soon. All his prescription medication were in the bottles they were dispensed in and kept in a white container. He put his medication in the cabinet over the refrigerator and sat back down for about five minutes waiting on Yarbrough to

finish. May eventually sat on his bed to put on his shoes and socks to get ready to pick up Jordan when he heard someone come into the apartment. Yarbrough entered his bedroom and walked around where he was sitting. She had a pink scarf in her hand and made a reference to the money and the pills he had. He told her he was not giving her anything.

Yarbrough unwrapped the pink scarf, pulled a handgun and shot toward May, grazing him on the inside of his left arm as he held up his arm in a defensive gesture. He grabbed the gun with his right hand and hit her over the head. She yelled, ran into the living room to get her bag, and threw it at him. May positioned himself so that a table was between them, but she moved around the table and attacked him. They struggled over the chair and the love seat. May tried to knock her out with the pistol and hit her two more times with it. She bled on the curtains behind him and the tissue box on the table. At trial, she denied fighting him, but her fingernail was torn off and was later recovered. Eventually, she stopped attacking May and got on her knees, prompting May to go find a towel to clean up her blood because she was bleeding profusely.

As May turned to get a towel for her, she jumped up and ran to the door. She fumbled with the door trying to open it. She

Started screaming for Jeremy Jones. May ran after her and tried to stop her from throwing the door wide open, afraid that Jeremy Jones would come into the apartment and harm him. The gun he took from her belonged to Jones. The gun was in his right hand. They were struggling at the door. The ejection port of the gun was face down in his palm. She manhandled May out of the way and the gun went off, a bullet striking her in the left cheek. May did not intend to shoot Yarbrough and instead did so accidentally. The gun didn't eject the fired cartridge casing after the bullet had gone out the cartridge. May dug the shell out and it fell to the floor where forensics found it. Yarbrough ran out of the apartment.

May was in shock. He was receiving chemotherapy treatment from K.U. Medical Center for cancer. He was recovering from pneumonia and had just been released from the VA where he had been hospitalized for four days. He was weakened from his illness and his hearing is also impaired. At trial May testified that he had tunnel vision which is a loss of peripheral vision as a result of combat or PTSD, when he tried to explain that he suffered from PTSD from his experience in the military, the trial court limited his testimony and instructed the jury to ignore any reference to PTSD.

Michael Jordan was acquainted with May and Yarbrough. At May's trial, Jordan testified that in December 2018, while they were both

in jail Jordan met with May, who talked to him about the events of July 2, 2018. According to Jordan, May said that Yarbrough and Jones were trying to rob him, and that Yarbrough shot him.

Detective George Baker lead the crime scene investigation. He stated a fake fingernail was on the floor and an applicator for fake fingernails in the backpack. A hypodermic needle in Yarbrough's bag and the blood spatter in the apartment suggested a struggle.

III. EXISTENCE OF JURISDICTION BELOW

Petitioner was convicted in the District Court of the State of Kansas of the crimes stated before. It was duly appealed to the Kansas Supreme Court. Although denied, this case raises a question of interpretation of the Due Process Clause of the Fourteenth Amendments to the United States Constitution.

REASONS FOR GRANTING THE WRIT

I. WHETHER TOMMY J. MAY WAS ENTITLED TO A JURY INSTRUCTION ON THE LESSER OFFENSE OF ATTEMPTED VOLUNTARY MANSLAUGHTER ON THE ATTEMPTED FIRST-DEGREE MURDER OF YARBROUGH?

In Price v. Vincent, 538 U.S. 634, 155 L.Ed.2d 874, 123 S.Ct. 1848, 1852 (2003), this court have explained that a decision by a state court is "contrary to" its clearly established law if it "applies a rule that contradicts the governing law set forth in [its] cases" or if it "confronts a set of

facts that are materially indistinguishable from a decision of this court and nevertheless arrives at a result different from [its] precedent."

Williams v. Taylor, 529 U.S. 362, 146 L.Ed.2d 389, 120 S.Ct. 1495 (2000).

The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. Const. Amend. XIV § 1.

In Beck v. Alabama, 447 U.S. 633, 65 L.Ed.2d 392, 100 S.Ct. 2332, 2389 (1980), while this court have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. This right to such an instruction has been recognized by numerous decision of this court. See e.g. Sansone v. United States, 380 U.S. 343, 349 (1965); Berra v. United States, 351 U.S. 131, 134 (1956); Stevenson v. United States, 162 U.S. 313 (1896).

Defense counsel's failure to object or submit a claim of attempted voluntary manslaughter does not excuse the trial court's failure to submit the instruction. "Because voluntary manslaughter is a lesser included offense of first-degree murder, it would have been legally appropriate for the court to [have] instruct[ed] on voluntary manslaughter." State v. Gulley, 315 Kan. 86, 92, 505 P.3d 354 (2022). And unlike with affirmative

defenses, "[t]he court's duty to instruct on lesser included crimes is not foreclosed or excused just because the lesser included crime may be inconsistent with the [petitioner's] theory of defense." State v. Simmons, 295 Kan. 171, Syl. ¶ 3, 176-77, 283 P.3d 212 (2012). In Kansas, an instruction should be given even if the evidence supporting that lesser offense is "weak or inconclusive." State v. Nelson, 291 Kan. 475, 243 P.3d 343 (2010). For petitioner, an instruction should have been given on voluntary manslaughter under both sections (1) a sudden quarrel or in the heat of passion and 2) upon an reasonable, yet honest, belief that deadly force was justified, commonly called imperfect self defense. K.S.A. 21-5404. "A sudden quarrel can be one form of heat of passion." State v. Johnson, 290 Kan. 1038, 1048, 236 P.3d 517 (2010). "[I]n unforeseen angry altercation, dispute, taunt, or accusation could fall within the] definition [of heat of passion] as sufficient provocation." Id.

In Kansas, under the skip rule: "when a lesser included offense has been the subject of an instruction, and the jury convicts of the greater offense, error resulting from failure to give an instruction on another still lesser included offense is cured." State v. Gentry, 310 Kan. 715, 729, 449 P.3d 429 (2019). The Kansas Supreme Court clarified that the skip rule is "a logical deduction that may be

drawn from jury verdicts in certain cases." 310 Kan. at 729. Kansas courts recognized it is "one factor, among many, to be considered as part of the applicable harmlessness test," and should not be applied automatically or mechanically. 301 Kan. at 729.

In the present case, the evidence at trial, primarily through May's testimony, and corroboration, supports an instruction of attempted voluntary manslaughter based on imperfect self defense and/or sudden quarrel and heat of passion. There was a sudden quarrel over drugs, an attempted robbery and shooting by Yarbrough. The struggle with Yarbrough over the weapons and her continuing physical aggression led up to the accidental shooting at the door. May's age (58), pneumonia, cancer, and stress from military service in Afghanistan contributed to his reaction where he defended himself.

Kansas' skip rule does not cure the error of the trial court's failure to give the instruction. May established that there was a struggle between him and Yarbrough when the shot was fired. The trial court had an unexcusable duty to submit the instruction. The instruction was appropriate despite it being inconsistent with May's theory of defense. State v. Simmons, 295 Kan. at Syl ¶ 3. According to the facts, May should be entitled to the instruction as a

matter of due process. Beck v. Alabama, 100 S.Ct. at 2389.

The failure to instruct on attempted voluntary manslaughter denied May his constitutional right to present a defense under the Due Process Clause of the Fourteenth Amendment.

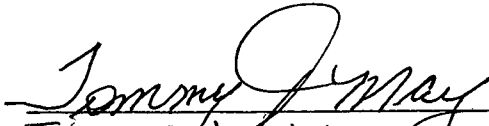
The Kansas Court of Appeals' decision to affirm the trial court denied May due process on the instruction of a lesser included offense and is contrary to this court's precedent and is inconsistent with its prior decisions. Williams v. Taylor, 529 U.S. 362.

CONCLUSION

The judgment below is a departure from the decisions of this court. As such, it falls short of the Due Process Clause of the Fourteenth Amendment of the United States Constitution guaranteed to its citizens, specifically petitioner's.

For the foregoing reasons, certiorari should be granted in this case.

Respectfully Submitted,


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