

Case No. _____

In The Supreme Court Of The United States

Tiara Smith

Vs.

State of Georgia

On Petition for a Writ of Certiorari to the Supreme Court of Georgia

PETITION FOR WRIT OF CERTIORARI

Tiara Smith/ GDC # 1258485 Pro Se

Lee Arrendale State Prison

PO Box 709

Alto, Ga 30510

QUESTIONS PRESENTED

1. Is Georgia's felony murder law (OCGA 16-5-1) too broad?
2. If Georgia's felony murder statute is considered broad, does its imposition of the "any" or "all" felony standard of the underlying felony for a felony murder conviction constitute cruel and unusual punishment if the felony is a nonviolent/ non-forcible felony?
3. Should Georgia's legislature amend its felony murder statute, by limiting its provocation to specified enumerated felonies since it is the only state that has NOT done so?
4. If Georgia were to specify which felonies should invoke the felony murder rule, should other deaths that occur during the commission of non-specified felonies fall under OCGA section 16-5-1(d) second degree murder (enacted July 1, 2012)?
5. If a petitioner has proven a miscarriage of justice with presented evidence, which by case law overcomes a procedural default, should their claims be dismissed as untimely although the Habeas Corpus statute OCGA 9-14-42 (c)(1) states in all cases Habeas relief shall be granted to avoid a miscarriage of justice?
6. If a petitioner proves their factual innocence, should their claim be barred due to a procedural default?

LIST OF PARTIES

For Respondents, The State of Georgia

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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 be issued to review the judgement below.

OPINIONS BELOW

The opinion of the highest state court, the Supreme Court of Georgia, to review the merits appears at Appendix A to the petition and is unpublished.

JURISDICTION

The date on which the highest state court, the Supreme Court of Georgia denied relief to Petitioner's Certificate of Probable Cause, appealing the dismissal of her Habeas Corpus Petition, was September 13, 2017. A copy of the decision appears at Appendix A

The jurisdiction of this Court is invoked un 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment: Cruel and Unusual Punishment of the U.S. Constitution

STATEMENT OF THE CASE

On June 4, 2006, Tiara Smith and Nebula McNeely shoplifted merchandise from a Marshall's dept. store in Augusta, Georgia. Upon leaving the store the defendants headed down Washington Road in a black Ford Explorer driven by Smith. A motorcycle deputy—Kenny Curtis then attempted to stop Smith's vehicle for speeding. He was unaware that the two women were involved in a shoplifting incident prior to that moment because the employee of Marshall's who called the police to report a shoplifting incident reported that the offenders were driving a Ford Escort (Taurus). (Curtis depo. Pg. 47, Appendix C; Investigative report pgs. 1, 13, 39-40 attached to Howard depo.; Howard depo. pgs. 44-46, Appendix C; District Attorney Response Brief GA Supreme Court case no. S15A1647 Pg. 4, Appendix A)

When the women saw the officer, they attempted to elude him, and in doing so Smith ran a red light and struck another vehicle. This crash caused the deaths of two adults and an unborn child. Upon arrest Smith was charged with various offenses ranging from vehicular homicide, shoplifting, hit and run, speeding, serious injury by vehicle, etc.

On August 9, 2009 Smith was grand jury indicted for felony murder upon the premise that during the commission of fleeing an attempting to elude an officer for the offense of felony shoplifting, Smith caused the deaths of two adults and an unborn child. (OCGA 16-5-1; 40-6-395(b)(5)(A); *Ferguson v. State*, 635 SE 2d 144, 280 Ga 893 (2006)) (Habeas transcript pg.16 Appendix B)

On September 21, 2007 Smith plead guilty to two counts of felony murder, feticide, fleeing and attempting to elude, and 2 counts of serious injury by vehicle, receiving life plus ten consecutive years in prison. On December 7, 2009 Smith's sentence was modified and the ten

consecutive years were removed from her sentence. (*Smith v. State* 298 Ga. 487, 782 S.E. 2d 17 (2016 Ga. LEXIS 80); Habeas transcript pg. 85, Appendix B)

On December 12, 2012 Smith filed an Extraordinary Motion for New Trial (EMFNT) based on the discovery of new evidence which she included with the motion despite pleading guilty. (*Britten v. State*, 173 Ga. App. 840, 328 SE 2d 556 (1985)) The new evidence was obtained from a wrongful death civil suit case filed against Columbia County Sheriff's Office naming Tiara Smith as one of the defendants. (Richmond County Superior Court case no. RCCV1046; *Columbia County v. Branton*, 304 Ga. App. 149, 695 SE 2d 674 (2010)) The stated civil suit case revealed evidence not available to Smith upon pleading guilty. During the civil suit litigation, Smith discovered that favorable evidence had been withheld from her. Petitioner first brought these claims before the trial court because it was her understanding that a sentencing court retained jurisdiction to correct an illegal or void sentence at any time. Petitioner believed the new evidence undermined the validity of her guilty plea. (OCGA 17-4-94); *Chester v State*, 284 Ga. 162, 664 S.E.2d 220(2008)

OCGA 5-6-35 states:

“new evidence warrants relief from an illegal, void sentence in which the defendant has met all six requirements to grant the motion: (1.) that newly discovered evidence has come to defendant's knowledge since the trial; (2.) The want of due diligence was not the reason the evidence was not acquired sooner; (3.) that the evidence was so material that it would probably produce a different verdict; (4.) that it was not cumulative only; (5.) that the affidavit of the witness is attached to the motion or its absence accounted for; and (6.) that the new evidence does not operate solely to impeach the credit of a witness.” (*Davis v State*, 283 Ga. 438, 660 SE 2d 354 (2008))

During the criminal conviction phase, Smith was led to believe that she was being apprehended on June 4, 2006 for the offense of shoplifting according to her grand jury

indictments. Fearing the possibility of receiving three consecutive life sentences if convicted at trial (like her co-defendant in *McNeely v State*, 296 Ga.422, 768 S.E. 2d 751 (2015)) Smith plead guilty.

Officials of the sheriff's office testified under oath, in their depositions, they were NEVER in pursuit of Smith on June 4, 2006. The civil suit states:

"A Columbia County Sheriff's deputy, Kenny Curtis, saw Smith's black Ford Explorer speed by him as he was riding his motorcycle in the opposite direction. Deputy Curtis activated his lights and siren, turned around, and followed the vehicle. Deputy Curtis deposed that he did not know whether Smith had seen him. No one monitoring radio traffic heard Deputy Curtis say he was engaged in "a pursuit." When Deputy Curtis finally caught up to Smith, the collision had already occurred." (*Columbia County v Branton*; Curtis depo, pg. 20-42; Appendix C).

Petitioner plead guilty and her co- defendant went to trial. Throughout the course of the criminal proceedings, authorities of the law maintained and testified under oath that they proceeded to arrest Smith and McNeely for the offense of shoplifting and engaged in pursuit of the defendants. (*McNeely v State*; Curtis depo. 38-42) In the civil suit *Branton v Columbia County et. al.*, the same authorities testified under oath that they were never in pursuit of Smith, or if they were in pursuit of the defendants it was for speeding. (*Columbia County v Branton*); (Curtis depo. 42; Howard depo. 44-46; **Appendix C**); (D.A. Brief in Opposition to Discretionary Application Case No. A15D0284 pg. 2; D.A. Response Brief to Supreme Court of GA Case No. S15A1647 pg. 4 **Appendix A**)

According to OCGA 5-5-23 (10 ALR 2d 381)—a civil suit testimony that differs from a criminal trial testimony is grounds for an Extraordinary Motion for New Trial. Smith's felony murder charges stem from her phone conversations with her mother while housed at Columbia County Detention Center. Smith's mother would ask her why the TV news channel's kept saying

the police were not pursuing her on the day of the incident. (Augusta Chronicle, News Ch. 6, Andrew Shedd Affidavit —all attached to Habeas petition, Appendix A; *Columbia County v Branton*) Smith, puzzled by her mother's inquiries, assured her mother that the police were chasing her and that she saw their blue lights. According to Inv. Howard, in Smith's mind she believed she was fleeing from a pursuing officer and that gave him the intent to seek felony murder charges against her. (Howard depo. pgs. 37 (lines 2- 19); 38 (lines 18- 25); 39, 40, 51, 59-63, Appendix C) Smith argued in every post- conviction motion that the investigator/ prosecutor of her case shifted the burden of proof and persuasion onto her unlawfully and that her admission of guilt did not corroborate with the evidence of the case. (Extraordinary Motion for New Trial; Appeal of EMFNT attached to Habeas petition, Appendix A; see *Smith v State*)

Smith's EMFNT was denied on January 20 2015. The trial court construed the motion as an Untimely Motion to Withdraw Guilty Plea, stating "one who plead guilty is not entitled to a new trial". (*Smith v State*)

Next, Petitioner filed an Application for Discretionary Review to the Court of Appeals, who then transferred it to the Supreme Court of Georgia. The District Attorney states in their response to the application on page 2 (Case No. A15DO284) the officer attempted to stop Smith's vehicle for shoplifting. After discretionary review was granted, the D.A. states in their response brief on page 4 (Case No. S1541647) that the officer was attempting to stop Smith's vehicle for speeding. (Both documents attached to Habeas Petition Appendix A) Why did the D.A. change one word? This word change, shoplifting to speeding, changes the dynamics of the charges to which Smith pled guilty and further invalidates her guilty plea. Petitioner then filed a supplemental brief pointing to the evidence and the D.A.'s agreement with the evidence of the case which is directly against the indictments to which Smith plead guilty. If according to

evidence, Smith was guilty of causing a death during the commission of speeding, then she could not be indicted, convicted, or even allowed to plead guilty to felony murder. The statute applicable to Smith at the time of subject incident, OCGA 40-6-395(b)(5)(A) prior to July 1, 2012, states that an offender had to have been fleeing from an officer for a felony and committing one of several traffic violations in order for fleeing and attempting to elude to be a felony. (*State v Tiraboschi*, 504 S.E.2d 689 (1998) Smith was not indicted for speeding, nor was this evidence preserved. (Habeas trans. pgs. 16-26 (Grand Jury indictments of case) Appendix B; Howard depo. pgs. 44, 46 Appendix C)

The Supreme Court of Georgia did NOT address any of Smith's enumeration of errors, particularly enumeration 13 which states: "It was unlawful to upgrade Appellant's vehicular homicide charges to felony murder by concealing the fact that the alleged pursuing officer says he was never in pursuit of Smith". (*Smith v State*; Appellant Brief S. Ct. pg. 17 case no. SI5A1647 attached to Habeas Petition Appendix A) Smith argues under this enumeration that Georgia's felony murder merger issue should be addressed. (*Baker v State*, 225, S.E. 2d 269, 236 Ga. 754 (1976)) Smith further argues that Georgia lacks a negligent homicide statute; life sentences should be reserved for those who cause a death during the commission of one of Georgia's "serious violent offenses"; and that it is cruel and unusual punishment to meter out a punishment disproportionate to the offense. The Georgia Supreme Court affirmed the trial court's decision on January 19, 2016 and denied reconsideration February 22, 2016. (*Smith v State*)

Petitioner then filed a petition for Habeas Corpus in Habersham County, Georgia on May 16, 2016. The Respondent served a Motion to Dismiss the petition 57 days later on July 12, 2016 stating Petitioner was not entitled to Habeas relief based upon the Georgia Supreme Court

decision. According to the State, Smith had 4 years from the date of her Motion for Reconsideration (December 7, 2009) order to file a Habeas petition. (Habeas Trans. pgs. 3-4, 7) In Petitioner's Response to the State's Motion to Dismiss, Smith asks the court to rule in her favor due to the fact the Motion to Dismiss was not filed within the 20 days as proscribed by OCGA 9-14-47 and Superior Court Rule 44.3. Petitioner's Habeas was dismissed as untimely on September 8, 2016. The Habeas court did not even consider the merits of the petition according to OCGA 9-14-48(d) which states, "in all cases habeas relief shall be granted to avoid a miscarriage of justice". Petitioner was not given the opportunity to present her evidence obtained through a production of documents request. The presentation of the documents would have demonstrated actual prejudice which would have overcome the perceived procedural default in order to avoid a miscarriage of justice. (*Perkins v Hall*, 288 Ga. 810, 708 S.E. 2d 335 (2011); and *Barrow v Barker*, 287 Ga. 145, 695 S.E. 2d 24 (2010))

Upon receipt of the full depositions of Howard, Curtis, and Shedd, Smith discovered even more favorable evidence through the information provided on July 5, 2016 by Richard Hendrix, attorney of John Branton in the stated civil suit. (*Columbia County et. al. v Branton*) (notice from Hendrix, Appendix C) From the information provided by Hendrix, Smith learned by what means she was charged with a felony amount of merchandise. The items found inside of her vehicle were inventoried along with the shoplifted items obtained from her co- defendant McNeely in front of the Marshalls Dept. Store. (Howard depo. Pg. 66) The evidence points to the fact that no items from Marshall's were placed inside of her vehicle on the day of subject incident. Items from another store were inventoried from Smith's vehicle according to Marshall's store employee Amelia Turner. (Investigative report pgs. 36-37 attached to Howard Depo. Appendix C) Smith was charged with felony shoplifting, but only a misdemeanor amount-- \$189.00, was

obtained from in front of the store. (OCGA 16-8-14(b)(2) “provides that the [shoplifting] offense is a felony when the merchandise which was the subject of the theft exceeds \$300 in value.”

Williams v State, 261 Ga. App. 176, 582 S.E. 2d 141 (2003) -- prior to July 1, 2012) To prove this fact even more so, McNeely was convicted of misdemeanor shoplifting. (*McNeely v State*)

According to the OCGA 40-6-395(b)(5)(A) statute prior to July 1, 2012, McNeely could not be found guilty of felony murder based on fleeing because she was fleeing for a misdemeanor offense, NOT a felony. Her prison sentence is illegal. (See OCGA 16-5-3(a), involuntary manslaughter applicable to deaths caused in commission of a misdemeanor.) (As of now, if a death occurs while in commission of fleeing and attempting to elude an officer, for any reason, the charge is felony murder. The punishment for felony murder is a mandatory life sentence with parole eligibility after 30 years. (OCGA 16-5-1))

Smith then filed a Certificate of Probable Cause which was denied September 13, 2017. The court gave no reason for its denial. In her Certificate of Probable Cause, Smith lists 4 errors of the trial court: (1) The court erred because Petitioner should have been allowed Habeas review to avoid a miscarriage of justice according to OCGA 9-14-48(d); (2) the court erred in dismissing Petitioner’s Habeas Corpus action when the Attorney General’s Office failed to respond and file a motion to dismiss within the 20 days of Petitioner’s Habeas petition being filed according to OCGA 9-14-47 and Superior Court Rule 44.3; (3) the court erred when it did NOT allow Petitioner to present evidence or claims at Habeas hearing on August 17, 2016 BEFORE dismissing the Petition to see if actual prejudice exists in which the court has jurisdiction to grant relief to avoid a miscarriage of justice where actual innocence exists to excuse a procedural default; and (4) the court erred in not reviewing the Constitutional violations

Petitioner filed in her Amended Habeas Petition. (Amended Habeas Petition, Appendix; Unofficial Copy Certificate of Probable Cause, Appendix A)

Petitioner's Habeas Petition, ground 8, states it is cruel and unusual punishment to charge one with felony murder when the underlying felony stems from a nonviolent act. No Georgia court has addressed this issue of law and policy which is of such a great magnitude of Constitutional dimension that it cannot be ignored. Petitioner provided evidence by depositions, news accounts, and legal motions from the stated civil suit. Her every claim was dismissed due to procedural defaults. No court would even look at the injustices Smith named. As a pro se prisoner, who learned the best of her ability how to file motions to attack her conviction, Petitioner filed the motions she thought to be the proper procedure. (*Britten v State*)

Whether Smith fled from the police for shoplifting in her mind, or speeding according to actual evidence, and caused multiple deaths, the issue that lies before this court is if in fact this type of crime labeled as felony murder in Georgia is deserving of 1st degree murder treatment with the imposition of a mandatory life sentence.

WHY CERTIORAI SHOULD BE GRANTED

The felony murder doctrine has been widely criticized by legal scholars as a legal fiction, a morally indefensible form of strict liability, or an extremely harsh rule in which an accidental, or negligent homicide is classified as first degree murder. The State of Georgia's statute OCGA 16-5-1 for felony murder states that the "legislature intended felony murder to encompass all felonies... and not just dangerous or forcible felonies." (*Scott v State*, 297 S.E. 2d 18, 250 Ga. 195 (1982); *Baker v State* (1976))

The reason why this court should grant Certiorari is because the State of Georgia retains the broadest version of the felony murder rule. The implications of a broad felony murder doctrine violate the 8th Amendment of the Constitution, cruel and unusual punishment. Bringing attention to this doctrine is of public importance as to require determination by this court.

"Most American jurisdictions have a restricted form of the rule that applies only when a felon acting in furtherance of one of a certain limited group of felonies commits a lethal act that kills another human being" (Tomkovicz 1434, 1994). Many states possess a restricted version of the rule because "the dominant trend has been toward limitation and refinement of the felony murder rule" (Fletcher, RETHINKING CRIMINAL LAW § 4.4.4. at 293 (1978)). To avoid potential injustices "most states have attempted to limit the [felony murder] rule's potential harshness either by limiting the scope of its operation or by providing affirmative defenses" (Roth & Sundby 446, 1985).

No state in the United States has a felony murder law that encompasses any felony to invoke the felony murder rule, except Georgia. Mostly every state follows some aspect of the Model Penal Code's overall approach to homicide. (Binder 979, 2008) Now that there are

more felonies in the American legal system, courts have expanded predicate offenses which increases the offenses used to invoke the felony murder rule. Many judicial systems historically acknowledge that:

“Felony murder liability first developed in the nineteenth century America as a legislative reform aimed at increasing the culpability required for capital murders. It was generally conditioned only on dangerous felonies involving a wrongful end independent of the injury to the victim, such as robbery, rape, burglary, and arson” (Binder 970). In the instances where impositions of felony murder liability “are unfair, they should be reformed to conform to principles that can justify felony murder liability as deserved” (Binder 981).

There “is widespread agreement that [the felony murder] rule requires limitation”, because to apply this rule to ‘any felony’ denies an offender the desired effect of deterrence, which “results in irrational grading.” (Crump & Crump 377, 1985). A broad version of the rule allows convictions for situations where one is held liable for an unintended death during the commission of a crime where a man endangering state of mind did not occur. (“A majority of states have limited the felony murder rule.” *State v Doucette*, 470 A. 2d 676, 680 (Vt. 1983); “With the general trend... the irrationality and unfairness of an unlimited felony murder rule became increasingly apparent.” *Comer v State*, 977 A. 2d 334 (Del. S. Ct. 2009))

Legal scholars in agreement with the Model Penal Code state:

“The [felony murder] rule originally led to murder convictions for those who had chosen to engage in seriously immoral, usually life endangering, conduct that resulted in death. At least in theory, it did not elevate the punishment beyond the level already available for the underlying felony. When applied to the wide range of felonious activities that exist today, the broad rule could lead to murder convictions for those who have engaged in relatively minor, not seriously immoral, non- dangerous conduct that happened to result in death. The punishment available for murder would likely be drastically higher than that available for the underlying felony” (see MODEL PENAL CODE § 210.2 commentary at 32 (1980) opining that “startling results” that would be consequence of applying felony murder rule to spectrum of modern felonies led to demands for limitation; (Tomkovicz 1447))

It is troubling to see people serving mandatory life sentences for unintended deaths arising out of nonviolent felonies such as shoplifting, theft, or distribution of drugs on a minor scale. (See *Hulme v State*, 273 Ga. 676, 544 S.E. 2d 138 (2001); *Carter v State*, 285 Ga. 394, 677 S.E. 2d 71 (2009); *State v Kelly*, 290 Ga. 29, 718 S.E. 2d 232 (2011)) In the State of Georgia people receive life sentences for felony murder when the underlying felony stems from an accident. In *Chapman v State* 266 Ga. 356, 467 S.E. 2d 497 (1996) the Defendant clearly shot his companion accidentally. The underlying felony, misuse of a firearm while hunting (OCGA § 16-11-108), is not the type of crime where the statute states it creates a foreseeable risk of death. The punishment for misuse of a firearm when it occurred was punishable by a fine of \$5000.00 and/or imprisonment for one to ten years. The Justice of the case, Judge Hunstein dissents the decision of the court stating:

“There is no dispute that the killing was accidental and inadvertent..., I believe this ruling to be in error... Therefore, the reasoning relied upon in *Baker* to support the proposition that "felony murder [encompasses] all felonies" simply is not applicable to this particular case.”

This is the dilemma in the legislative policy that the State of Georgia refuses to address. Other cases of the past have made failed attempts to highlight and even call attention to the legislative issue in Georgia’s felony murder statute, yet it remains the same. A year after the *Baker* decision evidently states Georgia’s non-dangerous underlying felony murder merger problem, the courts still refuse to rule on the injustice of the harshness of the existing law. *Malone v State*, 238 Ga. 251, 232 SE 2d 907 (1977) states:

“Georgia does not have a reckless homicide statute... We are aware... that in Georgia there is a history of punishing recklessly caused homicide as murder. This is a fact, but it simply has nothing to do with the deficiencies in the felony murder scheme because it provides no category of homicide less culpable than murder. {at 23 SE 2d 909} The present situation in Georgia with respect to the felony murder rule is caused in part by the

language of Code Ann. § 26-1101 (b), which does not in any way limit the felonies invoking the rule. As we noted hypothetically in *Baker*, we could have a “felony murder” arising out of a death associated with bribery. That is plainly nonsensical, though it is in effect what the legislature has decreed. Though we do not confront that situation... we note our hesitancy to conclude that such a death would be “caused” by the felony, within the meaning of [the statute]”.

Other states have therefore made legislative amendments to cure this perceived defect in their felony murder statutes because:

“An unlimited felony murder rule could make us confront a number of unsettling outcomes in individual cases. Individuals engaged in felonies that are neither risky nor inherently immoral could be convicted of murder for consequential killings. Such convictions would probably not be frequent, but could occur often enough and would, by their nature, attract sufficient publicity to disconcert more than a few. The number of individuals punished without fault and the disparity between fault and the punishment imposed would both increase and, consequently be harder to ignore” (Tomkovicz 1466).

OTHER STATES’ LIMITATIONS

To emphasize the degree of how each state enumerates which specified felonies invoke the felony murder doctrine, Petitioner has researched every state in the United States to prove in fact that Georgia’s current version of the felony murder doctrine is extremely harsh due to its sustaining of the broadest version of the rule. The only limitation on the type of felony that may serve as an underlying felony for a felony murder conviction is that the felony must be inherently dangerous to human life. (*Hulme v State*) The only amendment the State of Georgia has made recently (July 1, 2014) is the creation of OCGA 16-5-1(d) which “limits” the felony murder rule to 2nd degree murder **only** if the underlying felony is cruelty to children. This new subsection

makes no room for negligent or reckless homicides that occur during the commission of non-forcible felonies.

“An apparent majority of jurisdictions provides that only a short list of specified or enumerated felonies can be the foundation of a felony murder conviction.” (*Aaron*, 299 NW. 2d at 316 n. 79; see ALASKA STAT. § 11-41.110 (a)(3) (Supp. 1993); ARIZ. REV. STAT. ANN. § 13-1105 (A)(2) (Supp. 1993); IND. CODE ANN. § 35-42-1-1-(2)-(3) (Burns 1994)) “Others are a bit broader but confine the operation of the rule to felonies, ‘inherently dangerous to human life’... Most jurisdictions apparently follow some form of the ‘merger doctrine, a restriction that precludes certain particularly dangerous felonies—the archetype is assault with a deadly weapon—from qualifying” (Tomkovicz 1467).

There are currently seven states that classify felony murder as 2nd degree murder. They are Illinois, Louisiana, Missouri, New York, New Hampshire, Pennsylvania, and Utah. These states reserve 1st degree murder for intentional or premeditated murders. The scope of their 2nd degree murder statutes enumerate specified felonies which invoke the felony murder rule. If a death occurs during the commission of a nonviolent/ non-forcible, felony then the murder is reduced to negligent homicide or a less culpable homicide such as 3rd degree murder or a type of manslaughter. (Illinois statute 720ILCS 5/9-2(A)(1) (West 1994), see 720ILL. Comp. Stat. 5/9-1(a)(3) (2010); Louisiana La.R.S.14:30.1(A)(2), La.Rev.Stat. §14.29; Missouri, any felony can be felony 2nd degree murder, but does not carry a mandatory life sentence (RSMO 565.021 (1984), *State v Williams* 24 S.W. 3d 101, 110 (Mo. App. 2000); New Hampshire RSA 630:1-b, I(b); New York Penal Law §125.25; Pennsylvania 18 Pa. Cons. Stat § 302(A)1973, 18 Pa. Cons. Stat. § 2501 (1973), 18 Pa. Cons. Stat. § 2502 (1978); Utah (Code Ann. § (76-5-202(1)(d) first degree murder, 76-5-203(1)(d) (Supp. 1988) second degree murder).

There are 15 states that define felony murder in the 1st degree by specific enumerated felonies. These states define all other deaths that occur in the commission of the non-specified felonies as 2nd degree murder. These states are: Alaska (Ala. Stat. § 11.41.100(a)); Arkansas (felony murder statute § 5-10-102, § 5-10-103 (2006)); California (California Penal Code § 189, negligence not considered 1st degree murder—*People v Wilkins*, 56 Cal. 4th 333 (2013), 2nd degree murder—*People v Ford*, 60 Cal. 2d 772 (1964), *People v Hansen*, 9 Cal. 4th 300 (1994)); Colorado (Rev. Stat. § 18-3-102, § 18-3-102(1)(b) requires proof of culpable mental state, negligent/ reckless homicide = 2nd degree murder; Florida (Rev. Stat. § 782.04 1st degree murder), Fla. Stat. § 782.04(2) (2005) 2nd degree murder; Idaho (I.C. § 18-4003(d) Rev. 2002, all other murders 2nd degree; Maryland (Maryland code (1957, 1976 Repl. Vol.), Art. 27 § 407-410 (enumerated under § 410), all others not specified 2nd degree murder; Minnesota (Minn. Stat. § 609.185 (a)(3), “inherently dangerous” limitation developed to alleviate the harsh consequences of the felony murder rule as lesser and lesser crimes were made felonies—*State v Forsman*, 260 NW 2d 160 (1977), “Minnesota classifies felony murder as 3rd degree murder” (*People v Aaron*, 409 Mich. 672, 299 N.W. 2d 304 (Mich. 1980)); Mississippi (Miss. Code. Ann. § 97-3-19(2)(e) (Supp. 1977; 97-3-19(1)(b)); Nebraska (Neb. Rev. Stat. § 28-401 (R.S. Supp. 1974), Neb. Rev. Stat. § 28-304 (Reissue 1989); Nevada (Sect. 10068, N.C.L. 1943-1949 Supp., NRS 200.030(1st degree murder), all others 2nd degree murder NRS 200.030(2); New Jersey (N.J. SA. 2C:11-3(a)(3), 2nd degree murder unlawful homicide presumed, *State v Williams*, 29 N.J. 27, 44 (1959); North Carolina (N.C.G.S. § 14-17 (1999), *State v Davis*, 305 N.C. at 422-23, 290 SE 2d at 588 (1982), culpable or criminal negligence cannot serve as the basis for 1st degree murder conviction (*Jones*, 353 N.C. at 167-68, 538 S.E. 2d at 924-25 (2000)), all other deaths 2nd degree murder); Rhode Island (§ 11-23-1, if not enumerated, 2nd degree murder (*In re Leon*, 122 R.I.

548, 410 A. 2d 121 (1980); South Dakota (SDCL 22-16-14, SDCL 22-16-7); Tennessee (TCA §39-13-202(a)(2)(1997) (Amended 1998, 2002; *State v Hinton*, 42 S.W. 3d 113, 119 (Tenn. Crim. App. 2000)); and Washington (Rev. Code §§ 9A.32.030(b) and 9A.32.050(b), 1st degree murder enumerated, and 2nd degree all others.

The states that enumerate specified felonies as 1st degree murder do not necessarily have a second degree murder statute. These states vary in their approach as to their definitions of homicides not falling under the scope of the specified felonies to invoke the felony murder rule. These states include: Alabama (§ 13A-5-40(a)(4), Ala. Code 1975); Connecticut (Conn. Gen. Stat. Ann. § 53a-54c); Delaware (Amended Stat. 2004; unlimited felony murder rule is irrational and unfair-- *Comer v State*, 977 A. 2d 334 (Del. S. Ct. 2009), Del. Code Ann. Tit. 11§ 636 (2009), Del. Code Ann. Tit. 11§635 (2005)); District of Columbia (D.C. Code Ann. § 22-21201; *Comber v U.S.* 584 A. 2d 26 (1970); Indiana (Indiana Code § 35-42-1-1(3) 1st degree murder); Iowa (Iowa code § 707.2(2), (3), (5), (6) (2007); § 702.11(2) excludes specific offenses from definition of forcible felony); Kansas (K.S.A. §21-3401); Maine (17-A M.R.S.A. §202(1), read with 17-A M.R.S.A. § 34 prohibits as felony murder the causing of any unintended death that in fact results as a reasonably foreseeable consequence of an intended felony. See *State v Caouette*, 462 A. 2d 1171, 1174 (Me 1983)); 2 C. Torcia, Wharton's Criminal Law § 145 at 204 (14th ed. 1979); Massachusetts (*Commonwealth v Moran*, 387 Mass. 655, 648 (1982))—case by case basis; *Commonwealth v Claudio*, 418 Mass.103, 108 (1994), defect remedied by legislature in 1965 by including in the Revised Penal Law a list of specified felonies—all involving violence or substantial risk of physical injury as the only felonies forming a basis for felony murder. The legislative purpose for this limitation was “to exclude from felony murder, cases of accidental or not reasonably foreseeable fatality occurring in an unlikely manner in the course of a nonviolent

felony. Denzer and McQuillan, Practice Commentary, McKinney's Cons. Laws of N.Y., Vol. 39, p. 236, (1967)); *People v Miller*, 32 N.Y. 2d 157, 161 (1973)); Montana (Sect. § 45-5-102(1)(b) MCA—enumerated felonies or any other felony which involves the use of threat of physical force or violence against any individual); North Dakota (N.D.C.C. Ann. § 12-1-16-01 (West), manslaughter 12.1-16-02 N.D.C.C.; negligent homicide 12.1-16-03 N.D.C.C.); Oregon (Revised Stat. § 163.115); Vermont (13 V.S.A. § 2301), *State v Doucette*, 143 Vt. 573, 579, 470 A. 2d 676, 680 (1983)); Virginia (Code of Virginia §§ 18-2-32); West Virginia (W.Va. Code § 61-2-1 (1991); and Wisconsin (Wis. Stat. Sec. 940.03 (Revised 2005)).

Of the states that enumerate specified felonies that will invoke the felony murder doctrine, only three states enumerate resisting arrest or fleeing and attempting to elude an officer as one of the possible predicate felonies to felony murder. These state are: **Arizona** (§ 13-1105 (A)(2)), *State v Williams*, 232 Ariz. 158, 302 P. 3d 683 (2013)—where defendant stole 4 cases of beer, fled from an officer, and caused a death, received sentence of life, parole eligible after 25 years); **Oklahoma** (21 O.S. 1991 § 701.7(B)); and **Wyoming** (W.S. 6-2-101(a)) -- a life sentence for first degree murder equates to a life sentence without eligibility for parole. *See* W.S. 7-13-402 (1995); *Weldon v. State*, 800 P.2d 513, 514 (Wyo.1990)). While Oklahoma does have a negligent homicide and first degree manslaughter statute to cover deaths that occur from police chases, it is unclear if this state has given a life sentence to an offender for causing the death in commission of this crime. The fact that only three states enumerate eluding an officer or resisting arrest as an underlying felony, further shows that this type of reckless crime is viewed by most states as a negligent act, unless one flees from an officer for a violent or forcible felony such as armed robbery.

Five states have abolished the felony murder doctrine from their statutes. They are: Hawaii, Kentucky, Michigan, New Mexico, and Ohio. (Haw. Rev. Stat. §§ 707-701 (2006); Ky. Rev. Stat. Ann. § 507.020 (1984); Michigan— *People v Aaron*, 409 Mich. 672, 708-09, 299 N.W. 2d 304 (1980); N.M. Stat. § 30-2-1 (1978), *State v Ortega*, 112 N.M. 554, 563, 817 P. 2d 1196, 1205 (1991)); Ohio-- R. C. 2901.22(A), *Robbins v. State*, 8 Ohio St. 131 (1857); *State v. Farmer* 156 Ohio St. 214 (1951).

Only 4 states do not specify which felonies serve as the predicate to felony murder—, Georgia, Missouri, South Carolina, and Texas. Each of these states take a different approach to their felony murder law. Although the Missouri statute encompasses any felony for their felony murder law, their statute relegates felony murder to 2nd degree murder. (Stated above.) South Carolina's felony murder statute requires malice although this state technically has no felony murder law. (S.C. Code Ann § 16-3-10 (1985); *Gore v Leeke*, 199 S.E. 2d 755, 261, S.C. 308 (1973); *Lowry v State* 657 S.E. 2d 760, 376 S.C. 499 (2008); S.C. Jury Instr.—Crim. §2-1, SC JI Criminal § 2-1 (Lexis 2007) (Jury instruction on murder); S.C. Jury Instr.—Crim. § 2-3, SC JI Criminal 2-3 (Lexis 2007) (Jury instructions on felony murder)).

Texas' felony murder statute states:

Subsection (b) of section 19.02 of the Texas Penal Code provides:

(b) A person commits an offense if he:

- (1) intentionally or knowingly causes the death of an individual;
- (2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
- (3) commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he attempts or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Tex. Penal Code Ann. § 19.02(b) (West 1994).^[1]

Section 22.05 (Deadly Conduct) of the Texas Penal Code provides:

- (a) A person commits an offense if he recklessly engages in conduct that places another in imminent danger of serious bodily injury.
- (b) A person commits an offense if he knowingly discharges a firearm at or in the direction of:
 - (1) one or more individuals; or
 - (2) a habitation, building, or vehicle and is reckless as to whether the habitation, building, or vehicle is occupied.
- (c) Recklessness and danger are presumed if the actor knowingly pointed a firearm at or in the direction of another whether or not the actor believed the firearm to be loaded.
- (d) For purposes of this section, "building," "habitation," and "vehicle" have the meanings assigned those terms by Section 30.01.
- (e) An offense under Subsection (a) is a Class A misdemeanor. An offense under Subsection (b) is a felony of the third degree.

Tex. Penal Code Ann. § 22.05 (West 1994); Tex. Penal Code Ann. § 19.02(b)(3) (West 1994).

The statute in Texas does not require a mandatory life sentence under a conviction of felony murder. (See *Rodriguez v State*, 953 S.W. 2d 342 (1997)).

Georgia retains the broadest version of the felony murder law in the entire United States. This facilitates the fact that an accidental death or negligent homicide becomes felony murder. (OCGA 16-5-1; *Baker v State*; *Scott v State*) Although few states-- Missouri, South Carolina, and Texas do not enumerate specified felonies to invoke the felony murder doctrine, these same states do not require a mandatory life sentence for their statutes. For these states, a life sentence is a maximum punishment, not the *only* punishment proscribed by law for murder.

Petitioner was convicted of felony murder with the underlying felony of fleeing and attempting to elude an officer for shoplifting. She was sentenced to life plus 10 consecutive years in prison. The state of Georgia typically sentences offenders to life plus a consecutive amount of

years which even with parole eligibility amounts to life without parole *de facto*. This is only true because of the mandatory minimum of 30 years that must be served before one is eligible for parole. Few other states would sentence an offender to such a severe punishment for the same crime. Even if the only available punishment is life without parole (like Wyoming), a severe sanction such as this would bring to the attention of the courts the need for the reformation of felony murder statutes in order to avoid situations where a defendant is given a sentence disproportionate to the crime committed.

OTHER STATES COMPARED WITH GEORGIA

Petitioner further researched other states where she was able to find cases exactly like hers to see how those convictions weighed against hers. The only two cases petitioner found in the U.S. closely resembling the amount of time she was sentenced to were in Arizona and Mississippi. (*Sanders v State*, 942 So. 2d 156 (2006 Miss); *State v Williams*, 232 Ariz. 158, 302 P. 3d 683 (2013)) While it is permissible to sentence one to life in prison for the offense of causing a death in the commission of resisting arrest in the state of Wyoming, there are currently no cases that have been appealed for such a crime.

In the state of Illinois, a defendant engaged in a police chase while in possession of a stolen motor vehicle. The appellate court reduced his conviction to reckless homicide and vacated his sentence of natural life. The court states that although he “acted recklessly, his actions did not fall within the purview of the felony murder statute... the evidence did not support an inference that [he] contemplated violence or acted intentionally when his vehicle struck that of the victims, or that he intended to kill or cause great bodily harm to anyone who got in his way.” (*People v Belk*, 784 N.E. 2d 825 (Ill S. Ct. 2003))

In the state of Minnesota, charging one with eluding arrest which results in a death “constitutes an unwarranted extension of the felony murder doctrine.” (*State v Craven*, 628 N.W. 2d 632 (2001))

In North Carolina, the court reversed a 1st degree murder charge of one who caused a death while in commission of eluding arrest. According to their statute “culpable negligence cannot serve as the basis for intent for a 1st degree murder conviction in this state.” (*State v Jones*, 353 N.C. at 169, 538 S.E. 2d at 925) Furthermore, this state looked at the underlying felony of eluding in which the state used the motor vehicle in a car accident as assault with a deadly weapon. (*State v Woodard*, 552 S.E. 2d 650 (2001)) N.C. Gen. Stat. § 20-141.5(a) prohibits the operation of a motor vehicle in order to elude law enforcement. The crime does not become a felony unless 2 or more of the aggravating factors listed in the statute are present at the time of violation. (See N.C. Gen. Stat. § 20-141.5(b) (1-8)) In this sense the accused may actually intend to commit the misdemeanor, but only negligently commit the felony. For this reason, a 1st degree murder conviction for felony murder for this type of crime is improper. For this state eluding arrest does not fall under the scope of the felonies enumerated in the statute. In this way “the General Assembly has demonstrated its belief that the conduct... though egregious and deserving of severe punishment, does not warrant the severity of the sanctions concomitant with felony murder.” (*Jones*, 353 N.C. at 170, 538 S.E.2d at 926)

In South Carolina, one who led police on a high speed chase during the commission of car theft and caused a death received 37 years’ imprisonment. (*State v Watson*, 563 S.E.2d 336, 349 S.C. 372 (2002)) According to *Simmons v State*, 215 S.E. 2d 883, 264 S.C. 417 (1975), Justice NESS dissents and states:

“A murder conviction carrying a mandatory life sentence for a death caused by recklessness in the operation of a motor vehicle is indeed extremely rare and unusual under the state’s statutory scheme of penal laws which prescribes significantly less severe penalties for identical proscribed conduct, and is therefore discriminatory and incompatible with the idea of equal protection under the laws implicit in the ban on ‘cruel and unusual punishment’.”

Furthermore, Justice Ness,

“never tried a case in which there was a conviction of murder for homicide carrying a mandatory sentence of life imprisonment based upon malice *implied* from the reckless operation of a motor vehicle... Surely, if convictions of murder for the proscribed offense were frequent and usual, common experience dictates that many appeals would have resulted from such convictions and sentences and consequently there would be reported decisions on the subject.” (*State v Mouzon*, 231 S.C. 655, 99 S.E. 2d 672 (1957))

Petitioner researched this type of crime where one flees from an officer and causes a death in commission on theft. The above stated cases in Arizona and Mississippi where the defendants received life sentences, as well as Petitioner’s case (*McNeely v State*) all involve negligent, reckless conduct. Out of 50 states, only 3 states will sentence one to life for such a crime. If this is the case then, “when the punishment is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily.” (*Furman v Georgia* 408 U.S. 293, 92 S. Ct. 2754 (1972)) Thus, the increased punishment strikes at the wrong thing—not at the harm intended, but at the slight chance of an unintended greater harm. The culpability of one who did not intend to kill during the type of crime discussed is different from robbers who kill. Therefore, treating them alike and attributing the same culpability is impermissible under the 8th Amendment. (*Enmund, supra*, 458 U.S. at 798, 102 S. Ct. at 3377, 73 L. Ed 2d at 1152))

NONVIOLENT FELONIES RESULTING IN DEATH COMPARED TO GEORGIA

Although Petitioner attacks Georgia’s felony murder law according to the crime she was convicted of, there are other cases that involve nonviolent underlying felonies. They are cases

which do not state anything concerning *mens rea*. While intent is not a necessary part of felony murder, these cases have no story line or basis for the murder conviction besides the underlying felony. These cases involve negligent or even accidental deaths which do not warrant a mandatory life sentence in other states compared to Georgia. (See-- Alaska, misconduct involving a controlled substance, 2nd degree murder § 11.41.110(a)(3)-(5); Arizona, dangerous drug offenses narcotics offenses, 1st degree murder § 13-1105(A)(2); Arkansas, felonies involving delivery of a controlled substance § 5-10-102, § 5-10-103-- 1st and 2nd degree murder; Florida, drug trafficking, distribution of some controlled substance like cocaine, opium, 1st degree murder § 782.04; These states enumerate serious drug offenses in their statutes, but their laws do not reflect or encompass deaths occurring while a defendant and victim were using drugs together and the victim overdosed.)

For example, Georgia cases discussed here involve a defendant giving a victim drugs which causes an unforeseen death. Valerie Johnson Carter and James Carter were jointly indicted, tried, and convicted for felony murder, with the underlying felony of distribution of oxycodone. This case states that the defendants went to the victim's home, but it doesn't state how they knew her, if they were selling drugs to her, giving drugs to her, or using the drugs with her. The case does not state if the defendants had a drug problem their selves. Valerie Carter's role in this crime was extremely small. The pills found at her home further show that she may have had a drug problem. This case only states that Mr. Carter said he did not mean to cause the victim's death. The case does not show if the defendants had any ill will toward the victim, just the fact that they knew her before the incident. (*Carter v State* 285 Ga.394, 677 S.E.2d 71 (2009)) In another case, *Hulme v State*, 273 Ga. 676, 544 S.E.2d 138 (2001) the defendant was convicted of felony murder, with the underlying felony of distribution of methadone. Hulme had a

prescription for methadone for her own use. This case does not elaborate on how the defendant knew the victim or why she took it upon herself to administer the drugs to the victim. It does not state if the defendant had any ill will toward the victim, only that she caused her death. In the cases of Carter and Hulme, were these deaths accidental, negligent, or intentional? Under the felony murder scheme these questions are irrelevant. But, no other state will sentence one to a mandatory life sentence for this type of negligent homicide. (See *State v Randolph*, 676 S.W. 2d 943 (Tenn. 1984); *Heacock v Commonwealth*, 228 Va. 397, 323 S.E. 2d 90 (Va. 1984); *State v Wassil*, 233 Conn. 174, 658 A. 2d 548 (Conn. 1995); *State v Mauldin*, 215 Kan. 956, 529 P.2d 124 (1974); *Palmer v State* 871 P.2d 429 (Okla. 1994))

The Court must question “whether or not the felony murder rule should, or should not, be applied as to every homicide committed in connection with the commission of *any* and *every* felony whether or not inherently or foreseeably dangerous. (*Gore v Leeke*, 261 S.C. 308, 199 S.E. 2d 755 (1973)) California and Nevada courts hold that 2nd degree murder is imbedded in the law and that there must be limitations to the harshness of the felony murder doctrine.

“There can be no deterrent where the felony is not inherently dangerous, since the potential felon will not anticipate that any injury or death might arise solely from the fact that he will commit the felony... Only such felonies as are in themselves ‘inherently dangerous to human life’ can support the application of the felony murder doctrine.” (*Sheriff, Clark County v Morris*, 659 P.2d 852 (Nev. 1982); *People v Cline*, 270 Cal. App. 2d 328, 75 Cal. Rptr. 459 (Ct. App. 1969))

CONCLUSION

In conclusion, the felony murder doctrine is severely harsh when it allows for any felony to serve as the predicate to felony murder. The imposition of a severe punishment for a negligent act is cruel and unusual punishment. This court cannot ignore that the nature of felonies has changed throughout the passing of time. Accidental and negligent deaths occur in the commission of reckless acts. The victims of these crimes deserve justice just as much as the offenders deserve punishment. The issue is that a death caused during the commission of what would be viewed by any statute as a lesser crime is not deserving of a mandatory life sentence. An unlimited felony murder law, or one that makes no room for deaths occurring in commission of reckless, negligent acts results in repeated manifest injustices. (*People v Aaron*) Felony murder liability is not premised upon recklessness or negligence yet it is used as a deterrence for such acts. This “does not justify the distinctive feature of felony murder liability which aggravates liability for unintended homicide based on certain felonious motives” (Binder 983). Excessive punishment erodes the moral authority of the law. This defect in Georgia’s felony murder law must be remedied.

Respectfully submitted,

Tiara Smith

Tiara Smith, *pro se*

Date: December 11, 2017

12/11/17

Elaine Jett

