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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL MARQUARDT ,

Petitioner,

v.

**SECRETARY, DEPARTMENT OF CORRECTIONS
STATE OF FLORIDA**

Respondent.

ON *PETITION FOR WRIT OF CERTIORARI* TO
THE FOURTH DISTRICT COURT OF APPEAL
STATE OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

Michael Marquardt #B10725
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8100 Highway 64 East
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QUESTION PRESENTED

Q. (1): Whether Petitioner was denied due process of law and constitutionally effective assistance of counsel in the State trial and appellate courts of Florida regarding the failure to instruct on a necessarily “category one” lesser included offense of manslaughter during his first-degree felony murder trial, when that is the only “category one” required lesser instruction that was supposed to be given, constitutes fundamental error and a violation of due process, by the state failing to address Petitioner’s claim?

LIST OF PARTIES

All parties **do not** appear in the caption of this case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Bondi, Pamela Jo—Attorney General of Florida

Colbath, Jeffrey— Circuit Court Trial Judge

Collins, Sherri— State Attorney

Fountain, Charles— Co-defendants Trial Attorney

Fourth District Court of Appeal of Florida

Johnson, Quinn— Trial Counsel

Jones, Julie L. -- Secretary, Department of Corrections

Kelly, Glenn— Postconviction Circuit Court Judge

Marquardt, Michael— Petitioner

Mitchell, Darryl— Appellate Counsel

Rogers, Don— Assistant Attorney General

Skier, Scott— Trial Counsel

Streeker, Andrew— Co-defendants Trial Attorney

TABLE OF AUTHORITIES CITED

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In the
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a *Writ of Certiorari* issue to review the judgment below.

OPINIONS BELOW

Cases from **State Court:**

The opinion of the highest state court to review the merits appears at Appendix A to the petition and is unpublished.

The opinion of the **Fifteenth Judicial Circuit In And For Palm Beach, County, Florida's** lower court appears at Appendix B and C to the petition and is unpublished.

JURISDICTION

Cases from state court:

The date on which the highest state court decided my case was **February 22, 2018**.

A copy of that decision appears at Appendix A.

A timely petition for rehearing was thereafter denied on the following date: **March 29, 2018** and a copy of the order denying rehearing appears at Appendix D.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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STATEMENT OF THE CASE AND FACTS

On March 1, 2016 the Petitioner's initial Fla.R.Crim.P. Rule 3.850 motion was docketed, On April 27, 2016 the Petitioner filed a Motion in Leave to file a Supplemental 3.850 motion which included a ground 11. On January 4, 2017 the Petitioner filed another Motion in Leave to file a Supplemental 3.850 motion which included a ground 12 (See Appx. E). Furthermore, a motion to exceed the page limit to include this issue was granted by the trial court yet the trial court failed to rule on its merits (See Appx. F). On June 12, 2017 the trial court ordered the state respond to the allegation contained in the Petitioner's 3.850 motion and supplements (See Appx. G), however, the state did not respond to the January 4, 2017 Supplement (See Appx. C). When the trial court issued its order of denial on June 21, 2017 (merely 9-days later) the trial court did not make its own findings of fact or law and the state did not attach portions of the record that refuted the Petitioner's claims but adopted the state's response in its entirety with no further elaboration (See Appx. B).

It must be noted from the Palm Beach County of Florida's docket sheet (See Appx.G) that DE#542, which is the Petitioner's supplemental ground 12 was not acknowledged by the trial court in its order of denial (See Appx. B). Yet, was specifically mentioned in the state's response as "Exhibit O" (See Appx. C, pg.3-4) and made a part of the trial record on appeal but was not addressed on the merits.

The Circuit Court, Palm Beach County, Glenn Kelly summarily denied Marquardt's 3.850 motion, and Marquardt appealed. The Fourth District Court of Appeal, *pur curiam* affirmed on February 22, 2018, in which a timely motion for rehearing was subsequently filed and denied on March 29, 2018.

On April 2, 2012 Marquardt was sentenced to life in prison without the possibility of parole for first degree felony murder and robbery with a firearm, rendered by the Circuit Court for the Fifteenth Circuit in Palm Beach County, Florida.

The State charged two defendants with the April 14, 2007 shooting death of John Blazevice ("victim") – Michael Marquardt ("Petitioner") and Louis Baccari ("Baccari"). A third defendant, Antonio Bussey ("Bussey"), cut a deal with the State. He pled guilty to second-degree murder, received a 21-year prison sentence, and in exchange agreed to testify at trial against Marquardt and Baccari

The indictment against Marquardt and Baccari did not name Bussey (See Appx. H)(8/22/12 Supp. R. 1-3). The indictment charged Marquardt and Baccari with: 1) first-degree premeditated murder or murder with a firearm during the commission of an enumerated felony; 2) robbery with a firearm; and 3) accessory after the fact (See Appx. H). The indictment stated that either Marquardt or Baccari used the firearm to kill the victim during the commission enumerated felony (See

Appx. H). The indictment did not name Bussey and did not allege that Bussey used the firearm to kill the victim in the case (See Appx. H).

Baccari and Marquardt were tried together. After a ten-day jury trial, the jury found Marquardt guilty of first-degree felony murder and robbery with a firearm, and found Baccari guilty of first-degree murder and robbery with a firearm. The jury made a special finding that Baccari did not use the firearm that killed the victim (See Appx. I)(Vol. 19, T. 2321-2322), which – based on the evidence introduced at trial – necessarily meant that the jury concluded that “Bussey” and not Baccari shot and killed the victim in the case, contrary to the State’s indictment (See Appx. I)(Vol. 19, T. 2321-2322).

The State based its first-degree murder case against Marquardt and Baccari on circumstances, an alleged phone call that the state alleged throughout trial took place from Louis Baccari’s phone to Marquardt’s phone at 5:58 p.m., which Louis Baccari’s phone records contradicted. The jury never heard this contradiction, which led to Marquardt’s conviction. Also, the word of a man who shot the victim in this case, Antonio Bussey, which a majority of his testimony was contradicted through surveillance video, phone records, and crime scene investigator Jennifer Martin.

The jury also never got to consider, due to the state “illegally” redacting a “Gas One” video – a video – that actually proved Marquardt’s innocence, that the state has never refuted nor denied doing which, ultimately led to Marquardt’s conviction. (See Appx. C) (p. 13-15)

REASONS FOR GRANTING THE PETITION

Marquardt argues that his trial counsel was ineffective for failing to ensure that his jury was instructed on the sole category one lesser included offense of first degree felony murder, which was manslaughter.

The law is well established that a trial judge has absolutely no discretion in whether to instruct the jury on a “category one” necessarily lesser included offense. The presiding judge stated, “I don’t think anything is mandated, that you must have lessers.” (See Appx. I)(Vol. 10, T.1260-61). This constitutes a structural defect in the trial proceedings and created this present fundamental miscarriage of justice. (Trial Judge Colbath should have physically opened a law book and checked, if he was not sure (See Appx. I) (Vol. 10, T.1260-61).

Marquardt’s jury was never given an instruction on manslaughter. In the record (See Appx. I)(T.1266), Judge Colbath asked if anybody wanted the manslaughter instruction and Scott Skier (trial counsel) said nothing(See Appx. I) (T.1275). The trial court erred by denying this issue, when the supplemental motion filed on December 27, 2016 (Ground 12), was never addressed on the merits.

In the State’s response, it marked this issue “Exhibit O” (See Appx. C, pg.3-4), but never addressed the issue. The court adopted the State’s response and

denied this issue on the merits, even though Marquardt pointed this out in his rehearing motion. (See Appx. D)

The Florida Supreme Court¹ in Walton v. State,² on December 1, 2016 quashed the First District Court of Appeal's decision for three (3) reasons. However, only issue no. 2 is relevant here, failure to instruct the jury on attempted manslaughter. Yet, Marquardt is not being afforded the same considerations which constitute a manifest injustice.³

As fundamental error is applicable pursuant to Johnson when the failure to instruct on necessarily lesser-included offenses, (even category 1 lesser-included offenses) in a capital case is fundamental error. It must be noted that the Petitioner was indicted for first degree murder with a firearm and was eligible for the death penalty however, the state waived the death penalty. Therefore, because counsel led the trial judge to commit a fundamental error, by not giving Petitioner his necessary category one lesser-included offense of manslaughter, this court, in the interest of justice, must reverse Petitioner's two convictions for first degree felony murder and robbery with a firearm, and remand those charges for a new trial.

¹ Originally referred to as Case No.: SC13-1652 in Petitioner's January 4, 2017 Motion In Leave to file a Supplemental motion which included ground 12.

² Walton v. State, 208 So. 3d 60, 65 (Fla. 2016)

³ Johnson v. State, 695 So. 2d 787, 788 (Fla. 1st DCA 1997)

“Failure to properly and correctly instruct the jury is pure question of law and is subject to *de novo* review,”⁴ where Petitioner is entitled to a new trial on this issue. “Necessarily lesser included offenses are always subsumed within those of the charged offense.”⁵ The judge has no discretion in whether to instruct the jury on lesser included offense. Once the judge determines that the offense is a necessarily included offense, it must be given.⁶

Marquardt’s attorney was ineffective ~~for not~~ for not physically opening a law book and determining what lesser Marquardt was entitled to by law and not instructing the trial judge that he had no discretion in giving this manslaughter instruction which meant that the jury was not properly instructed, at no fault of Marquardt. (See Appx. J)

“[The Florida Supreme Court has] repeatedly held that the failure to properly instruct the jury on a necessarily lesser included offense constitutes fundamental error.”⁷ “If giving an incorrect instruction on a necessarily lesser included offense constitutes fundamental error then a fortiori, giving no instruction

⁴ Griffin v. State, 160 So. 3d 63 (Fla.2015)

⁵ Puglisi v. State, 112 So. 3d 1196, 1204 (Fla. 2013)

⁶ State v. Weller, 590 So. 2d 923, 926 (Fla. 1991)

⁷ Walton v. State, 208 So. 3d 60, 65 (Fla, 2016)

at all, likewise constitutes fundamental error.”⁸ As such, Marquardt is entitled to a new trial where the jury instruction of Manslaughter will be provided to the jury.

When the Court asked does anybody want Manslaughter as a lesser included offense, Marquardt’s attorney should have requested the instruction (See Appx. I) (T.1275). Marquardt contends that the state trial and appellate court orders of denials should be reversed and remanded for an evidentiary hearing and ultimately a new trial.⁹ The lower court should not be able to summarily deny a claim simply because they cannot refute or respond to a claim.

“A defendant is entitled to an instruction as to any valid defense supported by evidence or testimony in the case.”¹⁰ “Whether the evidence supports the defendant’s contention in such circumstances is an issue for the jury.”¹¹

Florida’s Jury Pardon Power

"Necessarily lesser included offenses are those offenses in which the statutory elements of the lesser included offense are always subsumed within those of the charged offense."¹² "The law requires that an instruction be given for any

⁸ State v. Montgomery, 39 So. 3d 252, 259 (Fla.2010)

⁹ State v. Wimberly, 498 So. 2d 929 (Fla. 1986)

¹⁰ Pamlis v. State, 397 So. 2d 648 (Fla.), *cert. denied*, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981).

¹¹ Cruz v. State, 465 So. 2d 516 (Fla.1985), *cert. denied*, 473 U.S. 905, 105 S.Ct. 3527, 87 L.Ed.2d 652 (1985).

¹² Sanders v. State, 944 So. 2d 203, 206 (Fla. 2006)

lesser offense all the elements of which are alleged in the accusatory pleadings and supported by the evidence adduced at trial."¹³ "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."¹⁴ But, of course, Florida's jury pardon doctrine renders the lack of an evidentiary basis for an instruction totally irrelevant. The connection between the jury pardon doctrine and the requirements regarding instructions on necessarily lesser included offenses is well established in Florida law. The Florida Supreme Court expressly identified that connection in State v. Wimberly:¹⁵

"The requirement that a trial judge must give a requested instruction on a necessarily lesser included offense is bottomed upon a recognition of the jury's right to exercise its 'pardon power.'"¹⁶

Unfolding the full implications of the jury pardon doctrine, we have treated the failure to provide a correct instruction on a one-step-removed necessarily lesser included offense as per se reversible error and as fundamental error without regard to whether there is any evidentiary basis for an instruction on the lesser offense.

¹³ State v. Weller, 590 So. 2d 923, 926 (Fla. 1991)

¹⁴ Montgomery v. State, 39 So. 3d 252, 259 (Fla. 2010)

¹⁵ State v. Wimberly, 498 So. 2d 929, 932 (Fla. 1986)

¹⁶ State v. Baker, 456 So. 2d 419, 422 (Fla. 1984)

Third-Degree Felony Murder

In addition to an instruction on the charged offense of first-degree felony murder, Marquardt's jury only received instructions on the permissive lesser included offense of third-degree felony murder based on a drug deal gone bad.

Marquardt was tried for first-degree felony murder, and convicted of the same. The jury was instructed on first-degree felony murder and third-degree felony murder but, not the required category one lesser included offense of manslaughter; manslaughter was the only instruction deemed necessary in Marquardt's case yet, third-degree murder was erroneously given in its place. Marquardt's trial counsel did not preserve the error with an objection at trial.

In determining whether failing to give the manslaughter instruction constituted fundamental error, in Marquardt's case, Florida trial and appellate courts failed to rule on the merits of this claim, thus, refusing to address Marquardt's claim.

In the present case, where Marquardt was indicted and tried for first-degree felony murder and convicted, the issue of intent was pertinent or material to what the jury had to consider in order to convict (See Appx. J). Indeed, "[a] homicide found to be unlawful is not automatically just one offense, but will be one of

several possible homicide offenses depending upon the nature of the intent or the lack of any intent at the time of the homicide."¹⁷

Category One Lesser Included Offense

Manslaughter is the only category one lesser included offense of first-degree felony murder.¹⁸ 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 2 crimes may have been alleged and proved." The Wimberly court explained:

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.** Wimberly, 498 So. 2d at 932.

Consequently, at Marquardt's trial for first-degree felony murder, the trial court was required to instruct the jury on the only "category one" lesser included

¹⁷ Griffin v. State, 160 So. 3d 63, 68 (Fla. 2015)

¹⁸ In first-degree felony murder cases, manslaughter is the sole category one lesser included offense. See Fla. Std. Jury Instr. (Crim.) 7.3. (2012) (Appx. J)

offense of manslaughter and trial counsel was constitutionally ineffective under Strickland¹⁹ in failing to ensure the jury was instructed accordingly.

¹⁹ Strickland v. Washington, 466 U.S. 688 (1984)

CONCLUSION

This Court should grant *certiorari* to review the judgment below.

Respectfully submitted,

Michael Marquardt B10725
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CERTIFICATE OF SERVICE

Under penalties of perjury, I hereby certify that a true and correct copy of the foregoing has been served by first-class mail on after being placed in the hands of a prison official for mailing at Avon Park Correctional Institution:

**SUPREME COURT OF THE
UNITED STATES**
One First St. N.E.,
Washington, DC 20543

Attorney General's Office
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On this 6th day of April 2018

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