

No. 16-1441

IN THE
SUPREME COURT OF THE UNITED STATES

JENNIFER GALVAN - PETITIONER

vs

ANTHONY STEWART, WARDEN - RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

- I. WAS THE DECISION OF THE U.S. COURT OF APPEALS FOR THE SIXTH CIRCUIT CONFLICTING WITH THE LONG STANDING AND BASIC PRINCIPLES SET FORTH BY THE U.S. SUPREME COURT IN JACKSON V. VIRGINIA, 443 U.S. 307 (1979), IN CONCLUDING THAT A REASONABLE JURY COULD HAVE FOUND BEYOND A REASONABLE DOUBT EVERY ELEMENT, EITHER AS THE PRINCIPAL OR AIDER TO FIRST DEGREE FELONY MURDER?
- II. WAS THE STATE COURT DECISION CONTRARY TO JACKSON V. VIRGINIA WHERE "A STATE COURT DECISION WILL CERTAINLY BE CONTRARY TO [THE SUPREME COURT'S] CLEARLY ESTABLISHED PRECEDENT IF THE STATE COURT APPLIES A RULE TAT CONTRADICTS THE GOVERNING LAW SET FORTH IN OUR CASES". WILLIAMS V. TAYLOR, 529 U.S. 362, 120 S. CT. 1495, 146 L.ED.2D 389 (2000)?

List of Parties

X All parties appear in the caption of the case on the cover page.

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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

X For cases from federal courts:

The opinion of the United States court of appeals appears at Appendix A and B to the petition and is

X is unpublished.

The opinion of the United States district court appears at Appendix C to the petition and is

X is unpublished.

JURISDICTION

X For cases from federal courts:

The date on which the United States Court of Appeals decided my case was August 23, 2017.

X A timely petition for rehearing was denied by the United States Court of Appeals on the following date: September 25, 2017, and a copy of the order denying rehearing appears at Appendix A.

The jurisdiction of this Court is invoked under 28 U.S.C. 81254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The panel's opinion in this case rests on critical mistakes of law, which led the panel to reach a decision that conflicts with precedents of this Court, other courts of appeals, and the Supreme Court.

Appellant Jennifer Galvan challenges her state conviction for first-degree felony murder. In a divided opinion, the Michigan Court of Appeals sustained Ms. Galvan's conviction without even purporting to identify any evidence of multiple essential elements of the offense: (1) that she committed the murder (necessary to convict her as a principal); or (2) that she aided the murder while (3) intending to render such aid (both necessary to convict her as an aider and abettor). The court also did not cite evidence that Ms. Galvan was even present for the murder or that she acted with malice at the time of the murder—also necessary elements of murder.

The panel excused these failures by misstating three key points of Michigan law. First, the panel simply ignored that Michigan law requires proof that an aider and abettor *intends* to aid the crime. Second, the panel accepted that there was insufficient evidence Ms. Galvan was present for the murder, but erroneously decided the State needed to prove only that she was present *elsewhere* in the house *before* the murder. Third, the panel mistakenly averred that Ms. Galvan could be convicted of murder if she aided *different* crimes—child abuse or torture—and intended that the principal commit *those* crimes.

These errors produced a decision in conflict with *Jackson v. Virginia*, 443 U.S. 307 (1979), which requires proof of each element of the offense as the state courts have defined them. *Id.* at 316.

The decision also conflicts with numerous factually analogous cases in which this Court has granted habeas petitions because a state court has sustained a conviction based on only speculative evidence of essential elements of the crime—including the same aiding-and-abetting elements at issue here. *See, e.g., Tanner v. Yukins*, --- F.3d ---, No. 15-1691, 2017 WL 3481867, at *10-11 (6th Cir. Aug. 15, 2017); *Newman v. Metrish*, 543 F.3d 793, 794-95, 797 (6th Cir. 2008); *Parker v. Renico*, 506 F.3d 444, 448-52 (6th Cir. 2007); *Joseph v. Coyle*, 469 F.3d 441, 455-56 (6th Cir. 2006). This Court also has held that presence for the crime is not enough, even when combined with far greater involvement than was alleged here. *Brown v. Palmer*, 441 F.3d 347, 351-53 (6th Cir. 2006); *see also, e.g., Juan H. v. Allen*, 408 F.3d 1262, 1275-79 (9th Cir. 2005). The Court additionally has held it unreasonable to sustain an aiding-and-abetting conviction for actions undertaken by others in the house without evidence the defendant was aware of those actions. *Gill v. Cason*, 281 F. App'x 522, 526-28 (6th Cir. 2008). Finally, the Court has held that a state court acts unreasonably where it ignores a previously announced element of the offense in sustaining a conviction, as the Michigan Court of Appeals did here. *Price v. Haney*, 562 F. App'x 334, 338 (6th Cir. 2014).

The panel opinion conflicts with all of these holdings, and sends the message that the Court will not seriously entertain *Jackson* challenges to a murder of which the defendant is innocent as long as she is guilty of some other heinous offense. The Court should correct the errors of law in the panel opinion

STATEMENT OF THE CASE

BACKGROUND

Three-year-old Prhaze Galvan was killed by her father, Joe Galvan, on January 15, 2010. Joe's then-wife, Appellant Jennifer Galvan, had only seen Prhaze once that day, in the morning, when Joe was punishing her by making her stand with her nose against the wall. In the afternoon, as Jennifer was leaving to pick up her children from school, Joe told Jennifer that Prhaze had wet her pants and he was going to give her a shower. After Jennifer was outside the house, Joe yelled for her to come back inside, where she discovered Prhaze on her last gasps of life. It later became clear Joe had intentionally killed Prhaze with a massive blow to her head. *See* Dkt. 41 ("Op.") at 4-5, 10; Dkt. 33 at 7-9, 11-14.

In the year before Prhaze died, Joe and Jennifer had mistreated and alienated Prhaze, and she had not gained any weight. *See* Op. 1-4; Dkt. 33 at 3-7, 14-16. The State charged both Joe and Jennifer with child abuse, torture, and first-degree felony murder with child abuse and torture as predicate offenses. *See* Dkt. 33 at 10. The first judge to hear the case found that there was not even probable cause to charge Jennifer

with murder, but the case was transferred and the charge reinstated. *See id.* at 10-11. The jury convicted, and the court sentenced her to 10-to-15 years for child abuse, 23-to-40-years for torture, and life without parole for murder. *See id.* at 16. The Michigan Court of Appeals affirmed. It acknowledged that the State needed to show that Jennifer aided the murder, but did not even *claim* that there was any evidence that she did or did so intentionally. *See* R. 10-25, Page ID ## 1802, 1809-10. Judge Douglas Shapiro dissented. *Id.*, Page ID ## 1817-18.

Ms. Galvan filed this habeas petition, which the district court denied. Page ID ## 2131-60. On appeal, Ms. Galvan challenged only the sufficiency of the evidence for her murder conviction. The panel rejected that challenge, reasoning that there was sufficient evidence that she aided and abetted Joe's *abuse* of Prhaze—but without showing that she aided and abetted the *murder*. *See* Op. 2-3, 11-13.

REASONS FOR GRANTING THE WRIT

I. The Panel Misstated Three Critical Points of Law

Ms. Galvan was convicted of child abuse, torture, and first-degree felony murder. She challenges only her murder conviction. The panel erroneously analyzed three essential features of this offense, which led it to affirm without identifying evidence of the actual elements of the crime.

A. Aiding and Abetting Felony Murder Requires Proof of the Elements of Aiding and Abetting Murder

To aid and abet first-degree felony murder under Mich. Comp. Laws § 750.316(1)(b), the State must prove the elements for aiding and abetting murder—not merely aiding the predicate offense. That section punishes as first-degree murder any “[m]urder committed in the perpetration of” any listed offense. *Id.* Thus, in Michigan, unlike in many other States, felony murder “raise[s] an established murder to first-degree murder.” *People v. Magyar*, 648 N.W.2d 215, 218 (Mich. Ct. App. 2002) (citation omitted); *see also* Dkt. 33 at 22; Oral Argument Recording at 6:30-7:51. All the elements of murder still must be satisfied. *See People v. Barrera*, 547 N.W.2d 280, 297 (Mich. 1996).

The panel opinion misunderstood the law of felony murder in Michigan. The decision rests on the erroneous premise that aiding and abetting “child abuse or torture” would suffice to sustain Ms. Galvan’s conviction for murder. Op. 9. That is the basis on which the panel distinguished *State v. Maupin*, No. 272, 1991 WL 197420 (Tenn. Crim. App. Oct. 7, 1991)—a case that, on nearly identical facts, found the evidence insufficient for murder under Tennessee law. *See* Dkt. 33 at 38-39. The panel reasoned that the crimes were different: Ms. Galvan’s conviction was for “felony murder based on first-degree child abuse or torture,” while the crime in *Maupin* “was first-degree murder” and therefore required intent of “the death.” Op. 14. There is no such distinction. Both

crimes were statutorily-defined “first-degree murder.” The same elements of “[p]resence,” “[i]ntent that the crime be committed” and “encourage[ment]” or “assit[ance]” of “the crime” were required—and lacking—in both cases. 1991 WL 197420, at *4; see Dkt. 33 at 38-39.¹

The panel’s mistaken determination that Ms. Galvan’s murder conviction could be sustained with only proof of aiding and abetting child abuse or torture led the panel to affirm without identifying proof of multiple essential elements of murder.

1. To Aid and Abet Felony Murder, the Defendant Must Aid the Murder—Not Just the Predicate Offense

First, to be liable for aiding and abetting murder, the defendant must render aid of *the murder*. E.g., *Barrera*, 547 N.W.2d at 297. Aid of other prior acts, including child abuse and torture, is not sufficient. *Id.*; Dkt. 34 at 23-25.

The panel assumed that it was. The opinion recounts the undisputed evidence of Ms. Galvan’s and her then-husband’s “joint abuse” of Prhaze in the months before her death. Op. 2-3, 11. It then states, “Petitioner encouraged Joe in carrying out the abuse,” and concludes “[t]his is all that is required.” *Id.* at 12, 13 (citing *People v. Carines*, 597 N.W.2d

¹ Indeed, the crime in *Maupin*—unlike the crime here—did not even require malice. 1991 WL 197420 at *7. The panel was thus incorrect to conclude that, in *Maupin*, unlike here, “the state had to prove that the defendant intended the death.” Op. 14. The opposite is true.

130, 135 (Mich. 1999)). That is incorrect. As *Carines* itself holds, to be an aider and abettor of murder (including felony murder), the “defendant must perform acts or give encouragement that assists the commission of the crime”—i.e., the murder. 597 N.W.2d at 141-42 (emphasis added).² Therefore, “it would not be sufficient for the jury to conclude only that [Ms. Galvan] had assisted another in committing or attempting to commit [child abuse] or [torture].” *Barrera*, 547 N.W.2d at 297. She must assist the murder. *See id.*

The panel opinion recites no proof that Ms. Galvan assisted the murder—because there is none. *See* Dkt. 33 at 36-39. As the panel recounts, Ms. Galvan’s only interactions involving Prhaze on the day of the murder were: (1) leaving food on the counter for Prhaze, (2) observing Prhaze with her nose against the wall, and (3) leaving the house after hearing that Joe was going to give Prhaze a shower. Op. 10. Even if these acts can be construed as aid or encouragement of abuse, they are not aid or encouragement of murder.

Under Michigan law, “[a]n aider and abettor” must be “present at the crime scene and by word or deed give[] active encouragement to the perpetrator of the crime.” *People v. Moore*, 679 N.W.2d 41, 46 (Mich. 2004). None of Ms. Galvan’s three actions are active encouragement of

² *Carines* found sufficient evidence that the defendant “aided and abetted the homicide” when he was wearing a jacket with the victim’s blood and was “present” for the murder. 597 N.W.2d at 136.

murder. The first—leaving food out for Prhaze—has no relation to (much less assisted) her murder. The last two are not “active” at all, but merely *observing* Joe’s actions. Neither “mental approval” nor “passive acquiescence or consent” suffices. *People v. Burrel*, 235 N.W. 170, 170-71 (Mich. 1931) (presence in the car where a rape is occurring insufficient); *see* Dkt. 33 at 37; Oral Argument Recording at 1:59-3:00. Moreover, the actions Ms. Galvan observed Joe engaging in were not murder (or even an assault). *See* Dkt. 33 at 8-9. They cannot reasonably be construed as “moral support” of *murder*—unlike the actions of the defendant in *Sanford v. Yukins*, who was not only “present in what seems to have been a small room” during the rape but also “returned with some tea for [her codefendant], who was explicitly orchestrating the rape.” 288 F.3d 855, 862-62 (6th Cir. 2002); *see* Dkt. 33 at 37-38; Dkt. 34 at 25; Oral Argument Recording at 3:00-33.

2. The Defendant Must Possess Malice

The panel also did not cite evidence of the mens rea for aiding and abetting murder. Michigan’s “felony-murder statute requires proof of malice aforethought.” *People v. Jones*, 530 N.W.2d 128, 215 (Mich. Ct. App. 1995). The opinion cites no evidence of malice; it is grounded on the erroneous premise that the State did not need to show intent to kill or anything like it. Op. 14. It states that “knowledge that Joe was going to abuse Prhaze” is sufficient. *Id.* at 10. It is not. Aiding and abetting

liability requires intent to commit “*the crime*” challenged, not merely “inten[t] to commit *any crime*.” *People v. Sims*, No. 267475, 2007 WL 2118998, at *6, *9 (Mich. Ct. App. July 24, 2007) (quoting *Carines*, 597 N.W.2d at 135)). Thus, Ms. Galvan must “possess[] the requisite intent with respect to the *murder*.” *Barrera*, 547 N.W.2d at 297. And the State must submit proof that the “defendant possessed the state of mind of malice *at the time of the killing*.” *Id.* at 297 n.29 (emphasis added).

Rather than pointing to evidence of *malice at the time* of the killing, the panel reasoned that “Petitioner *consistently and continuously* intended Prhaze to suffer great bodily harm,” based on evidence that Ms. Galvan and Joe had abused her in the past. Op. 11-12 (emphasis added). But it is undisputed that Prhaze died from the blow Joe inflicted on January 15, 2010—not from any prior abuse. See Dkt. 33 at 31-34; Dkt. 34 at 3-4. This evidence therefore cannot show that Ms. Galvan “possessed the requisite intent with respect to the *murder*.” *Barrera*, 547 N.W.2d at 297; see Dkt. 33 at 47-51; Dkt. 34 at 17-23; Michigan Court of Appeals Opinion, R. 10-25, Page ID ## 1817-18 (Shapiro, J., dissenting).

The panel also stated that Ms. Galvan “knew that great bodily harm was a natural and probable consequence” of “Joe giving Prhaze a cold shower for wetting herself.” Op. 11. But the State needed to prove that Ms. Galvan “*intended* to create a very high risk of serious harm to the victim” by her “actions.” *Barrera*, 547 N.W.2d at 298. Malice is not an objective standard, like negligence, and so evidence that Ms. Galvan

“should have known” the abuse “would eventually result in serious injury or death” cannot suffice. Michigan Court of Appeals Opinion, R. 10-25, Page ID # 1817 (Shapiro, J., dissenting).

The panel cited no evidence that (a) Ms. Galvan knew Joe would assault Prhaze in the shower or (b) Ms. Galvan knew that such an assault would result in death or great bodily injury. While the panel noted there was evidence Prhaze “was beaten for trying to get out of a cold shower” (Op. 11), there was no evidence Joe administered this beating and Jennifer knew about it. Dkt. 34 at 20-21. And as Judge Shapiro noted, “[n]o evidence was presented that Prhaze had been subject to life-threatening assaults during prior showers or at any other time.” R. 10-15, Page ID # 1817 & n.2.

Moreover, the bruises and black eyes Prhaze suffered in the past (Op. 12) are not the sort of life-threatening injuries that constitute “great bodily injury” sufficient for murder. In Michigan, “intent ‘to injure’ falls short of *malice*.” *Barrera*, 547 N.W.2d at 298. The mens rea of *murder* cannot be satisfied with the mens rea sufficient for only aggravated assault, or child abuse, or torture. Thus, in *Barrera*, even though one defendant “kicked the victim in the head” and another “hit the victim in her face” shortly before the murder, the court held this insufficient for malice. *Id.* at 294, 296, 298; see Dkt. 33 at 43; Dkt. 34 at 19.

The panel erred in affirming based on evidence only of aid and intent with respect to child abuse and torture, not *murder*.

B. The Defendant Must Be Present for the Murder

The opinion also erroneously absolves the State of the need to show that the defendant was present for the murder. The opinion states, without citation, that a defendant may be “guilty” of aiding and abetting if she “aided or encouraged the abuse, and then left the room before it actually occurred.” Op. 13. That is incorrect. Indeed, even as it sustained Ms. Galvan’s conviction, the Michigan Court of Appeals recognized that the State needed to show “that she was present at the time of the injury.” R. 10-25, Page ID # 1810. “[P]resence at the crime scene” is required under Michigan law. *Moore*, 679 N.W.2d at 46.

This error is dispositive because there was no evidence Ms. Galvan was present when Joe struck the fatal blow; all the physical, eyewitness, and expert evidence confirmed she was outside the home, leaving to pick up her children from school. See Dkt. 33 at 12-14, 24-31, 35-36; Dkt. 34 at 5-16. The panel opinion accepts this, and points to no evidence to the contrary. See Op. 4-5, 10.

C. Intent to Aid the Murder is an Element of the Offense

Finally, the State needed to prove that Ms. Galvan *intended to aid* the murder. The panel opinion ignores this element entirely. In Michigan, “an ‘aider and abettor’ is one who encourages, counsels, or assists another in the commission of a crime *with the intention of rendering such help.*” *People v. Ison*, 346 N.W.2d 894, 897 (Mich. Ct. App. 1984) (empha-

sis added). Thus, in *Ison*, the Michigan Court of Appeals reversed a conviction of “aiding and abetting” a runaway juvenile where the defendant provided aid that in fact assisted juveniles in evading lawful custody. *Id.* That did not suffice, because “an essential element of the crime” is “*an intent to encourage, counsel, or assist the juvenile in evading lawful custody.*” *Id.* (emphasis added). Here too, there was no evidence—and neither the panel nor the Michigan Court of Appeals cited any—that Ms. Galvan intended to aid Joe’s murder of Prhaze. *See* Dkt. 33 at 39-41; Dkt. 34 at 25-26.

II. These Errors Led the Panel to a Decision in Conflict with the Court’s Prior Decisions

The panel’s legal errors led it to render a decision that conflicts with several prior holdings of this Court, of its sister circuit courts, and of the Supreme Court.

A. Presence Coupled with Knowledge that a Crime is About To Be Committed Does Not Suffice

First, the panel opinion conflicts with *Brown*, in which this Court granted habeas relief because the Michigan Court of Appeals unreasonably applied *Jackson* in sustaining a conviction on an aiding-and-abetting theory. 441 F.3d at 351-53. In *Brown*, the defendant drove his car to a gas station with the principal as his passenger. *Id.* at 349. The defendant stared at the victims without ever pumping gas, watched as the principal

approached the victims and shot at them, and attempted to flee. *Id.* at 349, 353. This Court held that “mere presence, or even knowledge, that a crime is about to be committed is insufficient to prove guilt under an aiding-and-abetting theory.” *Id.* at 351.

In this case, the panel reasoned that Ms. Galvan “knew that Joe was engaging in the child abuse that led to Prhaze’s death.” Op. 13. Even if there were such evidence (and evidence of presence), *Brown* holds that such evidence would not suffice. As explained above, the State needed to submit evidence that Ms. Galvan knew that the abuse would lead to Prhaze’s death and intentionally aided the killing.

The panel opinion distinguishes *Brown* solely on the basis that the defendant in that case stated he met the principal shortly before the crime, while Joe and Jennifer were “spouses” who had “jointly and systematically abused Prhaze for over a year.” Op. 13. But evidence of Jennifer’s past conduct is not evidence she “in fact provided assistance or encouragement to [Joe]” in Prhaze’s murder, or intended to do so, as *Brown* requires. 441 F.3d at 352. The long association of the defendant and the principal cannot make the defendant liable for the principal’s murder. See *Juan H.*, 408 F.3d at 1266-67, 1276-79 (granting habeas where the defendant and his armed brother confronted members of a rival gang, whom the brother shot); *Kamienski v. Hendricks*, 332 F. App’x 740, 742-44, 748-52 (3d Cir. 2009) (granting habeas where the defendant and his friend sold cocaine to other acquaintances, and the friend shot

the acquaintances). Nor can longstanding animus towards the victim suffice. *See Joseph*, 469 F.3d at 445-48, 455-56 (granting habeas where the defendant and his friend worked together to kill the victim, who was dating defendant's ex-girlfriend); *Newman*, 543 F.3d at 794-95, 797 (granting habeas where the drug dealer-victim made a pass at defendant's girlfriend and the defendant intended to rob a drug dealer). The panel opinion conflicts with *Brown*.

B. Speculation Cannot Substitute for Reasonable Inference

The panel opinion also conflicts with a long line of precedent in which this Court has held that if an element of murder is based only on reasonable speculation, a state court cannot reasonably sustain the conviction. *E.g., Parker*, 506 F.3d at 452. The Court reaffirmed this holding less than a month ago in reversing a district court and granting habeas relief. *See Tanner*, 2017 WL 3481867, at *10.

Yet the panel opinion cites no non-speculative evidence that Ms. Galvan aided the murder, intended to aid the murder, or possessed the mens rea for murder. For example, it is at most speculation that Ms. Galvan wanted Joe to kill Prhaze in the shower on January 15, 2010, knew that Joe wanted to, or intended to help Joe do so.

C. A Defendant Is Not Liable for Others' Activities in Other Parts of the House

The decision also conflicts with *Gill*, another case in which this Court reversed an order denying habeas relief. 281 F. App'x at 522, 529. *Gill* held that the Michigan Court of Appeals unreasonably applied *Jackson* when it sustained an aiding-and-abetting conviction on the notion that the defendant, who was present in one part of the house, would know of crimes in another part of the house. *Id.* at 523-24, 527-28. The defendant could not be held liable for the full amount of cocaine found in the house, including rooms in which he was not present. *Id.*

Here, as explained above, the panel opinion acknowledges that Ms. Galvan was not present in the bathroom where the fatal assault took place at all on the day of the murder, at most was near the master bedroom shortly before the murder, and was outside when the murder took place. The decision to let stand Ms. Galvan's conviction of a murder for which she was not present conflicts with *Gill*.

D. A State Court Cannot Reasonably Ignore Elements of the Offense It Previously Has Announced

Finally, the panel opinion's most blatant error—ignoring elements of the offense—conflicts with *Price*, in which this Court held that a state court cannot reasonably ignore the elements of the offense it previously has announced. 562 F. App'x at 338; accord *Goldyn v. Hayes*, 444 F.3d 1062, 1065, 1070 & n.12 (9th Cir. 2006). Indeed, this is a central holding

of *Jackson* itself. 443 U.S. at 314-16. The panel opinion—like the Michigan Court of Appeals—directly contravened that holding when it ignored that there must be evidence of aiding the murder and intending to render such aid.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


Jennifer Galvan

Date: December 19, 2017