No. 11-9843

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL LYONS,
Petitioner,
v.

LISA A. MITCHELL, SUPERINTENDENT,
OLD COLONY CORRECTIONAL CENTER
Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a habeas petitioner's federal constitutional claim of denial of due process in the admission against him of gruesome photographic evidence has been "adjudicated on the merits" for purposes of 28 U.S.C. 2254(d) where the state court decision affirming the trial judge's admission of such evidence in the exercise of her discretion did not expressly address the petitioner's constitutional claim of denial of federal due process.

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STATEMENT OF THE CASE

A. State Court Proceedings.

On the afternoon of June 28, 1998, petitioner's two week old infant son was rushed to Good Samaritan Hospital and then "med flighted" to New England Medical Center in Boston—he died there as a result of "severe cerebral edema and subdural hematomas due to shaking." *Commonwealth v. Lyons,* 444 Mass. 289, 828 N.E.2d 1, 4 (2005). Petitioner, who was approximately five feet eight inches tall and weighed between 275 and 300 pounds, admitted to police that he had shaken the baby. *Id.* Petitioner described how he had placed his hands underneath the baby's armpits and shaken his son. *Id.* Apparently, he did so with enough force to shake a 215 pound man. *Id.*

A Plymouth County grand jury returned an indictment charging petitioner with murder in the second degree. At trial, three autopsy photographs were introduced over petitioner's objection. *Commonwealth v. Lyons*, 444 Mass. at 297, 828 N.E.2d at 8. The trial judge instructed the jurors that the pictures were being introduced "only to draw attention to a clinical medical status or the nature and extent of the victim's injuries." *Id.* at 9. There were bruises on both sides of the baby's upper back muscles just below his neck, and his body showed all the tell tale signs of shaken baby syndrome, which "essentially destroyed his brain." *Id.* at 4. Due to the severity of the child's injuries, he would have lost consciousness and become unresponsive "nearly instantaneously or within a very few seconds." *Id.* While petitioner admitted to shaking his son, he claimed that he did so out of panic, in an attempt to revive the baby, after finding the baby non-

responsive.[1] *Id*. The crux of petitioner's defense was that he had acted without legal malice and was therefore guilty of involuntary manslaughter, not second-degree murder. *Id*.

After a jury trial before Massachusetts Associate Justice Linda E. Giles in Plymouth Superior Court, petitioner was convicted of murder in the second-degree for the shaking death of his two-week old son. Petitioner appealed. Additionally, petitioner filed a motion, seeking a reduction of the verdict, which the Commonwealth opposed. The trial judge reduced the verdict to involuntary manslaughter, and the Commonwealth appealed. In an unpublished decision, the Massachusetts Appeals Court affirmed the order reducing the verdict from murder in the second degree to manslaughter, concluding that the trial judge acted within her discretion. *See Commonwealth v. Lyons*, 61 Mass. App. Ct. 1103, 807 N.E.2d 862 (2004).

The Commonwealth filed an application for leave to obtain further appellate review ("ALOFAR") challenging the reduction of the verdict that the Massachusetts Supreme Judicial Court ("SJC") allowed. The petitioner also appealed from the conviction raising a number of issues, including a claim related to the admission of the autopsy photographs. The SJC held that (1) the weight of the evidence clearly supported the verdict of second degree murder based on third-prong malice, and thus the trial court abused its discretion in reducing the verdict to involuntary manslaughter; (2) evidence of petitioner's size and victim's age and size was relevant to the issue of third-prong malice; (3) the autopsy photographs of the victim were relevant to show the amount of force used to shake the victim and to rebut petitioner's testimony that the victim hit his head in a bathtub; (4) the trial court acted within its discretion in refusing

[1] In footnote three, the SJC noted that five years earlier, Lyons and his wife had suffered the loss of another infant son due to natural causes.

to admit the death certificate of petitioner's other son; and (5) the prosecutor's comments concerning the natural death of the petitioner's other son were proper and necessary. *See Commonwealth v. Lyons*, 444 Mass. at 289, 828 N.E.2d 1. Petitioner applied for re-hearing and the application was denied.

B. Federal Habeas Proceedings.

On June 2, 2006, petitioner filed a petition for a writ of habeas corpus in the United States District Court for the District of Massachusetts alleging that he was denied due process in the admission, over objection, of post-mortem photographs. After briefing, United States District Judge Nathaniel M. Gorton referred the case to Magistrate Judge Joyce London Alexander. In her review, the magistrate judge noted that the petition was governed by the deferential standard of review accorded to state-court merits adjudications under 28 U.S.C. § 2254(d), and she issued a report and recommendation recommending the petition be denied. Petitioner filed objections to the magistrate judge's report and recommendation. On November 21, 2008, Judge Gorton reviewing petitioner's due process claim *de novo*, issued a memorandum and order denying the petition for a writ of habeas corpus. Petitioner timely appealed, and Judge Gorton granted a certificate of appealability on the issue noted above.

On January 17, 2012, the United States Court of Appeals for the First Circuit issued a decision affirming the denial of habeas relief. *See* Appendix A, *Lyons v. Brady*, 666 F.3d 51 (1st Cir. 2012). Acknowledging that the SJC did not elaborate on its reasoning for rejecting petitioner' s due process claim, the First Circuit determined that the SJC nevertheless addressed the claim when it concluded "'that there [was] no merit in [petitioner's] allegations of error.'" *See* Appendix A, *Lyons v. Brady*, 666 F.3d at 54, quoting *Commonwealth v. Lyons*, 828 N.E.2d at 4. Accordingly, the First Circuit applied AEDPA deference to petitioner's due process claim

and determined that the SJC's conclusion that the admission of autopsy photographs was proper was not an "an unreasonable application of [] clearly established Federal law." *See* Appendix A, *Lyons v. Brady*, 666 F.3d at 57, quoting 28 U.S.C. § 2254(d)(1).

REASONS FOR DENYING THE PETITION

I. Certiorari should be denied because even if petitioner's due process claim is reviewed *de novo,* his request for habeas relief would be denied. For this reason, petitioner cannot prevail no matter what this Court holds in *Johnson v. Wiliams*.

On January 13, 2012, this Court granted certiorari in *Williams v. Cavazos*, 646 F.3d 626, (9th Cir. 2011) to determine "whether a habeas petitioner's claim has been 'adjudicated on the merits' for purposes of 28 U.S.C. § 2254(d) where the state court denied relief in an explained decision but did not expressly acknowledge a federal-law basis for the claim." The case is briefed and awaiting argument. The question presented in this case is essentially the same one on which this Court granted certiorari in *Williams*.

In *Williams* the Ninth Circuit Court of Appeals declined to apply the deferential standard of review in 28 U.S.C. § 2254(d) to the petitioner's Sixth Amendment claim relative to the dismissal of a juror, concluding that the California Court of Appeal did not adjudicate Williams's Sixth Amendment claim on the merits. The petitioner offered two arguments on appeal regarding the juror removal claim: (1) "her section 1089 claim" that the trial court "abused the discretion accorded it by the statute to dismiss the jurors for cause"; and (2) her "constitutional claim…that the 'remov[al] and replace[ment]' of a holdout juror from a 'jury which had previously been deadlocked' violated her rights [to trial by an impartial jury] under the Sixth Amendment." *Williams v. Cavazos*, 646 F.3d at 638-639. The Ninth Circuit determined that the California Court of Appeal had conducted a "purely statutory analysis of whether the trial court had properly exercised its discretion under section 1089," but failed to analyze the constitutional

claim. *Williams v. Cavazos*, 646 F.3d at 641. The court therefore applied *de novo* review and granted habeas relief to the petitioner. *Id*. at 653. The Warden sought and obtained certiorari, which this Court limited to the question whether the state court issued a ruling on the merits of Williams' federal claim for purposes of applying § 2254(d)(2).

The same question of what standard of review should be applied on habeas review of a state court decision which did not appear to address a federal constitutional claim is presented in the instant petition. The district court applied *de novo* review in its analysis of the constitutional claim and denied relief. Both parties then argued the due process claim expressly under the *de novo* standard of review to the First Circuit. *See* Appendix A, *Lyons v. Brady*, 666 F.3d at 54, n.5. The First Circuit, however, concluded that the deferential-review standard in § 2254(d) applied because the SJC "addressed the claim when it concluded 'that there [was] no merit in [petitioner's] allegations of error.'" *See* Appendix A, *Lyons v. Brady*, 666 F.3d at 54, quoting *Commonwealth v. Lyons*, 444 Mass. 289, 828 N.E.2d at 4. It then applied deferential review and affirmed the denial of the petition. Respondent recognizes, therefore, that one possible disposition of the petition would be for the Court to hold it pending its ruling in *Williams*, and then dispose of it accordingly.

Nonetheless, certiorari should be denied without waiting for the ruling in *Williams* because petitioner's claim unquestionably fails even under *de novo* review. The SJC properly determined that the trial judge's admission of the autopsy photographs was a reasonable ruling that allowed the Commonwealth to explain the significance of the autopsy findings. As the district court judge who denied habeas relief under a *de novo* standard found, an alleged evidentiary error does not violate the Constitution unless it "'so infuse[d] the trial with inflammatory prejudice that it render[ed] a fair trial impossible.'" *See* Appendix B, *Lyons v.*

Brady, 587 F. Supp. 2d 327, 330 (D. Mass. 2008), quoting *Petrillo v. O'Neill*, 428 F.3d 41, 44 n.2 (1st Cir. 2005); *also citing Romano v. Oklahoma*, 512 U.S. 1, 12, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994). The district court determined that in light of the probative value of the three autopsy photographs, their admission did not so infuse petitioner's trial with inflammatory prejudice as to render it fundamentally unfair. *See* Appendix B, *Lyons v. Brady*, 587 F. Supp. 2d at 331.

Petitioner asserts that the cause of death was not a disputed issue. *See* Petition at p. 4. But in determining the photographs' relevance, the amount of force petitioner used to shake the baby could be probative of his intent, which was the most consequential fact before the jury. *See* Appendix B, *Lyons v. Brady*, 587 F. Supp. 2d at 331. Also, the degree of force used can, reputedly, be ascertained from the severity of the injuries the baby suffered, which was evident only from the autopsy photographs. *Id*. Furthermore, the amount of force was, contrary to petitioner's assertion, contested at trial. *Id.* For example, the petitioner testified that he shook his son for ten to fifteen minutes, but a clinical professor of pediatrics, a witness for the prosecution, testified that at most, the shaking lasted twenty seconds. *Id*.

As to prejudice, the jury saw only those photographs which were necessary to determine petitioner's intent at the time of the shaking incident. *See* Appendix B, *Lyons v. Brady*, 587 F. Supp. 2d at 332. The only external trauma visible on the baby was a small scratch on his forehead; the more significant injuries were visible only in the autopsy photographs. *Id.* Additionally, no full body photographs of the baby showing his condition at the time of his death were shown to the jury. *Id*. As a consequence there was no extraneous prejudicial effect. Finally, the photographs were admitted into evidence with a plain and clear limiting instruction that mitigated any potential prejudice. *Id.*

The admission of the autopsy photographs was not unfairly prejudicial. Indeed, as the SJC explained, "the judge appropriately mitigated any potential prejudice by cautioning the jury not to be affected by the nature of the photographs, and by instructing them that the photographs were to be used only to draw attention to a clinical medical status or the nature and extent of the victim's injuries." Appendix, *Commonwealth v. Lyons*, 444 Mass. at 298, 828 N.E.2d at 9. In the instant case, petitioner cannot demonstrate any inflammatory prejudice that prevented him from having a fair trial.[2] Accordingly, even applying *de novo* review petitioner is not entitled to habeas relief. For this reason, this Court should deny the petition for certiorari and need not hold the case pending the decision in *Williams*.

[2] To the extent petitioner relies on *Chambers v. Mississippi*, 410 U.S. 284 (1973) to support his due process claim, his reliance is misplaced. In *Chambers*, this Court emphasized that its holding did not "signal any diminution in the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." In fact, while *Chambers* warned against the "mechanistic" application of evidentiary rules, this Court has rarely used *Chambers* to overturn convictions and in recent years has made it clear that it can be invoked only in extreme cases. *United States v. Scheffer*, 523 U.S. 303 (1998).

CONCLUSION

For all of the foregoing reasons, this Court should deny the petition for a writ of certiorari.

Respectfully submitted,

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August 28, 2012

CERTIFICATE OF SERVICE

Pursuant to Rule 29(5)(a) of the Rules of the Supreme Court of the United States, I hereby certify that on August 28, 2012, two copies of the above document were served upon Brownlow M. Speer, counsel of record for petitioner, by first-class mail, postage prepaid, as follows:

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