No. _____

_____

IN THE

SUPREME COURT OF THE UNITED STATES

_____

Jerry Docaj
_____ — PETITIONER
(Your Name)

VS.

Administrator, New Jersey State Prison,
Attorney General State of New Jersey
_____ – RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis.*

Please check the appropriate boxes:

☑ Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s): Superior Court of New Jersey, Appellate Division
Supreme Court of New Jersey

☐ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

☐ Petitioner's affidavit or declaration in support of this motion is attached hereto.

☐ Petitioner's affidavit or declaration is **not** attached because the court below appointed counsel in the current proceeding, and:

☐ The appointment was made under the following provision of law: _____
_____, or

☐ a copy of the order of appointment is appended.

Jerry Docaj
(Signature)

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Jerry Docaj, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 80.00	$ N/A	$ 80.00	$ N/A
Self-employment	$ 00	$	$ 00	$
Income from real property (such as rental income)	$ 00	$	$ 00	$
Interest and dividends	$ 00	$	$ 00	$
Gifts	$ 00	$	$ 00	$
Alimony	$ 00	$	$ 00	$
Child Support	$ 00	$	$ 00	$
Retirement (such as social security, pensions, annuities, insurance)	$ 00	$	$ 00	$
Disability (such as social security, insurance payments)	$ 00	$	$ 00	$
Unemployment payments	$ 00	$	$ 00	$
Public-assistance (such as welfare)	$ 00	$	$ 00	$
Other (specify): _____	$ 00	$	$ 00	$
Total monthly income:	$ 80.00	$	$ 80.00	$

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
N/A	$ 00	$ 00
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
None		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ N/A	$ N/A
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ N/A	$
Home maintenance (repairs and upkeep)	$ N/A	$
Food	$ N/A	$
Clothing	$ N/A	$
Laundry and dry-cleaning	$ N/A	$
Medical and dental expenses	$ N/A	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ N/A	$ N/A
Recreation, entertainment, newspapers, magazines, etc.	$ N/A	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ N/A	$
Life	$ N/A	$
Health	$ N/A	$
Motor Vehicle	$ N/A	$
Other: _____	$ N/A	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): _____	$ N/A	$
Installment payments		
Motor Vehicle	$ N/A	$
Credit card(s)	$ N/A	$
Department store(s)	$ N/A	$
Other: _____	$ N/A	$
Alimony, maintenance, and support paid to others	$ N/A	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ N/A	$
Other (specify): _____	$ N/A	$
Total monthly expenses:	$ N/A	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☑ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☑ No

If yes, how much? N/A

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: August 15, 2018

Sworn to and subscribed before me
this 15th day of August, 2018

JOHN VINCENT SAYKANIC, ESQ.
An Attorney-At-Law of the
State of New Jersey

Jerry Kucey
(Signature)

No. _____

In the
Supreme Court of the United States

JERRY DOCAJ,

Petitioner,

v.

ADMINISTRATOR NEW JERSEY STATE PRISON;
ATTORNEY GENERAL OF NEW JERSEY,

Respondents.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Third Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Mr. Docaj seeks leave to appeal the following issues:

1) **Whether the jury instruction on passion/provocation manslaughter misstated the law, unconstitutionally shifted the burden of proof, and prejudicially confused the jury in violation of Mr. Docaj's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process?**

2) **Whether the prosecutor in her opening statement improperly urged the jury to consider "This . . . a trial to seek justice of [sic] her death" in violation of Mr. Docaj's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process?**

3) **Whether Mr. Docaj's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process was violated when the detective who interrogated Mr. Docaj repeatedly testified that Mr. Docaj "was not telling the whole truth" and "was trying to hide some things?"**

4) **Whether Mr. Docaj's Fifth Amendment right to remain silent and Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process was violated by the trial judge telling the jury, as to Mr. Docaj's statement, that it had already ruled on "the question of *Miranda* rights?"**

5) **Whether the emergency-medical technician repeatedly characterizing the shooting as a "murder" violated Mr.Docaj's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process?**

6) **Whether Mr. Docaj's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process was violated by a police detective reading a passage from a bible found during the search of Mr. Docaj's home?**

7) **Whether trial counsel's failure to request a competency hearing or, in the alternative, request an adjournment until Mr. Docaj was competent, along with the failure to object to the errors raised in grounds One, Four, Five and Six, along with other pretrial and trial errors, constitutes ineffective assistance of counsel as guaranteed by the Sixth Amendment?**

8) **Whether the trial was so riddled with errors that their cumulative effect rendered the trial unfair in violation of Mr. Docaj's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process?**

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Jerry Docaj respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit denying his application for a Certificate of Appealability and his Petition for Rehearing and Rehearing En Banc.

OPINIONS BELOW

The opinion of the United States District Court for the District of New Jersey filed October 10, 2017 Docaj v. D'Ilio, 2017 WL 4882486 (U.S.D.N.J. decided October 30, 2017), is reproduced here. (a[1] 34-44). The Unpublished and Unredacted Opinion of the New Jersey Superior Court, Appellate Division in State v. Gjelosh Docaj, a/k/a Jerry Docaj, a/k/a Jerry Docaj; (App. Div. Docket No. A-4592-06T4; decided May 27, 2009) is reproduced here. (a1-15). The unpublished and redacted Opinion in State of New Jersey v. Gjelosh Docah, a/k/a Jerry Docaj, 407 N.J. Super. 352 (App. Div. 2009) is reproduced here. (a16-27). The Order of the New Jersey Supreme Court Denying the Petition for Certification, State v. Docaj, 200 N.J. 370 (2009) is reproduced here. (a28). The unpublished Opinion of the New Jersey Superior Court, Appellate Division in State v. Gjelosh Docaj, 2012 WL 2529301 (decided July 3, 2012) is reproduced here. (a28-32). The Order of the New Jersey Supreme Court Denying the Petition for Certification, State v. Docaj, 213 N.J. 568 (2013)

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[1] "a" - denotes appendix to this petition.

is reproduced here. (a33). The Order of United States Court of Appeals for the Third Circuit Denying Request for a Certificate of Appealability (dated February 12, 2018) is reproduced here. (a45). The Order of United States Court of Appeals for the Third Circuit Denying Request for a Certificate of Appealability by the Panel and the Court en banc (dated May 31, 2018) is reproduced here. (a46).

JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit denying the petition for rehearing and rehearing en banc was denied on May 31, 2018. (a46-47).

CONSTITUTIONAL PROVISIONS

The relevant parts of the Fifth Amendment provides, in pertinent part, that: “No person shall be . . . compelled in any criminal case to be a witness against himself, nor deprived of life, liberty, or property, without due process of law.”

The relevant parts of the Sixth Amendment is: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . and to have the Assistance of Counsel for his defence.”

The relevant part of the Fourteenth Amendment (Section 1) is: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.”

STATEMENT OF THE CASE

A. Introductory Statement

It cannot be overemphasized that the Superior Court of New Jersey, Appellate Division, specifically found that the jury instructions on passion/provocation manslaughter were erroneous:

> Defendant is correct in stating that the model jury charge contained an error. In one of four statements regarding the State's burden of proof as to the adequacy of the cooling-off period, the charge stated, "In other words, you must determine whether the State has proven that the time between the provoking event and the acts which caused death was inadequate for the return of a reasonable person's self-control." (State v. Docaj, 407 N.J. Super. 352, 361 (App. Div. 2009), certif. denied, 200 N.J. 370 (2009); emphasis in original). (a21).

The Appellate Division held this error "harmless." Numerous other constitutional violations occurred at trial and on appeal.

B. Procedural History

Following a hung jury at his March 2005 murder trial in Bergen County Superior Court, on November 3, 2005, a second jury trial before the Honorable Patrick J. Roma, J.S.C., resulted in convictions on murder, N.J.S.A. 2C:11-3a(1); possession of a handgun for an unlawful purpose, N.J.S.A. 2C:39-4a; and possession of a weapon without a license under, N.J.S.A. 2C:39-5b. (Pa[2] 1-2; 15T13-20 to 14-25). Mr. Docaj relied on a defense of passion/provocation manslaughter. (12T157-2 to 158-12).

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[2] "Pa" denotes Mr. Docaj's appendix to his District Court Traverse Brief filed in the Third Circuit.

At sentencing on January 20, 2006, Judge Roma imposed a term of 63 years and nine months without parole. (16T50-24 to 51-14; Da5-10). On May 27, 2009, the Appellate Division affirmed the convictions but remanded for resentencing. State v. Docaj, 407 N.J. Super. 352 (App. Div. 2009), certif. denied, 200 N.J. 370 (2009) (unredacted opinion at a1; published but redacted opinion at a16). After several remands for resentencing, Mr. Docaj was sentenced to life imprisonment with 63 years and nine months to be served without parole eligibility. (ECF No. 1, ¶ 3).

Mr. Docaj filed a pro se petition for post-conviction relief ("PCR") (dated January 15, 2010). On August 30, 2010, Judge Roma denied the PCR petition. Mr. Docaj appealed and on July 3, 2012, the Appellate Division affirmed in an unpublished per curiam opinion (State v. Docaj, 2012 WL 2529301 (N.J.Super.A.D.; A-2557-10T4)) (a29). On January 16, 2013, the New Jersey Supreme Court denied the petition for certification. 213 N.J. 568 (2013).

A Petition for a Writ of Habeas Corpus was filed in the United States District Court for the District of New Jersey on October 15, 2013. By Order filed October 30, 2017, the Honorable Claire C. Cecchi, U.S.D.J., denied the habeas petition and ordered that a COA shall not issue. (Order at A29; Jerry Docaj v. Stephen D'Ilio, et al., 2017 WL 4882486; Opinion at A30-45).

On February 12, 2017, the Third Circuit denied an application for a certificate of appealability. (a46). On May 31, 2018, the Third Circuit denied a petition for rehearing and rehearing en banc. (a47).

C. Statement of Facts

Mr. Docaj and his wife Cathy were married in 1983 in Montenegro, in the former Yugoslavia. (11T[3]6-9 to 10). Once married, Mr. Docaj followed his wife to this country, and became a citizen a few years later. (9T16-5 to 6). Mr. Docaj worked as a heating and air-conditioning engineer-mechanic for a commercial building. (9T182-21 to 183-1). He was initially hired as a janitor and attended school for several years to earn an engineer's license. (10T187-18 to 192-1).

The Docaj's had three children. (7T69-11 to 70-1). In December 2002, Mrs. Docaj advised she wanted a divorce. Mr. Docaj took the news very hard, and frequently cried. (7T101-2 to 5). Both contacted divorce lawyers. (9T265-4 to 7). In early 2003, at his wife's request, Mr. Docaj moved out of the family to a nearby apartment. (7T70-6 to 19). He remained in close contact with his family, talking/visiting daily. (7T71-18 to 72-17).

In the second half of January 2003, Mrs. Docaj informed her husband that she had contacted a lawyer and that they had discussed citing "mental abuse" as a ground for the divorce. (11T15-22 to 16-11). A few days later, Mrs. Docaj told her husband: "I have another man lined up." (11T13-18 to 25, 14-4). Mr. Docaj said he had no inkling that his wife was seeing anyone until she asked for the divorce. (11T13-23 to 14-16).

Later, Mr. Docaj took note when Mrs. Docaj wore a bracelet her boyfriend had given her. (9T248-8 to 18, 280-3 to 13; 11T14-1

to 3). After Mr. Docaj moved out of the family home his son complained to him that Mrs. Docaj was spending an extraordinary amount of time on the telephone. (8T85-24 to 88-1).

Mrs. Docaj's boyfriend, Robert Narciso, met Mrs. Docaj in 2002 on the ferry from Hoboken to lower Manhattan. (9T231-18 to 24). In early 2003 the relationship took a serious turn; they started spending weekends together and he gave her a cell phone. (9T243-7 to 13). Mrs. Docaj spent Friday night, February 21, 2003, with her boyfriend while Mr. Docaj took their 3 children to a movie and dinner, staying the night with the children at the family home. (7T91-8 to 94-3). Mr. Docaj left for work early the next morning; Mrs. Docaj returned home in the afternoon. (7T94-10 to 95-1). Mr. and Mrs. Docaj planned to meet at the family home that evening. (7T95-3 to 10). Mr. Docaj arrived after 6:00 p.m.; he and Mrs. Docaj sat in the kitchen talking. (8T89-4 to 6). 18-year-old Christopher, was on the telephone in the kitchen. Noting that the house was full of children and their friends, Mr. Docaj suggested to his wife that they continue their conversation down the hall in the master bedroom. (8T79-15 to 17).

From the kitchen, Christopher saw his parents enter the bedroom and heard the door lock. Within a minute or so, Christopher heard his mother yelling and both of his parents cursing and what he described as "[p]ush, shove, fight."[4] Then

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[3] Transcript citations at page ix.

[4] Mr. Docaj advised Detective Cristiana that Mrs. Docaj was “angry” and had struck him on the face. (11T156-11 to 16).

he heard his mother scream and a gunshot. (8T96-20 to 97-24).

Christopher ran to the bedroom and pushed against the locked door. Mr. Docaj yelled to call 9-1-1, but Christopher remained at the door arguing with his father in an effort to enter the room. (7T69-11 to 13, 82-19 to 83-19). Mr. Docaj opened the door; his face was white and he repeatedly said, "I'm sorry, I'm sorry." (8T152-18 to 23). Mr. Docaj's daughter, 15-year-old Christina, ran to the bedroom when she heard her brother and father arguing. Mr. Docaj barred her from the bedroom, asking the children to call 911. (7T81-12 to 84-2; 8T152-24 to 25).

Christina testified her father was crying and repeatedly said, "She's gone," and "She cheated on me for two years."[5] (7T82-17 to 83-5). Similar remarks can be heard in the background on the 9-1-1 call (Pa11-15), which Christina placed at 6:56 p.m. (7T46-22 to 24). The call was recorded and played at trial as was a brief follow-up call made by the 9-1-1 operator (answered by Christopher). (7T46-22 to 24). A transcript of the calls is in the appendix at Pa11-15. (7T48-14 to 49-13).

Mr. Docaj was "just kind of walking around in a daze ..." (8T32-8 to 9). Mr. Docaj appeared to be dejected and in shock. (8T52-1 to 14). Mrs. Docaj was found lying on the bedroom floor with no pulse. (8T23-17 to 23). About an hour later the medical

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[5] Mrs. Docaj's boyfriend Robert Narciso testified they met less than a year earlier. (9T232-19 to 24). The two-year reference may allude to Mrs. Docaj's relationship with her boss, which Mr. Docaj only learned in the last few weeks. (11T16-12 to 17-4).

examiner pronounced her dead at the scene. (11T230-17 to 233-25). He found a single gunshot wound to the head. The bullet entered at the back of the skull and exited through the forehead. (11T239-18 to 19). It was a loose contact wound: the gun barrel in contact with the victim's head not tightly pressed against it. (11T258-1 to 25). Mr. Docaj was arrested and taken to the Lodi police station where he was placed in a cell. Two hours later he was moved to an interrogation room. The interrogation began at 9:37 p.m. and lasted until 1:18 a.m. at which point Mr. Docaj was returned to his cell. At 2:35 a.m. the police woke him to collect his clothing. A second round of questioning started at 4:10 a.m. and continued until 4:54 a.m. (10T203-3 to 15). Neither interrogation session was recorded; one of the detectives who questioned Mr. Docaj took notes which he threw away after he wrote his report a couple of months later. (10T214-11 to 14).

The detective testified that although the temperature at the police station seemed comfortable, when Mr. Docaj entered the interrogation room, "he was shivering and he was breathing heavy." (10T203-11 to 15). The detective also noted a scrape on Mr. Docaj's left arm. Mr. Docaj thought it was caused when he grappled with his son to keep him out of the bedroom after the shooting. The officer also observed a red spot toward the back of Mr. Docaj's head with a small streak of blood behind it. (10T205-18 to 206-18; 11T 72-11 to 15, 134-14 to 16). Throughout the interrogation, Mr. Docaj "almost constantly looked at the floor." (10T213-18 to 24; 11T 30-2 to 6). When Mr. Docaj

recounted how his wife would ask him to leave the house because his tears about their separation upset the children, he began "rocking back and forth in his chair, making sobbing sounds. It went on for about almost two minutes." (11T13-3 to 9).

Mr. Docaj recalled that earlier that evening he and his wife were having coffee in the kitchen and eventually went down the hall into the bedroom. (11T26-7 to 8). In the bedroom, he begged his wife to reconsider the divorce, urging that they "need to get together for these kids," and adding, "I'll forgive you to this point." (11T27-3 to 22). Mrs. Docaj made it clear that she was not interested in having a reconciliation, and responded: "The only thing you're getting are your walking papers." (11T27-23 to 28-5). The detective testified that as Mr. Docaj described the events, he "begins to sob again ... and he's rocking back and forth in his chair." (11T27-9 to 12). Mrs. Docaj was seated on the side of the bed while Mr. Docaj stood in front of her. (11T27-7 to 8). As they continued to argue, she reached out and slapped him. At that point, Mr. Docaj said, "Things went dark." (11T28-17 to 21). While he acknowledged that he was carrying a handgun in his waistband, he could not recall firing it. All he remembered was that after his wife hit him he pushed her downward and then tried to catch her when it looked like she was going to hit the floor, that he had the gun in his right hand, and that "with his right hand he thought he grabbed some clothing and then ... something went wrong." (11T34-9 to 35-18). Consistent with Mr. Docaj's statement that his wife was falling to the floor, the

medical examiner opined that she was not standing upright at the time she was shot. (11T246-18 to 247-20). Although questioned repeatedly as to the shooting, Mr. Docaj had no memory of drawing the gun or hearing the shot. (11T 47-15 to 48-1). He purchased the handgun at least ten years earlier for protection. (11T29-8 to 30-15). He did not bring it to the house that evening with intent to use it against his wife. (11T38-6 to 8). He did not have a license for the gun. (10T107-3 to 108-15).

With Mr. Docaj's consent, the police searched his apartment.[6] (3T93-1 to 94-6). A shoe box contained a second box which held the same brand of .38-caliber bullets as those used (with a few loose cartridges). (8T291-7 to 293-9). From a backpack the police seized a 2003 daily planner. (8T284-12 to 285-4). Mr. Docaj had made notes in the planner. (10T118-3 to 5). Mr. Docaj wrote of his anguish over the separation from his wife and children. In one entry he wrote that he cried whenever he visited his children. (10T123-16 to 17). Ten days before the offense, he noted that his children (not wife), had remembered his birthday. (10T126-1 to 21). He recorded funds he gave his wife "for the children and for the daily expenses" (10T122-19 to 22), listed financial questions to ask his lawyer (10T124-24 to 125-25), and reminded himself to check the phone bill to see who his wife had talked to in early February. (10T127-21 to 24).

On February 4, by which time Mr. Docaj had moved out of the

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[6] Mr. Docaj consented to a search of his car and to DNA samples (4T90-1 to 92-7) with this evidence not produced. (5T21-9 to 21).

family home, he wrote about his fervent hope that the marital separation was only temporary, and that he could not imagine living without his wife, and added how hard it had been to emigrate from his birthplace and leave family behind. (10T128-6 to 22). A day or two later Mr. Docaj wrote, "I woke up with such a heartache I couldn't even breath[e]." (10T129-7 to 21).

The next day, February 7, he wrote he woke up but "[i]t seems I am in a dream. But as a matter of fact, [I] was not. I was alone in my apartment." (10T131-5 to 8). He wrote of his love for his wife and she was "the air that I breathe." (10T131-9 to 20). He could not "understand ... how a person can lose the love for her husband or ... the father of her children ..." (10T132-13 to 16). Entries reflected prayer for a family reunion. (10T132-17 to 20). February 7 recorded he had been crying all day since informed about the divorce papers. (10T133-3 to 12). When she sought a divorce, he "felt like I was hit with [a] bullet between my eyes." (10T135-17 to 20). He thought they had agreed to a one-year separation, and "begged her ... [to] wait a little more, let us see how things would go." (10T135-20 to 136-13). Mrs. Docaj "didn't have time" for him (10T135-20 to 23), leaving him "very much lost." (10T136-19 to 20).[7]

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[7] Mr. Docaj disagrees with the State's contention in its brief that Mr. Docaj called "the Westervelt Place house twice during the day to look for Kathy." (Sa10). Mr. Docaj called twice and spoke with the children as they were left home alone.

REASONS FOR GRANTING THE WRIT

POINT I

CERTIORARI SHOULD BE GRANTED SINCE THE JURY INSTRUCTION ON PASSION/PROVOCATION MANSLAUGHTER 1) MISSTATED THE LAW; 2) SHIFTED THE BURDEN OF PROOF; AND 3) PREJUDICIALLY CONFUSED THE JURY IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW MANDATING ISSUANCE OF THE HABEAS WRIT

There is no question that the jury instruction on passion/provocation manslaughter misstated the law and Mr. Docaj submits this erroneous instruction deprived him of his Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process. The Appellate Division acknowledged the erroneous instruction: "Defendant is correct in stating that the model jury charge contained an error." State v. Docaj, 407 N.J. Super. at 361. The District Court denied on this ground:

> The Appellate Division reasonably applied controlling federal law by considering the challenged instruction in the context of the charge as a whole, and the trial record. The court reasonably concluded that because the passion/provocation manslaughter charge was given accurately three times, and only once with a misspoken word, that the jury followed the correct instruction. Furthermore, as the Appellate Division found, there was little chance the jury would find a slap in the face during an argument over divorce was sufficient to provoke Petitioner to kill his wife, particularly when one considers that he brought a gun to work that day and put it in his waistband before going to see his wife. The Court will deny Ground One of the habeas petition. (Docaj District Court Opinion at 4; a38).

The District Court misapplied federal law. As explained in Kamienski v. Hendricks, 332 Fed. Appx. 740 (3rd Cir. 2009), cert. denied, 558 U.S. 1147 (2010):

> . . . [a] state-court decision 'involve[s] an unreasonable application' of clearly established federal law if the state court (1) 'identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular . . . case'; or (2) 'unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should apply.'" Id. at 234 (quoting Williams, 529 U.S. at 407, 120 S.Ct. 1495). "[A]n unreasonable application of federal law is different from an incorrect application of federal law." Williams, 529 U.S. at 410, 120 S.Ct. 1495 (emphasis in original).

In Kamienski, the Third Circuit granted the petitioner's 2254 application, holding that the evidence did not support the criminal conviction for first degree murder and felony murder.

The State Appellate Division in Docaj found that the error in the jury instruction was harmless and "an isolated occurrence." (Op. at 10-11; a10).

The jury instruction on passion/provocation manslaughter (the key defense in the Docaj), conceded by even the State to be erroneous, deprived Mr. Docaj of the due process clause of the Fourteenth Amendment as it shifted the burden of proof from the State to Mr. Docaj. The District Court's finding of harmless jury instruction error (essentially affirmed by the Third Circuit) is in conflict with fundamental fourteenth amendment due process rights (that the State "must prove beyond a reasonable doubt 'every fact necessary to constitute the crime with which

[the defendant] is charged,'" Smith v. United States, 133 S.Ct. 714, 719 (2013), quoting In re Winship, 397 U.S. 358, 364 (1970). "Jury instructions relieving States of this burden violate a defendant's due process rights." Carella v. California, 491 U.S. 263 at 265 (1989), citing Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979). In a habeas corpus proceeding under 28 U.S.C. § 2254, where a petitioner claims his conviction in state court was based upon insufficient evidence, such a claim rests on the Due Process guarantee "that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof – defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." See Jackson v. Virginia, 443 U.S. 307, 319 (1979). See Bowen v. Kemp, 832 F.2d 546 (11th Cir. 1987) (insufficient evidence of mens rea to support petitioner's conviction for murder); see also Joseph v. Coyle, 469 F.3d 441 (6th Cir .2006) (evidence was insufficient to establish that defendant personally inflicted victim's fatal stab wound to sustain conviction for aggravated assault).

Mr. Docaj did not deny that he shot his wife. But he maintained that the shooting constituted passion/provocation manslaughter and not, as the state charged, murder.

In the State of New Jersey passion/provocation manslaughter is a purposeful or knowing killing "committed in the heat of passion resulting from a reasonable provocation." N.J.S.A. 2C:11-4b(2). Passsion/provocation manslaughter recognizes that "the

average person can understandably react violently to a sufficient wrong," and that such cases should be punished less severely than murder. State v. Mauricio, 117 N.J. 402, 410 (1990). Where, as here, the record contains evidence of passion/provocation, the state cannot obtain a conviction for the purposeful offense of murder unless it proves beyond a reasonable doubt that the purposeful killing was not the product of passion/provocation. State v. Heslop, 135 N.J. 318, 324-25 (1994); State v. Grunow, 102 N.J. 133, 145 (1986). Here, the trial court misstated the law on the second factor, the objective cooling-off period.

The court began by correctly charging that, "to find defendant guilty of murder," the state must prove beyond a reasonable doubt "that defendant did not act in the heat of passion resulting from a reasonable provocation." (12T208-8 to 10, 212-14 to 17). Next, the court listed the four Mauricio factors.[8] (12T212-22 to 23). The court explained that to defeat passion/provocation manslaughter and obtain a conviction for murder, "the state need only prove the absence of any one of ... [the four factors] beyond a reasonable doubt." (12T212-21 to 215-16). The instructional error occurred when the court explained that it was the state's burden to prove that Mr. Docaj had a reasonable time to cool off (whether a reasonable person would

[8] Passion/provocation manslaughter should be charged when there is a rational basis to conclude: (1) there was adequate provocation for a reasonable person; (2) the reasonable defendant would not have had an opportunity to “cool off” between the provocation and slaying; (3) the provocation actually impassioned the defendant; and (40 the defendant had not actually cooled off.

have had time to cool off between the provocation and the slaying is listed as the second factor in Mauricio; in the model charge it is the third factor; see Model Jury Charge at Pa21).

A correct charge explains that, to defeat Mr. Docaj's claim that he acted in the heat of passion, the state must prove that adequate time elapsed between the alleged provoking event and the shooting for a reasonable person to have cooled off. Instead, the court charged the state would defeat passion/provocation if it proved that inadequate time had passed between the provoking event and the shooting for a reasonable person to cool off. The instruction begins correctly but derails in the second sentence:

> **The third factor you must consider is whether the state has proven beyond a reasonable doubt that the defendant had a reasonable time to cool off. In other words, you must determine whether the state has proven that the time between the provoking event and the acts which caused death was inadequate for the return of a reasonable person's self-control. (12T214-6 to 10) (emphasis added).**

The significance of the error is clear. The trial court told the jury, correctly, that the state would defeat Mr. Docaj's passion/provocation claim if it disproved any one of the crime's four factors. And then it defined one of the four factors incorrectly. If, as the court instructed, the State proved Mr. Docaj had inadequate time to cool off, so far from defeating the passion/provocation claim, the state would have proved one its four factors. But if the jury followed the court's instruction and found the state had proved Mr. Docaj had inadequate time to

cool off, the jury would have rejected his passion/provocation claim when it had actually made a finding in support of the claim. The error cannot possible be considered harmless as it made it much more difficult for the jury to find the lesser offense of passion provocation manslaughter as opposed to murder.

Reasonable jurors could well have understood the charge to say that the state could defeat passion-provocation if it proved that the time to cool off was adequate, and that it could also defeat the lesser offense if it proved that the time to cool off was inadequate. Under the law, however, only the first is true. At best, as the two propositions are inconsistent and irreconcilable, the charge had to have left reasonable jurors confused about what constituted the lesser the offense of passion-provocation. At a minimum, the charge was hopelessly confusing. It contains two diametrically opposite and irreconcilable propositions, and left the jury without adequate guidance on the core of Mr. Docaj's defense. See Crane v. Kentucky, 476 U.S. 683, 690 (1986) (constitution guarantees meaningful opportunity to present a complete defense)[9];

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[9] See New Jersey cases that support Mr. Docaj: State v. Hock, 54 N.J. 526 (1969); State v. Savage, 172 N.J. 374 (2002); State v. Martin, 119 N.J. 2 (1990); State v. Green, 86 N.J. 281 (1981); State v. Collier, 90 N.J. 117 (1982); State v. Koskovich, 168 N.J. 448 (2001); State v. Grunow, 102 N.J. 133 (1986) ("Erroneous instructions . . . presumed to be reversible error"); State v. O'Neil, 219 N.J. 598 (2014) (appellate counsel's failure to raise self-defense jury instruction constituted deficient performance and mandated vacation of aggravated manslaughter conviction).

The jury was unquestionably confused, as evinced by their four requests for clarification regarding 1) “conscious object and knowingly” 13T27-23 to 24; 2) playback of the 9-1-1 tape, 3) read-back of Christopher and Christina Docaj’s testimony, the Medical Examiner testimony regarding the positions of Mr. Docaj and the deceased, and Detective Christiana’s police report; 14T8-7 to 13; and 4) “Detective Christiana’s testimony, the following excerpt is requested. Events in the master bedroom as described by the defendant”; 14T11-13 to 16). The confusing, misleading, and inaccurate jury instruction also shifted the burden of proof.

POINT II

CERTIORARI SHOULD BE GRANTED SINCE THE PROSECUTOR IN HER OPENING STATEMENT IMPROPERLY URGED THE JURY TO CONSIDER "THIS ... A TRIAL TO SEEK JUSTICE OF [SIC] HER DEATH" IN VIOLATION OF PETITIONER’S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

The prosecutor began her opening statement by telling the jury that this trial "is not about a celebration of Kathy [Docaj]'s life nor is it even about a[n] examination of Kathy's life." (7T21-6 to 8). Rather: "<u>What this is is a trial to seek justice of [sic] her death</u>." (7T21-9 to 10) (emphasis added). Mr. Docaj moved for a mistrial, objecting that "any ex[hor]tation to seek justice as to a verdict ... is forb[id]den" (7T113-16 to 18), that the prosecutor may not tell the jury that justice will be achieved if it returns a conviction for murder. (7T113-16 to 114-10). The trial judge denied the mistrial. (7T115-9 to 24).

The District Court rejected Mr. Docaj’s contention, stating:

> For prosecutorial misconduct to

> constitute a violation of due process, the conduct complained of must be so egregious as to render the entire proceeding fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-48 (1974). The effect of the prosecutor's conduct must be viewed in context of the whole trial. Greer v. Miller, 483 U.S. 756, 766 (1987) . . . The Appellate Division was not unreasonable in finding, in the context of the trial as a whole, the prosecutor's statement was not a violation of Petitioner's right to due process and a fair trial. (Docaj District Court Opinion at 5; a39).

The prosecutor's deliberate appeal to the jurors' emotions was out of place at a criminal trial where the only issue is whether the state has proved guilt beyond a reasonable doubt. By making the remarks at the very beginning of the trial, she ensured that the jury was aware of its duty from the outset. The trial court did not even offer a proper curative instruction.

From the first moment the prosecutor addressed the jurors, she appealed to their emotions and infringed Mr. Docaj's fundamental constitutional right to a fair trial.[10]

POINT III

CERTIORARI SHOULD BE GRANTED SINCE THE DETECTIVE WHO INTERROGATED THE PETITIONER REPEATEDLY TESTIFIED THAT THE PETITIONER "WAS NOT TELLING THE WHOLE TRUTH" AND "WAS TRYING TO HIDE SOME THINGS" IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

Mr. Docaj presented a defense of passion/provocation manslaughter, relying in large part on what he had said when he was interrogated by the police: that his wife slapped him when he

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[10] Instead of confining herself to guilt or innocence, she told the jurors it was their job to "seek justice."

begged her not to divorce him, that "things went dark" after she struck him, and that he could not recall the subsequent shooting. (11T28-17 to 21). The interrogation was not recorded, and Mr. Docaj relied on the testimony of the detective who prepared a report on the interrogation to relay what Mr. Docaj said during the interrogation. But the detective testified that when Mr. Docaj insisted that he did not go "to the house with the intent of killing his wife," the detective concluded that "it appeared that he was not telling the whole truth ..." (11T38-6 to 11). The court overruled Mr. Docaj's objections to the detective's opinions (11T38-10 to 41-20), and the state elicited twice more that it was the detective's opinion that Mr. Docaj's statements were less than the whole truth (11T42-2 to 3, 42-17 to 18) and that the detective believed that Mr. Docaj "was trying to hide some things." (11T42-3 to 4). The detective's testimony was inadmissible and thoroughly prejudicial.

The District Court rejected Mr. Docaj's contention, stating:

> **The Appellate Division noted the Detective's testimony was not admitted as an expression of his opinion on Petitioner's guilt, but rather that his statements were provided in a detailed description of the interrogation. (Answer, Ex. 5, ECF No. 10-5 at 40.) The testimony provided context for Petitioner's repeated claims that he did not recall the shooting (Id. at 41.) The jury was properly instructed that it was their duty to determine whether Petitioner stated he did not remember shooting his wife, and if his statement was credible. (Id.) The detective's statements did not prevent the jury from its function of evaluating Petitioner's credibility. (Id. at 42.)**
>
> *** * ***

> Furthermore, it is clear from the detective's testimony that he was describing what was said during the interrogation, and not offering the jury his opinion that Petitioner was guilty of murder rather than manslaughter. Therefore, the Court will deny Ground Three of the habeas petition. (Docaj District Court Opinion at 11-12; A12-13).

Courts have unequivocally "disapprov[ed] of the testimony of a police officer that expresses an opinion of defendant's guilt[.]" State v. Frisby, 174 N.J. 583, 596 (2002) ("Any improper influence on the jury that could have tipped the credibility scale was necessarily harmful and warrants reversal"); State v. Pasterick, 285 N.J. Super. 607, 622 (App. Div. 1995) (no one "is authorized to advise the jury ... the defendant's story is a lie"; admission of such testimony "was plain error because it deprived defendant of his right to a fair trial"). In Docaj the detective's testimony that Mr. Docaj "was not telling the whole truth" and "was trying to hide some things" violated his Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process and fundamental fairness.

POINT IV

CERTIORARI SHOULD BE GRANTED SINCE THE TRIAL COURT TOLD THE JURY, WITH RESPECT TO THE ADMISSION OF PETITIONER'S STATEMENT, THAT IT HAD ALREADY RULED ON "THE QUESTION OF MIRANDA RIGHTS" IN VIOLATION OF PETITIONER'S FIFTH AMENDMENT RIGHT TO REMAIN SILENT, SIXTH AMENDMENT RIGHT TO A FAIR TRIAL, AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

To establish his defense of passion/provocation manslaughter, Mr. Docaj relied on the police account of what he said during his interrogation. Particularly because the detective testified that he believed the statements Mr. Docaj

made during the interrogation were not "the whole truth" (11T38-6 to 11), and that Mr. Docaj "was trying to hide some things" (11T42-3 to 4), it was especially important that the court charge the jury properly on assessing the credibility of Mr. Docaj's statements. The court's charge, however, contained serious, prejudicial error that had the clear capacity to undermine the likelihood the jury would properly assess the statements.

The District Court rejected Mr. Docaj's contention, stating:

> Two factors make the Appellate Division's determination reasonable. First, as discussed in Ground Three, it would have been clear to the jury that the detective was not testifying to provide his opinion of Petitioner's guilt, but rather to tell them what occurred during the unrecorded interrogation. Second, even if a juror was inclined to believe the detective was offering his opinion that Petitioner was not telling the whole truth, the judge cured this by telling the jury it was their function alone to determine whether Petitioner was credible when he told the detective he could not remember shooting his wife. The Court will, therefore, deny Ground Four of the habeas petition. (Docaj District Court Opinion at 7; a41).

N.J.R.E. 104(c) prohibits the trial judge from informing the jury that the judge has determined that the police obtained a statement from the defendant in a legally proper manner. See State v. Hampton, 61 N.J. 250, 272 (1972) (court shall not advise jury that it has decided Miranda claim). The rule provides:

> If the judge admits the [defendant's] statement the jury shall not be informed of the finding that the statement is admissible but shall be instructed to disregard the statement if it finds that it is not credible. [Emphasis added].

In direct contravention of the rule, the court instructed the jury (charged with assessing the statement) that the court had settled any legal challenges to Mr. Docaj's Miranda rights:

> "The question of Miranda rights is a legal question which has been determined by this court." (12T230-2 to 3).

Virtually every citizen knows Miranda v. Arizona, 384 U.S. 436 (1966), protects an accused's rights to remain silent and to counsel, and ensures any waiver of those rights is voluntary. Reasonable jurors would have understood that when the court told the jury that it had "determined" "the Miranda question," it was assuring them that the police had honored Mr. Docaj's legal rights during the interrogation. The trial court effectively placed its imprimatur on the detective who, the jury was told, had conducted the interrogation. (10T203-3 to 15). Thus, despite that the court complied with other aspects of the model charge as to Mr. Docaj's statements (12T229-8 to 230-14), once the court assured the jury that the detective had observed Mr. Docaj's legal rights, it signaled that the jury could accept the detective's testimony concerning the statements. As in this case, in State v. Bowman, 165 N.J. Super. 531, 537 (App. Div. 1979), the judge instructed properly on credibility. Nevertheless, the court held that where the jury was told, "that the judge had found the 'confessions' were voluntarily given[,] the harm was done[.]" The court explained that once the jury learned about the trial judge's legal ruling, it "could readily infer" that defendant's objections had been resolved "against

him." Id. Similarly, where Mr. Docaj relied on the statements he made under interrogation to establish his passion/provocation defense, the court's improper charge assuring the jury of the legality of the interrogation bolstered the repeated assertions, made by the detective who conducted the interrogation, that the statements Mr. Docaj made were "not the whole truth." The erroneous instruction irredeemably tainted the entire trial.

POINT V

CERTIORARI SHOULD BE GRANTED SINCE THE EMERGENCY-MEDICAL TECHNICIAN AT TRIAL REPEATEDLY CHARACTERIZED THE SHOOTING AS A "MURDER" IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

One of the members of the Lodi Volunteer Ambulance Corps who responded to the 9-1-1 call testified about the scene at the Docaj house. (9T160-3 to 161-10). The medic, Merisha Mehanovic, distinguished the Docaj call from others she attended in which the patient had died because, she explained, this was a murder:

> I've been to scenes that [sic] people were dead. I've been to DOA's before, but I've never been to a murder scene[.] (9T170-7 to 9; emphasis supplied).

A few minutes later, Mehanovic emphasized that this was a "murder scene." (9T173-9; emphasis supplied).

The question was whether Mr. Docaj was guilty of murder or manslaughter. Mehanovic testified this was murder and made clear she was using the term to differentiate Mrs. Docaj's death from other deaths she had attended (not murders). Though she had no special skill or education enabling her to determine this was a murder, the jury might have believed her medical training or

experience (a medic who had attended many deaths added weight to her opinion). She told the jury Mr. Docaj was guilty of murder.

The District Court rejected Mr. Docaj's contention, stating:

> On direct appeal, the Appellate Division found this claim lacked sufficient merit to warrant discussion. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." Harrington v. Richter, 562 U.S. 86, 98 (2011). Petitioner has not met that burden here. It is unlikely the jury understood the EMT was giving her opinion that Petitioner was guilty of murder when she characterized the scene as a murder scene, rather than merely describing the scene where she found a body lying in a pool of blood with a revolver left lying nearby. Even if the jury were influenced by the fact that the EMT characterized what she saw as a murder scene, the jury was well-instructed on the elements of murder versus the elements of passion/provocation manslaughter, which the jurors knew to be Petitioner's defense. The jurors were instructed that they alone would decide the facts and apply the law to arrive at the verdict. There is a reasonable basis in the record upon which the Appellate Division could have denied this claim.
>
> Therefore, the Court will deny Ground Five. (Docaj District Court Opinion at 8; a41).

The District Court cites Harrington, which held that the State of California's court's determination that counsel was not deficient in not consulting blood evidence experts was not an unreasonable application of Strickland v. Washington, 466 U.S. 668 (1984) (counsel ineffective if performance deficient and error deprived defendant of fair trial). However, the Ninth Circuit declined to extend Harrington in Hall v. Haws, 861 F.3d 977 (9th Cir. 2017), which held that the determination by the

District Court that the trial court's error in giving a permissive inference instruction was harmless was an unreasonable application of clearly established federal law and a due process violation resulted from the trial court's permissive inference instruction resulting in actual prejudice to petitioner, warranting the federal habeas relief.[11]

Only a qualified expert may offer an opinion such as that in Docaj, N.J.R.E. 702, and Mehanovic was not qualified to determine whether the shooting was murder. Even the medical examiner was limited to testifying that the manner of death was homicide, and not specifically murder. (12T266-20 to 23). Even if, for argument's sake, Mehanovic had been qualified to opine that this was murder, the New Jersey Supreme Court has warned that "the trial court should carefully instruct the jury on the weight to be accorded to, and the assessment of, expert opinion testimony ... [and] that the determination of ultimate guilt or innocence is to be made only by the jury." State v. Odom, 116 N.J. 65, 82 (1989). Here, both trial counsel and the court failed in their obligations to protect Mr. Docaj's right to a fair trial.

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[11] The New Jersey Supreme Court has long held "testimony that expresses a direct opinion that defendant is guilty of the crime charged is wholly improper" as "[t]he determination of facts that serve to establish guilt or innocence is a function reserved exclusively to the jury." State v. Hightower, 120 N.J. 378 (1990) (sergeant's testimony defendant "was the person responsible for the murder" "related directly to the ultimate question of guilt ... unquestionably rises to the level of reversible error"); State v. Landeros, 20 N.J. 69 (1955) (captain's opinion defendant guilty "pronounced the defendant's doom").

Neither took any measures to ameliorate the improper admission of this prejudicial testimony. Counsel was deficient in not requesting a curative instruction directing the jury to disregard the witness's inadmissible opinion. The court, in turn, failed in its independent obligation to safeguard Mr. Docaj's constitutional right to a fair trial by instructing the jury sua sponte to disregard the prejudicial remarks. See State v. Pitts, 116 N.J. 580, 649 (1989) ("at the very core of the guarantee of a fair trial ... is the judicial obligation to assure that the jury's impartial deliberations are based solely on the evidence and in accordance with proper and adequate instructions").

Mehanovic's repeatedly characterizing the shooting as a "murder" embraced the ultimate issue before the jury, and violated Mr. Docaj's federal constitutional guarantees of due process and a fair trial, warranting certiorari.

POINT VI

CERTIORARI SHOULD BE GRANTED SINCE A POLICE DETECTIVE READ A PASSAGE FROM A BIBLE FOUND DURING THE SEARCH OF PETITIONER'S HOME IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

The search of Mr. Docaj's apartment produced a Bible. At trial, the detective who conducted the search read the jury a passage from the Bible. (11T156-1 to 157-10). Introduction of the Biblical quotation violated Mr. Docaj's constitutional rights to trial by jury, due process of law, and a fair trial.

The prosecutor elicited the Biblical quotation as follows:

> Q. [PROSECUTOR]: I'm going to direct your attention a little more specifically to the

> page that is on our right. There appears [sic] to be at least four different markings in ink. So you see where I'm talking about? ... Were those markings there at the time you opened the Bible when you were in the apartment on the morning of February 23rd, 2003?
> A. Yes.
> Q. Okay. And can you read for us, please, the caption of the passage that is marked in bold?
> A. It says: "Psalm 37. The fate of sinners and the reward of the just."[12]
> Q. Okay. Thank you. I don't have anything further. (9T156-8 to 157-12) (emphasis added).

The District Court rejected Mr. Docaj's contention, stating:

> Even assuming it was error to admit the testimony, the Appellate Division could have reasonably concluded that the testimony did not prejudice Petitioner. There was more than sufficient evidence during the trial for the jury to conclude Petitioner killed his wife out of anger over her cheating on him and asking for a divorce. He told his children, immediately after killing their mother, that she was cheating on him. On the recorded 9-1-1 call, Petitioner could be heard screaming "she cheated on me." Furthermore, Petitioner had made a statement in his diary, invoking God in his anger at his wife. Even without hearing the passage marked in the Bible, the jury was likely to find Petitioner killed his wife because she cheated on him. (Docaj District Court Opinion at 8; a42).

It is improper and highly prejudicial for a prosecutor to invoke the Bible. Sandoval v. Calderon, 241 F.3d 765, 766-67 (9th

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[12] On cross-examination the detective acknowledged that Psalm 37 was not the only psalm on the page. (9T157-15 to 17).

Cir. 2000) [13] (prejudicial for State to invoke God or paraphrase Biblical passage); Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991) (comparison of defendant to Judas Iscariot improperly appealed to jury's passions and prejudices); United States v. Giry, 818 F.2d 120, 133 (1st Cir. 1987) ("prosecutor's reference to Peter's denial of Christ constituted an irrelevant and inflammatory appeal to the jurors' private, religious beliefs.");

In addition to prejudice, introduction of the Biblical passage[14] was irrelevant. First, the state never established that the Bible belonged to Mr. Docaj. Second, neither the prosecutor nor detective could possibly have known the circumstances under which the slip of paper had landed in the Bible or whether it was Mr. Docaj who had placed it there. Even if Mr. Docaj deliberately marked the 37th psalm, no one could have known what it signified to Mr. Docaj. Neither is it clear

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[13] Commonwealth v. Chambers, 599 A.2d 630 (Pa. 1991) ("We now admonish all prosecutors that reliance in any manner upon the Bible or . . . religious writing in support of the imposition of a penalty of death is reversible error per se and may subject violators to disciplinary action."); State v. Wangberg, 136 N.W.2d 853 (Minn. 1965) ("state ask[ing] for a conviction under Divine law even if the defendant was innocent under Minnesota law constituted an unwarranted and improper appeal to religious prejudice which requires a new trial."); ABA Standards for Crim. Just., Paras. 3-5.8(c)-(d) (3d ed. 1993) (State "should not make arguments calculated to appeal to the prejudices of the jury ... [and] should refrain from argument which would divert the jury from its duty to decide the case on the evidence.")

[14] The psalm assures that "the meek shall inherit the earth," and adjures the reader to "[c]ease from anger, and forsake wrath; fret not thyself in any wise to do evil[.]" (King James).

what message(s) the prosecutor sought to convey to the jury when she had the witness read the passage about "[t]he fate of sinners and the reward of the just." Two inferences quickly suggest themselves, both equally improper. The prosecutor may have wanted the jury to infer Mr. Docaj viewed himself as "the just" who believed he was entitled to dispatch his wife (a "sinner.") Also, the jury might have understood that Mr. Docaj was the sinner whom the jury should dispatch with a guilty verdict. Whatever the prosecutor's intention and the jury's understanding, directing her witness to read from the psalm was completely inappropriate and introduced the potential for serious prejudice.

The ABA Standards explicitly provide that "any suggestion that the jury may base its decision on a 'higher law' than that of the court in which it sits is forbidden." "The obvious danger of such a suggestion is that the jury will give less weight to, or perhaps even disregard, the legal instructions given it by the trial judge in favor of the asserted higher law." Sandoval v. Calderon, 241 F.3d 765, 776 (9th Cir. 2000). The invocation of the Bible left no room for the defense of passion/provocation manslaughter. The Sixth Amendment guarantee of trial by jury ensures "that the evidence developed against a defendant shall come from the witness stand ... where there is full judicial protection of the defendant's right of confrontation [and] cross-examination[.]" Turner v. Louisiana, 379 U.S. 466, 472-73 (1965). A defendant cannot cross-examine a Biblical precept.

While defense counsel attempted to ameliorate the prejudice

by eliciting the fact that Psalm 37 was not the only psalm on the page from which the detective read the quotation selected by the prosecutor, defense counsel did not object to the recitation. Counsel's failure to object constituted ineffective assistance, and there is a reasonable probability the deficiency affected the outcome of the trial. Strickland, 466 U.S. at 687. In turn, the court also failed to take any action to correct the error. Farese v. United States, 428 F.2d 178 (5th Cir. 1970) ("The most general interpretation of a fair trial is that it be conducted before unprejudiced jurors under the superintendence of a judge who instructs them as to the law and advises them as to the facts.")

POINT VII

CERTIORARI SHOULD BE GRANTED SINCE TRIAL COUNSEL'S FAILURE TO REQUEST A COMPETENCY HEARING OR, IN THE ALTERNATIVE, REQUEST AN ADJOURNMENT OF THE CASE UNTIL PETITIONER WAS COMPETENT, ALONG WITH THE FAILURE TO OBJECT AT TRIAL TO THE ERRORS RAISED IN GROUNDS ONE, FOUR, FIVE AND SIX; ALONG WITH OTHER PRETRIAL, TRIAL, AND APPELLATE ERRORS, DEPRIVED PETITIONER OF THE EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Trial counsel's failure to object to the errors in Points I, IV, V, and VI violated Mr. Docaj's right to effective assistance of counsel. The District Court rejected this (Op. at 9; a42-43), and also found that Mr. Docaj failed to exhaust certain claims:

> In his PCR application, Petitioner alleged trial counsel was ineffective for failing to request a competency hearing or for an adjournment until Petitioner was competent to assist in his defense. (Answer, Ex. 7; ECF No. 10-7 at 4, Point I.) Petitioner also alleged counsel was ineffective for not insisting that an interpreter be present throughout the

> proceedings because Petitioner had a language barrier, and he lacked funds to hire an interpreter. (Id. at 5, Point IV.) Petitioner further contended that appellate counsel was ineffective for failing to raise ineffective assistance claims. (Id.)
>
> Petitioner procedurally defaulted these ineffective assistance of counsel claims by failing to raise them on appeal of the PCR Court decision. (Answer, Ex. 10, ECF No. 10-7 at 5-6, Points I and II.) A petitioner must exhaust all of his federal claims through one complete round of the State's appellate procedure. O'Sullivan, 526 U.S. at 845. It is now too late for Petitioner to appeal his abandoned PCR claims, and they are procedurally defaulted. Id. at 838 (failure to timely present federal habeas claims to State Supreme Court resulted in procedural default).
>
> Additionally, the Appellate Division affirmed the PCR Court's decision that New Jersey Rule 3:22-4 barred Petitioner from asserting ineffective assistance of counsel for failing to object to the prosecutor's summation because he could have raised, but failed to raise, the claim on direct appeal. (Answer, Ex. 7, ECF No. 10-7 at 7-8.) In any event, the Appellate Division correctly noted that counsel had objected to some of the comments Petitioner complained of, and the trial court gave appropriate instructions. (Id. at 8.) Therefore, Petitioner's ineffective assistance of counsel claim alternatively failed on the merits. (Id.) (Docaj District Court Opinion at 10; a43).

The District Court incorrectly concluded:

> Petitioner has not alleged an external impediment that might have prevented counsel from raising these claims on review. Furthermore, Petitioner has failed to offer any argument explaining how counsel's failure to appeal these issues rose to the level of ineffective assistance of counsel in violation of the Sixth Amendment. "Strickland makes clear, 'actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.'" Palmer v. Hendricks, 592 F.3d 386, 398 (3d

> Cir. 2010) (quoting Strickland, 466 U.S. at 693). Petitioner has not done so here. Therefore, the Court will deny Ground Seven of the petition. (Docaj District Court Opinion at 19-20; A20-21).

Here, the ineffectiveness claims (and prejudice therefrom) are clear on the face of the record: Competent trial counsel should have recognized that the passion/provocation manslaughter charge was legally incorrect (and logically confusing) (Point I) and, as discussed in Point IV, that N.J.R.E. 104(c) barred the court from instructing the jury that it had ruled on the defendant's Miranda claim. As discussed in Points V and VI, competent trial counsel should have objected when a prosecution witness repeatedly characterized the victim's death as murder and when a second prosecution witness was allowed to read to the jury from the defendant's Bible.

In addition, the following issues of ineffective counsel (both trial and appellate) were raised in the PCR application:

1) Trial counsel was ineffective in failing to request a competency hearing or, in the alternative, to request an adjournment of the case until Mr. Docaj was competent. Mr. Docaj was incapable of assisting trial counsel because he was so heavily medicated. In addition, due to Mr. Docaj's mental state, he could not testify in his own defense. The relevant medical records are included in the State's filing (Document 1-5, Filed 07/08/14, Pages 105 through 167; PageID: 395 through 457; Document 10-5 Page 92 of 200; PageID: 382).

2) The trial court erred by allowing a law enforcement

officer to interject his personal opinion with inadmissible hearsay. The detective who took Mr. Docaj's statement told the jury that Mr. Docaj was not telling the whole truth. (11T38-6 to 11). The trial judge's decision to overrule the objection deprived Mr. Docaj of his due process right to a fair trial.

3) The prosecutor engaged in prosecutorial misconduct by vouching for the credibility of State's witnesses.

4) Trial counsel was ineffective in failing to request expert services of an interpreter to assist in reading his discovery; in addition, trial counsel was ineffective for not insisting that there be an interpreter throughout the proceedings. Mr. Docaj lacked the capacity and ability to understand the proceedings due to the language barrier.

5) Mr. Docaj was denied effective assistance of appellate counsel who was ineffective in failing to argue that trial counsel was ineffective in failing to request expert services of an interpreter to assist Mr. Docaj in reading discovery.

Mr. Docaj, a layman, should not be penalized for trial counsel's and appellate counsels' errors. After trial, Mr. Docaj was represented by the Public Defender and he wrote to the OPD and Judge Roma expressing dissatisfaction (Pa116; Pa117 to 119).

As to "procedural default" even if a federal court determines that a claim has been defaulted, it may excuse the default upon a showing of "cause and prejudice" or a "fundamental miscarriage of justice." Lines v. Larkins, 208 F.3d 153, 166 (3d Cir. 2000). To satisfy the first reason for excuse, the

petitioner must show "some objective factor external to the defense [that] impeded . . . efforts to comply with the . . . procedural rule," as well as prejudice. Slutzker v. Johnson, 393 F.3d 373, 381 (3d Cir. 2004) (quoting Murray v. Carrier, 477 U.S. 478, 488, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)). To satisfy the second, the petitioner must typically show "actual innocence." Cristin v. Brennan, 281 F.3d 404, 420 (3d Cir. 2002). Any default should be excused since letting Mr. Docaj's conviction stand would result in a "fundamental miscarriage of justice."

"The Sixth Amendment guarantees to every criminal defendant 'the Assistance of Counsel for his defense.'" Saranchak v. Sec'y, Pa. Dep't of Corr., 802 F.3d 579, 586 (3d Cir. 2015), cert. denied sub nom. Saranchak v. Wetzel, 136 S.Ct. 1494 (2016). Federal courts have not hesitated to overturn convictions for ineffectiveness of counsel when so-called strategic trial decisions were based on inadequate or deficient pretrial investigation or preparation. See, Wiggins v. Smith, 539 U.S. 510, 536, 538, 123 S.Ct. 2527, 2543, 2544, 156 L.Ed.2d 471, 494, 495 (2003) (reversing denial of habeas petition and refusing to defer to attorneys' decisions because "counsel were not in a position to make a reasonable strategic choice" without reasonable investigation); Williams v. Taylor, 529 U.S. 362, 367, 396, 120 S.Ct. 1495, 1499, 1514, 1515, 146 L.Ed.2d 389, 402, 419, 420 (2000) reversing denial of habeas and finding that failure to conduct a thorough investigation, contact witnesses, and introduce helpful evidence constituted ineffective assistance);

United States ex rel. Hampton v. Leibach, 347 F.3d 219, 251-53, 255, 260 (7th Cir. 2003) (affirming grant of habeas on ineffective assistance grounds because counsel acted objectively unreasonably in failing to contact witnesses whose names defendant provided, and in failing to make an effort to locate other eyewitnesses); Lord v. Wood, 184 F.3d 1083, 1093, 1095 (9th Cir. 1999) (failure to conduct more than a "cursory investigation" of three potential witnesses, and to call them to the stand, "constitute[s] deficient performance" by counsel prejudicing defendant), cert. denied sub nom. Lambert v. Lord, 528 U.S. 1198, 120 S.Ct. 1262, 146 L.Ed.2d 118 (2000); Sanders v. Ratelle, 21 F.3d 1446, 1455-57 (9th Cir. 1994) (representation was ineffective because counsel "failed to conduct even the minimal investigation that would have enabled him to come to an informed decision about . . . whether to call" confessing witness, "did not attempt to obtain a statement from" the witness, and then "directed [the witness] to leave the courthouse as quickly as possible"). See United States v. Gray, 878 F.2d 702 (3d Cir. 1989) (Third Circuit overturned a possession of a firearm conviction because counsel's inadequate pretrial investigation violated right to assistance of counsel); Marshall v. Hendricks, 307 F.3d 36, 102, 109 (3d Cir. 2002) (overturning district court's rejection of a Strickland claim where defense attorney "fail[ed] to contact witnesses who were prepared and willing to provide relevant mitigating evidence" and the state court's opinion unreasonably "assume[d]} that counsel

had prepared and investigated"), cert. denied, 538 U.S. 911, 123 S.Ct. 1492, 155 L.Ed.2d 234 (2003). See United States v. Cronic, 466 U.S. 648 (1984); United States v. Cronic, 839 F.2d 1401 (10th Cir. 1988), held that defendant was denied effective assistance of counsel by trial counsel's failure to investigate the acceptance of security for an overdraft). See also Moore v. United States, 432 F.2d 730 (3d Cir. 1970) ("[t]he exercise of utmost skill during the trial is not enough if counsel has neglected the necessary investigation and preparation of the case or failed to interview essential witnesses or to arrange their assistance"; the Court held that where the question of identification was a fundamental issue in the case and appointed counsel conducted merely a cursory examination of an eyewitness as to the failure to identify the petitioner at a lineup, and did not call other eyewitnesses, and counsel had been appointed on the day before trial and allegedly did not adequately prepare for trial, a hearing was required on the claim of ineffective representation of counsel); Morrison v. Kimmelman, 752 F.2d 918 (3d Cir. 1985), certiorari granted, 106 S.Ct. 59, 88 L.Ed.2d 47, affirmed 106 S.Ct. 2574, 91 L.Ed.2d 305, on remand 650 F.Supp. 801 (1986) (the Court held that counsel was grossly ineffective due to the fact that he failed to conduct pretrial discovery and, accordingly, did not make a motion to suppress evidence, specifically, bed sheets); Taylor v. Hilton, 563 F.Supp. 913 (D.N.J. 1982) (Court found ineffectiveness and rejected counsel's contention at the competency hearing that the reasons he had not

investigated was because he believed his client's story; counsel failed to corroborate his client's story as to his whereabouts on the day of the crime, and his interviews with key state witnesses were "inexplicably brief and often nonexistent"); United States v. Gaviria, 116 F.3d 1498, 1512 (D.C. Cir. 1997) (counsel should have been aware of relevant legal decision); United States v. Kladouris, 739 F.Supp. 1221, 1227-28 (N.D.Ill. 1989) (counsel apparently unaware of applicable defense); United States v. Foster, 566 F.Supp. 1403, 1414 (D.D.C. 1983) (counsel deficient for failure to file viable suppression motion).

In Docaj, no conceivable trial strategy justified counsel's failure to raise the above claims; his numerous omissions were not the product of reasonable professional judgment. Strickland, 466 U.S. at 689; State v. Fritz, 105 N.J. 42 (1987)

POINT VIII

CERTIORARI SHOULD BE GRANTED SINCE THE TRIAL WAS SO RIDDLED WITH ERRORS THAT THEIR CUMULATIVE EFFECT RENDERED THE TRIAL UNFAIR IN VIOLATION OF PETITIONER'S SIXTH AMENDMENT RIGHT TO A FAIR TRIAL AND FOURTEENTH AMENDMENT RIGHT TO DUE PROCESS OF LAW

As explained in Collins v. Sec'y of Pennsylvania Dep't of Corr., 742 F.3d 528 (3d Cir. 2014), cumulative ineffective assistance of counsel claims are standalone constitutional claims. Federal courts may review these claims on habeas even where individual errors, on their own, would not satisfy Strickland. See Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008).

Each of the errors raised in Points I through VII is of sufficient magnitude to warrant issuance of the writ. In

addition, Detective Christiana testified that he had taken notes of his interview with Mr. Docaj and later destroyed them (4T58-19 to 61-25; "Q . . . and the notes that you took during that period of time have been discarded; is that right? A Yes.; 4T100-7 to 10). During direct examination, the following occurred:

> Q Okay. And whatever – during –- throughout the course of this report, was there a particular way in this report being S-7 that you would memorialize things that the defendant said to you?
> A Yes.
> Q How did you do that?
> A On a notepad.
> Q No. Right. Well, you had a notepad with you that night. And just so the record's clear, what became of the notes?
> A They were discarded because everything in my notes was – was placed into my interview report. (3T104-17 to 105-3).

On redirect, the following occurred:

> Q And is it your practice to always discard the notes once the report has been done, a report in any case?
> A Once it's complete.
> Q Once it's complete. (4T151-18 to 22).

In State v. W.B., 205 N.J. 588 (2011), the New Jersey Supreme Court left no doubt that law enforcement officers must preserve their handwritten interview notes even before the State is required to tender discovery to the defense under R. 3:13-3.[15]

Even if this court does not find that any one error alone

[15] In State v. Dabas, 215 N.J. 114 (2013), the New Jersey Supreme Court held the prosecutor violated the clear rule governing post-indictment discovery by failing to give to defense investigator's notes of statements made by defendant; the error in failing to give an adverse-inference charge was clearly capable of producing an unjust result, and defendant's murder conviction was reversed.

warrants issuance of the habeas writ, it should find that their cumulative effect undermined Mr. Docaj's constitutional right to due process and a fair trial mandating its issuance. See State v. Jenewicz, 193 N.J. 440, 474 (2008) ("the errors' cumulative impact prejudiced the fairness of defendant's trial and, therefore, casts doubt on the propriety of the jury verdict that was the product of that trial"); State v. Orecchio, 16 N.J. 125 (1954) (reversed due to cumulative effect).

The District Court rejected Mr. Docaj's contention, stating:

> The Appellate Division reasonably concluded that if Petitioner was not prejudiced by any of the individual alleged trial errors, he could not have been prejudiced based on cumulative errors . . . because the evidence strongly supported a finding that Petitioner went to his wife's home that evening with the intent of killing her. (Docaj District Court Opinion at 11; a44).

The District Court (and Third Circuit's) decisions are contrary to this Court's holdings in Strickland and Cronic.

CONCLUSION

For the foregoing reasons and authorities cited, the petitioner Jerry Docaj respectfully requests this Court grant the petition for a writ of certiorari.

Respectfully submitted,

BY: _*/s/ John Vincent Saykanic*
Attorney (Pro Bono) for
Petitioner Jerry Docaj

Dated: August 18, 2018

CERTIFICATION OF SERVICE

I, John Vincent Saykanic, Esq., hereby certify that on August 18, 2018, as required by Supreme Court Rule 29, I have served three copies of the attached Motion for Leave to Proceed In Forma Pauperis and Petition for a Writ of Certiorari on each party to the above proceeding by depositing an envelope containing the above documents in the United States Mail properly addressed. The name and address of those served is:

William Miller, Assistant
Bergen County Prosecutor
Justice Center
10 Main Street
Hackensack, New Jersey 07601

Dated: August 18, 2018 BY: */s/ John Vincent Saykanic*
John Vincent Saykanic

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.2(b) I certify that the petition for certiorari is 40 pages, excluding the parts of the petition that are exempted by Supreme Court Rule.

Dated: August 18, 2018 BY: */s/ John Vincent Saykanic*
John Vincent Saykanic

a1

2009 WL 1451341
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Gjelosh DOCAJ, a/k/a Jerry Docaj, a/k/a Jerry Docoj, Defendant–Appellant.

Submitted March 31, 2009.
Decided May 27, 2009.

West KeySummary

Change View

1 **Criminal Law** Elements and incidents of offense; definitions
Homicide Passion or provocation
Error in jury charge for passion/provocation manslaughter was harmless. Defendant was correct in arguing that the jury charge contained an error. The error was that the charge stated that the State's burden was to prove that the period of time was "inadequate" for the return of a reasonable's person's self-control. However, as correctly noted elsewhere in the charge, the State's burden was to prove that the period of time was "adequate" for the return of a reasonable person's self-control. Within the context of the trial, the error did not have the clear capacity to lead the jury to convict the defendant of murder, when it would not have otherwise been reached.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 03–07–01477.

Attorneys and Law Firms

Yvonne Smith Segars, Public Defender, attorney for appellant (Marcia Blum, Assistant Deputy Public Defender, of counsel and on the brief).

John L. Molinelli, Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Senior Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

Before Judges SKILLMAN, GRAVES and ESPINOSA.

Opinion

*1 The opinion of the court was delivered by

ESPINOSA, J.S.C. (temporarily assigned).

Defendant Gjelosh Jerry Docaj was convicted of the purposeful or knowing murder of his wife, Kathy Docaj, in violation of *N.J.S.A.* 2C:11–3(a)(1) or (2); possession of a firearm for an unlawful purpose, in violation of *N.J.S.A.* 2C:39–4(a); and third degree unlawful possession of a handgun without a lawful permit, in violation of *N.J.S.A.* 2C:39–5(b). He was sentenced to life imprisonment on the murder conviction and concurrent terms for the other charges. The term of life imprisonment equates to seventy-five years in prison and, pursuant to the No Early Release Act, *N.J.S.A.* 2C:43–7.2, a parole-ineligibility period of sixty-three years and nine months.

Defendant appeals his convictions and his sentence. We affirm the convictions but remand for resentencing.

Defendant and Kathy Docaj, nee Visita Zadrima, were wed in Yugoslavia in 1983 in an arranged marriage. Kathy had lived in the United States since the age of nine and returned to America shortly after the wedding. Defendant, an Albanian national, followed soon thereafter. They had three children and eventually settled in Lodi, New Jersey. At the time of Kathy's death in February 2003, their son, Christopher, was eighteen years old, their daughter, Christina, was fifteen years old and their younger daughter was nine years old.

Kathy was employed as a concierge at a business in Manhattan near the Battery Park ferry terminus. Defendant worked in air conditioner and refrigeration maintenance at a building in Manhattan. In the latter part of 2002, Kathy became acquainted with Robert Narciso, who also used the ferry to commute to Manhattan. Initially platonic, their relationship grew closer over several months. In mid-December 2002, Kathy told defendant that she no longer loved him. At Kathy's request, defendant moved out of the marital home to an apartment in Lodi in January 2003.

Approximately ten years earlier, defendant purchased a .38 caliber handgun, which he kept in a shoe box under his bed. At the time that he was moving out, he and Kathy discovered that Christopher had removed the gun some months earlier and kept it, unloaded, in his room since that time. Defendant took the handgun with him when he moved out.

Defendant began to suspect that Kathy was "cheating on him" and later told police that he saw her leaving her place of employment with "her boss." On February 7, 2003, Kathy telephoned defendant and told him that she was meeting a lawyer that day to prepare papers to file for divorce. Defendant's diary reflects that he begged her not to divorce him and that she replied, "[T]his thing has to be done." Kathy met with the lawyer and a complaint for divorce on the grounds of extreme cruelty was drafted.

Defendant and Kathy alternated weekends with the children. It was defendant's turn to spend the weekend of February 8 and 9 with the children. Narciso, a divorced father of two daughters, also alternated weekend child care with his wife. As a result, Kathy and Narciso were able to spend that weekend together. Kathy told defendant and her children that she was spending the weekend in Atlantic City with friends. Defendant wrote in his diary, "There's no way I understand how can a person who has been in love with her husband for 19 years can do something like this and go to Atlantic City to celebrate or for any other reason."

*2 Defendant's diary also recorded his reaction to Kathy's failure to give him anything for his birthday on February 12: "My wife bought me nothing, I will remember this because one day by the power of God it will come that I will remember that day."

He bought a birthday cake, flowers and a card for Kathy for her birthday two days later. Around this time, Kathy told defendant that she had "another man lined up." Defendant also noticed her wearing jewelry that he had never seen before.

On February 17, 2003, Narciso received a telephone call from a man speaking English with a foreign accent who would not identify himself. In their brief conversation, Narciso commented that the caller knew more about him than he did about the caller. When Narciso asked for the caller's telephone number, the caller hung up.

It is reasonable to infer that defendant placed this call to Narciso. Christopher had noticed that Kathy was spending "too much" time on the telephone and used the "Star sixty-nine" feature to learn what number she was calling. He provided the number, which was Narciso's, to his father. A paper with Narciso's telephone number was found among the defendant's possessions by the police after his arrest.

Kathy and Narciso planned to spend the weekend of February 22 together. Their plans had to change when defendant told her that he had to work on Saturday and Kathy would have to care for the children. Defendant also told Kathy that he wanted to meet

and talk to her. When she told him that she would not be coming home on Friday, he asked her why. She replied, "I'll come home when I want to."

Kathy spent Friday, February 21, 2003, with Narciso at his apartment. He dropped her off one block from her home on Saturday in the early afternoon.

Defendant spent Friday night with his children. He awakened around 4:00 a.m. on Saturday and left for his apartment at approximately 6:00 a.m. After changing clothes, he took a book bag containing the .38 caliber handgun with him to work and stored the book bag in his locker.

While at work on Saturday, February 22, 2003, defendant called the marital home twice. Kathy was not home until his second call. Defendant asked her, "How was your night out at the club?" Kathy told him that she had been out until 3:00 or 4:00 a.m. When defendant said that he would see her later at the marital home, she replied, "Whatever." According to her daughter, Kathy was not looking forward to defendant's visit.

Defendant left work at approximately 6:00 p.m., carrying the book bag with the .38 caliber handgun with him to his apartment. He removed the handgun from the book bag, placed it in the waistband of his trousers underneath a vest, and proceeded to the marital home.

Defendant entered the home on the lower level. Kathy was present on that level with their three children and two friends of the children. Defendant and Kathy went upstairs to the kitchen, where they sat, drinking coffee and smoking. When Christopher came to the kitchen to use the telephone, defendant asked Kathy to go to the bedroom because "he wanted to talk to her about something." Defendant walked to the bedroom and Kathy followed him. The door closed and was locked.

*3 Within a minute, Christopher heard his parents screaming and cursing, as well as noises of pushing and shoving. Then, he heard his mother scream and a single "boom." Christopher ran to the bedroom, trying unsuccessfully to open the door. He began screaming, "Open the door, open the door." Defendant opened the door and, white-faced, immediately said, "I'm sorry, I'm sorry." Defendant blocked Christopher from entering the room but Christopher was able to see his mother lying, bloody, on the floor. Drawn by the sounds, Christina came upstairs where she saw defendant and Christopher struggling and arguing. Defendant told Christina "she cheated on me for two years" and "she's gone." He continued to block Christina and Christopher from entering the bedroom.

Christina dialed "911" and asked for an ambulance, stating that she thought her mother was dead. Defendant can be heard on the tape recording of this conversation, yelling loudly, "She was cheating on me," "She was f—king cheating on me," "She was cheating on me for one year." A second call to "911" was made by Christopher, urgently requesting help.

Two policemen from the Lodi Police Department arrived to find Kathy lying in a pool of blood on the bedroom floor and a revolver resting on the lower end of the bed. Christopher was irate and about to walk out of the home. Defendant was in a daze, walking aimlessly in circles. Uncertain as to what had transpired, the police handcuffed both Christopher and defendant for "safety" reasons. Defendant was advised that he was not under arrest; he was not given *Miranda*[1] warnings and was not questioned by the police at this time.

Later investigation revealed that Kathy died from a single gunshot wound that entered the back of her head and exited from her forehead. The .38 caliber handgun found on the bed had been pressed loosely against the back of her skull when it was fired. The medical examiner testified that she was not standing but was "positioned low" in relation to the shooter when she was shot.

Defendant gave a statement to the police and described what happened in the bedroom. He admitted that he had the gun with him when they went into the bedroom but denied

that he had gone to the house with the intent to kill Kathy. He said that in the bedroom, he begged her to stay together for the children and that he would "forgive [her] to this point." He stated that Kathy was sitting on the bed and looked angry, "as if she really wasn't hearing it, that she didn't want to hear it." According to defendant, Kathy said, the "only thing you're getting are your walking papers." She struck him just once, "hit [ting] him on the left side of his face right by his mouth." He said, "Things went dark." He pushed Kathy downward with his left arm and tried to catch her with his right hand when it appeared that she might strike her face on the floor. He admitted that he had the handgun in his hand as he tried to grab her, but he did not remember withdrawing the handgun from his waistband, pulling the trigger, or what he did with the handgun after shooting Kathy.

*4 Defendant raises the following points on appeal:

POINT I

THE INSTRUCTION ON PASSION/PROVOCATION MANSLAUGHTER MISSTATED THE LAW. (Not Raised Below)

POINT II

IN HER OPENING STATEMENT, THE PROSECUTOR IMPROPERLY URGED THE JURY TO CONSIDER "THIS ... A TRIAL TO SEEK JUSTICE OF [SIC] HER DEATH."

POINT III

THE DETECTIVE WHO INTERROGATED DEFENDANT REPEATEDLY TESTIFIED THAT DEFENDANT "WAS NOT TELLING THE WHOLE TRUTH" AND "WAS TRYING TO HIDE SOME THINGS."

POINT IV

THE COURT TOLD THE JURY, WITH RESPECT TO THE ADMISSION OF DEFENDANT'S STATEMENT, THAT IT HAD ALREADY RULED ON "THE QUESTION OF MIRANDA RIGHTS." (Not Raised Below)

POINT V

THE EMERGENCY–MEDICAL TECHNICIAN REPEATEDLY CHARACTERIZED THE SHOOTING AS A "MURDER." (Not Raised Below)

POINT VI

THE POLICE DETECTIVE READ A PASSAGE FROM A BIBLE FOUND DURING THE SEARCH OF DEFENDANT'S HOME. (Not Raised Below)

POINT VII

DEFENSE COUNSEL'S FAILURE TO OBJECT AT TRIAL TO THE ERRORS RAISED IN POINTS I, IV, V, AND VI DEPRIVED DEFENDANT OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

POINT VIII

THE TRIAL WAS SO RIDDLED WITH ERRORS THAT THEIR CUMULATIVE EFFECT RENDERED THE TRIAL UNFAIR.

POINT IX

A LIFE TERM, WHICH IS THE MAXIMUM SENTENCE AND WHICH CARRIES A MANDATORY PAROLE DISQUALIFIER OF MORE THAN 63 YEARS, IS GROSSLY EXCESSIVE.

In a pro se supplemental brief, defendant argues that the passion/provocation manslaughter charge constituted reversible error because the trial court should have instructed the jury "that the State can only prove murder if it proves the absence of

passion/provocation first" and because an instruction should have been given, pursuant to *State v. Guido*, 40 *N.J.* 191, 191 A.2d 45 (1963), that a "course of ill treatment" can provide the basis for adequate provocation. In addition, defendant contends that his *Miranda* rights were violated because the warnings were not given in a timely manner and interrogation continued when he was falling asleep.

The issues raised by defendant in his supplemental brief lack sufficient merit to warrant discussion in a written opinion, *Rule* 2:11–3(e)(2), beyond the following brief comments. First, the jury was properly instructed that to find the defendant guilty of murder "the State must prove beyond a reasonable doubt ... that defendant did not act in the heat of passion resulting from a reasonable provocation." The *Guido* instruction was not available to defendant as it was undisputed that there had been no physical abuse in the marriage by either party before Kathy was killed. *State v. Harris*, 141 *N.J.* 525, 572, 662 A.2d 333 (1995); *State v. Lamb*, 71 *N.J.* 545, 551, 366 A.2d 981 (1976); *State v. Darrian*, 255 *N.J.Super.* 435, 450–52, 605 A.2d 716 (App.Div.), *certif. denied*, 130 *N.J.* 13, 611 A.2d 651 (1992). As to defendant's *Miranda* arguments, the record shows that defendant was not interrogated until after he was given *Miranda* warnings and that questioning was stopped to provide him an opportunity to rest.

I.

*5 We address first the passion/provocation manslaughter jury charge, an issue raised for the first time on appeal. *State v. Mauricio*, 117 *N.J.* 402, 411, 568 A.2d 879 (1990), identifies the four factors that must be present for a murder to be reduced to a passion/provocation manslaughter:

> [T]he provocation must be adequate; the defendant must not have had time to cool off between the provocation and the slaying; the provocation must have actually impassioned the defendant; and the defendant must not have actually cooled off before the slaying.

The trial court provided the jury with the model jury charge on passion/provocation manslaughter current at the time the instruction was given. Defendant is correct in stating that the model jury charge contained an error. In one of four statements regarding the State's burden of proof as to the adequacy of the cooling-off period, the charge stated,

> In other words, you must determine whether the State has proven that the time between the provoking event and the acts which caused death was *inadequate* for the return of a reasonable person's self-control.
>
> [(Emphasis added.)]

As correctly noted elsewhere in the charge, the State's burden was to prove that the period of time was "adequate" for the return of a reasonable person's self-control. The question here is whether, within the context of the trial, that error had the clear capacity to lead the jury to convict the defendant of murder, "a result it otherwise might not have reached." *State v. Jordan*, 147 *N.J.* 409, 422, 688 A.2d 97 (1997) (quoting *State v. Macon*, 57 *N.J.* 325, 336, 273 A.2d 1 (1971)). After reviewing the charge in its entirety, the evidence, the arguments of counsel and the questions asked by the jury, we conclude that the error was harmless.

Pursuant to *Rule* 1:7–2, defendant's failure to object constitutes a waiver of his right to challenge that instruction on appeal.[2] However, mindful of the principles that "appropriate and proper jury charges are essential to a fair trial," *State v. Savage*, 172 *N.J.* 374, 387, 799 A.2d 477 (2002), and are even more critical in criminal cases, *Jordan, supra*, 147 *N.J.* at 422, 688 A.2d 97, we review the charge to determine whether there was plain error clearly capable of producing an unjust result. *R.* 2:10–2; *State v. Afanador*, 151 *N.J.* 41, 54, 697 A.2d 529 (1997).

Even in a criminal prosecution, the mere fact of error does not require reversal. To constitute plain error, the error must be: "[L]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous

to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." *State v. Hock*, 54 *N.J.* 526, 538, 257 A.2d 699 (1969), *cert. denied*, 399 *U.S.* 930, 90 *S.Ct.* 2254, 26 *L. Ed.*2d 797 (1970). The possibility of an unjust result must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." *State v. Taffaro*, 195 *N.J.* 442, 454, 950 A.2d 860 (2008); *Jordan, supra*, 147 *N.J.* at 422, 688 A.2d 97; *Macon, supra*, 57 *N.J.* at 336, 273 A.2d 1. In short, the question here is whether the error made it easier for the State to get a conviction for murder as opposed to passion/provocation manslaughter. *See State v. N.I.*, 349 *N.J.Super.* 299, 315–16, 793 A.2d 760 (App.Div.2002).

***6** To make that evaluation, we review the error within the context of both the charge itself and the evidence and arguments presented at trial.

A. *The charge.*

When the error alleged concerns only a portion of a charge, the challenged portion is not to be "dealt with in isolation but the charge should be examined as a whole to determine its overall effect ." *State v. Wilbely*, 63 *N.J.* 420, 422, 307 A.2d 608 (1973). *See also State v. Delibero*, 149 *N.J.* 90, 106, 692 A.2d 981 (1997).

The instruction on passion/provocation manslaughter was immediately preceded by the model jury charge for murder. In addition to the elements regarding causation and intent, the jury was told, "The third element that the State must prove beyond a reasonable doubt to find the defendant guilty of murder is that defendant did not act in the heat of passion resulting from a reasonable provocation." The passion/provocation manslaughter charge followed:

> Passion/provocation manslaughter is a death caused purposely or knowingly that is committed in the heat of passion resulting from a reasonable provocation. Passion/provocation manslaughter has four factors which distinguish it from murder. *In order for you to find the defendant guilty of murder, the State need only prove the absence of any one of them beyond a reasonable doubt.*
>
> The four factors are:
>
> Number one, there was adequate provocation;
>
> Number two, the provocation actually impassioned defendant;
>
> *Number three, the defendant did not have a reasonable time to cool off between the provocation and the act which caused death;* and
>
> Four, the defendant did not actually cool off before committing the act which caused death.
>
> The first factor you must consider is whether the State has proven beyond a reasonable doubt that the provocation was not adequate. Whether the provocation is inadequate essentially amounts to whether loss of self-control is a reasonable reaction to the circumstance.
>
> In order for the State to carry its burden, it must prove beyond a reasonable doubt that the provocation was not sufficient to arouse the passions of an ordinary person beyond the power of his control. For example, words alone do not constitute adequate provocation. On the other hand, a threat with a gun or knife or a significant physical confrontation might be considered adequate provocation. Again, the State must prove that the provocation was not adequate.
>
> The second factor you must consider is whether the State has proven beyond a reasonable doubt that the defendant was not actually impassioned; that is, he did not actually lose his self-control.
>
> The third factor you must consider is *whether the State has proven beyond a reasonable doubt that the defendant had a reasonable time to cool off.* In other words, you must determine whether the State has proven that the time between the

provoking event and the acts which caused death was *inadequate* for the return of a reasonable person's self-control.

*7 The fourth factor you must consider is whether the State has proven beyond a reasonable doubt that the defendant actually did cool off before committing the acts which caused death; that is, that he was no longer actually impassioned.

If you determine that the State has proven beyond a reasonable doubt that there was not an adequate provocation or that the provocation did not actually impassion the defendant or *that defendant had a reasonable time to cool off,* or that defendant actually cooled off, and in addition to proving one of those factors you determine that the State has proven [the elements of murder] you must find the defendant guilty of murder.

On the other hand, [if] you determine that the State has not disproved at least one of the factors of passion/provocation manslaughter beyond a reasonable doubt, but that the State [has proven the elements of murder] then you must find him guilty of passion/provocation manslaughter.

[(Emphasis added.)]

A review of the charge therefore reveals that all four *Mauricio* factors were accurately introduced to the jury. *See Mauricio, supra,* 117 *N.J.* at 411–13, 568 A.2d 879. The third factor regarding the adequacy of the cooling-off period was stated correctly a second time. It was in recasting that factor "in other words" that the error was made. However, the court correctly summed up the State's burden as to murder and passion/provocation manslaughter thereafter:

If you determine that the State has proven beyond a reasonable doubt that there was not an adequate provocation or that the provocation did not actually impassion the defendant or *that defendant had a reasonable time to cool off,* or that defendant actually cooled off, and in addition to proving one of those factors you determine that the State has proven [the elements of murder] you must find the defendant guilty of murder.

[(Emphasis added.)]

Therefore, of the four references to the third factor and the State's burden, one was erroneous and three were correct. This was, then, an error that was isolated rather than pervasive in the charge. *Compare State v. Martini,* 187 *N.J.* 469, 478–80, 901 A.2d 941 (2006), *cert. denied,* 549 *U.S.* 1223, 127 *S.Ct.* 1285, 167 *L. Ed.*2d 104 (2007), *with State v. Rodriguez,* 195 *N.J.* 165, 171, 949 A.2d 197 (2008).

In *Martini,* the Court reviewed a similarly isolated error in the *Judges Bench Manual for Capital Causes.* Following the charge in the *Manual,* the trial court incorrectly instructed the jury that it had to find the mitigating factors unanimously. *Martini, supra,* 187 *N.J.* at 476, 901 A.2d 941. The Supreme Court viewed the instructions to the jury in their entirety, which included a curative instruction given after objection by counsel. *Id.* at 480, 901 A.2d 941. Satisfied that "the instruction properly conveyed to the jury that each juror must individually determine whether a mitigating factor exists," the Court found no prejudicial error. *Id.* at 478–80, 901 A.2d 941. Quoting from its consideration of similar arguments in *State v. Loftin,* 146 *N.J.* 295, 375–76, 680 A.2d 677 (1996), the Court recognized that " '[v]iewed in isolation, the single remark ... might suggest that the preferred result is a unanimous conclusion concerning the existence or non-existence of a mitigating factor,' ... but that 'when the isolated remark is viewed in the context of the charge as a whole, it is clear that there was no error.' " *State v. Martini, supra,* 187 *N.J.* at 478–79, 901 A.2d 941.

*8 Similarly, the error here was but one iteration imbedded in a charge that contained three entirely correct articulations of the State's burden regarding the third factor. In both describing the elements of murder and in summing up the State's burden as to the factors of passion/provocation manslaughter, the charge clearly conveyed the State's burden of proof. Specifically, the jury was instructed three times that, as to this factor,

the State's burden was to prove beyond a reasonable doubt "that defendant had a reasonable time to cool off." The isolated error's capacity to dispel that overall effect was minimal, at best.

B. *The evidence and arguments at trial.*

Reviewing an error in jury instructions within the context of the trial, our courts have found the following factors significant: (1) the nature of the error and its materiality to the jury's deliberations, *compare Jordan, supra,* 147 *N.J.* at 422, 688 A.2d 97, *with State v. Jackson,* 289 *N.J.Super.* 43, 54, 672 A.2d 1254 (App.Div.1996), *certif. denied,* 148 *N.J.* 462, 690 A.2d 609 (1997); (2) the strength of the evidence against the defendant, *see Jordan, supra,* 147 *N.J.* at 426, 688 A.2d 97; *compare State v. Heslop,* 135 *N.J* . 318, 639 A.2d 1100 (1994), *with State v. Lawton,* 298 *N.J.Super.* 27, 688 A.2d 1096 (App.Div.), *certif. denied,* 151 *N.J.* 72, 697 A.2d 545 (1997); (3) whether the potential for prejudice was exacerbated or diminished by the arguments of counsel, *see Jordan, supra; Wilbely, supra,* 63 *N.J.* at 422, 307 A.2d 608; (4) whether any questions from the jury revealed a need for clarification, *see Savage, supra,* 172 *N.J.* at 393–95, 799 A.2d 477; and (5) the significance to be given to the absence of an objection to the charge at trial, *see Macon, supra,* 57 *N.J.* at 341, 273 A.2d 1.

Errors in the jury instruction "on matters or issues that are material to the jury's deliberation are presumed to be reversible error." *Jordan, supra,* 147 *N.J.* at 422, 688 A.2d 97. A presumption of reversible error does not apply here because whether the defendant had "a reasonable time to cool off" was not "crucial to the jury's deliberations on the guilt of [the] defendant." *Ibid.* A review of the arguments made by the prosecutor and defense counsel clearly shows that the key *Mauricio* factor for both sides was whether there was adequate provocation to remove this case from murder.

The measure of adequate provocation is whether "loss of self-control is a reasonable reaction" to the provocation. *Mauricio, supra,* 117 *N.J.* at 412, 568 A.2d 879.

> That test is purely objective, because the provocation must be 'sufficient to arouse the passions of an ordinary [person] beyond the power of his ... control.' ... The provocation must be severe enough that the 'intentional homicide may be as much attributable to the extraordinary nature of the *situation* as to the moral depravity of the actor.'
>
> [*Ibid.* (Citations omitted) (Emphasis added).]

Having no evidence of any physical provocation that could rise to such a level, the defense highlighted defendant's continuing and escalating emotional state throughout the month of February. Defense counsel's summation emphasized the defendant's enduring "emotional swirl" that allowed him to lose control:

> *9 Ladies and gentlemen of the jury, once again, please, I do not for one moment suggest that a slap of a person justifies the taking of a life. But after years of marriage, after week—months, weeks, days and hours of confusion, after being told you're out of here, you'll get your walking papers, that I have another man lined up, that that conversation there punctuated now by the first form of physical violence may, in fact, be the adequate provocation that churns this to the heat that—that this—that this killing was done in the heat of the passion, a loss of self-control, a passion/provocation manslaughter.

Since defense counsel conceded to the jury that a slap did not constitute adequate provocation, the question whether an adequate time to cool off passed between the slap and the gunshot was irrelevant to the jury's deliberations.

In her summation, the prosecutor declared that this was a deliberate murder. Stating that "there is no adequate provocation in this case," she plainly targeted that factor as the one the State had proven was absent:

> If the State need only prove the absence of just one [factor], what that means is if you ... determine that there was no adequate provocation,

> defendant cannot be found guilty of passion/provocation manslaughter. He must be found guilty of murder.

Therefore, both the State and the defense clearly represented "adequate provocation" as the crucial issue for the jury's determination in considering passion/provocation manslaughter rather than whether defendant had a reasonable time to cool off.

The relative strength of the evidence of passion/provocation manslaughter weighs heavily in determining whether the error "led the jury to a result it otherwise might not have reached." *See Macon, supra,* 57 *N.J.* at 325, 273 A.2d 1. In *Heslop, supra,* 135 *N.J.* at 327, 639 A.2d 1100, the Supreme Court observed that it was "not faced with overwhelming evidence of passion/provocation as the singular and distinctive factor that led to the killing." The charge contained two significant errors: the "sequential error" condemned in *State v. Coyle,* 119 *N.J.* 194, 574 A.2d 951 (1990), and the failure to explicitly charge that the State bore the burden of proving the absence of passion/provocation beyond a reasonable doubt as required by *State v. Erazo,* 126 *N.J.* 112, 594 A.2d 232 (1991).[3] Despite the significance of these flaws, the Court found that the weakness of the case for passion/provocation manslaughter "militate[s] strongly against the actuality of prejudice that may have emanated from the somewhat maladroit instructions on that charge." *Heslop, supra,* 135 *N.J.* at 327, 639 A.2d 1100. The Court concluded that "a review of the factual record [did] not suggest the likelihood that the court's [charge] resulted in or contributed to an improper verdict." *Id.* at 328, 639 A.2d 1100. In contrast, in a "close" case, the presence of the same errors constituted reversible error. Lawton, *supra,* 298 *N.J.Super.* at 39, 688 A.2d 1096.

*10 The lack of proof of adequate provocation posed a critical weakness in the passion/provocation manslaughter evidence here. Adequate provocation is not satisfied by "words alone, no matter how offensive or insulting." *State v. Crisantos,* 102 *N.J.* 265, 274, 508 A.2d 167 (1986). A wife's repeated threats to kill her husband and burn the house down were deemed insufficient to warrant a passion/prejudice manslaughter instruction in *State v. Rambo,* 401 *N.J.Super.* 506, 951 A.2d 1075 (App.Div.), *certif. denied,* 197 *N.J.* 258, 962 A.2d 529 (2008). Similarly, Kathy's statements that she wanted a divorce and had "another man lined up" fail to meet the standard.

Defendant's claim that Kathy slapped him does not add substantial weight to a claim of passion/provocation. Although perhaps sufficient to warrant the instruction,[4] the evidence of an alleged slap was conceded to be insufficient to constitute adequate provocation. Even in instances of "mutual combat," the defendant's response must be proportionate to the provocation. *State v. Oglesby,* 122 *N.J.* 522, 536, 585 A.2d 916 (1991) (single blow by an unarmed woman was insufficient provocation to warrant an instruction on passion/provocation manslaughter); *State v. Crisantos, supra,* 102 *N.J.* at 280, n. 12, 508 A.2d 167; *State v. Darrian, supra,* 255 *N.J.Super.* at 449, 605 A.2d 716.

> [T]he contest must have been waged on equal terms and no unfair advantage taken of the deceased.... The offense is not manslaughter but murder where the defendant alone was armed; and took an unfair advantage of the deceased.... [I]f a person, under color of fighting on equal terms, kills the other with a deadly weapon which he used from the beginning or concealed on his person from the beginning, the homicide constitutes murder.
>
> [*Crisantos, supra,* 102 *N.J.* at 274–275, 508 A.2d 167 (citations omitted).]

Defendant brought a concealed and loaded handgun to the home that night. His response to his wife's refusal to abandon divorce proceedings, and even her slap, was wholly disproportionate to any provocation. As in *Heslop, supra,* 135 *N.J.* at 327, 639 A.2d 1100, the strength of the evidence supporting the State's theory that this was a deliberate murder "strongly militates against" a conclusion that the error in the charge contributed to a verdict that the jury might not otherwise have reached.

Turning to the prosecutor's summation, the prosecutor accurately identified all four *Mauricio* factors, including the third factor, and the fact that the State had to prove the

absence of one beyond a reasonable doubt to sustain a murder conviction. Therefore, the summation did not exacerbate the error in the charge, but rather, added further to the "overall effect" of a charge that properly conveyed the State's burden of proof.

Our review of the jury's questions reveals no indication that the jury was misled by the error. Unlike *Savage, supra*, 172 *N.J.* at 393–95, 799 A.2d 477, none of the jury's questions or requests suggested any confusion as to what the State had to prove beyond a reasonable doubt regarding passion/provocation manslaughter in order to secure a conviction for murder.

*11 The lack of prejudicial impact is further evinced by the absence of an objection. *See Macon, supra*, 57 *N.J.* at 341, 273 A.2d 1 ("failure to object may suggest the error was of no moment in the actual setting of the trial"). The one-word error was imbedded in the model jury charge that trial courts are required to read to juries:

> [M]odel jury charges should be followed and read in their entirety to the jury. The process by which model jury charges are adopted in this State is comprehensive and thorough; our model jury charges are reviewed and refined by experienced jurists and lawyers.
>
> [*State v. R.B.*, 183 *N.J.* 308, 325, 873 A.2d 511 (2005).]

Certainly, trial courts and counsel must review charges for potential error, even in model jury charges. However, this error was one word that was literally buried in a charge that was otherwise correct. The error went unnoticed by the "experienced jurists and lawyers" who "reviewed and refined" the charge, *ibid.*, as well as the trial court and counsel here.[5] We conclude that the failure to object here reflected the obscure nature of the error and that it is more likely that the jury also depended upon the overall, correct expressions of the controlling legal principles rather than the one erroneous statement here.

In summary, we find that the error here was an isolated occurrence in a charge that repeatedly stressed the State's burden to prove the absence of one of the factors of passion/provocation manslaughter beyond a reasonable doubt. The prosecutor specifically targeted "adequate provocation" as the factor the State had proven was not present. The evidence and arguments of counsel clearly show that the adequacy of any cooling-off period was not a crucial issue regarding passion/provocation manslaughter. Moreover, the evidence regarding passion/provocation manslaughter was relatively weak. Finally, the prosecutor's summation did not exacerbate the error but, rather, diminished it. Accordingly, we conclude that the error in the charge did not lead the jury to a verdict that it otherwise might not have reached.

II.

Defendant also contends that statements made by Detective Christiana constituted improper opinion testimony regarding his truthfulness. The statements were not made to the jury as an expression of the detective's belief in the defendant's overall truthfulness or guilt. Instead, they were provided as part of a detailed description of the exchanges between Detective Christiana and defendant during his interrogation.

Detective Christiana testified that, in his interview, defendant was able to recall the details of all that occurred on February 21 and 22, except for shooting his wife. He remembered bringing the handgun to the house, sitting at the kitchen table with Kathy, asking her to go to the bedroom to continue the discussion, that Kathy sat on the bed while he stood over her, begging her to return to him and that she slapped him in the face. Thereafter, defendant claimed that things "went dark" and he could provide no details. When defendant denied entering the house with the intent to kill his wife, Detective Christiana testified that he told defendant that he did not think he was telling the whole truth. This drew an objection, which was overruled. Detective Christiana continued to describe the interview. He testified that, in attempting to elicit more information, he told defendant that he was trying to hide some things and if the shooting was an accident, he should be honest and tell the truth. Defendant continued to deny any memory of what happened. Detective Christiana testified that he told

defendant that it was not reasonable for him to recall everything that happened until he entered the bedroom, to fire the gun and not remember the incident or hear the shot. Defendant persisted in stating that he did not remember.

*12 Detective Christiana's testimony provided a context for defendant's repeated claims that he did not recall the shooting. Unlike the testimony in *State v. Frisby*, 174 *N.J.* 583, 811 A.2d 414 (2002), Detective Christiana did not give an opinion to the jury as to the credibility of defendant's statements or whether the evidence substantiated that opinion. Moreover, the "ultimate question" for the jury here was not whether defendant recalled the shooting or not. *See id.* at 595, 811 A.2d 414. The jury was properly instructed that it was their responsibility to judge credibility and that as to defendant's oral statement, they were first to determine whether the statement was made and, if so, whether it or any portion of it was credible. We therefore conclude that Detective Christiana's testimony did not tread impermissibly upon the jury's function to evaluate the credibility of witnesses. *See State v. Kemp*, 195 *N.J.* 136, 156–157, 948 A.2d 636 (2008).

III.

Defendant also raises a number of issues that lack sufficient merit to warrant discussion in a written opinion, *R.* 2:11–3(e)(2), beyond the following brief comments.

Defendant alleges that the prosecutor improperly told the jury that "this is ... a trial to seek justice [for Kathy's] death." While this comment strayed from an appropriately limited "general recital of what the State expects, in good faith, to prove by competent evidence," *State v. Torres*, 328 *N.J.Super.* 77, 95, 744 A.2d 699 (App.Div.2000), it was not sufficiently egregious to substantially prejudice the defendant's "right to have a jury fairly evaluate the merits of his ... defense." *State v. Rodriguez*, 365 *N.J.Super.* 38, 47, 837 A.2d 1137 (App.Div.2003), *certif. denied*, 180 *N.J.* 150, 849 A.2d 183 (2004).

Defendant argues that plain error was committed by: a reference in the jury charge that the "question of *Miranda* rights is a legal question which has been determined by this Court"; the admission of an emergency medical technician's reference to the marital home as a "murder scene"; and a detective's reading of a passage in the Bible found in defendant's home during cross-examination. None of these issues have any merit. Since we do not find any of these arguments to have merit, defense counsel's failure to object does not reflect any deficiency in the effectiveness of legal assistance provided. *Strickland v. Washington*, 466 *U.S.* 668, 688, 104 *S.Ct.* 2052, 2064–65, 80 *L. Ed.*2d 674, 693–94 (1984); *State v. Worlock*, 117 *N.J .* 596, 625, 569 A.2d 1314 (1990); *State v. Roper*, 362 *N.J.Super.* 248, 255, 827 A.2d 1099 (App.Div.2003), *certif. denied*, 185 *N.J.* 265, 883 A.2d 1061 (2005). It follows that the contention that a new trial is required due to cumulative errors in the trial must also fail.

IV.

The court imposed the maximum sentence upon the defendant: life imprisonment, which equates with seventy-five years' incarceration, a requirement that defendant serve eighty-five percent of that term before being eligible for parole pursuant to the No Early Release Act, *N.J.S.A.* 2C:43–7.2, and five years' parole supervision upon release. In stating the reasons for sentence here, the court identified five aggravating factors:

*13 (1) the nature of the offense, *N.J.S.A.* 2C:44–1a(1);

(2) the seriousness of harm, *N.J.S.A.* 2C:44–1a(2);

(3) the likelihood that the defendant would commit another offense, *N.J.S.A.* 2C:44–1a(3);

(4) defendant took advantage of a position of trust or confidence to commit the offense, *N.J.S.A.* 2C:44–1a(4); and

(5) the need to deter the defendant and others from violating the law, *N.J.S.A.* 2C:44–1a(9).

The court also found two mitigating factors, the absence of any prior criminal record, *N.J.S.A.* 2C:44–1b(7), and excessive hardship, *N.J.S.A.* 2C:44–1b(11).

Defendant contends that there is no support in the record for any of the aggravating factors found by the court except for the need to deter. The State concedes that the "seriousness of harm" aggravating factor, *N.J.S.A.* 2C:44–1a(2), was "improperly found" but submits that the other aggravating factors were supported by the record. The State does not challenge the applicability of the two mitigating factors found by the court.

The goal of uniformity in sentencing is "achieved through the careful application of statutory aggravating and mitigating factors." *State v. Cassady*, 198 *N.J.* 165, 179–80, 966 A.2d 473 (2009); *State v. Natale*, 184 *N.J.* 458, 485–86, 878 A.2d 724 (2005). Accordingly, in imposing sentence, the trial judge is required to consider all of the aggravating and mitigating factors and to find those supported by the evidence. *State v. Dalziel*, 182 *N.J.* 494, 505, 867 A.2d 1167 (2005). The sentencing court is required to "identify the relevant aggravating and mitigating factors, determine which factors are supported by a preponderance of evidence, balance the relevant factors, and explain how it arrives at the appropriate sentence." *State v. O'Donnell*, 117 *N.J.* 210, 215, 564 A.2d 1202 (1989); *State v. M.A.*, 402 *N.J.Super.* 353, 370, 954 A.2d 503 (App.Div.2008); *N.J.S.A.* 2C:43–2(e); *R.* 3:21–4(g). If "the trial court properly identifies and balances aggravating and mitigating factors that are supported by competent credible evidence in the record," the sentence should be affirmed. *O'Donnell, supra*, 117 *N.J.* at 215, 564 A.2d 1202. The Supreme Court has repeatedly emphasized, "[W]e will always require that an exercise of discretion be based upon findings of fact that are grounded in competent, reasonably credible evidence ." *Dalziel, supra*, 182 *N.J.* at 501, 867 A.2d 1167; *State v. Megargel*, 143 *N.J.* 484, 493, 673 A.2d 259 (1996); *State v. Roth*, 95 *N.J.* 334, 364, 471 A.2d 370 (1984). *See also N.J.S.A.* 2C:44–7.

N.J.S.A. 2C:44–1a(1) defines the aggravating circumstance as the "nature and circumstances of the offense, and the role of the actor therein, including whether or not it was committed in an especially heinous, cruel or depraved manner." The "cruelty" addressed by this factor in a homicide has been compared to an intent "not only to kill, but 'to inflict pain, harm, and suffering-in addition to intending death.' " *O'Donnell, supra*, 117 *N.J.* at 217–18, 564 A.2d 1202 (quoting *State v. Ramseur*, 106 *N.J.* 123, 208, 524 A.2d 188 (1987)).

*14 The trial court here made the following statement in support of its finding that this factor was applicable:

> The offense is so horrific that it actually seems unconscionable the type of act that is so unimaginable. We know that we live in a society that from time to time we hear about senseless acts of violence and we see them in different contexts, but in this particular case we have a mother, we have a wife. Aside from all of the disagreements that they may have had each and every day people get divorced, but they don't end that divorce with a gun. In this particular case I find the nature of the offense to be so horrific that number one applies.

The court's stated reason for relying upon this factor is that the victim's decision to seek a divorce did not justify defendant's response in killing her. The jury reached the same decision in convicting defendant for murder rather than for passion/provocation manslaughter. The nature and circumstances of a purposeful murder as opposed to passion/provocation manslaughter were considered by the legislature in grading the offense. Accordingly, to rely upon this factor, the court must identify some evidence in the record that lies outside the scope of those considerations to support a conclusion that this factor is appropriate. *State v. Pineda*, 119 *N.J.* 621, 627, 575 A.2d 855 (1990).

In finding aggravating factor (2), the gravity and seriousness of harm inflicted on the victim, *N.J.S.A.* 2C:44–1a(2), the court said only, "[T]here can be no more serious of a harm than murder. Inherent in its nature is the seriousness of that harm." We agree

with defendant and the State that this factor was improperly found. *See State v. Carey*, 168 *N.J.* 413, 425, 775 A.2d 495 (2001); *Pineda, supra*, 119 *N.J.* at 627, 575 A.2d 855.

In support of its finding aggravating factor (3), the risk that defendant will commit another offense, *N.J.S.A.* 2C:44–1a(3), the court stated:

> [G]iven the nature of this offense and the fact that one like this defendant can take the life of another I find that the risk to commit another offense is a factor that I should take into account. One that could commit such a cruel act is capable of anger and is capable of harming another human being.

Defendant was forty-four years old at the time he was sentenced. He had a stable employment history and no prior criminal record, a circumstance recognized by the trial court in finding the absence of any prior criminal record to be a mitigating factor, *N.J.S.A.* 2C:44–1b(7). In cases in which a defendant with no criminal record has been properly found to be at risk for recidivism, the court has identified evidence in the record to support that conclusion. For example, in *O'Donnell, supra*, 117 *N.J.* at 216–17, 564 A.2d 1202, the Court concluded that the defendant police officer's lack of remorse and boasts about beating a victim after arrest provided an adequate factual basis for this aggravating factor. In *State v. Varona*, 242 *N.J.Super.* 474, 491–92, 577 A.2d 524 (App.Div.), *certif. denied*, 122 *N.J.* 386, 585 A.2d 389 (1990), the finding of a risk of recidivism was supported by evidence that the defendant was involved in organized crime and the fact that he was found in possession of one kilogram of cocaine. Here, the court's conclusion that defendant posed a risk to commit another offense was based exclusively upon the fact that he had committed murder. In the event that the court should find this factor applicable upon resentencing, care should be given to identify additional facts in the evidence that support this conclusion.

*15 *N.J.S.A.* 2C:44–1a(4) identifies the aggravating factor as:

> A lesser sentence will depreciate the seriousness of the defendant's offense because it involved a breach of the public trust under chapters 27 and 30, or the defendant took advantage of a position of trust or confidence to commit the offense.

Since the defendant's conduct did not involve a breach of the public trust, supporting evidence must show that he "took advantage of a position of trust or confidence to commit the offense." The phrase "position of trust and confidence" is not defined in the *New Jersey Code of Criminal Justice*, Title 2C. The term is, however, commonly associated with fiduciary relationships. *E.g., F.G. v. MacDonell*, 150 *N.J.* 550, 563, 696 A.2d 697 (1997) ("The essence of a fiduciary relationship is that one party places trust and confidence in another who is in a dominant or superior position."); *Balliet v. Fennell*, 368 *N.J.Super.* 15, 21, 845 A.2d 168 (App.Div.2004). That taking "advantage of a position of trust or confidence to commit the offense" is recognized as an aggravating factor is consistent with the principle that a fiduciary is liable for harm resulting from a breach of the duties imposed by the existence of such a relationship. *See F.G., supra*, 150 *N.J.* at 564, 696 A.2d 697 (citing *Restatement (Second) of Torts* § 874 (1979)). Cases in which this aggravating factor was deemed appropriate typically concern defendants whose "position of trust or confidence" involved the exercise of authority over persons or the property of another. *E.g., State v. Modell*, 260 *N.J.Super.* 227, 254–56, 615 A.2d 1264 (App.Div.1992), *certif. denied*, 133 *N.J.* 432, 627 A.2d 1138 (1993) (defendant convicted for crimes stemming from his misuse of client's funds in administering a 401k plan); *State v. Jones*, 197 *N.J.Super.* 604, 607, 485 A.2d 1063 (App.Div.1984) (defendant used her position of trust to steal in excess of $700,000); *State v. Epstein*, 175 *N.J.Super.* 93, 417 A.2d 1055 (Resent'g Panel 1980), *aff'd*, 177 *N.J.Super.* 423, 426 A.2d 1066 (App.Div.1981) (defendant convicted of embezzlement); *State v. Rosenberger*, 207 *N.J.Super.* 350, 359, 504 A.2d 160 (Law Div.1985) (defendant pilfered two checks of his employer made payable to an alleged vendor).

The trial judge acknowledged that his finding this aggravating factor, which he called "breach of trust," was one "that perhaps both of the attorneys will disagree with." In

addition to citing medical testimony as to how the shooting occurred, the judge stated his reasons as follows:

> Now, sometimes that's used in one context. This is a husband and wife and the defendant lured his wife into the bedroom. He went in there under the pretext of talking to her about the marriage I guess or some conversation with the kids in the next room.

A marital relationship may be the basis for a "position of trust and confidence" that a defendant takes advantage of to commit an offense in other circumstances. However, we are not convinced that the fact that the victim followed her husband to another room to continue a discussion constitutes taking advantage of such a position to commit an offense pursuant to *N.J.S.A.* 2C:44–1a(4). Accordingly, we find that the court erred in identifying this aggravating factor as being applicable in this case.

*16 In summary, we find that the court misidentified two aggravating factors in sentencing defendant: the seriousness of harm, *N.J.S.A.* 2C:44–1a(2), and taking advantage of a position of trust or confidence to commit the offense, *N.J.S.A.* 2C:44–1a(4). Because these errors violated the legislative policies underlying the sentencing guidelines, we reverse the sentence and remand for resentencing. *See Roth, supra,* 95 *N.J.* at 364, 471 A.2d 370. As a remand for resentencing is required, we also note that the court failed to cite competent, credible evidence in the record to support its findings that the nature of the offense, *N.J.S.A.* 2C:44–1a(1), and the likelihood that the defendant would commit another offense, *N.J.S.A.* 2C:44–1a(3), are applicable here. *See Roth, supra,* 95 *N.J.* at 364, 471 A.2d 370.

Defendant's conviction is affirmed. Defendant's sentence is vacated and the case is remanded for resentencing.

All Citations

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Footnotes

1 *Miranda v. Arizona,* 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L. Ed.*2d 694 (1966).

2 If there had been an objection, the error could have been readily corrected by the substitution of a single word, "adequate," for "inadequate," as was done in a subsequent revision of the model jury charge.

3 The instruction here did not include either of these errors.

4 The threshold for a jury instruction for passion-provocation manslaughter is relatively low. *Erazo, supra,* 126 *N.J.* at 123, 594 A.2d 232; *Coyle, supra,* 119 *N.J.* at, 224; *Crisantos, supra,* 102 *N.J.* at 278, 508 A.2d 167; *Rambo, supra,* 401 *N.J.Super.* at 515, 951 A.2d 1075; *State v. Copling,* 326 *N.J.Super.* 417, 428, 741 A.2d 624 (App.Div.1999), *certif. denied,* 164 *N.J.* 189, 752 A.2d 1290 (2000). Although the State now argues that a passion/provocation manslaughter charge was not required here, the prosecutor did not object to the charge in the trial court so we need not address whether the instruction was required.

5 In *State v. Brooks,* 309 *N.J.Super.* 43, 62–65, 706 A.2d 757 (App.Div.1998), this court reviewed a claim that the model jury charge on passion/provocation manslaughter in effect at that time also created confusion on the third element. The language in question was strikingly similar to the language challenged here:

> *Third, you must determine whether the defendant had a reasonable time to cool off;* in other words, you must determine whether the time between the provoking event or events, or the acts which caused death, was inadequate for the return of a reasonable person's self control.

[*Id.* at 63, 706 A.2d 757.]

However, the flaw alleged by defendant in *Brooks* and considered "unfortunate" by this court lay in the phrase, "you must determine," rather than the language following "in other words," which apparently gave no one cause for concern. *Ibid.*

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407 N.J.Super. 352
Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Gjelosh **DOCAJ**, a/k/a **Jerry Docaj**, a/k/a **Jerry Docaj**,
Defendant–Appellant.

Submitted March 31, 2009.
Decided May 27, 2009.

Synopsis

Background: Defendant was convicted in the Superior Court, Law Division, Bergen County, of purposeful or knowing murder, possession of a firearm for an unlawful purpose, and third-degree unlawful possession of a handgun without a lawful permit. He appealed.

Holding: The Superior Court, Appellate Division, Espinosa, J.S.C., temporarily assigned, held that an error in jury instructions on passion/provocation manslaughter was harmless.

Affirmed in part, vacated in part, and remanded for resentencing.

West Headnotes (12)

Change View

1 **Homicide** Passion as element or as factor affecting degree or grade of offense
Four factors must be present for a murder to be reduced to a passion/provocation manslaughter: the provocation must be adequate, the defendant must not have had time to cool off between the provocation and the slaying, the provocation must have actually impassioned the defendant, and the defendant must not have actually cooled off before the slaying.

9 Cases that cite this headnote

2 **Criminal Law** Elements and incidents of offense
Error in jury instructions on passion/provocation manslaughter, which incorrectly stated to the jury that it had to determine whether the state proved that the time between the provoking event and the acts that caused the death was "inadequate," rather than "adequate," for the return of a reasonable person's self control was harmless at a trial for purposeful or knowing murder; the error was isolated rather than pervasive, given that the jury was correctly instructed three times that the state's burden was to prove that defendant had a reasonable time to cool off, and, inter alia, the adequacy of any cooling-off period was not a crucial issue regarding passion/provocation manslaughter.

7 Cases that cite this headnote

3 **Criminal Law** Prejudice to rights of party as ground of review
Even in a criminal prosecution, the mere fact of error does not require reversal.

4 **Criminal Law** Plain or fundamental error

For an instructional error to constitute plain error, the error must be legal impropriety in the instruction prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result; the possibility of an unjust result must be sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached.

16 Cases that cite this headnote

5 **Criminal Law** Construction and Effect of Charge as a Whole
When an error alleged concerns only a portion of jury instructions, the challenged portion is not to be dealt with in isolation but the instructions should be examined as a whole to determine its overall effect.

6 Cases that cite this headnote

6 **Criminal Law** Instructions in general
Errors in jury instruction on matters or issues that are material to the jury's deliberation are presumed to be reversible error.

4 Cases that cite this headnote

7 **Homicide** Nature and adequacy in general
Measure of adequate provocation, for purposes of passion/provocation manslaughter, is whether loss of self control is a reasonable reaction to the provocation.

6 Cases that cite this headnote

8 **Homicide** Sufficiency as cause of passion
Provocation required for passion/provocation manslaughter must be sufficient to arouse the passions of an ordinary person beyond the power of his control.

4 Cases that cite this headnote

9 **Homicide** Nature and adequacy in general
Provocation required for passion/provocation manslaughter must be severe enough that the intentional homicide may be as much attributable to the extraordinary nature of the situation as to the moral depravity of the actor.

10 **Homicide** Mere language, or words alone
Adequate provocation for passion/provocation manslaughter is not satisfied by words alone, no matter how offensive or insulting.

12 Cases that cite this headnote

11 **Homicide** Sufficiency as cause of passion
Even in instances of mutual combat, a defendant's response must be proportionate to the provocation for a murder to be reduced to passion/provocation manslaughter.

6 Cases that cite this headnote

12 **Criminal Law** Form and Language in General
Trial courts and counsel must review jury instructions for potential error, even in model jury instructions.

9 Cases that cite this headnote

Attorneys and Law Firms

**419 Yvonne Smith Segars, Public Defender, attorney for appellant (Marcia Blum, Assistant Deputy Public Defender, of counsel and on the brief).

John L. Molinelli, Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Senior Assistant Prosecutor, of counsel and on the briefs).

Appellant filed a pro se supplemental brief.

Before Judges SKILLMAN, GRAVES and ESPINOSA.

Opinion

The opinion of the court was delivered by

ESPINOSA, J.S.C. (temporarily assigned).

*355 Defendant Gjelosh **Jerry Docaj** was convicted of the purposeful or knowing murder of his wife, Kathy **Docaj**, in violation of *N.J.S.A.* 2C:11–3(a)(1) or (2); possession of a firearm for an unlawful purpose, in violation of *N.J.S.A.* 2C:39–4(a); and third degree unlawful possession of a handgun without a lawful permit, in violation of *N.J.S.A.* 2C:39–5(b). He was sentenced to life imprisonment on the murder conviction and concurrent terms for the other charges. The term of life imprisonment equates to seventy-five years in prison and, pursuant to the No Early Release Act, *N.J.S.A.* 2C:43–7.2, a parole-ineligibility period of sixty-three years and nine months.

Defendant appeals his convictions and his sentence. We affirm the convictions but remand for resentencing.

Defendant and Kathy **Docaj**, nee Visita Zadrima, were wed in Yugoslavia in 1983 in an arranged marriage. Kathy had lived in the United States since the age of nine and returned to America shortly after the wedding. Defendant, an Albanian national, followed soon thereafter. They had three children and eventually settled in Lodi, New Jersey. At the time of Kathy's death in February 2003, their son, Christopher, was eighteen years old, their daughter, Christina, was fifteen years old and their younger daughter was nine years old.

Kathy was employed as a concierge at a business in Manhattan near the Battery Park ferry terminus. Defendant worked in air *356 conditioner and refrigeration **420 maintenance at a building in Manhattan. In the latter part of 2002, Kathy became acquainted with Robert Narciso, who also used the ferry to commute to Manhattan. Initially platonic, their relationship grew closer over several months. In mid-December 2002, Kathy told defendant that she no longer loved him. At Kathy's request, defendant moved out of the marital home to an apartment in Lodi in January 2003.

Approximately ten years earlier, defendant purchased a .38 caliber handgun, which he kept in a shoe box under his bed. At the time that he was moving out, he and Kathy discovered that Christopher had removed the gun some months earlier and kept it, unloaded, in his room since that time. Defendant took the handgun with him when he moved out.

Defendant began to suspect that Kathy was "cheating on him" and later told police that he saw her leaving her place of employment with "her boss." On February 7, 2003, Kathy telephoned defendant and told him that she was meeting a lawyer that day to prepare papers to file for divorce. Defendant's diary reflects that he begged her not to divorce him and that she replied, "[T]his thing has to be done." Kathy met with the lawyer and a complaint for divorce on the grounds of extreme cruelty was drafted.

Defendant and Kathy alternated weekends with the children. It was defendant's turn to spend the weekend of February 8 and 9 with the children. Narciso, a divorced father of two daughters, also alternated weekend child care with his wife. As a result, Kathy and Narciso were able to spend that weekend together. Kathy told defendant and her children that she was spending the weekend in Atlantic City with friends. Defendant wrote in his diary, "There's no way I understand how can a person who has been in love

with her husband for 19 years can do something like this and go to Atlantic City to celebrate or for any other reason."

Defendant's diary also recorded his reaction to Kathy's failure to give him anything for his birthday on February 12: "My wife bought me nothing, I will remember this because one day by the power of God it will come that I will remember that day."

*357 He bought a birthday cake, flowers and a card for Kathy for her birthday two days later. Around this time, Kathy told defendant that she had "another man lined up." Defendant also noticed her wearing jewelry that he had never seen before.

On February 17, 2003, Narciso received a telephone call from a man speaking English with a foreign accent who would not identify himself. In their brief conversation, Narciso commented that the caller knew more about him than he did about the caller. When Narciso asked for the caller's telephone number, the caller hung up.

It is reasonable to infer that defendant placed this call to Narciso. Christopher had noticed that Kathy was spending "too much" time on the telephone and used the "Star sixty-nine" feature to learn what number she was calling. He provided the number, which was Narciso's, to his father. A paper with Narciso's telephone number was found among the defendant's possessions by the police after his arrest.

Kathy and Narciso planned to spend the weekend of February 22 together. Their plans had to change when defendant told her that he had to work on Saturday and Kathy would have to care for the children. Defendant also told Kathy that he wanted to meet and talk to her. When she told him that she would not be coming home on Friday, he asked her why. She replied, "I'll come home when I want to."

**421 Kathy spent Friday, February 21, 2003, with Narciso at his apartment. He dropped her off one block from her home on Saturday in the early afternoon.

Defendant spent Friday night with his children. He awakened around 4:00 a.m. on Saturday and left for his apartment at approximately 6:00 a.m. After changing clothes, he took a book bag containing the .38 caliber handgun with him to work and stored the book bag in his locker.

While at work on Saturday, February 22, 2003, defendant called the marital home twice. Kathy was not home until his second call. *358 Defendant asked her, "How was your night out at the club?" Kathy told him that she had been out until 3:00 or 4:00 a.m. When defendant said that he would see her later at the marital home, she replied, "Whatever." According to her daughter, Kathy was not looking forward to defendant's visit.

Defendant left work at approximately 6:00 p.m., carrying the book bag with the .38 caliber handgun with him to his apartment. He removed the handgun from the book bag, placed it in the waistband of his trousers underneath a vest, and proceeded to the marital home.

Defendant entered the home on the lower level. Kathy was present on that level with their three children and two friends of the children. Defendant and Kathy went upstairs to the kitchen, where they sat, drinking coffee and smoking. When Christopher came to the kitchen to use the telephone, defendant asked Kathy to go to the bedroom because "he wanted to talk to her about something." Defendant walked to the bedroom and Kathy followed him. The door closed and was locked.

Within a minute, Christopher heard his parents screaming and cursing, as well as noises of pushing and shoving. Then, he heard his mother scream and a single "boom." Christopher ran to the bedroom, trying unsuccessfully to open the door. He began screaming, "Open the door, open the door." Defendant opened the door and, white-faced, immediately said, "I'm sorry, I'm sorry." Defendant blocked Christopher from entering the room but Christopher was able to see his mother lying, bloody, on the floor. Drawn by the sounds, Christina came upstairs where she saw defendant and Christopher struggling and arguing. Defendant told Christina "she cheated on me for

two years" and "she's gone." He continued to block Christina and Christopher from entering the bedroom.

Christina dialed "911" and asked for an ambulance, stating that she thought her mother was dead. Defendant can be heard on the tape recording of this conversation, yelling loudly, "She was cheating on me," "She was f—king cheating on me," "She was *359 cheating on me for one year." A second call to "911" was made by Christopher, urgently requesting help.

Two policemen from the Lodi Police Department arrived to find Kathy lying in a pool of blood on the bedroom floor and a revolver resting on the lower end of the bed. Christopher was irate and about to walk out of the home. Defendant was in a daze, walking aimlessly in circles. Uncertain as to what had transpired, the police handcuffed both Christopher and defendant for "safety" reasons. Defendant was advised that he was not under arrest; he was not given *Miranda*[1] warnings and was not questioned by the police at this time.

Later investigation revealed that Kathy died from a single gunshot wound that entered the back of her head and exited from her forehead. The .38 caliber handgun found on the bed had been pressed **422 loosely against the back of her skull when it was fired. The medical examiner testified that she was not standing but was "positioned low" in relation to the shooter when she was shot.

Defendant gave a statement to the police and described what happened in the bedroom. He admitted that he had the gun with him when they went into the bedroom but denied that he had gone to the house with the intent to kill Kathy. He said that in the bedroom, he begged her to stay together for the children and that he would "forgive [her] to this point." He stated that Kathy was sitting on the bed and looked angry, "as if she really wasn't hearing it, that she didn't want to hear it." According to defendant, Kathy said, the "only thing you're getting are your walking papers." She struck him just once, "hit[ting] him on the left side of his face right by his mouth." He said, "Things went dark." He pushed Kathy downward with his left arm and tried to catch her with his right hand when it appeared that she might strike her face on the floor. He admitted that he had the handgun in his hand as he tried to grab her, but he did not remember withdrawing *360 the handgun from his waistband, pulling the trigger, or what he did with the handgun after shooting Kathy.

Defendant raises the following points on appeal:

POINT I

THE INSTRUCTION ON PASSION/PROVOCATION MANSLAUGHTER MISSTATED THE LAW. (Not Raised Below)

POINT II

IN HER OPENING STATEMENT, THE PROSECUTOR IMPROPERLY URGED THE JURY TO CONSIDER "THIS ... A TRIAL TO SEEK JUSTICE OF [SIC] HER DEATH."

POINT III

THE DETECTIVE WHO INTERROGATED DEFENDANT REPEATEDLY TESTIFIED THAT DEFENDANT "WAS NOT TELLING THE WHOLE TRUTH" AND "WAS TRYING TO HIDE SOME THINGS."

POINT IV

THE COURT TOLD THE JURY, WITH RESPECT TO THE ADMISSION OF DEFENDANT'S STATEMENT, THAT IT HAD ALREADY RULED ON "THE QUESTION OF MIRANDA RIGHTS." (Not Raised Below)

POINT V

THE EMERGENCY–MEDICAL TECHNICIAN REPEATEDLY CHARACTERIZED THE SHOOTING AS A "MURDER." (Not Raised Below)

POINT VI

THE POLICE DETECTIVE READ A PASSAGE FROM A BIBLE FOUND DURING THE SEARCH OF DEFENDANT'S HOME. (Not Raised Below)

POINT VII

DEFENSE COUNSEL'S FAILURE TO OBJECT AT TRIAL TO THE ERRORS RAISED IN POINTS I, IV, V, AND VI DEPRIVED DEFENDANT OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

POINT VIII

THE TRIAL WAS SO RIDDLED WITH ERRORS THAT THEIR CUMULATIVE EFFECT RENDERED THE TRIAL UNFAIR.

POINT IX

A LIFE TERM, WHICH IS THE MAXIMUM SENTENCE AND WHICH CARRIES A MANDATORY PAROLE DISQUALIFIER OF MORE THAN 63 YEARS, IS GROSSLY EXCESSIVE.

****423** In a pro se supplemental brief, defendant argues that the passion/provocation manslaughter charge constituted reversible error because the trial court should have instructed the jury "that the State can only prove murder if it proves the absence of passion/provocation first" and because an instruction should have ***361** been given, pursuant to *State v. Guido*, 40 *N.J.* 191, 191 *A.*2d 45 (1963), that a "course of ill treatment" can provide the basis for adequate provocation. In addition, defendant contends that his *Miranda* rights were violated because the warnings were not given in a timely manner and interrogation continued when he was falling asleep.

[At the direction of the court the discussion of issues other than defendant's claim of error in the passion/provocation manslaughter charge has been omitted from the published version of the opinion]

I

1 2 We address first the passion/provocation manslaughter jury charge, an issue raised for the first time on appeal. *State v. Mauricio*, 117 *N.J.* 402, 411, 568 *A.*2d 879 (1990), identifies the four factors that must be present for a murder to be reduced to a passion/provocation manslaughter:

> [T]he provocation must be adequate; the defendant must not have had time to cool off between the provocation and the slaying; the provocation must have actually impassioned the defendant; and the defendant must not have actually cooled off before the slaying.

The trial court provided the jury with the model jury charge on passion/provocation manslaughter current at the time the instruction was given. Defendant is correct in stating that the model jury charge contained an error. In one of four statements regarding the State's burden of proof as to the adequacy of the cooling-off period, the charge stated,

> In other words, you must determine whether the State has proven that the time between the provoking event and the acts which caused death was *inadequate* for the return of a reasonable person's self-control.
>
> [(Emphasis added.)]

As correctly noted elsewhere in the charge, the State's burden was to prove that the period of time was "adequate" for the return of a reasonable person's self-control. The question here is whether, within the context of the trial, that error had the clear capacity to lead the jury to convict the defendant of murder, "a result it otherwise might

not have reached." *State v. Jordan*, 147 *N.J.* 409, 422, 688 *A.*2d 97 (1997) (quoting **362 State v. Macon*, 57 *N.J.* 325, 336, 273 *A.*2d 1 (1971)). After reviewing the charge in its entirety, the evidence, the arguments of counsel and the questions asked by the jury, we conclude that the error was harmless.

Pursuant to *Rule* 1:7–2, defendant's failure to object constitutes a waiver of his right to challenge that instruction on appeal.[2] However, mindful of the principles that "appropriate and proper jury charges are essential to a fair trial," *State v. Savage*, 172 *N.J.* 374, 387, 799 *A.*2d 477 (2002), and are even more critical in criminal cases, *Jordan, supra*, 147 *N.J.* at 422, 688 *A.*2d 97, we review the charge to determine whether there was plain error clearly capable of producing an unjust result. *R.* 2:10–2; *State v. Afanador*, 151 *N.J.* 41, 54, 697 *A.*2d 529 (1997).

3 4 *****424*** Even in a criminal prosecution, the mere fact of error does not require reversal. To constitute plain error, the error must be: "[L]egal impropriety in the charge prejudicially affecting the substantial rights of the defendant and sufficiently grievous to justify notice by the reviewing court and to convince the court that of itself the error possessed a clear capacity to bring about an unjust result." *State v. Hock*, 54 *N.J.* 526, 538, 257 *A.*2d 699 (1969), *cert. denied*, 399 *U.S.* 930, 90 *S.Ct.* 2254, 26 *L.Ed.*2d 797 (1970). The possibility of an unjust result must be "sufficient to raise a reasonable doubt as to whether the error led the jury to a result it otherwise might not have reached." *State v. Taffaro*, 195 *N.J.* 442, 454, 950 *A.*2d 860 (2008); *Jordan, supra*, 147 *N.J.* at 422, 688 *A.*2d 97; *Macon, supra*, 57 *N.J.* at 336, 273 *A.*2d 1. In short, the question here is whether the error made it easier for the State to get a conviction for murder as opposed to passion/provocation manslaughter. *See State v. N.I.*, 349 *N.J.Super.* 299, 315–16, 793 *A.*2d 760 (App.Div.2002).

**363* To make that evaluation, we review the error within the context of both the charge itself and the evidence and arguments presented at trial.

A. *The charge.*

5 When the error alleged concerns only a portion of a charge, the challenged portion is not to be "dealt with in isolation but the charge should be examined as a whole to determine its overall effect." *State v. Wilbely*, 63 *N.J.* 420, 422, 307 *A.*2d 608 (1973). *See also State v. Delibero*, 149 *N.J.* 90, 106, 692 *A.*2d 981 (1997).

The instruction on passion/provocation manslaughter was immediately preceded by the model jury charge for murder. In addition to the elements regarding causation and intent, the jury was told, "The third element that the State must prove beyond a reasonable doubt to find the defendant guilty of murder is that defendant did not act in the heat of passion resulting from a reasonable provocation." The passion/provocation manslaughter charge followed:

> Passion/provocation manslaughter is a death caused purposely or knowingly that is committed in the heat of passion resulting from a reasonable provocation. Passion/provocation manslaughter has four factors which distinguish it from murder. *In order for you to find the defendant guilty of murder, the State need only prove the absence of any one of them beyond a reasonable doubt.*
>
> The four factors are:
>
> Number one, there was adequate provocation;
>
> Number two, the provocation actually impassioned defendant;
>
> *Number three, the defendant did not have a reasonable time to cool off between the provocation and the act which caused death;* and
>
> Four, the defendant did not actually cool off before committing the act which caused death.
>
> The first factor you must consider is whether the State has proven beyond a reasonable doubt that the provocation was not adequate. Whether the provocation is

inadequate essentially amounts to whether loss of self-control is a reasonable reaction to the circumstance.

In order for the State to carry its burden, it must prove beyond a reasonable doubt that the provocation was not sufficient to arouse the passions of an ordinary person beyond the power of his control. For example, words alone do not constitute adequate provocation. On the other hand, a threat with a gun or knife or a *364 significant physical confrontation might be considered adequate **425 provocation. Again, the State must prove that the provocation was not adequate.

The second factor you must consider is whether the State has proven beyond a reasonable doubt that the defendant was not actually impassioned; that is, he did not actually lose his self-control.

The third factor you must consider is *whether the State has proven beyond a reasonable doubt that the defendant had a reasonable time to cool off.* In other words, you must determine whether the State has proven that the time between the provoking event and the acts which caused death was *inadequate* for the return of a reasonable person's self-control.

The fourth factor you must consider is whether the State has proven beyond a reasonable doubt that the defendant actually did cool off before committing the acts which caused death; that is, that he was no longer actually impassioned.

If you determine that the State has proven beyond a reasonable doubt that there was not an adequate provocation or that the provocation did not actually impassion the defendant or *that defendant had a reasonable time to cool off,* or that defendant actually cooled off, and in addition to proving one of those factors you determine that the State has proven [the elements of murder] you must find the defendant guilty of murder.

On the other hand, [if] you determine that the State has not disproved at least one of the factors of passion/provocation manslaughter beyond a reasonable doubt, but that the State [has proven the elements of murder] then you must find him guilty of passion/provocation manslaughter.

[(Emphasis added.)]

A review of the charge therefore reveals that all four *Mauricio* factors were accurately introduced to the jury. *See Mauricio, supra,* 117 *N.J.* at 411–13, 568 *A.*2d 879. The third factor regarding the adequacy of the cooling-off period was stated correctly a second time. It was in recasting that factor "in other words" that the error was made. However, the court correctly summed up the State's burden as to murder and passion/provocation manslaughter thereafter:

If you determine that the State has proven beyond a reasonable doubt that there was not an adequate provocation or that the provocation did not actually impassion the defendant or *that defendant had a reasonable time to cool off,* or that defendant actually cooled off, and in addition to proving one of those factors you determine that the State has proven [the elements of murder] you must find the defendant guilty of murder.

[(Emphasis added.)]

Therefore, of the four references to the third factor and the State's burden, one was erroneous and three were correct. This was, then, an error that was isolated rather than pervasive in the charge. *Compare* ***365** *State v. Martini,* 187 *N.J.* 469, 478–80, 901 *A.*2d 941 (2006), *cert. denied,* 549 *U.S.* 1223, 127 *S.Ct.* 1285, 167 *L.Ed.*2d 104 (2007), *with State v. Rodriguez,* 195 *N.J.* 165, 171, 949 *A.*2d 197 (2008).

In *Martini,* the Court reviewed a similarly isolated error in the *Judges Bench Manual for Capital Causes.* Following the charge in the *Manual,* the trial court incorrectly instructed the jury that it had to find the mitigating factors unanimously. *Martini,*

supra, 187 *N.J.* at 476, 901 *A.*2d 941. The Supreme Court viewed the instructions to the jury in their entirety, which included a curative instruction given after objection by counsel. *Id.* at 480, 901 *A.*2d 941. Satisfied that "the instruction ***426** properly conveyed to the jury that each juror must individually determine whether a mitigating factor exists," the Court found no prejudicial error. *Id.* at 478–80, 901 *A.*2d 941. Quoting from its consideration of similar arguments in *State v. Loftin*, 146 *N.J.* 295, 375–76, 680 *A.*2d 677 (1996), the Court recognized that " '[v]iewed in isolation, the single remark ... might suggest that the preferred result is a unanimous conclusion concerning the existence or non-existence of a mitigating factor,' ... but that 'when the isolated remark is viewed in the context of the charge as a whole, it is clear that there was no error.' " *State v. Martini*, *supra*, 187 *N.J.* at 478–79, 901 *A.*2d 941.

Similarly, the error here was but one iteration imbedded in a charge that contained three entirely correct articulations of the State's burden regarding the third factor. In both describing the elements of murder and in summing up the State's burden as to the factors of passion/provocation manslaughter, the charge clearly conveyed the State's burden of proof. Specifically, the jury was instructed three times that, as to this factor, the State's burden was to prove beyond a reasonable doubt "that defendant had a reasonable time to cool off." The isolated error's capacity to dispel that overall effect was minimal, at best.

B. *The evidence and arguments at trial.*

Reviewing an error in jury instructions within the context of the trial, our courts have found the following factors significant: (1) ***366** the nature of the error and its materiality to the jury's deliberations, *compare Jordan*, *supra*, 147 *N.J.* at 422, 688 *A.*2d 97, *with State v. Jackson*, 289 *N.J.Super.* 43, 54, 672 *A.*2d 1254 (App.Div.1996), *certif. denied*, 148 *N.J.* 462, 690 *A.*2d 609 (1997); (2) the strength of the evidence against the defendant, *see Jordan*, *supra*, 147 *N.J.* at 426, 688 *A.*2d 97; *compare State v. Heslop*, 135 *N.J.* 318, 639 *A.*2d 1100 (1994), *with State v. Lawton*, 298 *N.J.Super.* 27, 688 *A.*2d 1096 (App.Div.), *certif. denied*, 151 *N.J.* 72, 697 *A.*2d 545 (1997); (3) whether the potential for prejudice was exacerbated or diminished by the arguments of counsel, *see Jordan*, *supra*; *Wilbely*, *supra*, 63 *N.J.* at 422, 307 *A.*2d 608; (4) whether any questions from the jury revealed a need for clarification, *see Savage*, *supra*, 172 *N.J.* at 393–95, 799 *A.*2d 477; and (5) the significance to be given to the absence of an objection to the charge at trial, *see Macon*, *supra*, 57 *N.J.* at 341, 273 *A.*2d 1.

6 Errors in the jury instruction "on matters or issues that are material to the jury's deliberation are presumed to be reversible error." *Jordan*, *supra*, 147 *N.J.* at 422, 688 *A.*2d 97. A presumption of reversible error does not apply here because whether the defendant had "a reasonable time to cool off" was not "crucial to the jury's deliberations on the guilt of [the] defendant." *Ibid.* A review of the arguments made by the prosecutor and defense counsel clearly shows that the key *Mauricio* factor for both sides was whether there was adequate provocation to remove this case from murder.

7 8 9 The measure of adequate provocation is whether "loss of self-control is a reasonable reaction" to the provocation. *Mauricio*, *supra*, 117 *N.J.* at 412, 568 *A.*2d 879.

> That test is purely objective, because the provocation must be 'sufficient to arouse the passions of an ordinary [person] beyond the power of his ... control.' ... The provocation must be severe enough that the 'intentional homicide may be as much attributable to the extraordinary nature of the *situation* ***427** as to the moral depravity of the actor.'
>
> [*Ibid.* (Citations omitted) (Emphasis added).]

Having no evidence of any physical provocation that could rise to such a level, the defense highlighted defendant's continuing and *367 escalating emotional state throughout the month of February. Defense counsel's summation emphasized the defendant's enduring "emotional swirl" that allowed him to lose control:

> Ladies and gentlemen of the jury, once again, please, I do not for one moment suggest that a slap of a person justifies the taking of a life. But after years of marriage, after week—months, weeks, days and hours of confusion, after being told you're out of here, you'll get your walking papers, that I have another man lined up, that that conversation there punctuated now by the first form of physical violence may, in fact, be the adequate provocation that churns this to the heat that—that this—that this killing was done in the heat of the passion, a loss of self-control, a passion/provocation manslaughter.

Since defense counsel conceded to the jury that a slap did not constitute adequate provocation, the question whether an adequate time to cool off passed between the slap and the gunshot was irrelevant to the jury's deliberations.

In her summation, the prosecutor declared that this was a deliberate murder. Stating that "there is no adequate provocation in this case," she plainly targeted that factor as the one the State had proven was absent:

> If the State need only prove the absence of just one [factor], what that means is if you ... determine that there was no adequate provocation, defendant cannot be found guilty of passion/provocation manslaughter. He must be found guilty of murder.

Therefore, both the State and the defense clearly represented "adequate provocation" as the crucial issue for the jury's determination in considering passion/provocation manslaughter rather than whether defendant had a reasonable time to cool off.

The relative strength of the evidence of passion/provocation manslaughter weighs heavily in determining whether the error "led the jury to a result it otherwise might not have reached." *See Macon, supra*, 57 *N.J.* at 325, 273 *A.*2d 1. In *Heslop, supra*, 135 *N.J.* at 327, 639 *A.*2d 1100, the Supreme Court observed that it was "not faced with overwhelming evidence of passion/provocation as the singular and distinctive factor that led to the killing." The charge contained two significant errors: the "sequential error" condemned in *State v. Coyle*, 119 *N.J.* 194, 574 *A.*2d 951 (1990), and the failure to explicitly charge that the State bore the burden of proving the absence of passion/provocation beyond a ***368** reasonable doubt as required by *State v. Erazo*, 126 *N.J.* 112, 594 *A.*2d 232 (1991).[3] Despite the significance of these flaws, the Court found that the weakness of the case for passion/provocation manslaughter "militate[s] strongly against the actuality of prejudice that may have emanated from the somewhat maladroit instructions on that charge." *Heslop, supra*, 135 *N.J.* at 327, 639 *A.*2d 1100. The Court concluded that "a review of the factual record [did] not suggest the likelihood that the court's [charge] resulted in or contributed to an improper verdict." *Id.* at 328, 639 *A.*2d 1100. In contrast, in a "close" case, the presence of the same errors constituted ****428** reversible error. *Lawton, supra*, 298 *N.J.Super.* at 39, 688 *A.*2d 1096.

10 The lack of proof of adequate provocation posed a critical weakness in the passion/provocation manslaughter evidence here. Adequate provocation is not satisfied by "words alone, no matter how offensive or insulting." *State v. Crisantos*, 102 *N.J.* 265, 274, 508 *A.*2d 167 (1986). A wife's repeated threats to kill her husband and burn the house down were deemed insufficient to warrant a passion/prejudice manslaughter instruction in *State v. Rambo*, 401 *N.J.Super.* 506, 951 *A.*2d 1075 (App.Div.), *certif. denied*, 197 *N.J.* 258, 962 *A.*2d 529 (2008). Similarly, Kathy's statements that she wanted a divorce and had "another man lined up" fail to meet the standard.

11 Defendant's claim that Kathy slapped him does not add substantial weight to a claim of passion/provocation. Although perhaps sufficient to warrant the instruction,[4] the evidence of an ***369** alleged slap was conceded to be insufficient to constitute adequate provocation. Even in instances of "mutual combat," the defendant's response must be proportionate to the provocation. *State v. Oglesby*, 122 *N.J.* 522, 536, 585 *A.*2d 916 (1991) (single blow by an unarmed woman was insufficient provocation to warrant an instruction on passion/provocation manslaughter); *State v. Crisantos, supra*, 102

N.J. at 280, n. 12, 508 *A.*2d 167; *State v. Darrian*, *supra*, 255 *N.J.Super.* at 449, 605 *A.*2d 716.

> [T]he contest must have been waged on equal terms and no unfair advantage taken of the deceased.... The offense is not manslaughter but murder where the defendant alone was armed; and took an unfair advantage of the deceased.... [I]f a person, under color of fighting on equal terms, kills the other with a deadly weapon which he used from the beginning or concealed on his person from the beginning, the homicide constitutes murder.
>
> [*Crisantos*, *supra*, 102 *N.J.* at 274–275, 508 *A.*2d 167 (citations omitted).]

Defendant brought a concealed and loaded handgun to the home that night. His response to his wife's refusal to abandon divorce proceedings, and even her slap, was wholly disproportionate to any provocation. As in *Heslop*, *supra*, 135 *N.J.* at 327, 639 *A.*2d 1100, the strength of the evidence supporting the State's theory that this was a deliberate murder "strongly militates against" a conclusion that the error in the charge contributed to a verdict that the jury might not otherwise have reached.

Turning to the prosecutor's summation, the prosecutor accurately identified all four *Mauricio* factors, including the third factor, and the fact that the State had to prove the absence of one beyond a reasonable doubt to sustain a murder conviction. Therefore, the summation did not exacerbate the error in the charge, but rather, added further to the "overall effect" of a charge that properly conveyed the State's burden of proof.

Our review of the jury's questions reveals no indication that the jury was misled ***429** by the error. Unlike *Savage*, *supra*, 172 *N.J.* at 393–95, 799 *A.*2d 477, none of the jury's questions or requests *370 suggested any confusion as to what the State had to prove beyond a reasonable doubt regarding passion/provocation manslaughter in order to secure a conviction for murder.

The lack of prejudicial impact is further evinced by the absence of an objection. *See Macon*, *supra*, 57 *N.J.* at 341, 273 *A.*2d 1 ("failure to object may suggest the error was of no moment in the actual setting of the trial"). The one-word error was imbedded in the model jury charge that trial courts are required to read to juries:

> [M]odel jury charges should be followed and read in their entirety to the jury. The process by which model jury charges are adopted in this State is comprehensive and thorough; our model jury charges are reviewed and refined by experienced jurists and lawyers.
>
> [*State v. R.B.*, 183 *N.J.* 308, 325, 873 *A.*2d 511 (2005).]

12 Certainly, trial courts and counsel must review charges for potential error, even in model jury charges. However, this error was one word that was literally buried in a charge that was otherwise correct. The error went unnoticed by the "experienced jurists and lawyers" who "reviewed and refined" the charge, *ibid.*, as well as the trial court and counsel here.[5] We conclude that the failure to object here reflected the obscure nature of the error and that it is more likely that the jury also depended upon the overall, correct expressions of the controlling legal principles rather than the one erroneous statement here.

*371 In summary, we find that the error here was an isolated occurrence in a charge that repeatedly stressed the State's burden to prove the absence of one of the factors of passion/provocation manslaughter beyond a reasonable doubt. The prosecutor specifically targeted "adequate provocation" as the factor the State had proven was not present. The evidence and arguments of counsel clearly show that the adequacy of any cooling-off period was not a crucial issue regarding passion/provocation manslaughter. Moreover, the evidence regarding passion/provocation manslaughter was relatively weak. Finally, the prosecutor's summation did not exacerbate the error but, rather, diminished it. Accordingly, we conclude that the error in the charge did not lead the jury to a verdict that it otherwise might not have reached.

[At the direction of the court, the discussion of the other issues in the appeal has been omitted from the published version of the opinion.]

Defendant's conviction is affirmed. Defendant's sentence is vacated and the case is remanded for resentencing.

All Citations

407 N.J.Super. 352, 971 A.2d 418

Footnotes

1 *Miranda v. Arizona*, 384 *U.S.* 436, 86 *S.Ct.* 1602, 16 *L.Ed.*2d 694 (1966).

2 If there had been an objection, the error could have been readily corrected by the substitution of a single word, "adequate," for "inadequate," as was done in a subsequent revision of the model jury charge.

3 The instruction here did not include either of these errors.

4 The threshold for a jury instruction for passion-provocation manslaughter is relatively low. *Erazo, supra*, 126 *N.J.* at 123, 594 *A.*2d 232; *Coyle, supra*, 119 *N.J.* at 224, 574 *A.*2d 951; *Crisantos, supra*, 102 *N.J.* at 278, 508 *A.*2d 167; *Rambo, supra*, 401 *N.J.Super.* at 515, 951 *A.*2d 1075; *State v. Copling*, 326 *N.J.Super.* 417, 428, 741 *A.*2d 624 (App.Div.1999), *certif. denied*, 164 *N.J.* 189, 752 *A.*2d 1290 (2000). Although the State now argues that a passion/provocation manslaughter charge was not required here, the prosecutor did not object to the charge in the trial court so we need not address whether the instruction was required.

5 In *State v. Brooks*, 309 *N.J.Super.* 43, 62–65, 706 *A.*2d 757 (App.Div.1998), this court reviewed a claim that the model jury charge on passion/provocation manslaughter in effect at that time also created confusion on the third element. The language in question was strikingly similar to the language challenged here:

> *Third, you must determine whether the defendant had a reasonable time to cool off;* in other words, you must determine whether the time between the provoking event or events, or the acts which caused death, was inadequate for the return of a reasonable person's self control.
>
> [*Id.* at 63, 706 *A.*2d 757.]

However, the flaw alleged by defendant in *Brooks* and considered "unfortunate" by this court lay in the phrase, "you must determine," rather than the language following "in other words," which apparently gave no one cause for concern. *Ibid.*

End of Document

200 N.J. 370
(The decision of the Court is referenced in the Atlantic Reporter in a table captioned "Supreme Court of New Jersey Table of Petitions for Certification".)
Supreme Court of New Jersey.

State v. Docaj
Supreme Court of New Jersey September 11, 2009 200 N.J. 370 982 A.2d 457 (Table) *(Approx. 1 page)*

State

v.

[Gjelosh **Docaj**, a/k/a **Jerry Docaj**, a/k/a **Jerry** Docoj

NOS. C-82 SEPT.TERM 2009, 64,406
September 11, 2009

Synopsis
Lower Court Citation or Number: 407 N.J.Super., 352, 971 A.2d 418

Opinion
Disposition: Denied.

All Citations

200 N.J. 370, 982 A.2d 457 (Table)

End of Document

2012 WL 2529301
Only the Westlaw citation is currently available.

Superior Court of New Jersey,
Appellate Division.

STATE of New Jersey, Plaintiff–Respondent,
v.
Gjelosh DOCAJ, Defendant–Appellant.

Submitted May 1, 2012.
Decided July 3, 2012.

On appeal from Superior Court of New Jersey, Law Division, Bergen County, Indictment No. 03–07–1477.

Attorneys and Law Firms

Joseph E. Krakora, Public Defender, attorney for appellant (William Welaj, Designated Counsel, on the brief).

John L. Molinelli, Bergen County Prosecutor, attorney for respondent (Catherine A. Foddai, Senior Assistant Prosecutor, of counsel and on the brief).

Before Judges ESPINOSA and KENNEDY.

Opinion

PER CURIAM.

*1 Defendant appeals from the denial of his petition for post-conviction relief (PCR) without an evidentiary hearing. For the reasons that follow, we affirm.

Defendant was convicted by a jury of first-degree murder, *N.J.S .A.* 2C:11–3(a)(1), (2), (count one); possession of a weapon for an unlawful purpose, *N.J.S.A.* 2C:39–4(a) (count two); and possession of a weapon without a permit, *N.J.S.A.* 2C:39–5(b) (count three). The sentencing court merged count three into count one and imposed a sentence of life imprisonment subject to the No Early Release Act, *N.J.S.A.* 2C:43–7.2 (NERA), with five-years parole supervision on count one, a concurrent term of five years on count two, and appropriate fines and penalties. The court also required defendant to pay $7,750 in restitution to the Victims of Crime Compensation Board.

Defendant filed a direct appeal in which he raised the following issues:

POINT I

THE INSTRUCTION ON PASSION/PROVOCATION MANSLAUGHTER MISSTATED THE LAW. (NOT RAISED BELOW)

POINT II

IN HER OPENING STATEMENT, THE PROSECUTOR IMPROPERLY URGED THE JURY TO CONSIDER "THIS ... A TRIAL TO SEEK JUSTICE OF [SIC] HER DEATH."

POINT III

THE DETECTIVE WHO INTERROGATED DEFENDANT REPEATEDLY TESTIFIED THAT DEFENDANT "WAS NOT TELLING THE WHOLE TRUTH" AND "WAS TRYING TO HIDE SOME THINGS."

POINT IV

THE COURT TOLD THE JURY, WITH RESPECT TO THE ADMISSION OF DEFENDANT'S STATEMENT, THAT IT HAD ALREADY RULED ON "THE QUESTION OF MIRANDA RIGHTS." (NOT RAISED BELOW)

POINT V

THE EMERGENCY–MEDICAL TECHNICIAN REPEATEDLY CHARACTERIZED THE SHOOTING AS A "MURDER." (NOT RAISED BELOW)

POINT VI

THE POLICE DETECTIVE READ A PASSAGE FROM A BIBLE FOUND DURING THE SEARCH OF DEFENDANT'S HOME. (NOT RAISED BELOW)

POINT VII

DEFENSE COUNSEL'S FAILURE TO OBJECT AT TRIAL TO THE ERRORS RAISED IN POINTS I, IV, V, AND VI DEPRIVED DEFENDANT OF THE EFFECTIVE ASSISTANCE OF COUNSEL.

POINT VIII

THE TRIAL WAS SO RIDDLED WITH ERRORS THAT THEIR CUMULATIVE EFFECT RENDERED THE TRIAL UNFAIR.

POINT IX

A LIFE TERM, WHICH IS THE MAXIMUM SENTENCE AND WHICH CARRIES A MANDATORY PAROLE DISQUALIFIER OF MORE THAN 63 YEARS, IS GROSSLY EXCESSIVE.

We affirmed defendant's conviction and remanded for re-sentencing. *State v. Docaj,* 407 *N.J.Super.* 392 (App.Div.2009).[1] Defendant filed a petition for certification, which was denied by the Supreme Court, 200 *N.J.* 370 (2009). The facts underlying defendant's convictions are set forth in our opinion and need not be repeated here.

Defendant filed a petition for PCR on January 15, 2010, in which he argued

POINT I

TRIAL COUNSEL FAILURE TO REQUEST A COMPETENCY HEARING BASED ON THE MEDICAL REPORT DEPRIVED DEFENDANT OF HIS CONSTITUTIONAL RIGHT TO DUE PROCESS OF LAW AND EFFECTIVE ASSISTANCE OF COUNSEL. (NOT RAISED BELOW)

POINT II

THE TRIAL COURT'S [SIC] COMMITTED REVERSIBLE ERROR BY ALLOWING LAW ENFORCEMENT OFFICER [SIC] TO INTERJECT THEIR PERSONAL OPINION AND INADMISSIBLE HEARSAY EVIDENCE OVER DEFENSE OBJECTION. (NOT RAISED BELOW)

**2 POINT III*

THE PROSECUTOR ENGAGED IN PROSE[C]UTORIAL MISCONDUCT BY VOUCHING FOR THE CREDIBILITY OF KEY STATE'S [SIC] USURPING THE FUNCTION OF THE JURY. (NOT RAISED BELOW)

POINT IV

THE LOWER COURT'S FAILURE TO ADEQUATELY VOIR–DIRE POTENTIAL JURORS COUPLED WITH THE STATE'S FAILURE TO SERVE DEFENDANT WITH DISCOVERIES IN HIS NATIVE LANGUAGE AND PROVIDE AN INTERPRETER THROUGHOUT THE PROCEEDINGS, DEPRIVED DEFENDANT OF DUE PROCESS OF LAW AND A FUNDAMENTALLY FAIR TRIAL. (NOT RAISED BELOW)

The PCR court denied defendant's petition by order dated August 30, 2010.

Defendant presents the following issues for our consideration in his appeal.

POINT I

THE TRIAL COURT ERRED IN DENYING THE DEFENDANT'S PETITION FOR POST CONVICTION RELIEF SINCE HE FAILED TO RECEIVE ADEQUATE LEGAL REPRESENTATION FROM TRIAL COUNSEL AS A RESULT OF HIS FAILURE TO REQUEST THE APPROPRIATE RELIEF ARISING OUT OF THE PROSECUTOR'S SUMMATION WHICH EXCEEDED THE BOUNDS OF PROPRIETY.

POINT II

RULE 3:22–4 DID NOT OPERATE AS A PROCEDURAL BAR TO PRECLUDE THE DEFENDANT'S CONTENTION FROM BEING ADJUDICATED ON A SUBSTANTIVE BASIS.

We are not persuaded by either of these arguments and affirm.

In his direct appeal, one of the issues raised by defendant was that the prosecutor committed misconduct by making improper comments in her opening statement. Defendant did not challenge any comment made by the prosecutor in summation.

Rule 3:22–4(a) states in pertinent part:

> Any ground for relief not raised in the proceedings resulting in the conviction, ... or in any appeal taken in any such proceedings is barred from assertion in a proceeding under this rule unless the court on motion or at the hearing finds:
>
> (1) that the ground for relief not previously asserted could not reasonably have been raised in any prior proceeding; or
>
> (2) that enforcement of the bar to preclude claims, including one for ineffective assistance of counsel, would result in fundamental injustice; or
>
> (3) that denial of relief would be contrary to a new rule of constitutional law under either the Constitution of the United States or the State of New Jersey.

Defendant contends that, although an argument was made in his direct appeal that the prosecutor made improper comments during her opening statement, his present argument regarding her summation could not have reasonably been raised in his direct appeal. He claims that the argument was not reasonably available because he was denied the effective assistance of counsel on appeal. However, the rule limits the application of this exception as follows:

> A ground could not reasonably have been raised in a prior proceeding only if defendant shows that the factual predicate for that ground could not have been discovered earlier through the exercise of reasonable diligence.
>
> [*Ibid.*]

Therefore, this exception does not apply.

In addressing this issue, the PCR court stated:

> *3 [T]he petitioner made a vague claim of prosecutorial misconduct. The Court noted that the petitioner did not assert this claim with any specificity. Petitioner simply asserted that the prosecutor vouched for certain witnesses but could not support this argument with any reference to the record. Thus, this claim failed.

On appeal, defendant concedes that "neither the defendant nor post conviction relief counsel presented any references whatsoever to the trial record in support of this contention[.]" Defendant bore the burden to establish by a preponderance of the evidence that he is entitled to relief. "To sustain that burden, specific facts must be

alleged and articulated, which, if believed, would provide the court with an adequate basis on which to rest its decision." *State v. Mitchell*, 126 *N.J.* 565, 579 (1992). The PCR court correctly denied relief because the submission to the PCR court failed to present a factual basis for granting relief to defendant based upon alleged improprieties in the prosecutor's summation.

On appeal, defendant attempts to cure this deficiency by quoting passages from the prosecutor's summation that purportedly represent misconduct. To justify a reversal, the prosecutor's comments "must have been clearly and unmistakably improper, and must have substantially prejudiced defendant's fundamental right" to a fair trial. *State v. Timmendequas*, 161 *N.J.* 515, 575 (1999) (citing *State v. Roach*, 146 *N.J.* 208, 219, *cert. denied*, 519 *U.S.* 1021, 117 *S.Ct.* 540, 136 *L. Ed.*2d 424 (1996) (internal quotation marks omitted)). We are satisfied from our review of the comments cited that the prosecutor's comments did not rise to that level.

Moreover, trial counsel interposed objections to certain of the comments and the trial court gave appropriate instructions both during the trial and in the charge. Therefore, even considering the supplemental argument made on appeal, defendant has failed to show he was deprived the effective assistance of counsel as a result of the alleged failure of his trial counsel to respond to alleged improprieties in the prosecutor's summation. *See Strickland v. Washington*, 466 *U.S.* 668, 104 *S.Ct.* 2052, 80 *L. Ed.*2d 674 (1984); *State v. Fritz*, 105 *N.J.* 42 (1987).

Affirmed.

All Citations

Not Reported in A.3d, 2012 WL 2529301

Footnotes

1 Following remand, defendant appealed his sentence while this appeal was pending. We remanded the matter for resentencing a second time. *State v. Docaj*, No. A–002542–09 (App.Div. November 21, 2011).

End of Document

213 N.J. 568
(The decision of the Court is referenced in the Atlantic Reporter in a table captioned "Supreme Court of New Jersey Table of Petitions for Certification".)
Supreme Court of New Jersey.

State v. Docaj
Supreme Court of New Jersey January 16, 2013 213 N.J. 568 65 A.3d 835 (Table) *(Approx. 1 page)*

State

v.

[Gjelosh **Docaj**

NOS. C-411 SEPTTERM 2012, 071271
January 16, 2013

Opinion
Disposition: Denied.

All Citations

213 N.J. 568, 65 A.3d 835 (Table)

End of Document

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JERRY DOCAJ, Petitioner, v. STEPHEN D'ILIO, *et al.*, Respondents.	:	Civil Action No. 13-6120 (CCC) **ORDER**

For the reasons described in the accompanying Opinion filed herewith,

IT IS therefore on this 27 day of October, 2017

ORDERED that the Petition for Writ of Habeas Corpus under 28 U.S.C. § 2254 (ECF No. 1) is **DENIED**; it is further

ORDERED that a certificate of appealability shall not issue; and it is further

ORDERED that the Clerk shall close this matter.

CLAIRE C. CECCHI
United States District Judge

2017 WL 4882486
Only the Westlaw citation is currently available.
NOT FOR PUBLICATION
United States District Court,
D. New Jersey.

Jerry DOCAJ, Petitioner,
v.
Stephen D'ILIO, et al., Respondents.

Civil Action No. 13-6120 (CCC)
Filed 10/30/2017

OPINION

CLAIRE C. CECCHI United States District Judge

*1 This matter comes before the Court upon the Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 (Pet., ECF No. 1) filed by Petitioner **Jerry Docaj** ("Petitioner"), an inmate confined in state prison in New Jersey. Respondents filed an Answer and brief in opposition to habeas relief. (Answer, ECF No. 10.) Petitioner filed a reply. (Petitioner **Jerry Docaj's** Reply/Traverse Brief in Support of His 28 U.S.C. § 2254 Petition ("Reply") ECF No. 18.)

I. PROCEDURAL HISTORY

In March 2005, Petitioner's first murder trial ended in a hung jury in Bergen County Superior Court. (Pet., ECF No. 1, ¶ 2.) His second trial, ending on November 3, 2005, resulted in conviction on three counts: (1) murder, N.J.S.A. 2C:11-3a(1)(2); (2) possession of a weapon for unlawful purpose, N.J.S.A. 2C:39-4a; (3) unlawful possession of a weapon, handgun, N.J.S.A. 2C:39-5b. (Id., ¶¶ 2-3.) On May 27, 2009, the Appellate Division affirmed the convictions but remanded for resentencing. (Id., ¶ 9); State v. **Docaj**, 407 N.J. Super. 352 (N.J. Super. Ct. App. Div. 2009),[1] cert. denied, 200 N.J. 370 (2009). (Id.) Petitioner's sentence, after several remands for resentencing on appeal, was life imprisonment with 63 years and nine months served without parole eligibility. (ECF No. 1, ¶ 3.)

Petitioner filed a petition for post-conviction relief ("PCR"). (Pet., ¶ 11.) The PCR Court denied the petition on August 30, 2010. (Id.) Petitioner appealed, and the Appellate Division affirmed. (Id.); State v. **Docaj**, 2012 WL 2529301 (N.J. Super. Ct. App. Div. July 3, 2012). The New Jersey Supreme Court denied the petition for certification on January 16, 2013. (Pet., ¶11.)

Petitioner filed his habeas petition in this Court on October 15, 2013. He raised eight grounds for relief, discussed below.

II. BACKGROUND

The factual background in this matter was summarized by the New Jersey Superior Court, Appellate Division upon Petitioner's direct appeal. State v. **Docaj**, 407 N.J. Super. 352 (N.J. Super. Ct. App. Div. 2009).[2] Petitioner, an Albanian national, and Kathy **Docaj**, a Yugoslavian who lived in the United States since age nine, were married in an arranged marriage in 1983. They had three children, and lived in Lodi, New Jersey. In February 2003, the time of Kathy's death, their son Christopher was eighteen, their daughter Christina was fifteen, and their youngest daughter was nine. In mid-December 2002, Kathy was involved with another man, Robert Narciso, and she told Petitioner she no longer loved him, and asked him to move out. He moved to an apartment in Lodi in January 2003.

*2 Petitioner had purchased a .38 caliber handgun ten years earlier, which he kept under his bed. He took the handgun with him when he moved out. He began to suspect that Kathy was cheating on him. On February 7, 2003, Kathy called Petitioner and told him she was meeting with a lawyer to prepare papers to file for divorce.

Petitioner's diary showed that he begged Kathy not to divorce him. Petitioner and Kathy were alternating weekends with the children, and Petitioner had the children on February 8 and 9, 2003. Kathy said she was spending the weekend with friends in Atlantic City, but she spent the weekend with Narciso. Petitioner wrote in his diary that he could not understand how someone who loved her husband for nineteen years could go to Atlantic City to celebrate.

Petitioner's diary also showed he was upset that Kathy did not give him anything for his birthday on February 12. He wrote, "I will remember this because one day by the power of God it will come that I will remember that day." Her birthday was two days later, and he gave her a gift. Around this time, she told him she had "another man lined up." Petitioner noticed Kathy wearing jewelry he did not know she owned.

Petitioner's son Christopher, noticing that his mother was spending a lot of time on the telephone, used the "Star 69" feature on the phone to find out who his mother was calling, and he gave the number to his father. On February 17, 2003, Narciso received a call from a man who had an accent. When Narciso asked for the caller's phone number, the caller hung up. A paper with Narciso's phone number on it was found in Petitioner's possession after police arrested him.

Kathy spent the night with Narciso on February 21, 2003. Petitioner spent that night with their children in their marital home. He went to his apartment early the next morning. When he went to work, he brought a book bag containing the .38 caliber gun. He called Kathy that day and he asked how her night out at the club had been. She told him she was out until 3:00 or 4:00 a.m. He said he would see her later because he wanted to talk to her, to which she replied, "whatever."

Petitioner left work at 6:00 p.m., bringing the book bag containing the handgun back to his apartment. In his apartment, he put the gun in the waistband of his trousers, underneath a vest, and went to their marital home. Kathy, their three children, and two friends of their children were in the lower level of the home. Petitioner and Kathy went upstairs to the kitchen, where they sat drinking coffee and smoking cigarettes. When Christopher came to the kitchen to use the phone, Petitioner asked Kathy to go to the bedroom so they could talk. They went to the bedroom. The door was closed and locked.

Within a minute, Christopher heard his parents screaming and cursing, and noises of pushing and shoving. His mother screamed and he heard a single boom. Christopher began screaming, "open the door." Petitioner opened the door, white-faced, and immediately said, "I'm sorry, I'm sorry." Petitioner tried to block Christopher from seeing his mother, but he saw her lying bloody on the floor.

Christina came upstairs and saw Christopher and Petitioner arguing and struggling. Petitioner told Christina, "she cheated on me for two years" and "she's gone." Petitioner continued to block them from entering the room. Christina dialed 9-1-1, and said she thought her mother was dead. Petitioner could be heard on the 9-1-1 recording yelling, "she was cheating on me," "she was f-ing cheating on me," and "she was cheating on me for one year." Christopher also called 9-1-1 and requested help.

*3 Two police officers from Lodi Police Department arrived and found Kathy lying in a pool of blood on the bedroom floor, and a revolver resting on the lower end of the bed. Christopher was angry and attempting to walk out of the house. Petitioner was in a daze, walking in circles. Not knowing what had happened, police handcuffed Christopher and Petitioner. Petitioner was advised he was not under arrest, and he was not given Miranda warnings.

Investigation showed Kathy died from a single gunshot wound to the back of the head, and she was positioned low in relation to the shooter when she was shot. Petitioner gave a statement to police about what happened in the bedroom. Petitioner denied he had gone to the house to kill his wife. He said he begged her to stay with him, and told her he would forgive her "to this point," but she had looked angry and like she did not

want to hear him. According to Petitioner, Kathy had said the only thing he was getting was walking papers, and hit him once in the face.

When Kathy hit him, Petitioner said "things went dark," and he pushed Kathy down but also tried to catch her when it looked like she would hit her face on the floor. Petitioner admitted he had the gun in his hand when he tried to catch her, but he did not remember pulling the gun from his waistband and pulling the trigger, nor did he remember what he did with the gun after shooting Kathy.

III. DISCUSSION

A. Standard of Review

28 U.S.C. § 2254(d) provides:

> An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

"Contrary to clearly established Federal law" means the state court applied a rule that contradicted the governing law set forth in U.S. Supreme Court precedent or that the state court confronted a set of facts that were materially indistinguishable from U.S. Supreme Court precedent and arrived at a different result than the Supreme Court. Eley v. Erickson, 712 F.3d 837, 846 (3d Cir. 2013) (citing Williams v. Taylor, 529 U.S. 362, 405-06 (2000)). The phrase "clearly established Federal law" "refers to the holdings, as opposed to the dicta" of the U.S. Supreme Court's decisions. Williams, 529 U.S. at 412. An "unreasonable application" of clearly established federal law is an "objectively unreasonable" application of law, not merely an erroneous application. Eley, 712 F.3d at 846 (quoting Renico. v. Lett, 130 S. Ct. 1855, 1862 (2010)).

B. Analysis

1. Ground One

In Ground One of the petition, Petitioner claims that the jury instruction on passion/provocation manslaughter misstated the law, in violation of his Sixth Amendment right to a fair trial, and Fourteenth Amendment right to due process. Petitioner cites the following portion of the jury charge:

> The third factor you must consider is whether the state has proven beyond a reasonable doubt that the defendant had a reasonable time to cool off. In other words, you must determine whether the state has proven that the time between the provoking event and the acts which caused death was inadequate for the return of a reasonable person's self-control.

*4 (Answer, Ex. 20, ECF No. 10-20, 12T214-6 to 10.) The correct charge is that the state must prove that "adequate time" elapsed between the provoking event and the shooting for a reasonable person to have cooled off. The court used the word "inadequate" in the instruction, when it should have said adequate." In fact, the word "inadequate" is a mistake that appears in the model jury instruction. State v. **Docaj**, 407 N.J. Super. at 361.

Respondents cite the Appellate Division's decision on direct appeal. Although the error was present in the instruction, all four factors that reduce murder to manslaughter were accurately introduced to the jury, and twice more accurately set forth when the judge "summed up" the State's burden of proof. State v. **Docaj**, 407 N.J. Super. at 363-

64. In sum, there was one error imbedded in three correct instructions regarding the State's burden on the cooling off factor. Id. at 364.

The Appellate Division also found any error was harmless because the only evidence of provocation was a slap in the face, which did not constitute adequate provocation to support passion/provocation manslaughter. Defense counsel argued in summation that the provocation included increasing emotional turmoil from the impending divorce, which was punctuated by the slap. Id. at 367. The Appellate Division found that the lack of proof of adequate provocation posed a critical weakness in the evidence for conviction on manslaughter, that Petitioner's response was not proportionate to the provocation, and that there was evidence that Petitioner brought a concealed and loaded handgun with him that night. Id. at 368-69.

In reply, Petitioner asserts that the jury charge was, at a minimum, hopelessly confusing; and it misstated the State's burden of proof. Petitioner contends the jury instruction relieved the State of its burden to prove every element of the crime beyond a reasonable doubt.

For habeas relief on an erroneous jury instruction, a defendant must show both that the jury instruction was ambiguous, and that there was a reasonable likelihood that the jury applied the instruction in a way that relieved the State of proving every element of the crime beyond a reasonable doubt. Estelle v. McGuire, 502 U.S. 62, 72 (1991). In doing so, the court must consider the challenged instruction in context of the charge as a whole and the trial record, and decide whether the charge so infected the trial that the result violated due process. Id.; Cupp v. Naughten, 414 U.S. 141, 146-47 (1973).

The Appellate Division reasonably applied controlling federal law by considering the challenged instruction in the context of the charge as a whole, and the trial record. The court reasonably concluded that because the passion/provocation manslaughter charge was given accurately three times, and only once with a misspoken word, that the jury followed the correct instruction. Furthermore, as the Appellate Division found, there was little chance the jury would find a slap in the face during an argument over divorce was sufficient to provoke Petitioner to kill his wife, particularly when one considers that he brought a gun to work that day and put it in his waistband before going to see his wife. The Court will deny Ground One of the habeas petition.

2. Ground Two

In Ground Two, Petitioner alleges that prosecutorial misconduct in the opening statement was so egregious as to violate Petitioner's Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process. In her opening statement, the prosecutor said the trial "is not about a celebration of Kathy's life ... what this trial is[,] is a trial to seek justice of her death." (Answer, Ex. 15, ECF No. 10-15, 7T21-7 to 21-10.) The trial court denied the defense motion for a mistrial. Petitioner contends by making this deliberate appeal to the juror's emotions at the outset of trial, the jury was told it was their duty to convict and get justice for the victim.

*5 Respondents argue that the trial judge's instruction cured any possible prejudice. The judge instructed, "[a]rguments, statements, remarks, openings and summations of counsel are not evidence and must not be treated as evidence." (Answer, Exhibit 20, ECF No. 10-20, 12T202-14 to 16); and it was the jurors' duty to:

> weigh the evidence calmly and without passion, prejudice or sympathy. Any influence caused by these emotions has the potential to deprive both the State and the defendant of what you promised them, a fair and impartial trial...

(Id., 12T198-15 to 198-20.) Although the Appellate Division agreed that the comment in the opening statement went beyond recitation of what the State expected to prove, it was not "sufficiently grievous" to prejudice defendant's right to a fair trial. State v. **Docaj**, 407 N.J. Super. at 362.

In reply, Petitioner cites Viereck v. United States, 318 U.S. 236 (1943), in support of reversal. In Viereck, the Supreme Court found the prosecuting attorney's statements "might well have placed the judgment of conviction in jeopardy," although the Court reversed on another basis. Id. at 247. However, the prosecutor's statements in Viereck were far more egregious than the prosecutor's statements here. During World War II, the prosecutor in Viereck called on the jury to do their duty to their country in a time of war, telling the jury the American people were relying on them for protection, just as they were relying on the soldiers in the Bataan Peninsula. Id. at 247 n.3.

For prosecutorial misconduct to constitute a violation of due process, the conduct complained of must be so egregious as to render the entire proceeding fundamentally unfair. Donnelly v. DeChristoforo, 416 U.S. 637, 642-48 (1974). The effect of the prosecutor's conduct must be viewed in context of the whole trial. Greer v. Miller, 483 U.S. 756, 766 (1987).

The trial judge made very clear to the jury at the beginning and close of trial that it was their obligation to find the facts from the evidence presented to them, and apply the law in reaching the verdict, without considering the lawyers' arguments as evidence. (Answer, Ex. 15, ECF No. 10-15, 7T6-22 to 7-15; Answer, Ex. 20, ECF No. 10-20, 12T202-3 to 202-20.) The Appellate Division was not unreasonable in finding, in the context of the trial as a whole, the prosecutor's statement was not a violation of Petitioner's right to due process and a fair trial.

3. Ground Three

Petitioner contends, in Ground Three of the petition, that his rights to due process and a fair trial were violated when the detective who interrogated Petitioner repeatedly testified that Petitioner "was not telling the whole truth" and "was trying to hide some things." Petitioner presented a defense of passion/provocation manslaughter and relied in large part on the fact that when he was interrogated by police, he said that "things went dark" after his wife slapped him, and he could not recall the shooting.

The detective testified that Petitioner had insisted he did not go to the house with the intent of killing his wife but "it appeared that he was not telling the whole truth." (Answer, Ex. 19, ECF No. 10-19, 11T38-6 to 11.) Twice more, the State elicited the detective's testimony that Petitioner's statements were less than the whole truth, and that Petitioner was trying to hide some things.

*6 When Petitioner insisted to the detective that he did not remember what happened, the detective accused him of being the person who fired the gun. The detective told Petitioner that his story about not remembering was not reasonable given his recall of everything that happened up to that point. (Id. at 11T50-4 to 51-4 to 7.) Petitioner responded, "I don't f------ remember man." (Id. at 51-6 to 51-7.) Petitioner's defense was that he was telling the detective the truth about not remembering killing his wife.

Respondents contend the context of the detective's testimony is important. During the interrogation, after Petitioner recounted in detail going to the victim's house and arguing with her, Petitioner admitted that he had a gun in his waistband, but did not recall taking the gun out. The detective asked Petitioner whether he went to the house with the intent of killing his wife. When Petitioner answered no, the detective said he did not think Petitioner was telling the whole truth. The trial judge denied defense counsel's objection to this testimony because the detective was only recounting what was said in the interrogation.

In the jury charge, the trial judge reminded the jurors that they were the finders of fact and must determine the credibility of witnesses. (Answer, Ex. 20, ECF No. 10-20, 12T202-3 to 10). The court stressed that, "[y]ou and you alone are the sole and exclusive judges of the evidence, of the credibility of the witnesses, and the weight to be attached to the testimony of each witness." (Id. at 12T202-7 to 202-10.) With respect to petitioner's statement, "I don't f------ remember man," the court instructed that the jury first had to decide whether the statement was made and whether, if made, it or any portion of it was credible. (Id. at 12T229-2 to 229-21). In deciding credibility, the jurors were told to "take into consideration the circumstances and facts as to how the

statement was made, as well as all other evidence in this case relating to this issue." (Id. at 12T229-22 to 230-1.)

In reply, Petitioner cites state cases condemning testimony by police officers that expressed an opinion of the defendant's guilt, warning that a jury may be inclined to accord special respect to a police witness. Petitioner argues, the detective's testimony violated his right to a fair trial.

"Federal habeas corpus relief does not lie for state law errors." Estelle, 502 U.S. at 67 (quoting Lewis v. Jeffers, 497 U.S. 780 (1990)). The only question is whether the error so infected the entire trial with unfairness that the resulting conviction violated due process. Id. at 72. The Supreme Court has defined the category of errors that violate fundamental fairness very narrowly. Id. at 73.

The Appellate Division noted the Detective's testimony was not admitted as an expression of his opinion on Petitioner's guilt, but rather that his statements were provided in a detailed description of the interrogation. (Answer, Ex. 5, ECF No. 10-5 at 40.) The testimony provided context for Petitioner's repeated claims that he did not recall the shooting. (Id. at 41.) The jury was properly instructed that it was their duty to determine whether Petitioner stated he did not remember shooting his wife, and if his statement was credible. (Id.) The detective's statements did not prevent the jury from its function of evaluating Petitioner's credibility. (Id. at 42.)

The transcript of the record, cited above, confirms that the jury was correctly instructed on its duty to consider whether Petitioner was credible when he said he did not remember shooting his wife. Furthermore, it is clear from the detective's testimony that he was describing what was said during the interrogation, and not offering the jury his opinion that Petitioner was guilty of murder rather than manslaughter. Therefore, the Court will deny Ground Three of the habeas petition.

4. Ground Four

*7 In Ground Four, Petitioner contends that the trial court denied him the right to a fair trial, the right to remain silent, and the right to due process under the Fifth, Sixth and Fourteenth Amendments, by instructing the jury that the Court had already ruled on the question involving Petitioner's Miranda rights. Petitioner contends reasonable jurors might have taken this to mean the judge believed that the police honored his legal rights during the interrogation. This would suggest to the jury that they could believe the testimony of the interrogating detective, that Petitioner was not telling the whole truth when he said he did not remember. Petitioner asserts this was prejudicial because his defense was based on the jury believing his statements that he could not remember what happened after his wife slapped him.

Respondents again note that the trial judge instructed the jury "[t]here is for your consideration in this case an oral statement allegedly made by the petitioner. It is your function to determine whether or not the statement was actually made by the defendant and, if made, whether the statement or any portion of it is credible." (Answer, Exhibit 20, ECF No. 1-20, 12T229-2 to 229-7.) Respondents contend that no juror who heard this instruction could take away from it that the trial judge was vouching for the detective's testimony.

In reply, Petitioner points out that New Jersey rules of evidence prohibit a trial judge from informing the jury that the judge has determined police obtained a statement from the defendant in a legally proper manner. (Reply at 49 citing N.J.R.E. 104(c); State v. Hampton, 61 N.J. 250, 272 (1972)). Petitioner's statements to the detective were critical to his defense, and he asserts bolstering the detective's credibility prejudiced the trial. The Appellate Division found this claim without sufficient merit to warrant discussion. (Answer, Ex. 5, ECF No. 10-5 at 42-43.)

To obtain habeas relief, it is not enough for a Petitioner to show an error of State law. Estelle, 502 U.S. at 67. As discussed above, a petitioner must show that an evidentiary error rendered the entire trial, considered as a whole, fundamentally unfair.

Two factors make the Appellate Division's determination reasonable. First, as discussed in Ground Three, it would have been clear to the jury that the detective was not testifying to provide his opinion of Petitioner's guilt, but rather to tell them what occurred during the unrecorded interrogation. Second, even if a juror was inclined to believe the detective was offering his opinion that Petitioner was not telling the whole truth, the judge cured this by telling the jury it was their function alone to determine whether Petitioner was credible when he told the detective he could not remember shooting his wife. The Court will, therefore, deny Ground Four of the habeas petition.

5. Ground Five

In Ground Five, Petitioner alleged his Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process were violated when an Emergency Medical Technician ("EMT") repeatedly characterized the crime scene as a murder scene, when the defense was that defendant was guilty only of manslaughter. The jury might have accorded the EMT's testimony weight because she had medical training, and she testified that the scene of the crime did not appear the same as other deaths she attended. Petitioner contends this was an improper statement that expressed the EMT's opinion that defendant was guilty. Defense counsel did not request a curative instruction, nor did the trial judge sua sponte instruct the jury to disregard the prejudicial remarks.

Respondents submitted that it was defense counsel, on cross-examination, who asked the EMT if she had ever come upon a scene that looked like this one. She answered, "I've been to scenes [where] people were dead. I've been to DOAs before, but I've never been to a murder scene, no." (Answer, Ex. 17, ECF No. 10-17, 9T170-1 to 170-8.) Later in the cross-examination, she repeated that she had never responded to a murder scene before. (Id., 9T173-7 to 173-9.) Respondents note the jury received instructions on the whole panoply of homicide charges, from murder, passion/provocation manslaughter, aggravated manslaughter to reckless manslaughter, and this would dispel any prejudice that the jury might have been influenced by the EMT's characterization of the scene as a murder.

*8 Petitioner argues determination of the facts that establish guilt or innocence are exclusively reserved to the jury, and testimony directly related to the ultimate question of guilt rises to reversible error. (Pet., ECF No. 1 at 53 citing State v. Odom, 116 N.J. 65, 77 (1989); State v. Hightower, 120 N.J. 378, 425-26 (1990); State v. Landeros, 20 N.J. 69, 74-75 (1955)).

On direct appeal, the Appellate Division found this claim lacked sufficient merit to warrant discussion. "Where a state court's decision is unaccompanied by an explanation, the habeas petitioner's burden still must be met by showing there was no reasonable basis for the state court to deny relief." Harrington v. Richter, 562 U.S. 86, 98 (2011). Petitioner has not met that burden here. It is unlikely the jury understood the EMT was giving her opinion that Petitioner was guilty of murder when she characterized the scene as a murder scene, rather than merely describing the scene where she found a body lying in a pool of blood with a revolver left lying nearby. Even if the jury were influenced by the fact that the EMT characterized what she saw as a murder scene, the jury was well-instructed on the elements of murder versus the elements of passion/provocation manslaughter, which the jurors knew to be Petitioner's defense. The jurors were instructed that they alone would decide the facts and apply the law to arrive at the verdict. There is a reasonable basis in the record upon which the Appellate Division could have denied this claim.

Therefore, the Court will deny Ground Five.

6. Ground Six

Petitioner claims, in Ground Six, that he was denied due process and a fair trial when an officer read a Bible passage to the jury. The prosecutor elicited testimony from the officer that a Bible was found in Petitioner's apartment, bookmarked at a certain page where passages had been marked. The prosecutor asked the officer to read the caption of one of the passages. He read, "Psalm 37: The fate of the sinners and the reward of the

just." Petitioner contends it is highly prejudicial for the prosecutor to invoke the Bible to infer Petitioner's motive to kill his wife.

Respondents note the Bible was never mentioned on direct examination; defense counsel raised the issue by asking the police officer why pictures of pages of the Bible were taken at the scene but the Bible was not taken into evidence. The detective testified that a page was marked by a bookmark, and several passages were marked, so they photographed that page. Respondents assert the Bible was relevant to show Petitioner's feelings about his wife's betrayal and decision to seek a divorce. Furthermore, there was never any question at trial that the Bible belonged to Petitioner.

Petitioner cited State cases holding that reliance by the prosecutor on any religious writing is improper. Furthermore, Petitioner contends the Bible was irrelevant because it was not shown to be his, and no one could know who or why someone marked the passages that were marked or even what it meant if Petitioner had marked the passage.

The Appellate Division found this claim to be without sufficient merit to warrant discussion. Even assuming it was error to admit the testimony, the Appellate Division could have reasonably concluded that the testimony did not prejudice Petitioner. There was more than sufficient evidence during the trial for the jury to conclude Petitioner killed his wife out of anger over her cheating on him and asking for a divorce. He told his children, immediately after killing their mother, that she was cheating on him. On the recorded 9-1-1 call, Petitioner could be heard screaming "she cheated on me." Furthermore, Petitioner had made a statement in his diary, invoking God in his anger at his wife. Even without hearing the passage marked in the Bible, the jury was likely to find Petitioner killed his wife because she cheated on him. For this reason, Petitioner is not entitled to habeas relief on Ground Six.

7. Ground Seven

*9 Petitioner alleges ineffective assistance of trial and appellate counsel. Respondents contend Petitioner exhausted some but not all of his claims of ineffectiveness of trial counsel, and procedurally defaulted all his claims of ineffective assistance of appellate counsel.

a. Ineffective Assistance of Trial Counsel

On direct appeal, Petitioner argued that his trial counsel was ineffective for failing to object to the error in the passion/provocation manslaughter charge, failing to object to the jury charge regarding Miranda rights, failing to object to the EMT's reference to the "murder scene," and failing to object to an officer reading a passage from a Bible found in Petitioner's apartment. (Answer, Ex. 1, ECF No. 10-1 at 45-48.) The Appellate Division, citing Strickland v. Washington, 466 U.S. 668, 688 (1984), found that because all of the underlying claims of trial court error were meritless, counsel could not have been ineffective for failing to object. (Answer, Ex. 5, ECF No. 10-5 at 43.)

The Appellate Division applied the correct standard for ineffective assistance of counsel under Strickland, and reasonably concluded that counsel's performance was not deficient for failing to raise arguments that lacked merit. See Boyer v. Houtzdale, 620 F. App'x 118, 123 (3d Cir. 2015) ("[C]ounsel cannot be ineffective for failing to raise a meritless claim.")

b. Procedural default

In general, federal habeas relief may not be granted to a person in custody pursuant to a judgment of a State court, if the person has not exhausted the remedies available in the courts of the State. 28 U.S.C. § 2254(b)(1)(A). "State prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." O'Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). The independent and adequate state ground doctrine "applies to bar federal habeas when a state court declined to address a prisoner's federal claims because the prisoner had failed to meet a state procedural requirement." Coleman v. Thompson, 501 U.S. 722, 729-30 (1991). The doctrine is based on concerns of respecting a State's interest in enforcing its laws. Id. at 730-31.

Federal and State courts are "equally bound to guard and protect rights secured by the Constitution." Id. at 731 (quoting Rose v. Lundy, 455 U.S. 509, 515 (1982)).

The procedural default doctrine applies to both state appeal and collateral proceedings. Coleman, 501 U.S. at 732. "[A] habeas petitioner who has failed to meet the State's procedural requirements for presenting his federal claims has deprived the state courts of an opportunity to address those claims in the first instance." Id. at 731-32. Although the claims are technically exhausted because there are no longer any state remedies available, applying the independent and adequate state ground doctrine in such cases protects "the States' interest in correcting their own mistakes." Id.

To overcome a procedural default of federal claims in state court, a prisoner must demonstrate "cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750. The cause-and-prejudice test applies to procedural defaults at trial and on direct appeal. Murray, 477 U.S. at 489-91 (citing Reed v. Ross, 468 U.S. at 10-11.) For ineffective assistance of counsel to establish cause to excuse a procedural default, the defendant must show counsel's performance was constitutionally ineffective under the Strickland standard. Id. at 488.

*10 In his PCR application, Petitioner alleged trial counsel was ineffective for failing to request a competency hearing or for an adjournment until Petitioner was competent to assist in his defense. (Answer, Ex. 7; ECF No. 10-7 at 4, Point I.) Petitioner also alleged counsel was ineffective for not insisting that an interpreter be present throughout the proceedings because Petitioner had a language barrier, and he lacked funds to hire an interpreter. (Id. at 5, Point IV.) Petitioner further contended that appellate counsel was ineffective for failing to raise ineffective assistance claims. (Id.)

Petitioner procedurally defaulted these ineffective assistance of counsel claims by failing to raise them on appeal of the PCR Court decision. (Answer, Ex. 10, ECF No. 10-7 at 5-6, Points I and II.) A petitioner must exhaust all of his federal claims through one complete round of the State's appellate procedure. O'Sullivan, 526 U.S. at 845. It is now too late for Petitioner to appeal his abandoned PCR claims, and they are procedurally defaulted. Id. at 838 (failure to timely present federal habeas claims to State Supreme Court resulted in procedural default).

Additionally, the Appellate Division affirmed the PCR Court's decision that New Jersey Rule 3:22-4 barred Petitioner from asserting ineffective assistance of counsel for failing to object to the prosecutor's summation because he could have raised, but failed to raise, the claim on direct appeal. (Answer, Ex. 7, ECF No. 10-7 at 7-8.) In any event, the Appellate Division correctly noted that counsel had objected to some of the comments Petitioner complained of, and the trial court gave appropriate instructions. (Id. at 8.) Therefore, Petitioner's ineffective assistance of counsel claim alternatively failed on the merits. (Id.)

Petitioner now contends appellate counsel's failure to raise these claims on appeal establishes cause and prejudice to excuse his procedural default. (Reply at 69.) In support of his argument, Petitioner states only that he should not be penalized for counsel's failure to raise these issues, and he had expressed his dissatisfaction with counsel to both the Public Defender's Office and the trial judge. (Id.)

> "[T]he existence of cause for a procedural default must ordinarily turn on whether the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L.Ed.2d 397 (1986). Cause, therefore, can be established by showing, for example, that the factual or legal basis for a claim was not reasonably available to counsel or that government interference made compliance with the procedural rule impracticable. Id.; Hull v. Freeman, 991 F.2d 86, 91 (3d Cir. 1993). Attorney error may constitute cause *only where such error rises to the level of ineffective assistance of counsel in violation of the Sixth Amendment.* Murray, 477 U.S. at 488-89, 106 S. Ct. 2639.

Johnson v. Pinchak, 392 F.3d 551, 563 (3d Cir. 2004) (emphasis added).

Petitioner has not alleged an external impediment that might have prevented counsel from raising these claims on review. Furthermore, Petitioner has failed to offer any argument explaining how counsel's failure to appeal these issues rose to the level of ineffective assistance of counsel in violation of the Sixth Amendment. "Strickland makes clear, 'actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice.' " Palmer v. Hendricks, 592 F.3d 386, 398 (3d Cir. 2010) (quoting Strickland, 466 U.S. at 693). Petitioner has not done so here. Therefore, the Court will deny Ground Seven of the petition.

8. Ground Eight

*11 In Ground Eight, Petitioner contends cumulative trial errors denied him his rights to due process and a fair trial. The Appellate Division held that because there were no prejudicial trial court errors, the argument that cumulative errors warrant a new trial must also fail. (Answer, Ex. 5, ECF No. 10-5 at 43.) In reply, Petitioner argued that each of the trial errors he raised were of sufficient magnitude to warrant relief.

The cumulative error doctrine is a standalone constitutional claim that the cumulative effect of the errors at trial "so undermined the verdict as to constitute a denial of his constitutional right to due process." Collins v. Secretary of Pennsylvania Dep't of Corr., 742 F.3d 528, 542 (3d Cir. 2014) (citing Albrecht v. Horn, 485 F.3d 103, 139 (3d Cir. 2007) (holding that petitioner could not show that the cumulative prejudice of trial errors "undermined the reliability of the verdict"). A petitioner must show actual prejudice to be entitled to relief. Id. (citing Fahy v. Horn, 516 F.3d 169, 205 (3d Cir. 2008)).

The Appellate Division reasonably concluded that if Petitioner was not prejudiced by any of the individual alleged trial errors, he could not have been prejudiced based on cumulative errors. The record supports the conclusion that the outcome of Petitioner's trial was not likely to have been different absent the alleged errors, because the evidence strongly supported a finding that Petitioner went to his wife's home that evening with the intent of killing her. Therefore, Petitioner is not entitled to relief on Ground Eight of his petition.

IV. CERTIFICATE OF APPEALABILITY

This Court must determine whether Petitioner is entitled to a certificate of appealability in this matter. See Third Circuit Local Appellate Rule 22.2. The Court will issue a certificate of appealability if the petitioner "has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Based on the discussion in this Opinion, Petitioner has not made a substantial showing of denial of a constitutional right, and this Court will not issue a certification of appealability.

V. CONCLUSION

For the reasons described above, in the accompanying Order filed herewith, the Court will deny the petition for a writ of habeas corpus under 28 U.S.C. § 2254.

Dated: October 27, 2017

All Citations

Slip Copy, 2017 WL 4882486

Footnotes

1 Only a portion of the opinion on direct appeal was published. A complete copy of the Appellate Division's decision on direct appeal is attached as Exhibit 5 to the Answer.

2 "In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed

to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

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2018 WL 2143467
Only the Westlaw citation is currently available.
United States Court of Appeals, Third Circuit.

Jerry DOCAJ, Appellant

v.

ADMINISTRATOR NEW JERSEY STATE PRISON, et al.

C.A. No. 17-3459
February 7, 2018
Dated: February 12, 2018

(D.New Jersey CIV. NO. 13-CV-06120)

Attorneys and Law Firms

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Annmarie Cozzi, Esq., Catherine A. Foddai, Esq., Bergen County Office of Prosecutor, Hackensack, NJ, for Administrator New Jersey State Prison, et al.

Present: RESTREPO, BIBAS and NYGAARD, Circuit Judges

Opinion

L. Felipe Restrepo, Circuit Judge

*1 Submitted are:

(1) Appellant's application for a certificate of appealability under 28 U.S.C. § 2253(c)(1); and

(2) Appellant's memorandum of law in support in the above captioned case.

ORDER

The foregoing request for a certificate of appealability is denied. For substantially the reasons given by the District Court, appellant has not made a substantial showing of the denial of a constitutional right, nor shown that reasonable jurists would find the correctness of the procedural aspects of the District Court's determination debatable. See 28 U.S.C. § 2253(c)(2); Slack v. McDaniel, 529 U.S. 473, 484 (2000).

All Citations

Not Reported in Fed. Rptr., 2018 WL 2143467

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17-3459

JERRY DOCAJ,
Appellant

v.

ADMINISTRATOR NEW JERSEY STATE, ET AL.

(D.C. Civ. No. 2-13-cv-06120)

SUR PETITION FOR REHEARING

Present: SMITH, Chief Judge, McKEE, AMBRO, CHAGARES, JORDAN, HARDIMAN, GREENAWAY, JR., VANASKIE, SHWARTZ, KRAUSE, RESTREPO, BIBAS, and NYGAARD,* Circuit Judges

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who

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* Judge Nygaard's vote is limited to panel rehearing only.

concurred in the decision having asked for rehearing, and a majority of the judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court en banc, is denied.

BY THE COURT,

s/ L. Felipe Restrepo
Circuit Judge

Date: May 31, 2018
tmm/cc: John V. Saykanic, Esq.
Annmarie Cozzi, Esq.