No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October 2017 Term

DEBRA ANN AQUILINA - PETITIONER

(Your Name)

Vs.

SARAH DAVIS, ADMINISTRATOR, EMCF - RESPONDENT(S)

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES DISTRICT COURT DISTRICT OF NEW JERSEY

(NAME OF THE COURT THAT LAST RULED ON THE MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Debra Ann Aquilina, # 388640C

(Your Name)

Edna Mahan Correctional Facility, Box 4004

(Address)

Clinton, N.J., 08809

(City, State, Zip Code)

(908) 735-7111

(Phone Number)

QUESTION(S) PRESENTED

QUESTION ONE:

Did the petitioner's trial counsel provide constitutionally ineffective assistance, violated petitioner's right to effective assistance of counsel, because of two glaring errors during the trial proceedings?

QUESTION TWO:

Was the testimony of the medical examiner regarding the cause and manner of death of the victim an inadmissible "net" expert opinion?

LIST OF PARTIES

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

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

Defendant-Petitioner: Debra Ann Aquilina, presently confined at Edna Mahan Correctional facility, P.O. Box 4004, Clinton, N.J., 08809

Respondents: Sarah Davis, Administrater, Edna Mahan Correctional Facility, P.O. Box 4004, Clinton, N.J., 08809

New Jersey Attorney General, Gurbir S. Grewal, Office of the Attorney General, Hughes Justice Complex, 25 West Market St., P.O. Box 080, Trenton, N.J., 08625

Bergen County Prosecutor's Office, 2 Bergen County Plaza, Floor 4, Hackensack, N.J., 07601

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SUPREME COURT OF THE UNITED STATES

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[X] For cases from **federal courts:**

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

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or,

[X] is unpublished.

The opinion of the United States District Court appears at Appendix ___B____ to the petition and is

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[X] is unpublished

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is:

[ ] reported at _____; or

[ ] has been designated for publication but is not yet reported; or

[ ] is unpublished

JURISDICTION

[X] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was

_____.

[X] No petition for rehearing was timely filed in my case.

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

[ ] An extension of time to file the petition for certiorari was granted to and including _____ (date) on _____ (date) in Application Number _____.

[ ] For cases from **state courts:**

The date on which the highest state court decided my case was _____.

A copy of that decision appears at Appendix _____.

[ ] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing Appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application Number. _____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Constitutional, Amendment Six (Right to Effective Counsel)

U.S. Constitution, Amendment Fourteen (Due Process)

STATEMENT OF THE CASE

Petitioner Debra Aquilina was charged in Bergen County (N.J.) Indictment 05-10-1857 with murder (N.J.S.A. 2C:11-3a – first degree); conspiracy to commit murder (N.J.S.A. 2C:5-2; 2C:11-3 – first degree); possession of cocaine (N.J.S.A. 35-10a(1) – third degree); possession of heroin (N.J.S.A. 2C:35-10a(1) – third degree); and hindering apprehension (N.J.S.A. 2C:29-3b(1) – third degree). Also named in the indictment were co-defendants Mark Aquilina (petitioner's son) and James Gerritson. The charges arose from the death of Ralph Ludvik, Jr., petitioner's husband, whose body was found on the bedroom floor of his and petitioner's home on February 14, 2003. Drug paraphernalia was discovered at the scene by investigating police officers. The police did not initially conclude that the death was anything other than an accidental self-administered drug overdose. The medical examiner and toxicologist determined that the cause of death was due to an overdose of heroin; the manner of death was accidental. The amount of heroin in Ludvik's blood was five times more than the therapeutic level of morphine and there was also cocaine residue in his system.

Matters remained as they were until May 11, 2004, when the Bergen County Prosecutor's Office received a letter from one Frank Baez, an inmate at the Bergen County Jail. Baez was confined in the same housing pod with Mark Aquilina, who has then incarcerated on unrelated charges. Baez stated in the letter that Mark Aquilina had admitted to Baez that Aquilina had been involved in a suspicious death in Garfield, N.J.. Aquilina was transported to the Bergen County Prosecutor's Office, *Mirandized*, and was interviewed. He initially denied taking part in the death of Ralph Ludvik, but later provided a full and detailed confession. He said that his mother (petitioner) believed that if Ludvik were dead, she would inherit the house in Garfield. Mark Aquilina said that petitioner had been "fooling around" with Gerritson and that petitioner and Gerritson intended to "get together" after Ludvik's death.According to Mark Aquilina, he, petitioner and Gerritson devised a scheme to "get Ludvik out of the way." On the day of Ludvik's death, the three alleged conspirators acted. After Ralph Ludvik drove to Paterson to purchase cocaine, Mark Aquilina dissolved four bags of heroin and drew the solution into a syringe, aware that this would be a lethal dosage for a person to ingest. Mark Aquilina handed the syringe to Ludvik after the latetr returned and Ludvik injected the heroin into his arm.

Ludvik immediately clutched his chest and dropped to the floor unconscious. Petitioner allegedly then removed valuables from Ludvik's pockets and the three conspirators partied through the night. The next morning, when they realized that Ludvik was not merely unconscious but dead, they called the police.

A jury trial was held in the Bergen County Superior Court from February 24, 2009 to March 11, 2009. The statement and read to the jury at trial in its entirety and a videorecording was shown to the jury. During his testimony at trial, Mark Aquilina recanted his entire confession, stating "it was all made up...nothing ever happened...it was all just a fictional account." He denied having ever told Frank Baez that he had participated in the murder. The prosecution also used testimony from James Gerritson at trial. He testified that petitioner constantly made disparaging remarks about Ralph Ludvik, that on several occasions when petitioner came into his room and crawled into his bed. Gerritson told petitioner that this was improper behavior and that she should be in her husband's bed; petitioner then allegedly became aggravated.

The jury also heard from medical examiner Dr. Singh, who had initially classified the Ludvik death as "accidental." ~~Ludvik~~ changed his report after he was given a copy of the Mark Aquilina statement and classified the death as a homicide. Dr. Singh did concede that if it was shown Mark Aquilina's statement was false, he would be obliged to revise his conclusion yet again.

Petitioner was convicted on all counts. She was sentenced to an aggregate term of life in prison with an 85% parole disqualifier mandated by New Jersey's No Early Release Act (NERA) statute. On direct appeal, petitioner raised seven claims of error. The New Jersey Superior Court, Appellate Division, affirmed the conviction and sentence. The New Jersey Supreme Court denied certification to review the direct appeal at 210 N.J. 479 (2012).

Petitioner then filed an application for post-conviction relief in the Superior Court of Bergen County. She argued ineffective assistance of counsel. The petition for post-conviction relief was denied by the Bergen County Superior Court and thus denial was affirmed by the Superior Court, Appellate Division on appeal. The New Jersey Superior Court then denied certification to review the matter at 228 N.J. 474 (2017).

Petitioner then filed a petition for habeas corpus relief in the U.S. District Court for the

District of New Jersey. On December 7, 2017, the Judge Susan Wigenton of the District Court issued an opinion and order, denying the habeas corpus petition. (Exhibit A annexed hereto). The court also denied a certificate of appealability (COA). Ms. Aquilina then filed Notice of Appeal and later filed a request for a COA to the Third Circuit Court of Appeals. (Exhibit B annexed hereto). By Order dated May 4, 2018, the Third Circuit Court of Appeals denied the request for a certificate of appealability, thus ending the habeas litigation.

Petitioner now seeks certiorari from this Court to review the claim(s) presented.

REASONS FOR GRANTING THE PETITION

This Court has long recognized that a defendant is entitled under the Sixth Amendment of the U.S. Constitution to the effective assistance of counsel at all critical stages of a criminal prosecution. See *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006 (1972)(guilty plea stage); *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984)(trial stage); *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366 (1985)(guilty plea stage); *United States v. Cronic,* 466 US 648, 104 S Ct 2039 (1984)(trial stage); *Missouri v. Frye,* 566 *U.S.* 134, 132 S.Ct. 1399 (2012)(plea bargain stage); *Evitts v. Lucey,* 469 U.S. 387, 105 S.Ct. 830 (1985)(first direct appeal as of right); *Glover v. United States,* 531 U.S. 198, 121 S.Ct. 696 (2001)(sentencing stage).

QUESTION ONE

As applied to this case, petitioner's trial counsel was constitutionally ineffective in two respects: (1) counsel called no witnesses (especially an expert forensic pathologist) on petitioner's behalf to rebut or challenge the testimony of prosecution witnesses, especially the testimony of the medical examiner that no needle marks were found on the body of the victim, the alteration of the medical examiner's determination of the manner of death (it was first classified as accidental drug overdose), and the medical examiner's inconsistent testimony as to whether heroin alone, cocaine alone, or a combination of both caused the death of the victim; and (2) Petitioner received ineffective assistance of counsel from trial counsel based on counsel's advising petitioner not to testify at trial when such testimony was necessary to enable her to rebut erroneous and inaccurate assertions by prosecution witnesses at trial and to assert her innocence.

The first claim is based upon the medical examiner first classifying the death as accidental drug overdose and later changing the manner of death to "homicide" based solely on the statement given to police (and later recanted) by co-defendant Mark Aquilina. Evidently during the autopsy the medical examiner found no needle marks to indicate the injection of drugs into the body of Ralph Ludvik, Jr, yet this important fact was never emphasized to the jury. If there were no needle marks, how could anyone have injected the victim? The key to the state's case was the statement made by Mark Aquilina (later recanted at trial) that he had prepared a

lethal dosage of heroin and then watched as Ralph Ludvik injected himself then lost consciousness. There was evidently no independent corroboration as to the veracity of this statement. If in fact events had actually gone as Mark Aquilina described them in his statement to the police, then there should have been a needle mark of Ludvik's body. None was found. Additionally, there was an issue with the medical examiner's flip-flop on the manner of death. The medical examiner evidently based his findings of whether the death was a homicide or accidental on factors completely unrelated to the examination of the victim's body. Was this acceptable or common in that profession? If not, why was it utilized in this case? Calling an independent medical examiner would have bolstered defense counsel's attack on the credibility of the medical examiner.

For example, in *Pavel v. Hollins*, 261 F.3d 210 (CA2 2001), the Second Circuit found ineffective assistance of counsel in a case where counsel failed to call an important factual witness and a medical expert witness. The defendant was charged with and convicted of sodomizing, sexually abusing, and endangering the welfare of his children. The defendant's two sons testified under oath that Pavel had sodomized them. Ms. Constance McKinstry, who is not a licensed psychologist, testified that when she first began meeting with the boys on March 14, 1989, she believed that they suffered from "adjustment disorder with anxious mood." Ms. McKinstry testified that she began to suspect "the possibility" that they were being sexually abused in mid-April of 1989, when Matthew, during therapy sessions, began hitting a three and a half foot tall yellow dummy on a label located in the dummy's genital area. Thereafter, Ms. McKinstry testified, Matthew and David talked with her during their weekly therapy sessions about Pavel's sexual abuse.

The defendant's wife testified that, on the day the boys returned from Florida, Matthew began singing songs about his "peeny" when she was giving the boys a bath. Matthew's singing, Ms. Pavel testified, prompted a series of questions and a conversation in which the boys described Pavel's alleged sexual abuse.

The prosecution's medical expert, testified that she reviewed the records of the physical examination of the boys that had been conducted on April 27, 1989, five days after they returned from Florida. She did not examine the boys herself. The expert observed that the records of the physical examination of Matthew showed no relevant physical abnormalities, while the records

of David's physical examination indicated only that he had "mild perianal arrythmia," which the expert described as "discoloration of the skin, redness around the anal area." The expert testified that it was "possible" that diarrhea could cause such "redness." The expert testified also that David's "discoloration" was "consistent" with his account of sexual abuse, and that Matthew might have been anally sodomized as he described without any physical indication of the sodomy remaining after the fact.

Defense counsel decided not to prepare a defense for Pavel solely because he was confident that, at the close of the prosecution's presentation of its evidence, the trial judge would grant Meltzer's motion to dismiss the government's charges against Pavel. Counsel decided not to call two fact witnesses with whose putative testimony he was familiar before the trial began. Pavel, David, Matthew, and Clothilde Pavel spent a week at the Florida apartment of Clothilde Pavel just before Pavel was arrested; the boys testified that during that week they were sodomized by Pavel. Clothilde Pavel explained that had she been called at trial, she would have testified that

> "On Wednesday, April 19, 1989, we drove back to my apartment in Boynton Beach at the conclusion of our trip to Disneyworld. At the beginning of this 2-3 hour drive, David, the younger child, became extremely agitated because he needed to go to the bathroom. After searching along the road for a rest-stop we found an International House of Pancakes restaurant. Immediately after we pulled into the parking lot, and before [Pavel] could get out the door, David ran out of the car and into the restaurant. [Pavel] chased after him and they returned shortly thereafter at which point [Pavel] informed me that David had had trouble with his bowels and that his stomach was obviously very upset. At the time we thought nothing of it and attributed his upset stomach to the fact that he had eaten too much at breakfast and lunch and had been badly frightened on the Space Mountain ride at Disneyworld."

Dr. Berry was a psychiatrist and court-appointed mediator who conducted a number of counseling sessions in September and October of 1988 with Pavel and Ms. Pavel to help them resolve their custody dispute over the boys. Dr. Berry would have been prepared to testify at trial as follows: "It appeared to me that the stress [Ms. Pavel] experienced as a result of the marital situation resulted in problems with [Ms. Pavel's] psychological functioning and memory. For example, [Ms. Pavel] would take very extreme positions regarding visitation and subsequently deny having taken those positions. Further, [Ms. Pavel] showed a historical distrust and dislike

Gerritson, and that she had any scheme to kill her husband and gain possession of the home.

Finally, she could also have testified to rebut the assertion of the police officer who was dispatched to the Ludvik house on the day of the victim's death) that she was "flirting" with him, a piece of evidence that went unrefuted at trial.

Both of the above deficiencies of defense counsel are *prima facie* evidence of ineffective assistance and this Court should grant certiorari to hear this matter.

QUESTION TWO

Petitioner also assserts that the testimony of the medical examiner that the manner of death was homicide was inadmissible as a net opinion because it was based on a subjective belief that Mark Aquilina's statement was truthful.

The medical examiner charged his finding on the manner of death from accidental to homicide based solely on the statement given by co-defendant Mark Aquilina to police. But Aquilina recanted his confession in court at the trial of Debra Aquilina and the medical examiner admitted on cross-examination that his opinion was subject to change at any time based solely on the unverified evidence provided by someone. Because the opinion had such a poor basis in the evidence, the medical examiner's opinion amounted to an inadmissible net opinion. It was unreliable under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993). The net opinion rule requires an expert to give the why and wherefore of his or her opinion, rather than a mere conclusion. *State v. Townsend,* 186 N.J. 473,494, 897 A.2d 316 (2006). Put another way, an expert must state the "why and wherefore" of his opinion to satisfy *Rosenberg v. Tavorath, 352 N.J. Super. 385, 401, 800 A.2d 216* (A.D.2002). When opining on the cause of an event, an expert must state his opinion in terms of probabilities. *Scully v. Fitzgerald,* 179 N.J. 114,128, 843 A.2d 1110 (2004). For example, the New Jersey Supreme Court excluded a fire chief's opinion that it was his "best guess" that a discarded cigarette started the fire in question. *Scully, supra*, 179 N.J. at 128.

The federal courts have ruled similarly. See also *General Electric. Co. v. Joiner*, 522 U.S. 136, 146, 118 S. Ct. 512 (1997) ("Nothing in either *Daubert* or the Federal Rules

of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the ipse dixit of the expert."); *Daubert v. Merrill Dow Pharmaceuticals, supra*, 509 U.S. 579,590 (1993)("the word "knowledge" connotes more than subjective belief or unsupported speculation."); *Brown v. Darcy*, 783 F.2d 1389, 1396 (9th Cir. 1986) (Expert testimony is properly excluded where it "infringes on the jury's role"; *United States v. Binder*, 769 F.2d 595, 602 (9th Cir. 1985) ("Expert testimony should not be permitted if it concerns a subject . . . that invades the province of the jury."); *Tyger Constr. Co., Inc. v. Pensacola Constr. Co.*, 29 F.3d 137, 142 (4th Cir. 1994) ("An expert's opinion should be excluded when it is based on assumptions which are speculative and are not supported by the record.") (citation omitted); *Sterling v. Velsicol Chem. Co.*, 855 F.2d 1188, 1209 (6th Cir.1988) (without a widely accepted medical basis for their conclusions, the plaintiffs' experts' opinions were insufficient to sustain the plaintiffs' burden of proof that contaminated water damaged their immune system); *Johnston v. United States,* 597 F. Supp. 374 (D.Kan.1984)(rejecting plaintiff's expert's conclusion that the plaintiffs' cancers were causally related to the radiation in the aircraft factory where they were employed because the experts had not premised their opinions on reliable or significant evidence, or to account for the amount of exposure).

In the case at bar, the trial court committed prejudicial error when it denied the defense motion to strike the medical examiner's testimony because it was tantamount to a net opinion that petitioner was guilty of the crime of murder. The Due Process Clause of the 14th Amendment prohibits an expert witness from testifying in such a manner. The medical examiner's testimony should have been stricken and the jury instructed to disregard it. The failure to do so violated petitioner's 14th Amendment U.S. Constitutional right to due process of law. This Court should grant certiorari and assign counsel to represent petitioner in this matter.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted:

Debra Aquilina

Date: May 21, 2018