

No. 20-8102

IN THE
SUPREME COURT OF THE UNITED STATES

ADAM ROSEN

(Your Name)

PETITIONER

vs.

SUPERINTENDENT, SCI-MAHANOY RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Third Circuit
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

ADAM ROSEN

(Your Name)

301 Morea Road

(Address)

Frackville, PA 17932

(City, State, Zip Code)

N/A

(Phone Number)

ORIGINAL

FILED

FEB 11 2021

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SUPREME COURT, U.S.

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SUPREME COURT, U.S.

QUESTION(S) PRESENTED

1. WHETHER THE 3rd CIRCUIT COURT OF APPEALS RULING ALLOWING THE COMMONWEALTH TO INTRODUCE A DEFENDANT'S STATEMENTS TO THE COMMONWEALTH'S MENTAL HEALTH EXPERT RELATING TO A MENTAL INFIRMITY DEFENSE RAISED AT THE FIRST TRIAL, EVEN THOUGH THE DEFENDANT DID NOT RAISE THE MENTAL INFIRMITY DEFENSE AT THE RETRIAL, WAS CONTRARY TO AND UNREASONABLE APPLICATION OF THIS COURT'S PRECEDENT IN N.J. V. PORTASH 440 US. 450 (1979) & BUCHANAN V. KENTUCKY 483 US. 402 (1987).

LIST OF PARTIES

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

[✓] 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:

1. Petitioner is Adam Rosen a Pennsylvania State prisoner confined at the State Correctional Institution Mahanoy, 301 Morea Road, Frackville, PA 17932, at No. _____.

2. Respondent, ~~Frackville~~ ^{SCI MAHANoy / SUPERINTENDENT} is Superintendent at SCI Mahanoy and has custody of Petitioner.

3. Respondent, District Attorney of Montgomery County prosecuted Petitioner.

4. Respondent, Attorney General of Pennsylvania is an additional Respondent.

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OTHER

Rosen v. Sup't SCI Mahanoy

Appendix to

Petition for Certiorari

IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The October 25, 2017, Report and Recommendation of the Magistrate Judge appears at Appendix "B".

The August 22, 2018, Order of the United States District Judge adopting the Magistrate's Report and Recommendation appears at Appendix "C".

The March 4, 2019, Order of the Circuit Court denying Certificate of Appealability appears at Appendix "E".

The July 3, 2019, Order of the Circuit Court granting Rehearing appears at Appendix "G".

The August 26, 2020, Opinion of the Circuit Court affirming appears at Appendix "J".

The 9-22-20 Order of the Circuit Court denying Rehearing appears at Appendix "L".

JURISDICTION

The Judgment of the United States Court of Appeals for the Third Circuit was entered on 9-22-20. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part: No person shall be compelled in any Criminal Case to be a witness against himself.

STATEMENT OF THE CASE

PETITIONER FATALY STABBED HIS WIFE, HOLIE ROSEN ("HOLLIE"), IN THEIR HOME ON THE MORNING OF JUNE 30, 2001. HE INITIALLY TOLD RESPONDING OFFICERS THAT SHE WAS KILLED BY TWO MASKED INTRUDERS. SOON AFTER, HOWEVER, HE ACKNOWLEDGED TO DETECTIVES THAT HE STABBED HER, EXPLAINING THAT IT HAPPENED DURING A DOMESTIC ARGUMENT IN WHICH HOLIE FIRST THREATENED HIM WITH A KNIFE. SHE SUFFERED STAB WOUNDS TO THE CHEST, NECK, BACK & LUNG.

THE COMMONWEALTH HAS TRIED PETITIONER TWICE FOR THIS MURDER. AT BOTH TRIALS, THE DEFENSE CONCEDED THAT PETITIONER INFLECTED THE FATAL WOUNDS BUT CONTENDED THAT HE DID NOT ACT WITH THE SPECIFIC INTENT REQUIRED FOR A CONVICTION OF FIRST DEGREE MURDER. BOTH CASES WERE TRIED BEFORE THE HONORABLE PAUL W. TRESSLER, THE FIRST WAS A JURY TRIAL AND THE SECOND A BENCH TRIAL.

PETITIONER WAS REPRESENTED IN THE FIRST TRIAL, WHICH WAS HELD IN APRIL & MAY OF 2002, BY ATTORNEYS F. EMMETT FITZPATRICK JR. & F. EMMETT FITZPATRICK III. PETITIONER DID NOT TESTIFY BUT ASSERTED A DIMINISHED CAPACITY DEFENSE THROUGH A PSYCHIATRIC EXPERT, DR. PAUL FINK. HE TESTIFIED THAT PETITIONER SUFFERED FROM BIPOLAR DISORDER THAT ESCALATED IN PARANOID PSYCHOSIS. HE OPINED THAT THE STABBING RESULTED FROM A PSYCHOTIC EPISODE & THE KILLING WAS NOT PREMEDITATED. THE COMMONWEALTH COUNTERED WITH ANOTHER EXPERT, DR. TIMOTHY MICHAELS WHO, BASED UPON AN EXAMINATION OF PETITIONER AND A REVIEW OF RECORDS IN THIS CASE, OPINED THAT PETITIONER HAD NO MENTAL DISORDER THAT WOULD IMPAIR HIS CAPACITY TO FORM THE INTENT TO COMMIT THIS CRIME. THE COMMONWEALTH ALSO ARGUED THAT PETITIONER'S CONDUCT PRIOR TO & FOLLOWING →

→ THE ATTACK SHOWED THAT HE DESIRED TO BRING ABOUT HIS WIFE'S DEATH AND UNDERMINED ANY NOTION THAT THE FATAL ATTACK WAS UNINTENTIONAL. THE JURY RETURNED A VERDICT OF FIRST DEGREE MURDER ON MAY 2, 2002, AND THE COURT SENTENCED PETITIONER TO LIFE IMPRISONMENT. THE PA. SUPERIOR COURT AFFIRMED THE JUDGMENT OF CONVICTION, COM. V. ROSEN, 832 A.2d 436 (PA. OCT 2, 2003) (TABLE). WITH THE ASSISTANCE OF RETAINED COUNSEL, PETITIONER FILED A PETITION ON SEPT. 27, 2004, SEEKING COLLATERAL RELIEF UNDER THE POST CONVICTION RELIEF ACT ("PCRA"), 42 PA. CONS. STAT. § 9541, ET SEQ ("PCRA"), 42 PA. CONS. STAT. § 9541, FOR SEVERAL CLAIMS OF INEFFECTIVE ASSISTANCE OF COUNSEL. THE PCRA COURT CONVENED AN EVIDENTIARY HEARING BUT DENIED THE PETITION ON MARCH 1, 2005. THE SUPERIOR COURT HOWEVER, DETERMINING THAT TRIAL COUNSEL HAD BEEN INEFFECTIVE FOR FAILING TO CALL CHARACTER WITNESSES TO TESTIFY TO PETITIONER'S REPUTATION FOR NON-VIOLENCE, AS THIS EVIDENCE ALIGNED WITH THE DEFENSE THAT PETITIONER DID NOT PLAN, NOT INTEND TO KILL HOLLY & THAT HE WAS MENTALLY UNSTABLE WHEN HE DID SO. IT REVERSED THE PCRA COURT & REMANDED THE CASE FOR A NEW TRIAL. COM. V. ROSEN, NO. 753 EDA 2005, 890 A.2d 1105 (PA SUPER. CT. (NOV. 23, 2005)). THE PENNSYLVANIA SUPREME COURT DENIED ~~REVIEW~~ FURTHER REVIEW. SEE COM V. ROSEN, NO. 1090 MAL 2005, 905 A.2d 542 (PA. AUG 31, 2006).

PETITIONER WAS APPOINTED NEW COUNSEL, RICHARD D. WINTERS, ESQUIRE, FOR RE-TRIAL IN THE COURT OF COMMON PLEAS, OVER WHICH JUDGE TRESSLER WOULD AGAIN PRESIDE. IN ADVANCE OF TRIAL, THE DEFENSE FILED A MOTION IN LIMINE SEEKING THE PRECLUSION OF PSYCHIATRIC EVIDENCE INTRODUCED IN THE FIRST TRIAL, AS PETITIONER DID NOT INTEND TO PRESENT A MENTAL CAPACITY DEFENSE AGAIN BUT RATHER PLANNED TO TESTIFY HIMSELF CONCERNING HIS ACTIONS & INTENTIONS.

THE COMMONWEALTH FILED A COUNTER-MOTION AFFIRMATIVELY SEEKING TO USE THE MATERIAL AT THE RETRIAL. THE COURT GRANTED THE DEFENSE MOTION TO PRECLUDE THE COMMONWEALTH FROM PRESENTING EXPERT PSYCHIATRIC IN ITS CASE IN CHIEF. AT THE SAME TIME, THE COURT ALSO RULED THAT PETITIONERS PRIOR STATEMENTS TO A TREATING PSYCHIATRIST AND THE MENTAL HEALTH EXPERTS THAT WERE INTRODUCED AT THE FIRST TRIAL COULD BE USED BY THE COMMONWEALTH AS IMPEACHMENT EVIDENCE IF PETITIONER GAVE INCONSISTENT TESTIMONY AT TRIAL. THE STATE COURT FOUND THAT THIS RULING KEPT PETITIONER OFF THE STAND. PETITIONER WAIVED HIS RIGHT TO ~~TESTIFY~~ A JURY TRIAL AND PROCEEDED TO A BENCH TRIAL BEFORE JUDGE TRESSLER. MUCH OF THE TESTIMONY FROM THE FIRST TRIAL WAS INCORPORATED BY STIPULATION, ALTHOUGH SOME WITNESSES TESTIFIED AGAIN LIVE AND SOME ADDITIONAL WITNESSES WERE CALLED. THE COMMONWEALTH AGAIN CALLED IAN HODD, MD., ONE OF TWO MEDICAL EXPERTS FROM THE FIRST TRIAL, AND ASKED HIM ABOUT WHETHER OR NOT THE WOUNDS DOCUMENTED IN THE POST-MORTEM EXAMINATION OF HOLIE SUGGESTED "OVERKILL", WHICH PETITIONER NOW ARGUES REFLECTED A SURPRISE LINE OF QUESTIONING THAT ~~IMPROPERLY~~ I IMPROPERLY SOUGHT TO UNDERMINE HIS DEFENSE REGARDING HIS STATE OF MIND. ON CROSS-EXAMINATION, ATTORNEY WINTERS ELICITED TESTIMONY THAT THE STAB WOUNDS WERE CONSISTENT WITH A STRUGGLE AND THAT HOLIE WAS NOT STABBED WHILE SHE SLEPT. THIS CONCESSION SUPPORTED THE DEFENSE NARRATIVE THAT HOLIE STARTED A FIGHT BY SWINGING A KNIFE AT PETITIONER, TO WHICH HE CLAIMED THAT HE RESPONDED SPONTANEOUSLY. THE DEFENSE CALLED CHARACTER WITNESSES IN PETITIONERS BEHALF, BUT PETITIONER ULTIMATELY DID NOT TESTIFY IN HIS OWN DEFENSE.

AS THE STATE COURT FOUND, HIS DECISION NOT TO TESTIFY WAS DUE TO THE COURTS PRE-TRIAL RULING ON THE MOVIE IN LIAISON THAT EXPRESSED HIM TO PROVIDE IMPARTIALITY WITH STATEMENTS MADE TO HIS TREATING PSYCHIATRIST AND THE PSYCHIATRIC EXPERTS THAT WERE UTILIZED IN THE FIRST TRIAL WITH THE EXPERTS WERE CITED. FOLLOWING THE RELATIVELY BRIEF PRESENTATION OF EVIDENCE, ATTORNEY WINFORD FOCUSSED HIS CLOSING ARGUMENT ON THE EVIDENCE SHOWING THAT PENNOWER LACKED A PLAN TO COMMIT AND TO DISPUTE HIS ROLE IN THE COMMISSION OF THIS HORRIBLE THAT MORNING. HE ARGUED THAT THESE CIRCUMSTANCES DEMONSTRATED THAT PENNOWER DID NOT ACT WITH THE SPECIFIC INTENTION TO KILL KYLE WITHIN THE STABBED HEAD. (N.T. 12.11 VOL 2 (7/22/08) AT 10-14, 18.) (DOC 9-2). AT THE CONCLUSION OF THE EIGHTH TRIAL ON JULY 22, 2008, JUDGE PRESSER CONCLUDED PENNOWER OF FIRST DEGREE MURDER, THE SAME VERDICT RETURNED BY A JURY SIX YEARS EARLIER. THE SUPERIOR COURT AFFIRMED THE CONVICTION ON DEC. 28, 2009. COMMONWEALTH V. ROSEN, 988 A.2D 145 (PA SUPERIOR CT. 2009). THE PENNSYLVANIA SUPREME COURT GRANTED PENNOWER'S PETITION FOR ALLOWANCE OF APPEAL TO CONSIDER WHETHER THE TRIAL COURT PROBABLY RULED THAT THE COMMONWEALTH WAS PERMITTED TO USE PENNOWER'S STATEMENTS TO THE PSYCHIATRIST - OBTAINED PURSUANT TO A LIMITED FIRST AMENDMENT WITHIN OCCASIONED BY THE MENTAL HEALTH ASSISTED IN THE FIRST TRIAL - IN THE SUBSEQUENT TRIAL WITH NO MENTAL HEALTH DEFENSE WAS PRESENTED. THE COURT ULTIMATELY, HOWEVER, AFFIRMED THE CONVICTION ON APR. 25, 2012. WITH HIS DIRECT APPEAL PROCESS ON THE SECOND CONVICTION FINAL, PENNOWER AGAIN PURSUED PLEA BARGAINING, THIS TIME ASSIGNED IN EFFECTIVE ASSISTANCE OF ATTORNEY WINFORD IN THE 2008 TRIAL. PENNOWER RETURNED NEW COUNSEL FOR PLEA BARGAINING FOLLOWING THE -

RETIREMENT OF JUDGE TRESSLER, JUDGE WENDY DEMCHICK ALLOY WAS ASSIGNED THE PETITION AND CONVENED A HEARING AT WHICH ATTORNEY WINTERS TESTIFIED ABOUT HIS ROLE IN THE SECOND TRIAL. ONE OF THE SUBJECTS OF THE HEARING WAS HIS "FAILURE" TO CALL AN EXPERT WITNESS TO REBUT THE TESTIMONY OF DR. HOOD CONCERNING THE ABSENCE OF EVIDENCE OF "OVERKILL" IN THE STAB WOUNDS. ATTORNEY WINTERS ACKNOWLEDGED THAT HE HAD NOT THINK THAT ONE WAS WARRANTED. THE PCRA COURT AGREED, FINDING THAT COUNSEL HAD A REASONABLE BASIS FOR NOT CALLING AN EXPERT WITNESS ON THIS ISSUE AND THAT PETITIONER DID NOT SUFFER PREJUDICE WHERE HIS DEFENSE WAS NOT THAT HE KILLED HOLLYE WHILE IN THE HEAT OF PASSION BUT RATHER THAT HE NEVER SPECIFICALLY INTENDED TO KILL HOLLYE. THE SUPERIOR COURT AFFIRMED THE DENIAL OF PCRA RELIEF. COM V. ROSEN NO. 1260 EDA 2014, 122 A.3d 444 (PA. SUPER. CT. MAY 11, 2015) THE SUPREME COURT DENIED REVIEW. COM V. ROSEN NO. 488 MAL 2015, 125 A.3d 1201 (OCT 7, 2015) (TABLE). PETITIONER FILED HIS HABEAS PETITION ON AUG 13, 2015, WHILE HIS PETITION FOR REVIEW WAS STILL PENDING IN THE PENNSYLVANIA SUPREME COURT. ONCE STATE REVIEW CONCLUDED, THE PARTIES COMPLETED THEIR BRIEFING ON THE PETITION. IN HIS FIRST GROUND FOR RELIEF (HABEAS), PETITIONER PRESENTED THE ISSUE CONSIDERED IN HIS DIRECT APPEAL OF HIS SECOND CONVICTION: THAT THE COURT'S PRE-TRIAL RULING, PERMITTING THE COMMONWEALTH TO CROSS-EXAMINE HIM USING STATEMENTS HE MADE TO PSYCHIATRIST BEFORE HIS FIRST TRIAL, VIOLATED HIS RIGHTS UNDER THE FIFTH AMENDMENT AND COMPROMISED HIS FUNDAMENTAL RIGHT TO TESTIFY IN HIS OWN DEFENSE WHEN HE WAS RETRIED. HIS SECOND GROUND PRESENTED THE ISSUE ADDRESSED IN THE APPEAL OF THE DISMISSAL OF HIS PCRA PETITION →

FOLLOWING THE SECOND CONVICTION: THE ALLEGEDLY INADEQUATE RESPONSE OF ATTORNEY WINTERS WHEN THE COMMONWEALTH ELICITED TESTIMONY FROM DR. HOOD REGARDING HOLMES INJURIES IN RELATION TO "OVERKILL". HE CONTENDED THAT THE STATE COURTS ADJUDICATIONS OF THESE CLAIMS ON THE DIRECT APPEAL AND PCRA REVIEW FOLLOWING HIS SECOND CONVICTION WERE CONTRARY TO CLEARLY ESTABLISHED FEDERAL LAW OR INVOLVED UNREASONABLE APPLICATIONS OF CLEARLY ESTABLISHED FEDERAL LAW. ON OCTOBER 25, 2017, MAGISTRATE JUDGE DAVID R. STRAWBRIDGE ISSUED A REPORT AND RECOMMENDATION TO DENY HIS PETITION. BY ORDER DATED AUG. 22, 2018, THE HONORABLE NITZA I. QUINONES ALEJANDRO APPROVED & ADOPTED THE MAGISTRATE'S REPORT & RECOMMENDATION. A TIMELY FILED APPEAL TO THE THIRD CIRCUIT COURT OF APPEALS AT NO. 18-3111 RESULTED IN CERTIFICATE OF APPEALABILITY BEING DENIED BY ORDER DATED MARCH 4, 2019. A TIMELY FILED PETITION FOR REHEARING WAS GRANTED BY ORDER JULY 3, 2019. WITH RESPECT TO PETITIONERS CLAIM THAT THE USE OF HIS STATEMENTS TO PSYCHIATRISTS BEFORE HIS FIRST TRIAL VIOLATED THE FIFTH AMENDMENT. BY OPINION DATED AUG 26, 2028, THE COURT OF APPEALS AFFIRMED THE DISTRICT COURT'S DENIAL OF THE PETITION FOR HABEAS CORPUS. ON SEPT. 8, 2020, PETITIONER FILED A PETITION FOR REHEARING EN BANC ALLEGING THE PANEL DISREGARDED THIS COURTS FIFTH AMENDMENT PRECEDENT. BY ORDER DATED SEPT 22, 2020 REHEARING WAS DENIED. THIS TIMELY FILED PETITION FOLLOWS.

REASONS FOR GRANTING THE PETITION

THIS CASE PRESENTS A FUNDAMENTAL QUESTION OF THE INTERPRETATION OF THIS COURT'S DECISIONS IN N.J. V. PORTASH 440 U.S. 450 (1979), BUCHANAN V. KENTUCKY 483 U.S. 402 (1987), THE QUESTION PRESENTED IS OF GREAT PUBLIC IMPORTANCE, BECAUSE IT ~~IS~~ EFFECTS THE PROCEDURAL SAFEGUARD EMPLOYED TO PROTECT FIFTH AMENDMENT RIGHTS AGAINST THE COMPELSION INHERENT IN CUSTODIAL SURROUNDINGS.

THE ISSUE'S IMPORTANCE IS ENHANCED BY THE FACT THAT THE LOWER COURTS IN THIS CASE HAVE SERIOUSLY MISINTERPRETED PORTASH. THIS COURT HELD IN PORTASH THAT A DEFENDANT'S FIFTH AMENDMENT WAIVER THAT OCCURS UNDER A THREAT OF SANCTION FOR REFUSING TO WAIVE, IS DEEMED INVOLUNTARY. PORTASH HAD TESTIFIED BEFORE A GRAND JURY, UNDER A GRANT OF IMMUNITY. *Id.* 451-52. AT HIS CRIMINAL TRIAL, THE TRIAL JUDGE PRECLUDED THE USE OF HIS GRAND JURY TESTIMONY TO IMPEACH HIM WHEN HE TESTIFIED. *Id.* 452.

AS TO THE PARTICULAR FACTS IN PORTASH, THE COURT HELD THAT "TESTIMONY GIVEN IN RESPONSE TO A GRANT OF LEGISLATIVE IMMUNITY IS THE ESSENCE OF COERCED TESTIMONY." *Id.* 459. THE COURT, HOWEVER, MADE CLEAR THAT THE FAVORABLE RESULT FOR PORTASH WAS INFORMED BY THE OVER

FIFTH AMENDMENT PRINCIPLE THAT A DEFENDANT CANNOT BE REQUIRED "TO PAY A PENALTY" "TO ASSERT HIS FIFTH AMENDMENT RIGHT TO REMAIN SILENT." *Id.* 456 (CITING BROOKS V. TENNESSEE, 406 U.S. 605 (1972)). THE 3rd CIRCUIT REASONED THAT THIS COURT HAD YET TO ⇒

→ DETERMINE WHETHER "TESTIMONY GIVEN TO A PSYCHIATRIST UNDER COURT ORDER IS TRULY COERCED AND THEREFORE INVOLUNTARY, OR MERELY COMPELLED IN THE SAME SENSE AS A STATEMENT GIVEN TO POLICE IN VIOLATION OF MIRANDA (AND THEREFORE STILL ADMISSIBLE FOR IMPEACHMENT)."

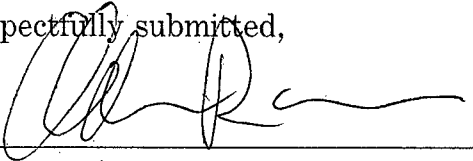
THE 3rd CIRCUIT COURT ASK THE WRONG QUESTION, THE DISTINCTION THAT IS RELEVANT IS BETWEEN A PROPHYLACTIC RULE & GENUINE COMPULSION BEING ENFORCED TO FIT FOR AN EXAM IS NO LESS COMPELLED THAN BEING FORCED TO TESTIFY BEFORE A GRAND JURY. SUCH COMPELLED TESTIMONY IS INADMISSIBLE FOR ANY PURPOSE, & WHEN USED IN A MANNER THAT KEEPS A DEFENDANT OFF THE STAND VIOLATES HIS RIGHT TO TESTIFY.

THIS PROCESS ALSO VIOLATES THE RULE OF BUKHANAN THAT CABINS THE USE OF STATEMENTS MADE TO A GOVERNMENT MENTAL HEALTH EXPERT TO REBUTAL OF A MENTAL HEALTH DEFENSE.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



Date: 2-11-2021