No. 21-5446

ORIGINAL

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT CARTER-PETITIONER

VS

VINCENT MOONEY, ET AL.-RESPONDENTS

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit Order that was issued on March 18, 2021.

PETITION FOR WRIT OF CERTIORARI

Submitted by,

Robert Carter, Pro Se
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QUESTIONS PRESENTED

1. WHETHER TRIAL COUNSEL ADEQUATELY AND EFFECTIVELY ASSISTED PETITIONER IN DECIDING WHETHER TO ACCEPT A PLEA OFFER OF 15 TO 30 YEARS WHERE COUNSEL FAILED TO OBJECT WHEN HE WAS ERRONEOUSLY ADVISED THAT IF CONVICTED, HE WOULD ONLY BE SUBJECTED TO A MAXIMUM PENALTY OF 4 YEARS ON THE MOST SERIOUS CHARGE, THIRD DEGREE MURDER?

2. WHETHER THE DISTRICT COURT'S DETERMINATIONS REGARDING COUNSEL'S INEFFECTIVENESS FOR FAILING TO OBJECT TO WITHDRAWAL OF THE CHARGE OF INVOLUNTARY MANSLAUGHTER WHICH WAS THE LESSER INCLUDED OFFENSE WHERE SUCH DEFENSE EXISTED MANDATING THIS PARTICULAR INSTRUCTION, DISTORTS THE MEANINGS OF 28 U.S.C. § 2254(d)(1)/(2)?

LIST OF PARTIES

1. Vincent Mooney, the Superintendent of SCI Retreat.
2. The Commonwealth of Pennsylvania, in particular, the District Attorney's Office of Philadelphia.
3. The Superior Court of Pennsylvania.
4. The United States District Court for the Eastern District of Pennsylvania.
5. The Third Circuit Court of Appeals.

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APPENDIX

TABLE OF AUTHORITIES

OPINIONS BELOW

Petitioner respectfully prays that a Writ of Certiorari be issued to review the judgment below.

For cases from federal court:

1. Robert Carter v. Vincent Mooney, et al., 2019 U.S. Dist. Lexis 107910, No. 18-2366 (E.D. Pa. 2019), Appendix A.
2. Robert Carter v. Vincent Mooney, et al., 2020 U.S. Dist. Lexis 92977, No. 18-2366 (E.D. Pa. 2020), Appendix B.
3. Robert Carter v. Superintendent Retreat SCI, et al., No. 20-2348 (3d Cir. 2021), Appendix C.
4. Commonwealth v. Robert Carter, 170 A.3d 1220 (Pa. Super. 2017), Appendix D.

JURISDICTION

The date in which the Third Circuit Court of Appeal denied a Certificate of Appealability was March 18, 2021. Per Order dated March 19, 2020 via Order List: 589 U.S. and pursuant to Rule 13.1 and 13.3, "the deadline to file any petition for writ of certiorari [is] due on or after the date this order is extended to 150 days from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing." As such, the time to file a writ of certiorari is August 18, 2021.

Accordingly, this Petition is timely and jurisdiction is vested in this Court by way of 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTIONAL PROVISIONS

The Sixth Amendment of the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him." U.S. Const. Amend. VI.

The Sixth Amendment of the United States Constitution provids that, "In all criminal prosecutions, the accused shall enjoy the right... to have [effective] Assistance of Counsel for his defense." U.S. Const. Amend. VI.

The Fifth and Fourteenth Amendments forbid both the Federal Government and the States from depriving any person of "life, liberty, or property, without due process of law." U.S. Const. Amendments V and XIV.

STATUTORY PROVISIONS

Where claims presented in a federal habeas were adjudicated on the merits in the state court, a federal court shall not grant habeas relief unless the adjudication:

> "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
>
> 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." 28 U.S.C. § 2254(d)(1)/(2).

STATEMENT OF THE CASE

Robert Carter ("Petitioner") the Petitioner, is a thirty (30) year old man. When the offense was committed, he was only twenty (20) years old. The circumstances of the case are very unfortunate, as such involves Petitioner's reckless driving which resulted in the death of Kahlil Sephes ("victim"), the victim in this case. At this juncture it is noteworthy to mention that, the Petitioner and the victim were best friends. In fact, during the trial the victim's mother and sister were willing to testify on Petitioner's behalf to essentially shine light on the circumstances by explaining this was a forgivable accident-they were best friends and to provide character testimony. N.T. 2/13/13 at 82-83. Although raised in the initial collateral review petition, this claim was not fully litigated by the attorneys involved in this matter. Unquestionably, their testimonies, at the very least, would have compelled a lesser finding of guilt. In spite of these facts, the circumstances of this case are listed as follows.

On April 5, 2011, in the Court of Common Pleas of Philadelphia County, State of Pennsylvania, among other things, the Petitioner was charged with fleeing or attempting to elude officer, unauthorized use of a motor vehicle, involuntary manslaughter, homicide by vehicle and third degree murder. See, CP-51-CR-7203-2011.

On February 11, 2013, Petitioner was arraigned on the aforementioned charges and entered a plea of not guilty and requested a trial by jury. Before the arraignment, the State had offered him a plea of 15 to 30 years. On its face, the most serious charge in this matter is third degree murder. In spite of this, the plea was made part of the record and in determining on whether to accept the plea offer or not, Petitioner was informed by the

state court that the charge of "third degree murder... has a four-year maximum exposure if [he] were convicted of third degree murder." N.T. 2/8/13 at 13. When asked if he had "a full opportunity to talk about" his options of whether to plead guilty or not, the Petitioner responded, "[n]ot really." Id. at 14. Consequently, the offer of 15 to 30 years was rejected and Petitioner proceeded to trial.

As stated above, Petitioner was initially charged with involuntary manslaughter. On the day of trial, however, this charge was nolle prossed. When this occurred, trial counsel did not object despite this being the lesser included offense where a defense existed.

The trial commenced and to sustain the causation element, the State called Dr. Aaron Rosen ("Dr. Rosen") who was qualified as an expert in the field of forensic pathology. N.T. 2/13/13 at 52. On direct examination it was revealed that, Dr. Rosen did not perform the autopsy, nor did he at the very least participate in any form of the autopsy. Ultimately, Dr. Rosen provided an opinion for the cause of death and when this occurred, trial counsel did not object on the grounds that the admission of his testimony violated Petitioner's Sixth Amendment right to Confrontation. N.T. 2/13/13 at 62.

Thereafter, closing arguments occurred and the case was in the hands of the jury. However, prior to being charged trial counsel was provided the opportunity to object and/or request an instruction she thought would be favorable for the Petitioner. Ultimately, this opportunity was declined. See, N.T. 2/13/13 at 6-9. During deliberations jurors straddled back and forth by asking questions surrounding the charges of third degree murder and vehicular homicide. N.T. 2/13/13 at 185-186.

Consequently, on February 13, 2013, among other things, the Petitioner was found guilty of third degree murder and vehicular homicide. On April 19, 2013, for the charge of third degree murder he was sentenced to 17 to 34 years and for the charge of aggravated assault he was sentenced to a consecutive term of 8 to 16 years. For the accidental death of his best friend, the Petitioner received an aggregated term of 25 to 50 years imprisonment.

Petitioner appealed in the state courts and relief was denied. Ultimately, he filed a Petition for Post-Conviction Relief ("PCRA") and on December 20, 2017, relief was denied. Thereafter, Petitioner sought habeas relief in the district court. On May 28, 2020, the district court denied relief. On March 18, 2021, the Third Circuit Court of Appeals denied Petitioner's request for a Certificate of Appealability ("COA"). This Petition for Writ of Certiorari now follows.

REASONS FOR GRANTING THE PETITION

I. When deciding to accept a plea offer of 15 to 30 years, the state court erroneously advised the Petitioner that the statutory maximum for the charge of third degree murder was only 4 years, when in fact it is 40 years. When this occurred, trial counsel did not object and advise Petitioner that this was not true. On this premise, the offer was rejected.

In Martinez v Ryan, 566 U.S. 1 (2012), this Honorable Court recognized a narrow equitable exception to the doctrine of procedural default: "Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial." This exception is available to a petitioner who can show that: (1) his procedurally defaulted ineffective assistance of trial counsel claim has "some merit," and that (2) his state-

post conviction counsel was "ineffective under the standards of Strickland v. Washington, 466 U.S. 668 (1984). Id.

In order to prove ineffective assistance of counsel under Strickland, a petitioner must show that "counsel's representation fell below an objective standard of reasonableness." Strickland, 466 U.S. at 687-688. A petitioner must also show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

The Third Circuit Court of Appeals has adopted the following rule with respect to Martinez. If a petitioner can show "that his underlying ineffective-assistance-of-trial-counsel claim has smoe merit and that his state post-conviction counsel's performance fell below an objective standard of reasonableness, [then] he has shown sufficient prejudice from counsel's ineffective assistance that his procedural default must be excused under Martinez." Workman v. Superintendent Albion SCI, 908 F.3d 896, 903 (3d Cir. 2018).

The Honorable Mitchell S. Goldberg was the district court's judge who approved the findings of the magistrate judge. In questioning the validity of those findings, Petitioner refers to that Opinion and Order. See, Carter v. Mooney, 2020 U.S. Dist Lexis 92977 (E.D. Pa. 2020); Appendix B.

In this case, the district court relied upon this Court's holdings of Missouri v. Frye, 566 U.S. 134 (2012) and Lafler v. Cooper, 566 U.S. 156 (2012). This Court held that defense counsel has a duty to communicate formal plea offers to the defendant and the failure to properly communicate an offer may constitute ineffective assistance of counsel. In contrast, to

effectivly assist a client in the plea-bargaining process, counsel must provide "enough information 'to make a reasonably informed decision whether to accept a plea offer.'" United States v. Bui, 795 F.3d 363, 366 (3d Cir. 2015).

The Court of Appeals for the Third Circuit has held that, "a habeas petitioner states a claim under the Sixth Amendment when he contends that that advice he received from counsel regarding a plea bargain was so insufficient or incorrect as to undermine his ability to make an intelligent decision whether to accept the plea offer." United States v. Day, 969 F.2d 39, 43 (3d Cir. 1992). This standard correlates with assuring that the habeas petitioner has "knowledge of the comparative sentence exposure between standing trial and accepting a plea offer." United States v. Booth, 432 F.3d 542, 549 (3d Cir. 2005).

In disposing of this claim, the District Court determined that counsel's performance was not deficient and the factual basis did not distort the values of 28 U.S.C. § 2254(d)(2) because:

> "(1) trial counsel met with Petitioner several times to discuss the plea offer... (2) trial counsel understood the impact of the second victim's death and requested that the trial judge allow her an opportunity to discuss the consequences of that death with Petitioner... (3) the trial judge explained to Petitioner the charges against him and the sentence that could result from each charge... and four years for third-degree murder; (4) the trial judge informed Petitioner that the Commonwealth's offer would result in a sentence of 15 to 30 years in exchange for resolving all charges aginst him... and explicitly questioned Petitioner about the plea offer and whether he understood his options;... (5) Petitioner affirmed to the trial judge that the plea offer was communicated to him and that he wanted to proceed to trial; (6) and Petitioner changed his mind regarding the plea at least twice." Appendix B at 6; (emphasis added).

Petitioner contends that the district court's reliance on Frye and Lafler was incorrect because, there is no dispute that he was aware of the offer of 15 to 30 years. In contrast, this case is controlled by Hill v. Lockhart, 474 U.S. 52 (1985) and Lee v. United States, 137 S.Ct. 1958 (2017), because the inquiry here as prescribed in Hill focuses on the defendant's decision making. Hill, 474 U.S. at 59.

On this premise this Court has to take a strong look at the information that was relayed to Petitioner when making his decision on whether to plead guilty or proceed to trial. As stated, Petitioner does not dispute the offer was relayed to him and made part of the record. In addition, he was also aware of the fact that, if convicted, he would have received a maximum sentence of 20 years for the charge of aggravated assault and 7 years for the homicide by vehicle-exactly what the evidence of this case amounts to. Most importantly and most troubling, the Petitioner was aware that if he was convicted on the charge of third-degree murder, the maximum sentence he could receive was 4 years. Appendix B at 6.

At this juncture it is fair to state that, the most serious charge in this case is third-degree murder. That is because, the statutory maximum is 40 years. See, 18 Pa. C.S. § 1102(d). Nevertheless, without objection and providing the correct information, Petitioner was unquestionably informed that he was exposed to a maximum penalty of 4 years on the most serious charge. This was fatal to Petitioner's decision making. See, Bui, 795 F.3d at 367, ("Potential sentencing exposure [is] an important factor in the decision-making process.").

As this Honorable Court explained in Lee:

> "A defendant without any viable defense will be highly likely to lose at trial. And a defendant facing such long odds will rarely be able to show prejudice from accepting a guilty plea that offers him a better resolution than would be likely after trial. But that is not because the prejudice inquiry in this context looks to the probability of a conviction for its own sake. ...
>
> But common sense (not to mention our precedent) recognizes that there is more to consider than simply the liklihood of success at trial. The decision whether to plead guilty also involves assessing the respective consequences of a conviction after trial and by plea. See, INS v. St. Cyr, 533 U.S. 289, 322-323 (2001). When those consequences are, from the defendant's perspective, simply dire, even the smallest chance of success at trial may look attractive. For example, a defendant with no realistic defense to a charge carrying a 20-year sentence may nevertheless choose trial, if the prosecution's plea offer is 18 years." Lee, 137 S.Ct. at 1966.

In this case, Petitioner was offered a plea of 15 to 30 years. Based upon erroneous advice, he rejected this offer, was found guilty and received a sentence of 25 to 50 years. The sentence is structured as follows, 8 to 16 years for aggravated assault and 17 to 34 years for third-degree murder. However, based upon the information that was provided during the decision-making process, the conviction and sentence thereafter, Petitioner's sentence should have only amounted to 10 to 20 years. That is because, that maximum penalty as explained by the court for third-degree murder was 4 years. Taking the face value of the aggravated assault conviction and the sentence of 8 to 16 years-when adding a consecutive term of 2-4 years for the third-degree murder conviction, you end up with 10 to 20 years. A sentence less than 15 to 30 years.

The district court specifically held that, the "state court record shows that Petitioner was aware of the comparative sentence exposure of

standing trial and accepting the plea offer. This information, crucial to Petitioner's decision regarding the plea, was explicitly communicated to Petitioner by the trial Judge." Appendix B at 7. In contrast, the information given to Petitioner was unquestionably incorrect. Therefore, the factual basis is incorrect. Miller-El v. Cockrell, 537 U.S. 322 (2003)(explaining that, a court's determination can be unreasonable when it had facts before it but ignored them). Clearly, the district court ignored that Petitioner was advised by "the trial judge" that he could only receive a maximum sentence of 4 years for the charge of third-degree murder, when in fact he received a maximum penalty of 34 years. Lafler, supra.

Finally, the district court's determinations are contrary to Lee as explained above and in Hill. See, e.g., Hill, 474 U.S. at 60 (reserving the issue of whether incorrect advice regarding parole eligibility could be deemed deficient performance). The claim raised by Petitioner "is a substantial one, which is to say ... that the claim has some merit." Martinez, 566 U.S. at 14. Jurists "of reason could disagree with the [state] court's resolution of [Petitioner's] constitutional claims." Miller-El, 537 U.S. 327. Petitioner has satisfied the Martinez standard and in the interest of justice premised upon the prejudicial impact imposed on him by counsel's deficient performance, this application should be granted.

II. The district court's disposal of Petitioner's claim of trial counsel's ineffectiveness for failing to request an involuntary manslaughter instruction was contrary to clearly established Federal law and extremely unreasonable. In light of the jury question, the decision was contrary to the facts. 28 U.S.C. § 2254(d)(1)/(2).

A federal court may grant habeas relief if a state court's adjudication of the claim was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined" by this Court. 28 U.S.C. § 2254(d)(1). "Where, as here, the state's application of governing federal law is challenged, it must be shown to be not only erroneous, but objectively unreasonable." Yarborough v. Gentry, 540 U.S. 1, 5 (2003): Williams v. Taylor, 529 U.S. 362, 409 (2000).

In this case, Petitioner was charged as follows, involuntary manslaughter, homicide by vehicle and third-degree murder. The charges of involuntary manslaughter (with the exception of the vehicle) and homicide by vehicle are identical. See, e.g., Commonwealth v. Comer, 716 A.2d 593, 599 (Pa. 1998)(holding that because "imposing separate sentences [for homicide by vehicle and involuntary manslaughter] violates double jeopardy, the two offenses merge for sentencing purposes"). Involuntary manslaughter is the lesser included offense for the charge of third-degree murder. See, Commonwealth v. Polimeni, 378 A.2d 1189, 1193 (Pa. 1977).

As a general proposition, this Honorable Court has consistently held that a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor. Stevenson v. United States, 162 U.S. 313 (1896). A parallel rule has been applied in the context of a lesser included offense instruction. Keeble v. United States, 412 U.S. 205, 208 (1973).

In denying habeas corpus relief, the district court adopted the state court's findings which confussionly and unreasonably held:

> "homicide by vehicle includes all the elements of involuntary manslaughter, plus the additional requirement that the death was caused while violating the [Vehicle Code]. Accordingly, trial counsel would have been entitled to request that involuntary manslaughter be submitted to the jury if a reasonable juror could have found [Petitioner] guilty of involuntary manslaughter but not guilty of homicide by vehicle.
>
> The evidence at trial, however, clearly established the contrary. In particular, there was overwhelming evidence that [Petitioner's] reckless and grossly negligent conduct consisted of multiple violations of the [Vehicle Code]. ...
>
> Because no reasonable juror could have found [Petitioner] guilty of involuntary manslaughter, but not guilty of homicide by vehicle, any request by trial counsel to submit the involuntary manslaughter charge to the jury would have been rejected. PCRA Super. Ct. Op. at 3 (quoting PCRA Trial Ct. Op. at 6-7)". (emphasis added); Appendix A at 11-12).

While it is true that a habeas court, by statute, is required to give appropriate deference to the state court's findings, 28 U.S.C. § 2254(c), the deference in this case is alarming and extremely unreasonable. That is because, the state court specifically acknowledged that, "homicide by vehicle includes all the elements of involuntary manslaughter" and that "trial counsel would have been entitled to request that involuntary manslaughter be submitted to the jury," only if "a reasonable juror could have found [Petitioner] guilty of involuntary manslaughter but not guilty of homicide by vehicle." It is hard not to say wow.

Indeed, in Matthews v. United States, 485 U.S. 58 (1988), this Honorable Court held that, "even if the defendant denies one or more elements of the crime, he is entitled to an instruction whenever there is

sufficient evidence from which a reasonable juror could find." In addition, the Matthews Court stated that:

> "Federal appellate cases also permit the raising of inconsistent defenses. See, Johnson v. United States, 426 F.2d 651, 656 (1970)(the defense in a rape case was permitted to argue that the act did not take place and that the victim consented) ... And state cases suport the proposition that a homicide defendant may be entitled to an instruction on both accidental and self-defense, two inconsistent affirmative defenses." (citation omitted).

On its face, the state court's decision is in direct conflict with Matthews, and while this point exists, it is minimal. That is because, "homicide by vehicle includes all the elements of involuntary manslaughter." Therefore, it is not a inconsistent defense, instead, it is a defense itself. To agree with the district court's findings, this Court would have to use a broad stroke to deny him relief. Put in perspective, this Court will have to agree that, the only way for the Petitioner to be entitled to an involuntary manslaughter instruction, he would have to literally prove that "a reasonable juror could have found [him] guilty of involuntary manslaughter but not guilty of homicide by vehicle," which is simply not true. That is because, he was actually found guilty of third-degree murder and homicide by vehicle.

In Stevenson, this Court reversed a murder conviction arising out of a gunfight in the Indian Territory. The principle holding of this Court was that the evidence was sufficient to entitle the defendant to a manslaughter instruction, not that a defendant must prove that he was not guilty of the general charge of murder.

And while it is true that Petitioner was found guilty of third-degree murder and homicide by vehicle, the bottom line it that, the same way that

he was found guilty of the aforementioned charges, he could have been found guilty of both homicide by vehicle and involuntary manslaughter without disproving either charge. This is exactly what happened in the State Supreme Court case of Comer, but nevertheless, those convictions for sentencing purposes merged. Comer, 716 A.2d at 599.

Contrary to the state court's factual findings, reasonable jurors could have found him guilty of both charges. In fact, the record clearly reflects that had the jury been provided the lesser included offense instruction, it is reasonable to conclude that he would have been found guilty of involuntary manslaughter because the jury submitted questions surrounding the charge of third-degree murder and homicide by vehicle. See, N.T. 2/13/13 at 185-186. Moreover, Dr. Aaron Rosen testified that the cause of death was an accident. See, N.T. 2/13/13 at 62, 65.

In regards to "there was overwhelming evidence that [Petitioner]" could not be found guilty of the lesser included offense is erroneous. That is because, the court may not speculate as to the basis of the jury's verdict. Strong as the state's case may be, a jury is nonetheless free to reject it in its entirety and instead accept the Petitioner's defense. Commonwealth v. Ewell, 319 A.2d 153, 157 (Pa. 1974).

On proir occasions, the State Supreme Court has refused to ignore an incorrect, misleading, or incomplete charge on a matter as fundamental as the burden of proof in a criminal case, even where "the evidence of guilt piles as high as Mt. Everest on Matterhorn, even if the [state court] conscientiously believes the defendant to be as guilty as Cain, and no matter with what certainty the Judge views the culpability of the accussed at the bar." Commonwealth v. Bishop, 372 A.2d 794, 797 (Pa. 1977).

Unquestionably, the Petitioner was entitled to this instruction and had it been given it is reasonable to conclude that the outcome would have been different. Namely, a lesser sentence at the very least. Consequently, the district court's findings are contrary to Stevenson, Keeble and Matthews. Furthermore, the factual basis is incorrect and therefore, distorts the entire meaning of 28 U.S.C. § 2254(d)(1)/(2). Relief is appropriate in this case.

CONCLUSION

While it is true that Petitioner is a pro se litigant and the likeliness of review is dim, the reality of the matter is that this Court's precedent is crystal clear, directly on point and totally conflicts with the district court's findings. The Petitioner is actively serving a sentence of 25 to 50 years for the accidental death of his best friend, when in fact, he was offered a plea substantially less than the sentence imposed. Had he received adequate advice, he probably would have accepted that plea. Had the jury been properly instructed, it is reasonable to conclude that he would have been convicted on the lesser included offense and received less time. In the interest of justice, Petitioner prays that this Honorable Court strongly consider his Petition and grant whatever relief deemed appropriate and just.

Respectfully Submitted,

Date: 8-12-2021

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