ORIGINAL

No. 21-7513

IN THE

SUPREME COURT OF THE UNITED STATES

JONATHAN CARVALHO,
Petitioner

vs.

STEVEN KENNEWAY,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Does the Supreme Court's leeway, and the Antiterrorism Effective Death Penalty Act ("AEDPA") deference, for lower courts to determine due process violations, yield arbitrary and conflicting decisions that, in turn, reduce due process to mere judicial whimsy, making trial-court-instructional-error-due-process-violation determinations freewheeling, unbound, and thus constitutionally unreliable? And, if so, does this case present the opportunity to correct that with clearly established guidance, where the ailing reasonable provocation instruction itself so infected the entire trial that the resulting conviction violated due process?

LIST OF PARTIES

[X] 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:

PROCEEDINGS RELATED TO THIS CASE

United States Court of Appeals for the First Circuit: Carvalho v. Kenneway
Docket No. 20-2174
Judgment: Dec. 23, 2021

United States District Court (D.Mass.):

Carvalho v. Kenneway
Docket No. 18-12018-NMG
Judgment: Nov. 10, 2020

United States Supreme Court:

Carvalho v. Massachusetts
Docket No. 16-9309
Denied: Oct. 2, 2017

Supreme Judicial Court of Massachusetts:

Commonwealth v. Carvalho
Docket No. FAR-24804
Denied: Dec. 22, 2016

Massachusetts Appeals Court:

Commonwealth v. Carvalho
Docket No. 13-P-1594
Judgment: Oct. 14, 2016

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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

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

The opinion of the United States court of appeals appears at Appendix p. A3 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[X] is unpublished.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 p. A5 to the petition and is

[X] reported at 2020 U.S. Dist. LEXIS 211025 (2020); or,
[ ] has been designated for publication but is not yet reported; or,
[ ] 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.

The opinion of the _____ court 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 Dec. 23, 2021.

[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 a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ___A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] 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 No. ___A_____.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

STATEMENT OF THE CASE

Relevant Procedural History

In September 2010, a Suffolk County, Massachusetts grand jury returned an indictment against the Petitioner, Jonathan Carvalho, for one count of first-degree murder and one count of unlicensed possession of a firearm. (A5) In December 2011, a jury found Mr. Carvalho guilty of the lesser-included offense of murder in the second degree and guilty of the firearms charge. (A5) The trial judge sentenced Mr. Carvalho on the second degree murder count to life in prison with the possibility of parole and on the firearms count to four to five years in state prison, concurrent with the sentence on the murder conviction. (A5). Mr. Carvalho is currently incarcerated on this conviction at the Massachusetts Correctional Institution in Shirley, Massachusetts. (A5).

Mr. Carvalho appealed his conviction to the Massachusetts Appeals Court ("MAC") and argued

the exact point underlying this Petition—that a wrong reasonable provocation instruction violated his federal constitutional rights to due process and a fair trial. (A54-60) The MAC affirmed his convictions in an unpublished decision. See Commonwealth v. Carvalho, 90 Mass. App. Ct. 1110, 60 N.E. 3d 1198 (2016). (A23-26) Mr. Carvalho then presented an application for further appellate review ("AFAR") to the Massachusetts Supreme Judicial Court ("SJC") raising the exact underlying federal constitutional point that is argued here. (61-63).

In his AFAR, Mr. Carvalho cited to Commonwealth v. Morales, 70 Mass. App. Ct. 526, 532 (2007) as the reason the SJC needed to correct the reasonable provocation instruction contained in the Model Instructions on Homicide in effect at the time of his trial to eliminate the possibility that a jury would interpret that instruction to mean that physical contact was required. (A62-63). Although the SJC denied Mr. Carvalho's AFAR without comment in 2016, (A64) a mere two years later in 2018 the SJC indeed corrected the reasonable

provocation instruction to explicitly say that "[r]easonable provocation does not require physical contact." See Supreme Judicial Court Model Jury Instructions on Homicide (April 2018) at 77. ("2018 Model Instructions"). (A32-36). The SJC footnoted this correction to Commonwealth v. Morales, 70 Mass. App. Ct. 526, 532-533 (2007). (A35).

Mr. Carvalho filed a petition for writ of habeas corpus in the United States District Court for the District of Massachusetts on September 26, 2018. Before that, on October 2, 2017, Mr. Carvalho also filed a petition for writ of certiorari to the Supreme Court of the United States which was denied on October 2, 2017. (A66-80; A65). On November 12, 2020, the district court entered an order of dismissal of the petition. (A27).

Mr. Carvalho filed an appeal of that decision with the United States Court of Appeals for the First Circuit on April 28, 2021, which was denied on March 23, 2021. (A81; A3).

This petition for writ of certiorari follows.

Facts Relevant to the Issues for Review

Mr. Carvalho had been dating Daisy Lopez ("DAISY") for several months before the August 10, 2010 shooting that resulted in this case. (A23). Daisy's former boyfriend was Emmanuel Flores ("Emanuel"), and Emanuel was friends with Luis Rodriguez, the deceased in this case. (A23). Mr. Carvalho's childhood friend was Hugo Valladares ("Hugo"). (A23). Hugo lived at 230 Central Avenue in Chelsea in an apartment complex where Luis Rodriguez's girlfriend also lived. (A23).

Mr. Carvalho and Emanuel had a dispute involving Daisy that led to several prior physical altercations. Shortly before the shooting incident here, Emanuel pulled his friend Luis Rodriguez into his dispute with Mr. Carvalho, resulting in a "beef" between Luis Rodriguez and Mr. Carvalho. (A23).

Luis Rodriguez told Hugo that he and Mr. Carvalho were going to fight to settle the "Beef".

(A23). Mr. Carvalho also told Hugo that he and Luis Rodriguez were going to "squash the beef," or settle the dispute through a fist fight. (A23). Luis Rodriguez was a boxer, and Mr. Carvalho expected "an Ass whooping" from him. (S.A. 891).

On the morning of August 10, 2010, Mr. Carvalho asked Hugo to go upstairs and get Luis Rodriguez so that they could "scrap it out". (A23). Indeed, shortly thereafter Luis Rodriguez met Mr. Carvalho in the parking lot outside of 230 Central Avenue. (A23).

Geraldo Flores ("Geraldo") saw the confrontation from the other side of the parking lot. Geraldo saw the two men walk towards each other and meet in the middle of the parking lot. (A23). When they met in the middle of the parking lot, Luis Rodriguez had his fists up and they were circling each other. (A23).

Luis Rodriguez was saying "come on, let's go" and advancing on Mr. Carvalho who was backing away and saying "hold on, relax" and "let me talk to you." (A23). Geraldo turned away as Luis Rodriguez was still coming towards Mr. Carvalho.

Two seconds after Geraldo turned away, he heard the first shot. (A23). Geraldo turned arround to see Mr. Carvalho pointing a gun at Luis Rodriguez as he ran back to the building. (A23). Then he heard a second shot and saw Mr. Carvalho shoot Luis Rodriguez in the back. (A23). A third shot was fired as Geraldo ran away.(A23).

The evidence was that Luis Rodriguez, who was unarmed, had three gunshot wounds to his body, and the cause of death was the gunshot to the back. (23).

The Jury Instructions

Before trial, defense counsel requested in writing that the trial judge instruct the jury that heat of passion upon reasonable provocation can arise from the victim's "aggressive approach" which need "not include—that the victim struck

a blow." (A24). Instead, the trial judge gave the model instruction language on reasonable provocation in force at the time of the December 2011 trial stating:

> Mere words, no matter how abusive standing alone do not constitute reasonable provocation. Physical contact, evan a single blow may amount to reasonable provocation depending upon the circumstances. Whether the contact is sufficient will depend on whether a reasonable person under the same or similar circumstances would have been provoked or acted under emotion rather than reasoned reflection. (emphasis added) (A37-42; A52).

See Model Jury Instructions on Homicide 28-29 (A30-31)

Right before this challenged instruction, the MAC found that the trial judge "stated

generally that reasonable provocation is that 'which would likely produce [in] a reasonable person such a state of anger, fear, passion, fright and nervous excitement which would have overcome his capacity for reflection and restraint and did actually produce such a state of mind of the defendant.'" (A24).

After the trial judge's first set of instructions to the jury, defense counsel objected to the reasonable provocation instruction:

> Lastly, I object to in your instruction about heat of passion upon reasonable provocation that you did not instruct as requested that adequate provocation can arise not necessary from the blow was struck, but from aggressive approach. (A43-44).

The jury broke deliberations to ask the trial court a question, "asking for a handout of what is the second and what's manslaughter". (A45).

The trial judge then re-instructed the jury on reasonable provocation. (A46-48)

The language used was essentially the same as in the first instruction, with the notable exception that in the second instruction the trial judge stated that mere words "did not constitute reasonable provocation". (A47).

Defense counsel once again objected. (A49).

REASONS FOR GRANTING THE PETITION

For now, combined, the AEDPA and general leeway granted for due process deprivations makes federal review of state court convictions a futile formality. The Great Writ reduced. But this case gives the opportunity to provide specific language that clarifies due process rights in any given trial where the trial court twice misinstructs the jury on a critical element.

Under 28 U.S.C. § 2254, habeas corpus relief will not be granted unless the state court's adjudication (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 proceedings." 28 U.S.C. § 2254(d). "[C]learly established Federal law" means the holdings—not the dicta—of Supreme Court dec-

isions." Howes v. Fields, 565 U.S. 499, 505 (2012).

The Fourteenth Amendment to the United States Constitution demands that Mr. Carvalho had a due process right to a fair trial. The Due Process Clause "protects the accused against conviction upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970).

In the habeas corpus context, to charge the jury incorrectly on state law warrants no relief, unless the "ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." Cupp v. Naughten, 414 U.S. 141, 147 (1973). When making the due process analysis, "an omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155 (1977).

But the instruction must be examined "in the context of the overall charge." Cupp v.

Naughton, 414 U.S. at 146-147. For instance, when the court correctly states the elements of the crime three out of four times, no violation occurred because "not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation." Middleton v. McNeil, 541 U.S. 433, 437 (2004).

This means, then, that "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Nonetheless, the lower court ruling may be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 103 (2011) And if true, the petitioner can then show that the error "had substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 631 (1993).

But this Court's decisions are bereft of examples that guide lower courts' due process inquiries. No objective language that gives clarity to how misstated, for example, an instruction must be to "infect[] the entire trial." Cupp v. Naughton at 147. Here, the jury broke deliberations to ask—showing their focus—for a handout on the difference between second-degree murder and manslaughter, which the lower court did not provide. (A:45) Over defense objection, the trial court re-instructed the jury using essentially the same instruction given in the original charge on reasonable provocation. (A46-49)

And the first instruction stated that physical contact "may amount to reasonable provocation," while the court answered the jury's question by stating that mere words "did not constitute reasonable provocation." (A40; A47). (emphasis added).

In other words, the jury was never expressly instructed on Carvalho's defense: that reas-

onable provocation here did not require physical contact. That instruction—that reasonable provocation can arise from the victim's "aggressive approach" which need not include "that the victim struck a blow"—was requested by trial counsel in writing before trial. (A24).

And counsel's request comported with the law at the time of Mr. Carvalho's trial. Indeed, the case counsel cited, Commonwealth v. Morales, 70 Mass. App. Ct. 526, 532-533 (2007), was the very case that the Model Jury Instruction Committee cited when they changed the instruction four years later to reflect the law. There, the law correctly now states that "[r]easonable provocation does not require physical contact." See 2018 Model Instruction at 77 (A35). This is the exact argument that Mr. Carvalho made in his AFAR filed with the SJC in 2016. (A61-63). No new law announced this change after Mr. Carvalho's trial. It was the law at the time of his trial, and if the jury received this charge

the jury would have returned with a manslaughter verdict.

Instead, the charge as a whole directed the jury that "[m]ere words ... do not constitute," and mere words "did not constitute reasonable provocation," but that "[p]hysical contact, even a single blow may amount to reasonable provocation." (A40; A47).

But the lower courts have held that the failure to state the law to the jury correctly was nonetheless cured. Despite the fact that the jury was inadequately reinstructed after they broke deliberations to ask a question, back during the original charge the trial judge "stated generally that reasonable provocation is that 'which would likely produce [in] a reasonable person such a state of anger, fear, passion, fright and nervous excitement which would have overcome his capacity for reflection and restraint and did actually produce such a state of mind of the defendant.'" (A24).

The MAC—whose decision was repeatedly affirmed—

then reasoned that this general instruction "closely tracked the model instructions then in effect" and thus "avoided any possibility that the jury would reasonably have interpreted the phrase 'physical contact' in the manner suggested by the defendant." (A24).

But the crux of this case was whether physical contact was required for the jury to decide that Mr. Carvalho was reasonably provoked. That reasonable provocation requires no physical contact was the defense. It was also the law. And yet despite repeated requests for the very same instruction, based on the very same case, the lower court failed to properly instruct the jury. Worse still, the MAC actually cites Mr. Carvalho's citation to Commonwealth v. Morales, 70 Mass. App. Ct. 526, 532-533 (2007) as "not on point" to require an instruction that no physical contact was required to find reasonable provocation. (A24).

The 2018 Model Instructions cite that same case

as cause for adding "[r]easonable provocation does not require physical contact" to the charge. (A35).

· This Jury was palpably misled.

This Court should hold firmly that the Due Process Clause is violated when the jury charge misstates the law, and thus reduces the prosecution's burden to prove beyond a reasonable doubt the absence of provocation. Mullaney v. Wilbur, 421 U.S. 684, 704 (1975) The Court has already held that "[a]n omission, or an incomplete instruction is less likely to be prejudicial than a misstatement of the law." Henderson v. Kibbe, 431 U.S. 145, 155 (1977) But in Henderson the charge was not objected to, and there was no request for the correct instruction. In fact, the incomplete instruction escaped notice until a dissent filed at the intermediate appellate level.

In contrast, since before trial—as counsel prepared the defense—until this very moment,

Mr. Carvalho has made one simple request: Please instruct the jury that the law in the Commonwealth of Massachusetts is that reasonable provocation does not require physical contact. Plain. Simple. It is not Mr. Carvalho's law. It is the law of the Commonwealth now, and it was the law at the time of his trial.

But his jury never knew this. This violated due process. If, instead of telling the jury that mere words "did not constitute reasonable provocation," as the jury decided between second degree and manslaughter (A47), the trial judge stated the correct law, that "reasonable provocation does not require physical contact," the verdict would have been manslaughter, not second degree murder. (A35).

· If this Court's decisions thus far fail to make clear that this error demands a new trial, this Court must act now.

Apparently—because the lower courts have not reversed—this Court's decisions fail to

charge the lower courts adequately on due process violations in the context of instructional errors. Cupp v. Naughton, 414 U.S. 141, 147 (1973) was decided that way because the jury "remained free to exercise its collective judgment to reject what it did not find trustworthy or plausible." Id. at 149. Here, though, the jury was not "free to exercise its collective judgment" on the crucial issue of reasonable provocation. Rather it stopped the jury from finding reasonable provocation because there was no evidence that Luis Rodriguez physically struck Mr. Carvalho. Without the specific correction advocated by trial counsel, that reflects the law, but rejected by the trial judge, Mr. Carvalho's trial was fundamentally unfair and his conviction constitutionally invalid.

And in Estelle v. McGuire, 502 U.S. 62 (1991), the habeas challenge to a propensity instruction failed as being not unfair enough to deny the petitioner due process in the cont-

ext of a specific limiting instruction. Id. at 73-75. But in Estelle, the language of the challenged instruction "unquestionably left it to the jury to determine" whether or not to apply the instruction. See id. at 73. Here, the ailing instruction removed the jury's ability to determine reasonable provocation according to the law. And in Estelle, unlike Cupp and unlike this case, there was a specific limiting instruction that cured any error with the challenged instruction. See Estelle v. McGuire, 502 U.S. at 75. Both reasons for the Estelle Court's finding of no due process violation—unfettered jury choice and an effective limiting or explanatory instruction—are absent here.

Also, if the "context of the proceedings" analysis that this Court endorsed in Boyde v. California, 494 U.S. 370, 383 (1990) was properly applied to Mr. Carvalho's case, reversal should

be swift. After all, the "context of the proceedings" here was the fact of Luis Rodriguez's aggressive approach towards Mr. Carvalho—advancing on Mr. Carvalho saying "come on, let's go"—and Mr. Carvalho backing away and saying "hold on, relax" and "let me talk to you." (A 23). Luis Rodriguez was a boxer (S.A. 705-706), and Mr. Carvalho expected "an ass whooping" from him. (S.A. 891).

Yet Luis Rodriguez never landed a blow. The jury instructions on reasonable provocation in the "context of the proceedings" thus yields the inescapable conclusion that the jury would have rejected a manslaughter verdict on the erroneous basis that there was not even a "single blow." Whereas, an instruction articulating the actual law at the time of trial—that physical contact was not required for reasonable provocation—would have resulted in a manslaughter, not a murder, verdict.

To the extent that Middleton v. McNeil, 541 U.S. 433 (2004) provides guidance to lower

courts, that Court concluded that four incorrect words in a jury instruction did not mislead the jury nor rise to the level of a due process violation. But here, reasonable provocation, in contrast, was a primary defense eviscerated by two iterations of the misleading and completely uncorrected physical contact instruction. In fact, besides not correctly instructing on the law, the trial judge actually told the jury that mere words "did not constitute reasonable provocation." (A47). So, compound instructional errors on the pivotal jury question stopped the jury from a manslaughter verdict. In effect, the jury was told that they must return a murder verdict, and so they returned with a second-degree conviction.

· The prosecution cannot demonstrate harmlessness.

"Relief is appropriate only if the prosecution cannot demonstrate harmlessness." Davis v.

Ayala, 576 U.S. 257, 267 (2015). Here, the erroneous reasonable provocation instruction left the jury to believe that physical contact was required for reasonable provocation. This creates "grave doubt" as to the harmlessness of an error that directly prejudicied the substantial and meritorious defense that Luis Rodriguez's aggressive approach to Mr. Carvalho reasonably provoked the shooting. O'Neal v. McAninch, 513 U.S. 432, 437 (1995).

This Court stated that "the petitioner must win," when a trial error of federal law had a "substantial and injurious effect or influence in determining the jury's verdict," O'Neal v. McAninch, 513 U.S. at 436. That is because, like in this case, such an error is not harmless.

Reasonable Jurists Agree.

Even the District Court conceded that "reasonable jurists could find that the MAC

erred in finding that the jury deliberated with the understanding that physical contact was not required for reasonable provocation and that therefore the jury instructions were misleading." (A21). And why is that:

> When hearing the general instruction that 'any physical contact, even a single blow, may amount to reasonable provocation,' Carvalho, 2016 WL 59559 49, at *2, outside the context of the second instruction in this case, a jury might consider the general instruction controlling. Massachusetts courts appear to have recognized that ambiguity, having amended the instruction to confirm that physical contact is not a prerequisite. (A21).

Plus, the second instruction, regardless of inadvertence or some other excuse, told the jury that words "did not amount to reasonable provocation." (A47). So, it is plain that the incorrect instructions infected the entire trial.

CONCLUSION

- A golden opportunity for this Court to state that due process errors like this are constitutionally unacceptable.

Busy courts should not have to wonder if errors like this violate due process. This Court should tell them that they do. This will bolster constitutional rights, and, no less importantly, unburden lower courts from having to give deference to unconstitutional judgments. It will make trial courts more ardent in their delivery of instructions that properly enunciate the law to juries. This will spare appellate courts the need to excuse errors based on the leeway given to foggy notions of fairness and of due process.

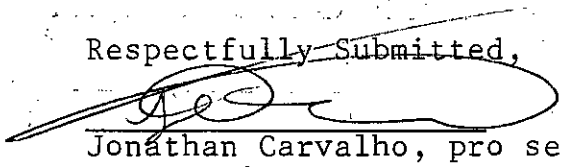
Lower court decisions like those here start with embarrasingly unconstitutional decisions—like not instructing the jury on relevant law on which the defense is based—and then move to constitutionally embarrasing appellate court rationalizations, justificat-

ions, and excuses, for allowing the unconstitutionality. Trials may be variously expensive, and thus granting new trials limited, but this jury would be outraged to know that they decided this case without knowing the relevant law.

Because this Court does not tell the lower courts what the law is, the lower courts themselves believe that they do not have to instruct juries on what the law is. Hence, the unconstitutionality starts here. Lower courts use this Court as a scapegoat for lack of clarity, even when the constitutional violation is manifest. This further prejudices petitioners.

Now is the chance to reduce excuses, and to lay down the law. Deference normalizes constitutional violations. That, at least on the facts here, can stop. This Court should grant the petition for writ of certiorari.

Respectfully Submitted,



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